

Institute for Policy Integrity

new york university school of law

September 17, 2013

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

Dear Regulations Division:

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”) respectfully submits these comments on the Department of Housing and Urban Development’s (“HUD”) Affirmatively Furthering Fair Housing rule.¹

Policy Integrity is a non-partisan think-tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Policy Integrity acknowledges HUD’s hard work on the Affirmatively Furthering Fair Housing rule. In May 2013, before the proposed rule was released, Policy Integrity published a regulatory report recommending improvements to the rule during its development. We attach and incorporate that regulatory report by reference here. We note that HUD has implemented several of our recommendations in its proposed rule. In particular, we commend HUD for more clearly defining its goals in “affirmatively furthering fair housing,” as well as providing metrics and data by which municipalities can measure their compliance with the mandate.

However, HUD should still consider making additional changes to the rule consistent with our recommendations. As discussed in our report, the agency should provide additional guidance on how grantees and the agency can measure—if possible through a single aggregate metric—prospective and existing projects’ effectiveness at furthering fair housing. The agency should also encourage grantees to conduct cost-effectiveness analyses in determining which projects to pursue. As the program develops, the agency should collect additional data on the benefits of fair housing, which can be used to conduct cost-benefit analyses to aid in resource allocation in the future.

We appreciate your extensive and important work in the development of this rule, and we thank you for your consideration of our comments.

Sincerely,

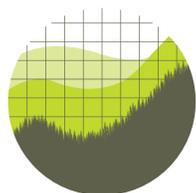
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¹ Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (July 19, 2013).



Regulatory Report

Affirmatively Furthering Fair Housing



Institute *for*
Policy Integrity

new york university school of law

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Executive Summary

Problems concerning the clarity and enforceability of the U.S. Department of Housing and Urban Development's (HUD) current affirmatively furthering fair housing regulation have come to light prominently over the last few years, particularly in the *Westchester County* litigation of 2009.¹ To address these problems, HUD has indicated that it intends to promulgate new regulations, with publication of a proposed rule expected in the near future. This regulation should help guide grantees in crafting more efficient fair housing projects.²

HUD is required by executive order to “design its regulations in the most cost-effective manner to achieve the regulatory objective”³ and to “assess both the costs and the benefits of the intended regulation and . . . adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”⁴ The Office of Management and Budget (OMB) issues guidance to Federal agencies on how to perform the needed regulatory analysis, including how to conduct cost-effectiveness analysis and cost-benefit analysis.⁵ These methods of analysis are consistent with economic principles and HUD should adhere to them whenever possible.

In order to maximize the effectiveness of the regulation, and for reasons of good governance, the new regulation should achieve the following objectives:

- HUD should clearly define “affirmatively furthering fair housing,” articulating the specific goals of the mandate;
- HUD should determine how best to measure the effectiveness of a program with respect to achieving those goals;
- HUD should encourage grantees to perform cost-effectiveness analysis when evaluating projects, which would assist HUD and its grantees in determining which projects most efficiently meet the requirements of the mandate; and
- In the long run, HUD should collect data on the benefits of such projects, with the goal of conducting cost-benefit analyses to determine whether funding levels are appropriate for these projects.

HUD has never laid down an authoritative definition of what is meant by affirmatively furthering fair housing. It should do so in this regulation. If HUD clearly defines the goals of affirmatively furthering fair housing and provides appropriate metrics for measuring the effectiveness of housing programs with respect to those goals, then encouraging HUD grantees to use cost-effectiveness analysis will best advance fair housing given the resources allocated to them.

In the short term, HUD should consider the funds it has given to grantees as fixed, since they have presumably already been allocated or budgeted for. Cost-effectiveness analysis will indicate which programs achieve the greatest level of fair housing per unit of cost. In the long term, however, HUD should assess and (where possible) monetize the benefits of these programs, with the goal of conducting cost-benefit analyses. This will allow HUD to determine whether the amount they are devoting to fair housing projects is optimal, or whether spending on these projects should increase or decrease.

Analysis

HUD Can Improve on Past Approaches to Affirmatively Furthering Fair Housing

Congress passed the Fair Housing Act (“FHA”) in 1968, prohibiting discrimination in the sale, rental, and financing of housing and in other housing-related transactions, on the basis of race, color, national origin, religion, sex, familial status, and disability.⁶ The affirmatively furthering fair housing requirement follows from the statutory mandate included in Section 3608 of the FHA that HUD shall “administer the programs and activities relating to housing and urban development . . . in a manner affirmatively to further the policies of this subchapter.”⁷ As such, HUD must affirmatively further fair housing when administering its federal housing assistance, such as through its Community Development Block Grant funding program.⁸

Notably, the FHA does not define what it means to “affirmatively further fair housing.”⁹ In interpreting congressional intent as to the meaning of the mandate, scholars and commentators have often looked to the bill’s legislative history to suggest that the point of § 3608 was to encourage HUD and other federal agencies to take a more active role in ending segregation.¹⁰ Senator Brooke, one of the key sponsors of the Act, noted that “an overwhelming proportion of public housing . . . directly built, financed and supervised by the Federal Government—is racially segregated,” and concluded that Title VI of the Civil Rights Act of 1964 had not achieved its goal because “[r]arely does HUD withhold funds or defer action in the name of desegregation.”¹¹

