



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

March 16, 2020

VIA ELECTRONIC SUBMISSION

Department of Housing and Urban Development

Attn: Regulations Division, Office of General Counsel

Re: Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (proposed January 14, 2020)

Docket ID: HUD-2020-0011

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the Department of Housing and Urban Development (“HUD”) regarding its latest proposal for an “Affirmatively Furthering Fair Housing (AFFH)” rule (“Proposed Rule”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Our comments focus on deficiencies in the Regulatory Impact Analysis (“RIA”) for the Proposed Rule. Specifically, we note that HUD:

- fails to consider benefits of the 2015 AFFH Rule (“2015 Rule”)³ that will be forgone under the Proposed Rule; and
- overestimates the cost savings that will result from the Proposed Rule.

I. HUD Fails to Consider Benefits of the 2015 Rule That Will Be Forgone Under the Proposed Rule

HUD promulgated the 2015 Rule to replace a longstanding process that was ineffective at fulfilling the Fair Housing Act’s mandate to affirmatively further fair housing. HUD expected the 2015 Rule to help participants in HUD programs develop policies to overcome impediments to fair housing, resulting in more effective policies and improvements to resident welfare, especially among members of protected classes.⁴ By repealing the 2015 Rule, the Proposed Rule will forgo these desirable outcomes, but HUD neither acknowledges these forgone benefits nor explains why their loss is justified. Because HUD fails to provide “a reasoned explanation . . . for

¹ This document does not purport to present New York University School of Law’s views, if any.

² Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (proposed Jan. 14, 2020) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903, and 905) [hereinafter 2020 Proposed Rule].

³ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter 2015 Final Rule].

⁴ U.S. DEP’T OF HOUSING AND URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING FINAL RULE: REGULATORY IMPACT ANALYSIS 2 (2015) [hereinafter 2015 RIA].

disregarding facts and circumstances that underlay” the 2015 Rule, finalizing the Proposed Rule would be arbitrary and capricious.⁵

A. The 2015 Rule replaced a process that was ineffective at furthering fair housing because it lacked clarity and oversight

HUD promulgated the 2015 Rule in response to criticism from program participants, civil rights groups, and the U.S. Government Accountability Office (“GAO”) that the Analysis of Impediments (“AI”) process, which had been used since 1995, was an ineffective way for HUD and program participants to fulfill their statutory obligation to affirmatively further fair housing.⁶ Under the AI process, HUD required program participants to identify impediments to fair housing choice and make a plan for how to overcome the effects of those impediments.⁷ However, HUD provided only “general guidance” to program participants on how to conduct an AI, and program participants usually did not submit their analyses to HUD for review.⁸

In a September 2010 report, the GAO found that 29% of HUD grantees had not updated their AIs since the last five-year planning cycle ended in 2004—and that 11% had not done so since the 1990s—raising doubts as to whether their AIs “provide[d] a reliable basis to identify and mitigate *current* impediments to fair housing.”⁹ The GAO also noted discrepancies in the length, content, and quality of the AIs,¹⁰ finding that many AIs lacked important information like timeframes for achieving the goals described therein.¹¹ The GAO believed that “HUD’s limited regulatory requirements and oversight [might] help explain why many AIs [were] outdated or [had] other weaknesses.”¹² The GAO concluded that AIs did not “serve as effective planning documents to identify and address current potential impediments to fair housing choice.”¹³

In the 2015 Rule, HUD acknowledged the GAO’s findings regarding the AI process’s lack of submission requirements and oversight.¹⁴ HUD concluded that “the current AI process was not well integrated into the planning efforts for expenditure of funds made by HUD program participants.”¹⁵ Specifically, the AI process failed to “specify or provide grantees relevant information, and did not clearly link grantees’ AIs to community planning efforts.”¹⁶ HUD acknowledged that many program participants “actively grapple[d] with how issues involving race, national origin, disability, and other fair housing issues do and should influence grant

⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

⁶ The Fair Housing Act of 1968 (“FHA”) requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of” the FHA. 42 U.S.C. § 3608(e)(5). To receive funding, recipients must therefore affirmatively further the FHA’s goal of “provid[ing] . . . for fair housing throughout the United States.” 42 U.S.C. § 3601.