In the absence of a clear statutory definition, HUD has broad discretion in crafting the regulations that effectuate the statute.¹² Prior to the Obama administration, HUD had taken some small steps towards a definition. For instance, in the Fair Housing Planning Guide promulgated in 1995, HUD defined the requirement to affirmatively further fair housing as requiring a grantee to (1) conduct an analysis identifying “impediments to fair housing choice within the jurisdiction,” (2) take the appropriate actions in order to overcome any identified impediments, and (3) maintain records of the analysis conducted and subsequent actions taken.¹³ In addition to conducting this Analysis of Impediments, the current regulations also require HUD grantees to certify that “the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 . . . and the Fair Housing Act . . . and the grantee will affirmatively further fair housing.”¹⁴ HUD has generally presumed grantees to be in compliance with the affirmatively furthering fair housing requirement so long as they complete an Analysis to Impediments to Fair Housing Choice and take actions to address any identified impediments.¹⁵

Housing advocates¹⁶ and independent reviewers like the Government Accountability Office¹⁷ have decried the Analysis to Impediments reports as insufficient to address housing inequality, both as designed and due to lackluster enforcement. By 2010, HUD began revising its affirmatively furthering fair housing policy, shifting toward a more concrete definition of “affirmatively furthering fair housing” and toward clearer measures of how grantees could comply with this requirement.

In its June 2010 Notice of Funding Availability, HUD revised the criteria it uses to select recipients of its competitive grants. Since 2010, in order to receive full points for the affirmatively furthering fair housing policy priority, applicants must “not only identify the specific activities to be undertaken to solve identified problems, but also identify the quantifiable outcomes that the grantee will measure in order to

track the progress of these efforts.”¹⁸ Applicants must “explain how they will collect baseline and outcome data, and they must provide evidence of capacity to collect and interpret this data.”¹⁹ Grantees must explain how they will achieve outcomes in areas such as: (1) decreasing racial segregation in housing developments, neighborhoods, or communities; (2) creating regional plans that result in more integrated living patterns and reduce other effects of formerly de jure segregation; (3) increasing the number of HUD-assisted households in mixed-income low-poverty communities with access to opportunities in education, employment, transportation, and essential goods and services; and (4) increasing the number of HUD-assisted households that live outside neighborhoods of concentrated poverty.²⁰ In addition, all grantees—regardless of whether they earn full points for the affirmatively furthering fair housing priority—must address at least one of the following objectives: “(1) help overcome any impediments to fair housing choice related to the assisted program or activity itself; (2) promote racially, ethnically, and socioeconomically diverse communities; or (3) promote housing-related opportunities that overcome the effects of past discrimination because of race, color, national origin, religion, sex, disability, and familial status.”²¹

HUD has also worked on revising the formal guidance surrounding the obligation to affirmatively further fair housing.²² The initial goal of this rulemaking process was to create “fair housing performance standards” that would “foster effective fair housing strategies” and “provide clear guidance to local communities, public housing agencies, and assisted housing providers to help them in their efforts to responsibly identify and solve fair housing problems, as these recipients strive to achieve equal opportunity in housing for all.”²³ Notably, HUD intended the rule to “provide specific standards and the bases upon which these requirements would be measured—both for purposes of receiving HUD funds and to aid the Department in determining that recipients are in compliance with the applicable requirements.”²⁴ HUD submitted the proposed rule for review by the Office of Information and Regulatory Affairs (OIRA) in 2012.²⁵ OIRA concluded its review in July 2012, deeming the rule consistent with regulatory review requirements, as long as HUD undertook recommended changes.²⁶

After OIRA’s review, HUD revised its description of its goals for the rulemaking, adding more details about the proposed changes, while reducing its former emphasis on specific standards and measurable outcomes. The new goal of the rulemaking is to “provide HUD program participants with more effective means to affirmatively further the purposes and policies of the Fair Housing Act.”²⁷ It noted that the current “analysis of impediments to fair housing choice and . . . certification that the grantee is affirmatively furthering fair housing” have “been found not as effective as envisioned.”²⁸ It proposes “replac[ing] existing requirements with a fair housing assessment and planning process that is intended to aid HUD program participants in improving access to opportunity and advancing the ability for all families to make true housing choices.”²⁹ HUD would “provide States, local governments, and public housing agencies, as well as the communities they serve, with local and regional data on . . . patterns of integration and segregation, and racially and ethnically concentrated areas of poverty.”³⁰ HUD will also commit to “greater engagement and better guidance for program participants in fulfilling their obligation to affirmatively further fair housing.”³¹

HUD has also piloted new metrics for evaluating fair housing in new, regionally focused grant programs. In particular, HUD has employed a new “Fair Housing and Equity Assessment” process in its Sustainable Communities Initiative, which housing advocates have viewed as a preview of some possible changes in the upcoming affirmatively furthering fair housing regulation.³² The Fair Housing and Equity Assessment process is largely focused on data analysis and planning, addressing several different issues.³³ In particular, an applicant must consider: (1) “Segregated Areas and Areas of Increasing Diversity and/or Racial/Ethnic Integration;” (2) “Racially/Ethnically Concentrated Areas of Poverty;” (3) “Access to Existing Areas of High Opportunity;” (4) “Major Public Investments;” and (5) “Fair Housing Issues, Services, and Activities.”³⁴ An applicant must go through several steps: (1) setting an approach to the Fair Housing Equity Assessment in conjunction with a HUD representative; (2) data analysis based on HUD-provided

data that is relevant to the applicant's particular region; (3) creation of an analysis document that explains how the applicant plans to fulfill the requirements of the program; (4) engagement with the program findings by key decisionmakers at the regional level; and (5) determination of how the findings will affect regional planning (also called the "bridge").³⁵ In a training webinar on the new program, HUD offered examples of metrics that could be used to satisfy the data analysis requirements for each of the different key issues.³⁶