⁷ 2015 Final Rule, 80 Fed. Reg. at 42,272.

⁸ *Id.*

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 2, 9 (2010) [hereinafter GAO REPORT]; *see also* U.S. DEP’T OF HOUSING & URB. DEV., FAIR HOUSING PLANNING GUIDE 2-6 (1996), (recommending that program participants update AIs at least once every three to five years).

¹⁰ *See* GAO REPORT, *supra* note 9, at 14.

¹¹ *See id.* at 6.

¹² *Id.* at i.

¹³ *Id.* at 31.

¹⁴ 2015 Final Rule, 80 Fed. Reg. at 42,272.

¹⁵ *Id.* at 42,275.

¹⁶ *Id.* at 42,348.

decisions.”¹⁷ HUD also noted the many program participants who spent “considerable time and funds trying in good faith to comply” with an AI process that lacked specificity.¹⁸ But ultimately, HUD concluded that a lack of oversight and clear guidelines in the pre-2015 AI process meant program participants were either not meaningfully assessing fair housing impediments in their jurisdiction or were doing so in an inefficient way.¹⁹

B. HUD identified several ways through which the 2015 Rule would further fair housing

HUD proposed the 2015 Rule and its Assessment of Fair Housing (“AFH”) process as a replacement for the AI process that would “more effectively carry out the obligation to affirmatively further fair housing.”²⁰ The Regulatory Impact Analysis for the 2015 Rule (“2015 RIA”) found that impediments to fair housing were “costly for members of protected classes that reside in these communities.”²¹ HUD believed that a more thorough analysis of fair housing issues could produce policy changes among program participants that would improve fair housing outcomes and the welfare of protected classes.²²

HUD stated that a lack of fair housing opportunities had the effect of “reducing employment, education, and homeownership opportunities as well as the benefits of living in a safer and healthier environment.”²³ The 2015 RIA cited several studies linking racial and ethnic segregation and concentrations of poverty to social and economic costs. For example, a study of closing costs in real estate transactions showed that African American homebuyers pay \$415 more for their mortgage loans than white homebuyers, even after accounting for variables like credit score and loan amounts.²⁴ A 2011 study found evidence that “segregation is correlated with higher black poverty and lower white poverty, compared to places that are less segregated.”²⁵ A 1997 study by Cutler and Glaeser also found that segregation is correlated with a difference in measured outcomes like education level, earnings, and rate of single parenthood between white and black residents.²⁶ The authors concluded that “housing policy which reduced spatial segregation could be as effective as education, labor, or social policies in achieving equal outcomes.”²⁷ Finally, the 2015 Chetty and Hendren study on the economic impact of residential

¹⁷ *Id.* at 42,275.

¹⁸ *Id.* at 42,349.

¹⁹ 2015 RIA, *supra* note 4, at 7.

²⁰ 2015 Final Rule, 80 Fed. Reg. at 42,274.

²¹ 2015 RIA, *supra* note 4, at 3.

²² *See id.* at 13-14 (“The goal of the final rule is to improve fair housing outcomes and thus the welfare of protected classes through better information, clearer AFH formulation standards, and improved accountability.”); 2015 Final Rule, 80 Fed. Reg. at 42,350-51 (“Actions taken by program participants as a result of this rule may result in new local approaches to reducing segregation, eliminating racially concentrated areas of poverty, reducing disparities in access to opportunity, and reducing disproportionate housing needs. HUD believes that some of these new approaches would better achieve the goals of fair housing, meaning that communities would be more integrated, fewer people would live in high-poverty, segregated neighborhoods, and access to high-quality education, job opportunities, and other community assets would be more equal.”).

²³ 2015 RIA, *supra* note 4, at 4.

²⁴ *Id.* at 3 n.2 (citing SUSAN WOODWARD, URB. INST., A STUDY OF CLOSING COSTS FOR FHA MORTGAGES (2008)).

²⁵ *Id.* at 4 (citing Elizabeth Oltmans Ananat, *The Wrong Side(s) of the Tracks: The Causal Effects of Racial Segregation on Urban Poverty and Inequality*, AM. ECON. J.: APPLIED ECON., 34-66 (2011)).