HUD's forthcoming regulations are welcomed as a means to clarify the requirements imposed by the affirmatively furthering fair housing mandate as well as to better enable compliance with and enforcement of the mandate. Moreover, HUD should take this opportunity to ensure that grantees further fair housing using the most efficient means possible. Cost-effectiveness analysis can be a particularly useful tool to aid grantees in deciding which projects to fund. The further step of conducting cost-benefit analysis, to help inform choices about the total level of funding devoted to affirmatively furthering fair housing, will rely on monetization of the benefits and costs of these projects. HUD can take steps now to collect data and identify research needs for further monetization efforts.

Cost-Effectiveness Analysis Can Improve Grantee Decisionmaking

Cost-effectiveness analysis is a powerful method to determine the most effective use of limited resources to achieve a defined goal.³⁷ In cases in which there are multiple alternatives to achieving the same primary outcome, cost-effectiveness analysis can assist policymakers in choosing the best regulatory action.³⁸ Cost-effectiveness analysis is particularly useful when the costs of a program are relatively well-known, but benefits are hard to monetize.

The White House has developed guidance on how agencies can exercise their regulatory discretion most efficiently. Executive Order 12,866 instructs agencies to "assess both the costs and benefits" of any proposed significant regulation and tasks the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB") with reviewing all significant proposed regulations to ensure that they comply with this Executive Order and other applicable laws and policies.³⁹ Executive Order 13,563 reaffirms and supplements these principles,⁴⁰ and OMB's Circular A-4 provides guidance to agencies in conducting an effective regulatory analysis.⁴¹ Together, these documents aid HUD in determining what sort of regulatory analysis to employ.

The most fundamental policy set by Executive Order 12,866 is to define regulatory goals: agencies should identify the problem to be addressed, assess the significance of the problem, and explain why regulation is necessary to address that problem. Defining goals initially is crucial to all subsequent steps in rational rulemaking, such as evaluating the effectiveness of different policy alternatives in meeting those goals, and assessing the actual performance of the rule on an ongoing basis. Only by defining regulatory goals can an agency determine which regulatory structure will be the "best . . . tool[] for achieving regulatory ends."⁴²

Circular A-4 explains why and how agencies should employ cost-effectiveness analysis in order to "identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs."⁴³ The major components of cost-effectiveness analysis are as follows: first, determining the goal to be achieved; second, deciding how to measure that goal; and finally, calculating the costs of different options for implementing the program and selecting the most efficient option. These steps will be discussed below.

1. HUD Must Define What Affirmatively Furthering Fair Housing Means, and then How to Measure It

Within the context of this rulemaking, the effectiveness of the regulatory action refers to how well it affirmatively furthers fair housing. HUD's first and perhaps most important task in this rulemaking is to define in concrete terms what is meant by affirmatively furthering fair housing. Because Congress has not spoken precisely to this issue, and because HUD is the agency primarily responsible for interpreting the

FHA, courts will give substantial deference to any reasonable interpretation promulgated by HUD.⁴⁴

By giving the term a precise definition, HUD can provide funding recipients with more guidance about what their goals should be. HUD will also be able to better analyze which of several potential recipients of federal funds will be most effective at reaching these goals. In addition, HUD will be better equipped to measure the effectiveness of programs after implementation.

Between the 2011 and 2012 versions of the rule's abstract in the Unified Agenda, HUD switched the emphasis of its guidance for potential grantees from "provid[ing] specific standards and the bases upon which these requirements would be measured" to simply providing grantees with "local and regional data on . . . patterns of integration and segregation, and racially and ethnically concentrated areas of poverty."⁴⁵ Obviously, data is a key part of any regulatory analysis, but HUD should retain its goal of providing specific standards and methods describing how those standards would be measured, rather than just providing an agglomeration of data to grantees and leaving them to devise *ad hoc* methods of evaluating the data.

With its pilot Fair Housing and Equity Assessment program, HUD has hinted at what it means by "affirmatively furthering fair housing," but it still needs to be more explicit in its goals. In its guidance for the program, HUD has laid out five major categories of outcomes that grant applicants must identify and assess. These categories are: (1) "Segregated Areas and Areas of Increasing Diversity and/or Racial/Ethnic Integration;" (2) "Racially/Ethnically Concentrated Areas of Poverty;" (3) "Access to Existing Areas of High Opportunity;" (4) "Major Public Investments;" and (5) "Fair Housing Issues, Services, and Activities."⁴⁶ These outcomes can, in turn, be split into two broad categories of outcomes: (A) achieving actual integration along racial/ethnic and socioeconomic lines (comprising outcomes (1) and (2)) and (B) ensuring equal access to opportunity in housing (comprising outcomes (3)-(5)). The goal of actual integration is suggested by court precedent⁴⁷ and the Fair Housing Act's legislative history.⁴⁸ HUD may determine that recent court cases⁴⁹ and other considerations provide reason to focus on equality of opportunity as well.

Because the Fair Housing Act does not clearly define what is meant by "affirmatively further[ing]" fair housing, the courts will give HUD discretion in interpreting the statute, as long as HUD's interpretation is reasonable.⁵⁰ This report will not analyze the merits of any particular interpretation of the mandate, but will instead identify potential interpretations in order to explore possible metrics that HUD might use to assess progress on achieving the goals it chooses to set.

Defining one clear overarching goal for affirmatively furthering fair housing would make quantification and evaluation easier than working with several disparate goals. However, there are ways that HUD can effectively apply multiple goals, as described more fully below in the cost-effectiveness analysis section.

Assuming that HUD will work to advance actual integration, equality of opportunity, or both, there are several metrics that HUD could employ to evaluate the effectiveness of a proposed plan at reaching these goals.

a. HUD Could Define Affirmatively Furthering Fair Housing to Refer to Actively Integrating Neighborhoods

One possible interpretation of HUD's mandate to affirmatively further fair housing is that the goal is to work toward actual integration of communities. Under this interpretation, HUD is under an obligation to ensure that neighborhoods are representative of the locality or region as a whole. HUD could focus on either or both racial or economic integration.

HUD may choose to focus on racial integration. Studies have found that racial barriers have persisted that have shut out African Americans and other minorities from benefits and resources that are tied to the housing market.⁵¹

In its guidance on the new Fair Housing and Equity Assessment program, HUD suggests the use of

several metrics that grant applicants may use to evaluate racial and ethnic integration. In particular, HUD suggests using the dissimilarity index,⁵² which measures how much a given community differs from a community with a representative demographic sample,⁵³ and the predicted racial/ethnic composition, which addresses what the expected racial/ethnic composition of the jurisdiction would be, given its current household income characteristics.⁵⁴ With respect to the identification and assessment of racially concentrated areas of poverty, HUD defines such areas as those with a family poverty rate at or above 40% (or at or above 300% of the metro tract average, whichever is lower) and with a majority non-white population.⁵⁵

The advantage of using integration-based indices over other metrics is that they rely on census data, and are thus relatively easy and inexpensive to obtain.⁵⁶ Moreover, under the rubric of racial integration, they are generally sufficient by themselves to give a reasonable snapshot of segregation, and are correlated with other, more complex metrics.⁵⁷

As an alternative, or in addition, to focusing on racial integration, HUD could tailor its policies toward furthering economic integration. Among the most well-known examples of integration based on income is the Moving to Opportunity Program.⁵⁸ From 1994-1998, the housing authorities of five major U.S. cities engaged in a project to give almost 5,000 low-income families the opportunity to move out of their neighborhoods, which typically had extremely high poverty rates.⁵⁹ If accepted into the program, these families were to move out of those neighborhoods into low-poverty neighborhoods, defined as those with poverty rates under 10 percent.⁶⁰ Because of the way in which the study was conducted, researchers have been able to glean a substantial amount of data from the results.⁶¹ In short, the simple act of moving to low-poverty neighborhoods produced a wealth of positive consequences. And those positive consequences persisted even if they remained in racially segregated (albeit low-poverty) neighborhoods. Based on these positive consequences and the legal questions surrounding racial integration, HUD might choose to focus on economic integration, in which case it could use integration metrics, such as the Gini coefficient,⁶² which are based upon income levels rather than race.

b. Alternatively or Concurrently, HUD Could Focus on Promoting Equality of Opportunity In Housing Choice

HUD may also interpret affirmatively furthering fair housing to mean improving access to opportunity for all community members. HUD has already focused on improving access to opportunity in its discussion of the upcoming proposed rule.⁶³ If HUD chooses to take this approach, the challenge becomes how to determine what “access to opportunity” means and how to reflect this in a metric.

HUD has taken steps toward explaining what it means by improving access to opportunity. In particular, the agency has focused on distinguishing neighborhoods with high opportunities available to their residents from those neighborhoods with low opportunities available to their residents, based upon factors including school quality, poverty level, job availability, transportation availability, environmental health, and crime level.⁶⁴ In its pilot Fair Housing and Equity Assessment program, HUD has created five opportunity indices:⁶⁵ a School Proficiency Index, a Poverty Index, a Labor Market Index, a Housing Stability Index, and a Job Access Index.⁶⁶ It has also considered creating indices on crime levels and environmental health. It then combines these indices into an overarching “opportunity index,” which it can use to compare opportunity across different racial and economic groups.⁶⁷

Participants in the Sustainable Communities Initiative pilot program have employed opportunity indices for their regions,⁶⁸ often in conjunction with research institutes.⁶⁹ However, the opportunity index methodology remains in a rough form, with no official standardized approach. While it may make sense to employ variations on an opportunity index to assist planners with unique needs in particular regions, HUD should also provide a standardized methodology for conducting the opportunity index analysis, so as to allow for easy comparison across regions.

c. HUD Should Endeavor to Create A Single Combined Metric That Will Facilitate Comparison Between Proposed Programs

Once HUD has determined the goal or goals of the affirmatively furthering fair housing mandate, and once it has explored potential metrics for evaluating these goals, it should work to create a compound metric to measure the effectiveness of a program at furthering fair housing. A single metric of effectiveness will allow HUD to compare between the likely effectiveness of proposed projects when deciding how to allocate funds, and will also allow HUD to measure the effectiveness of implemented programs when assessing which funding recipients have successfully progressed on the goal and where enforcement action might be warranted against recalcitrant localities.⁷⁰

If HUD determines that equal opportunity in housing is the ultimate goal of its affirmatively furthering fair housing mandate, the final metric may end up being a version of the Opportunity Index described above. If HUD determines that the ultimate goal of its mandate is a combination of active integration and ensuring equality of opportunity, HUD will need to create a metric that combines the Opportunity Index with measures like the dissimilarity index, weighting each by the proportional importance HUD ascribes to it with respect to the goal of affirmatively furthering fair housing.⁷¹

If HUD finds it impracticable or inadvisable to create a national standardized fair housing metric, it should at least mandate that grant applicants create and describe their own standardized metrics in their assessment process, so as to be able to effectively compare between potential programs in their jurisdiction.