²⁶ *Id.*

²⁷ *Id.*

mobility suggested that “moving out of a high-poverty neighborhood is especially important to young children” and that “mobility policies can improve lifetime outcomes.”²⁸

HUD expected the AFH process to “highlight[] these issues and their attendant costs in ways that were not previously appreciated” and inform program participants’ policy decisions accordingly.²⁹ The AFH process was “designed to improve the fair housing planning process by providing better data and greater clarity to the steps that program participants must undertake to assess fair housing issues and contributing factors.”³⁰ HUD “precisely defined” the required contents of the AFH submission,³¹ with a standardized submission format and set of questions expected to “clarify and ease the analysis that program participants must undertake.”³² The 2015 Rule also advised program participants of how HUD would review the AFH submissions.³³

In addition, HUD committed to providing program participants with tailored data sets to analyze and with specific factors, like contributing factors for segregation and racially or ethnically concentrated areas of poverty, to consider when assessing fair housing opportunities in their jurisdictions.³⁴ The use of HUD-provided data was expected to provide insights to impediments to fair housing that the AI process missed.³⁵ For example, new data regarding the “geographic distribution and housing needs of households with different protected characteristics” could help policymakers provide more affordable housing to the areas with the most need first.³⁶ HUD-provided data might also reveal that disparities in access to community assets were “more acute for public housing residents, many of whom are racial and ethnic minorities,” and allow the program participant to tailor their development strategy accordingly.³⁷ The AFH process thus produced a more robust analysis of fair housing impediments, which program participants could use to make policy decisions that could positively impact the lives of members of protected classes.³⁸

²⁸ *Id.* at 22.

²⁹ *Id.* at 4.

³⁰ 2015 Final Rule, 80 Fed. Reg. at 42,273.

³¹ 2015 RIA, *supra* note 4, at 7.

³² 2015 Final Rule, 80 Fed. Reg. at 42,345.

³³ *Id.* at 42,285. For example, HUD would not accept an AFH that “does not identify policies or practices as fair housing contributing factors, even though they result in the exclusion of a protected class from areas of opportunity,” an AFH developed without community participation, or an AFH “in which priorities or goals are materially inconsistent with the data or other evidence available to the program participant.” 24 C.F.R. § 5.162(b)(1).

³⁴ *See* 2015 Final Rule, 80 Fed. Reg. at 42,285 (“HUD’s AFFH rule is intended to help program participants by providing additional information and data that is expected to aid the program participants’ analysis and final decisions on investment of Federal funds.”); *see also* 24 C.F.R. § 5.154.

³⁵ *See* 2015 Final Rule, 80 Fed. Reg. at 42,351 (“With HUD-provided data and any additional local data provided by program participants, program participants can better identify, in their areas, patterns of integration and segregation, disparities in access to opportunity by members of protected classes, racially or ethnically concentrated areas of poverty, and disproportionate housing needs based on protected class. With such identification, program participants can focus on areas for improvement, develop strategies to address barriers to fair housing choice, and prioritize where resources will be deployed first.”); *see also* 2015 RIA, *supra* note 4, at 16 (“The new information could, however, highlight relationships that were previously not well understood. . . . The new information might also shed light on an issue that had not previously been emphasized but that the AFH process makes clear is important.”).

³⁶ 2015 RIA, *supra* note 4, at 17.

³⁷ *Id.* at 20.

³⁸ 2015 Final Rule, 80 Fed. Reg. at 42,349.

Ultimately, HUD found that the qualitative benefits of the 2015 Rule could be “significant.”³⁹ The 2015 RIA explained that if the 2015 Rule prompted local jurisdictions to promote “more racially and socio-economically equitable allocation of neighborhood services and amenities, residents would enjoy the mere sense of fairness from the new distribution.”⁴⁰ Desegregating communities could also “revitalize[] the dignity of residents who felt suppressed under previous housing and zoning regimes.”⁴¹ Finally, HUD believed that actions that program participants would take as a result of the 2015 Rule may make “access to high-quality education, job opportunities, and other community assets . . . more equal.”⁴² While quantifying the values of fairness, equality, and dignity of residents is “likely impossible,” HUD stated in 2015 that these values were “the crux” of the 2015 Rule.⁴³