2. Once HUD Has Defined Affirmatively Furthering Fair Housing and Has Chosen Appropriate Metrics, It Should Encourage Grant Applicants to Select Cost-Effective Projects

Once HUD has determined which metrics are appropriate to measure the effectiveness of programs to affirmatively further fair housing, it should encourage grant applicants to select cost-effectiveness projects.⁷² The costs that are relevant to the analysis are those that are attributable to compliance with the mandate, and should “reflect the marginal or incremental resources consumed or saved, rather than total resources.”⁷³ The total costs of a project will generally include expenses necessary to achieve other housing goals of a particular undertaking not related to affirmatively furthering fair housing, and it is important that such costs not be included in cost-effectiveness analysis with respect to affirmatively furthering fair housing.

Consider an action of a Community Development Block Grant grantee to construct a new public housing project with HUD funds. The underlying goal of the action is to provide additional units of affordable housing. The grantee could achieve this goal by building a new housing project in a low-income, segregated neighborhood and thus potentially be non-compliant with the affirmatively furthering fair housing mandate. For the purposes of the hypothetical, for this action to be compliant with the affirmatively furthering fair housing mandate it must be built in a neighborhood that is neither predominantly low-income nor racially segregated.⁷⁴ The costs that should be included in a cost-effectiveness analysis for this project are those additional costs associated with complying with the affirmatively furthering fair housing mandate. The costs would be measured on a marginal basis per unit of additional “fair housing” expected to occur, based upon whichever metric HUD selects. The relevant costs could include the difference in real estate expenditures between the target neighborhood and a neighborhood where price (and not the mandate) was the only factor considered.

Increased real estate expenditures are bound to be among the most prevalent costs factored into a cost-effectiveness analysis. The analysis should include both public and private costs to society and should account for any cost savings.⁷⁵ If racial integration were the goal of the mandate, the relocation costs of low-income minority individuals who move to public housing in more integrated neighborhoods could be considered to the extent that they can be monetized. Such costs should only be considered, however, where they are attributable to the mandate, rather than generally to the project. Furthermore, in cases

where some, but not all, ancillary benefits can be monetized, these should be subtracted from the gross cost estimate.⁷⁶ Those conducting the cost-effectiveness analysis should attempt to monetize all benefits resulting from the affirmatively furthering fair housing mandate.

There is a risk that in assessing the costs of compliance under the mandate, the outcome used as the measure of effectiveness can be double-counted. Care should be taken not to count as negative costs expected changes in factors which are used for the measurement of effectiveness.⁷⁷ For example, if a grant applicant were to measure the effectiveness of a program with respect to affirmatively furthering fair housing by looking at the change in school performance of adolescents in public housing projects, then it would be incorrect to decrease net costs by counting the increased benefit from improved school performance as a result of the program.

Once a grant applicant has assessed the effectiveness of each potential program option at furthering fair housing, as well as the likely costs of those options, it can compare the incremental cost-effectiveness of the different potential options and select the optimal program. Cost-effectiveness analysis can assist at two stages of the analysis process—both when individual grantees are deciding the optimal projects for their region, and when HUD is deciding between potential grantees in order to decide which entities should receive the limited grant funds.

HUD Should Facilitate Greater Use of Cost-Benefit Analysis

Cost-effectiveness analysis is useful as a tool to guide HUD grantees in evaluating projects and selecting a course of action that most cost-effectively furthers fair housing, *i.e.*, maximizes fair housing on a unit basis per unit of cost. This analysis cannot, however, determine the optimal amount of spending that should be allocated towards affirmatively furthering fair housing, *i.e.*, the amount of spending that would supply the optimal level of fair housing. Cost-benefit analysis is needed to make this determination.

Cost-benefit analysis is advantageous in considering alternatives, such as levels of spending for fair housing, when both the benefits and costs of a proposed action can be expressed along a single dimension, typically through monetization.⁷⁸ The total costs of a proposal are subtracted from the total benefits to yield the net benefits, which can then be compared to the net benefits of alternatives. Benefits or costs that cannot be monetized can be accounted for qualitatively in a cost-benefit analysis, however this analysis is less useful when important benefits and costs cannot be expressed in monetized units.⁷⁹ When benefits and costs can adequately be accounted for, maximizing net benefits through cost-benefit analysis will indicate the optimal level of spending.

As grantees expand their use of grantees cost-effectiveness analysis in evaluating fair housing actions, HUD should ensure it collects relevant data regarding the benefits of fair housing actions that will allow it to monetize those benefits in the future. Doing so would permit HUD to use cost-benefit analysis in order to evaluate and adjust the amount of spending it puts towards affirmatively furthering fair housing.

HUD and Grantees Should Account for Additional Benefits and Costs of the Regulation

There are a number of benefits associated with affirmatively furthering fair housing, depending upon the goals of mandate. HUD should further study and monetize any applicable benefits and work these into its analysis whenever possible.