C. HUD fails to account for the benefits that the Proposed Rule forgoes

HUD now emphasizes the cost savings that the Proposed Rule will yield by reducing the amount of analysis that program participants need to perform to demonstrate compliance with their obligation to affirmatively further fair housing. However, HUD fails to account for the forgone benefits that will accompany these cost savings. Namely, HUD ignores how higher-quality analyses and targeted information collection can lead to more effective policies that improve outcomes for residents. HUD also fails to address how repealing the requirement for participants to evaluate obstacles to fair housing like discrimination and segregation will lead to forgone benefits in the form of fewer policies that prevent harms caused by these problems. Finally, HUD fails to address the forgone benefits of changing the requirement that program participants take “meaningful actions” to further fair housing.

Many of these forgone benefits are difficult to quantify; HUD expected “most of the positive impacts” of the 2015 Rule to “entail changes in equity, human dignity, and fairness.”⁴⁴ But HUD may not ignore benefits merely because they are unquantified. On the contrary, Executive Order 12,866 explicitly instructs agencies to consider all important unquantified effects of regulatory actions.⁴⁵ Guidance from the Office of Management and Budget on conducting Executive Order 12,866 cost-benefit analyses further cautions agencies against ignoring the potential magnitude of unquantified benefits.⁴⁶

³⁹ *Id.* at 42,348.

⁴⁰ 2015 RIA, *supra* note 4, at 2.

⁴¹ *Id.*

⁴² *Id.* at 24-25.

⁴³ 2015 Final Rule, 80 Fed. Reg. at 42,349.

⁴⁴ 2015 RIA, *supra* note 4, at 2.

⁴⁵ Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993) (“Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”); *see also* Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (allowing agencies “where appropriate and permitted by law,” to “consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts”).

⁴⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, at 2-3 (2003), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> [hereinafter CIRCULAR A-4] (“It will not always be possible to express in monetary units all of the important benefits and costs. When it is not, the most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. . . . When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs.”).

In addition to violation Executive Order 12,866, ignoring forgone benefits, quantified or not, violates the Administrative Procedure Act (“APA”). A regulation is arbitrary and capricious under the APA if the issuing agency fails to “examine the relevant data” or “consider an important aspect of the problem,”⁴⁷ and “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”⁴⁸ Furthermore, the costs that an agency must consider “include[] more than the expense of complying with regulations”; instead, “any disadvantage could be termed a cost.”⁴⁹ In the context of a repeal, relevant disadvantages include forgone benefits.⁵⁰ By ignoring these effects, HUD has “failed to consider an important aspect of the problem” and rendered the Proposed Rule arbitrary and capricious.⁵¹

Finally, when agencies repeal or revise existing rules, the APA requires them to provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁵² Here, HUD offers no explanation for disregarding its previous findings regarding the benefits provided by the 2015 Rule—benefits that will be forgone if the Proposed Rule is finalized.

- i. *HUD ignores its prior finding that the 2015 Rule would result in higher quality analyses, producing better housing policies and improved welfare for residents*

HUD now characterizes the AFH process as “little more than an administrative hurdle” and proposes replacing it with a process that may be light not only in administrative burdens, but also in any analysis of fair housing impediments.⁵³ HUD specifically states that the Proposed Rule “does not require jurisdictions to analyze and evaluate data concerning the status of protected classes along a variety of dimensions.”⁵⁴ HUD will instead require program participants to identify “at least three goals towards fair housing choice or obstacles to fair housing choice” that the program participant intends to address.⁵⁵ Notably, if a program participant selects one of the sixteen obstacles to fair housing choice listed in the Proposed Rule, the program participant will not even need to explain how “how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that jurisdiction.”⁵⁶

HUD fails to account for how HUD’s refusal to provide data will affect the quality of analysis and resulting policy initiatives. HUD expected its provision of data and detailed requirements for

⁴⁷ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

⁴⁸ *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015).

⁴⁹ *Id.*

⁵⁰ *See California v. BLM*, 277 F. Supp. 3d 1106, 1122-23 (N.D. Cal. 2017) (holding that failure to consider forgone benefits was arbitrary and capricious); *cf. Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1039-41 (finding that the agency properly calculated the costs of amending a regulation); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal “is common sense and settled law.”).