Concentrations of disadvantaged families and immigrants have been correlated with the level of violence in the community.⁸⁰ Consequently, reducing these concentrations through fair housing policies could decrease the level of violence. Some scholars suggest that in metropolitan areas with higher levels of racial and economic segregation, there are fewer neighborhoods able to absorb economic shocks, thus resulting in higher concentrations of poverty.⁸¹ They propose that the resulting resource deprivation of such neighborhoods undermines residential stability.⁸² To the extent that affirmatively furthering fair housing can be found to decrease neighborhood violence, this should be counted as a benefit.

A number of child and adolescent outcomes are associated with concentrated economic disadvantage, including “infant mortality, low birthweight, teenage childbearing, dropping out of high school, child maltreatment, and adolescent delinquency.”⁸³ Health-related indicators include homicide, infant mortality, low birthweight, accidental injury, and suicide.⁸⁴ Increased compliance with the affirmatively furthering fair housing mandate should provide numerous opportunities to test whether such correlated effects are causally-linked, as well as an opportunity to potentially monetize these benefits in order to conduct a comprehensive cost-benefit analysis of proposed policies.

Researchers have explored the benefits of integration in a number of studies, especially the Moving to Opportunity study discussed above. Some researchers followed up with the test subjects of that experiment and collected survey data to find that low-income test subjects who moved from more distressed to less distressed areas experienced positive effects as measured by a self-reported subjective well-being test.⁸⁵ Importantly, that study produced a monetized value for the “happiness” increase that resulted from the move to less distressed neighborhoods, even in the absence of actual improved economic outcomes for those families.

The same researchers also found that the test subjects from the Moving to Opportunity study who relocated to less distressed areas experienced considerable long-term improvements in extreme obesity and diabetes rates, and generally experienced less profound but still relevant improvements across general health outcomes and also marginally significant benefits related to mental health.⁸⁶

Another well-documented benefit to increased economic integration is enhanced performance of low-income students. A study of Montgomery County, Maryland’s economically integrative housing policies provides support for this benefit. Montgomery County avoided large-scale public housing, instead opting for building scattered-site units and two- or three-story family developments throughout the county’s many neighborhoods.⁸⁷ Observing all elementary-age children of families who lived in public housing in Montgomery County during the period 2001-07, the study found that after the fifth year in the school district, the performance of children living in public housing who attended low-poverty schools markedly improved and pulled away from the performance of children living in public housing who attended moderate-poverty schools.⁸⁸ Furthermore, the achievement gap between students living in public housing who attended low-poverty schools and their more affluent peers at those schools closed significantly, whereas in moderate-poverty schools, the achievement gap between students living in public housing and their peers who did not live in public housing remained the same.⁸⁹ The economically-integrative housing policy in Montgomery County contributed to these measurable, statistically significant benefits in child and adolescent education by providing a way for low-income students to attend low-poverty schools and promoting residential stability among families in low-poverty neighborhoods which in turn improved students’ academic outcomes.⁹⁰ This benefit resulting from fair housing policies should be included in any future cost-benefit analysis of economically-integrative fair housing policy.

Individual preferences of impacted families may be considered as costs or benefits. Because housing policies ultimately have the power to determine where people live, the decisions made under the policy may counter the preferences of the individuals affected by it. If racial integration is a goal of the program, then the mandate will result in a shift of individuals from racially segregated neighborhoods to racially integrated ones. The individual preferences of those impacted may align with this objective or run counter to it, and to the extent that these preferences can be monetized, those preferences should be factored into the analysis.

How much weight should be given the individual preferences is a policy decision for HUD to consider. HUD could take the view that to some extent, individual preferences may not reflect the best outcome due to the adoption of preferences based upon sustained suboptimal conditions. On the other hand, HUD may be reluctant to implement policies that could be deemed overly paternalistic. However, to be

clear, preferences motivated by racial animus should be disregarded as running counter to purposes of the Fair Housing Act and Civil Rights Act.

Conclusion

HUD's forthcoming regulation on affirmatively furthering fair housing has the potential to be a turning point in housing law and policy. HUD should embrace this opportunity by promulgating rigorous, quantitative guidance to communities and housing authorities about the steps they can take to effectuate better housing programs and policies throughout the country. Greater integration of cost-effectiveness analysis into fair housing policy will allow government bodies to use their limited budgets to generate the most socially desirable set of outcomes.

Notes

- 1 U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009). *See also* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. Pa. J. CONST. L. 1191, 1194 (2011).
- 2 For the purposes of this letter, “grantees” are the state and local governments, municipalities, public housing agencies, and assisted housing providers that receive HUD funding through one of the agency’s programs.
- 3 Executive Order No. 12,866 § 1(b)(5), 58 Fed. Reg. 51,735 (Sept. 30, 1993).
- 4 *Id.* § 1(b)(6) (alteration added).
- 5 OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (2003) [hereinafter CIRCULAR A-4], available at http://www.whitehouse.gov/omb/circulars_a004_a-4.
- 6 42 U.S.C. § 3604. Though the mandate applies to discrimination based upon numerous classifications, this report will focus primarily on discrimination based upon race. HUD could apply a similar analysis to other forms of discrimination, as well.
- 7 42 U.S.C. § 3608(e)(5).
- 8 The National Commission on Fair Housing and Equal Opportunity, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY (2008) [hereinafter FUTURE OF FAIR HOUSING], available at http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf.
- 9 Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 Ky. L.J. 125, 127 (2012).
- 10 *E.g.*, Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973); NAACP v. Sec. of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987); Schwemm, *supra* note 9, at 129 (quoting 114 Cong. Rec. 2281, 2528 (1968)); Johnson, *supra* note 1, at 1193-94, n.17; Craig Gurian & Michael Allen, *Making Real the Desegregating Promise of the Fair Housing Act: “Affirmatively Furthering Fair Housing” Comes of Age*, 43 CLEARINGHOUSE REV. 560, 560, n.1 (2010).
- 11 Schwemm, *supra* note 9, at 129 (quoting 114 Cong. Rec. 2281, 2528 (1968)).
- 12 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984).
- 13 U.S. DEP’T OF HOUS. & URBAN DEV., HUD-1582B-FHEO, FAIR HOUSING PLANNING GUIDE, Vol. 1 at 1-2 (1996), available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.
- 14 42 U.S.C. § 5304(b)(2) (alteration added).
- 15 24 C.F.R. § 570.904(c).
- 16 Lawyers Committee on Civil Rights under Law, National Fair Housing Alliance, and Poverty & Race Research Council, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD, PART II (2013), available at <http://prrac.org/pdf/HUDFirstTermReportCardPartII.pdf>; The Opportunity Agenda, REFORMING HUD’S REGULATIONS TO AFFIRMATIVELY FURTHER FAIR HOUSING (2010), available at http://opportunityagenda.org/files/field_file/2010.03ReformingHUDRegulations.pdf; FUTURE OF FAIR HOUSING, *supra* note 8.
- 17 GOVERNMENT ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (2010), available at <http://www.gao.gov/assets/320/311065.pdf>.
- 18 Notice of HUD’s Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA): Policy Requirements and General Section to HUD’s FY2010 NOFAs for Discretionary Programs, at 12 (June 4, 2010), available at <http://archives.hud.gov/funding/2010/gensec.pdf>. The 2011, 2012, and 2013 NOFAs include the same key language as the 2010 NOFA, but add additional examples for clarification.

- 19 *Id.*
- 20 *Id.*
- 21 *Id.* at 22.
- 22 Poverty & Race Research Action Council, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD 4-5 (2013).
- 23 Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda, RIN No. 2501-AD33 (Fall 2011), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2501-AD33>. Similar entries appeared in the Unified Agenda from 2007 through 2011.
- 24 *Id.*
- 25 OIRA Conclusion of EO 12866 Regulatory Review, RIN No. 2501-AD33, available at <http://www.reginfo.gov/public/do/eoDetails?rrid=121495>.
- 26 *Id.*
- 27 Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda, RIN No. 2501-AD33 (2012), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2501-AD33>.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 Poverty & Race Research Action Council, AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD 5 (2013).
- 33 See U.S. Department of Housing and Urban Development, Program Policy Guidance regarding Fair Housing and Equity Assessment (Feb. 17, 2012) [hereinafter, HUD Program Policy Guidance], available at <http://portal.hud.gov/hudportal/documents/huddoc?id=OSHC2012-03FHEAss.pdf>; U.S. Department of Housing and Urban Development, Addressing Equity & Opportunity: The Regional Fair Housing and Equity Assessment (FHEA) Grant Obligation [hereinafter, HUD Addressing Equity & Opportunity], available at http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf.
- 34 HUD Program Policy Guidance, *supra* note 33, at 1.
- 35 HUD Program Policy Guidance, *supra* note 33, at 2-3.
- 36 HUD Addressing Equity & Opportunity, *supra* note 33.
- 37 CIRCULAR A-4, *supra* note 5.
- 38 *Id.*
- 39 Exec. Order No. 12,866 § 1(b)(6) at 51,736-37.
- 40 Exec. Order No. 13,563, § 1(b) at 3,821.
- 41 CIRCULAR A-4, *supra* note 5.
- 42 Exec. Order No. 13,563 § 1 at 1.
- 43 CIRCULAR A-4, *supra* note 5, at 11.
- 44 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984) (holding that because the agency had made a “reasonable policy choice,” courts were not to second-guess that judgment.).
- 45 Compare Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda, RIN No. 2501-AD33 (Fall 2011), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=2501-AD33> with Affirmatively Furthering Fair Housing Rulemaking in the Unified Agenda, RIN No. 2501-AD33 (2012), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2501-AD33>.
- 46 HUD Program Policy Guidance, *supra* note 33, at 1.
- 47 U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., 668 F. Supp. 2d 562 (S.D.N.Y. 2009). See also Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. Pa. J. CONST. L. 1191, 1194 (2011).
- 48 See Schwemm, *supra* note 9, at 127, n.18.
- 49 E.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) (holding a school district’s integration program to be unconstitutional and stating in a plurality opinion that racial balancing could not be a compelling state interest so as to satisfy strict scrutiny).
- 50 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984).
- 51 DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 151 (1993); Ingrid Gould Ellen, *Continuing Isolation: Segregation in America Today*, in SEGREGATION: THE RISING COSTS FOR AMERICA (James H. Carr & Nandinee K. Kutty, eds., 2008).
- 52 A related measurement is the isolation index, which in essence measures the tendency for members of

one group to live in neighborhoods where their share of the population is above the regional average. This metric has some hypothetical advantages over the dissimilarity index, however historically the two indices have tracked each other almost perfectly over the past century. Edward Glaeser & Jacob Vigdor, *THE END OF THE SEGREGATED CENTURY 2-4* (2012), available at http://www.manhattan-institute.org/pdf/cr_66.pdf (arguing that “[t]he easing of credit standards . . . permitted many moderate-income African-American families access to neighborhoods that would have otherwise been out of their financial reach.”).

53 *E.g.*, Schwemm, *supra* note 9, at 131. The dissimilarity index can also be thought of as the proportion of individuals that would have to change neighborhoods in order to achieve perfect racial integration. Glaeser & Vigdor, *supra* note 51, at 2.

54 HUD Addressing Equity & Opportunity, *supra* note 33, at 10.

55 *Id.* at 14. Advocacy groups have objected to this particular metric, arguing that the 40% poverty cutoff is too high and “will allow some regions to avoid addressing the issue of racially concentrated areas of poverty in their communities,” but they do not object to the basic approach. Poverty & Race Research Action Council, *AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD 8* (2013).

56 American Housing Survey, <http://www.census.gov/housing/ahs/> (last visited Dec. 7, 2012).

57 Glaeser & Vigdor, *supra* note 51, at 2.

58 See LARRY ORR ET. AL., *MOVING TO OPPORTUNITY* (2003), available at <http://www.huduser.org/Publications/pdf/MTOFullReport.pdf>

59 *Id.*

60 *Id.*

61 Greg J. Duncan and Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 Nw. J.L. & Soc. POL’Y. 110 (2006).

62 United States Census Bureau, *Household Income Inequality Within U.S. Counties: 2006-2010* (2012), available at <http://www.census.gov/prod/2012pubs/acsbr10-18.pdf>.

63 U.S. Department of Housing and Urban Development, *Statement of Regulatory Priorities for FY2013*, available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement_2500.html.

64 HUD Addressing Equity & Opportunity, *supra* note 33, at 18-19, available at http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf; U.S. Department of Housing and Urban Development, *Statement of Regulatory Priorities for FY2013*, available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201210/Statement_2500.html.

65 HUD also suggests analyzing the distribution of major public investments and fair housing infrastructure separately from opportunity, but these factors could be addressed as part of an opportunity analysis. HUD Addressing Equity & Opportunity, *supra* note 33, at 23-24.

66 *Id.* at 19.

67 *Id.* at 19-21.

68 See, e.g., Kirwan Institute & Puget Sound Regional Council, *EQUALITY, OPPORTUNITY, AND SUSTAINABILITY IN THE CENTRAL PUGET SOUND REGION* (2012), available at <http://www.psrc.org/assets/7831/EquOppSusReport2.pdf>; Jason Reece, et al., *THE GEOGRAPHY OF OPPORTUNITY: BUILDING COMMUNITIES OF OPPORTUNITY IN MASSACHUSETTS* (2009), available at http://www.mlac.org/pdf/Geography%20of%20Opportunity_MA_full%20report.pdf.

69 The Kirwan Institute has been especially influential in shaping thought on the Opportunity Index. See <http://kirwaninstitute.osu.edu/>.

70 See CIRCULAR A-4, *supra* note 5, at 11.

71 Though this report has focused on racial and economic issues, HUD is tasked with addressing housing discrimination based on other factors as well, including disability, gender, sexual orientation, and religion. HUD could incorporate metrics addressing integration with respect to these characteristics, as well.

72 If HUD is reluctant to create a single metric for affirmatively furthering fair housing, a cost-effectiveness analysis can be conducted for each of the relevant metrics separately, and HUD or the grantee can at least favor those programs that exhibit dominance, meaning that they are most effective across all potential measures.

73 Gold, MR, et al., *Recommendations of the Panel on Cost-Effectiveness in Health and Medicine*, 276 J. AM. MED. ASS’N 1253, 1255 (1996).

74 How the goals of the mandate are defined will determine the criteria by which a particular project is assessed for compliance with the mandate. This is true both in terms of substance and degree of compliance required. In terms of substance, for example, racial segregation would only be a factor if racial integration is deemed

a goal of the program.

75 CIRCULAR A-4, *supra* note 5, at 11.

76 *Id.* at 12.

77 *Id.*

78 See CIRCULAR A-4, *supra* note 5, at 10 (citing MISHAN, E.J., COST-BENEFIT ANALYSIS (1994)).

79 *Id.*

80 Robert J. Sampson, et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 921 (1997).

81 *Id.* at 919

82 *Id.*

83 Robert J. Sampson, et al., *Assessing "Neighborhood Effects": Social Processes and New Directions in Research*, 28 ANN. REV. SOC. 443, 446 (2002).

84 *Id.*

85 Jens Ludwig, et al., *Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults*, 337 SCI.1505, 1509 (2012) (“[A] 1-SD reduction in neighborhood poverty (about 13 percentage points) is associated with an increase in [subjective well-being] that is... about equal to the remaining gap in [subjective well-being] between families with annual incomes that differ by \$13,000.”).

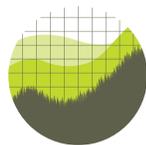
86 *Id.* at 1508-09.

87 HEATHER SCHWARTZ, THE CENTURY FOUND., HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 13 (2010). Part of the process of assigning public housing was drawing family names randomly from a waiting list as units became available. The families were given up to two options for housing and were not told the second option unless they rejected the first. If a family rejected both options, it was removed from the waiting list. *Id.* at 14.

88 *Id.* at 17.

89 *Id.* at 18,19.

90 *Id.* at 7.



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