⁵¹ *State Farm*, 463 U.S. at 43.

⁵² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); *see also Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (“[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.”).

⁵³ U.S. DEP’T OF HOUSING AND URB. DEV., FR-6123-P-02, “AFFIRMATIVELY FURTHERING FAIR HOUSING” PROPOSED REGULATORY IMPACT ANALYSIS (RIA) 9 (2020) [hereinafter 2020 RIA].

⁵⁴ *Id.* at 11.

⁵⁵ 2020 Proposed Rule, 85 Fed. Reg. at 2056.

⁵⁶ *Id.*

the AFH process to reveal impediments to fair housing that program participants previously missed, thereby producing benefits like improved access to affordable housing and increased dignity from decreased segregation.⁵⁷ Therefore, HUD must now consider the forgone benefits that will result from the Proposed Rule's simplified certification requirements. The repeal of these measures will impair program participants' ability to identify and address fair housing issues in their jurisdiction, thereby restricting program participants' ability to achieve their fair housing goals. HUD must also offer a reasoned explanation for why it now believes that the more data-intensive and standardized AFH process would lead to costs, rather than the potential benefits described in the 2015 Rule.⁵⁸

ii. *HUD fails to assess the forgone benefits that will result from repealing the 2015 Rule's comprehensive outreach requirements*

The Proposed Rule fails to address the forgone benefits of withdrawing the outreach requirement to people with disabilities and people with limited English proficiency (LEP), two groups which the statute was meant to protect.

The Proposed Rule eliminates outreach requirements that HUD implemented in 2015 to "strengthen the community participation requirements" of the fair housing planning process.⁵⁹ The 2015 Rule required program participants to use communication methods "designed to reach the broadest audience."⁶⁰ This included ensuring that "all aspects of community participation are conducted in accordance with applicable fair housing and civil rights laws" including assuring "access to communications for persons with [LEP] and access to meetings and materials for persons with disabilities."⁶¹ At the same time, the 2015 Rule allowed program participants to "tailor outreach methods [to] provide for meaningful actions."⁶² The 2015 RIA concluded that significant benefits would flow from these provisions, noting that "information gathered in the community participation process" would "increase local decision makers' awareness of the need for more affordable housing options in a greater variety of geographic areas" and lead to policies addressing these gaps.⁶³

The Proposed Rule, by contrast, significantly reduces the requirements for public outreach by not requiring jurisdictions to "include web postings [or conduct] certain outreach to people with disabilities or those with limited-English proficiency."⁶⁴ HUD acknowledges the possibility that there "could be some loss of information from" reducing the required outreach efforts to people with disabilities and people with limited English proficiency.⁶⁵ However, the 2020 RIA makes no effort to characterize the importance of this loss, citing the difficulty of providing "an estimate of the value of that information."⁶⁶ But the mere fact that a benefit cannot currently be quantified says little about its magnitude. For this reason, OMB's Circular A-4 warns agencies

⁵⁷ See 2015 RIA, *supra* note 4, at 2.

⁵⁸ See *id.* at 7 ("[T]he clarity provided by the rule concerning AFFH requirements may, to some extent, reduce the burden of completing the AFH.").

⁵⁹ 2015 Final Rule, 80 Fed. Reg. at 42,295.

⁶⁰ *Id.* at 42,292.

⁶¹ *Id.*

⁶² *Id.* at 42,295.

⁶³ 2015 RIA, *supra* note 4, at 17-18.

⁶⁴ 2020 RIA, *supra* note 53, at 11.

⁶⁵ *Id.*

⁶⁶ *Id.*

that the most efficient rule may not have the “largest quantified and monetized net-benefit estimate.”⁶⁷ Thus, even if HUD cannot assign a dollar value to the information that would have been provided through outreach efforts under the 2015 Rule, it must still provide a thorough *qualitative* discussion of this benefit and explain why forgoing it is justified.

- iii. *HUD fails to assess the forgone benefits that will result from focusing on increasing housing supply rather than addressing other impediments to fair housing*

HUD suggests that the Proposed Rule still furthers fair housing, but the Proposed Rule appears to conflate *fair* housing with *affordable* housing. The Proposed Rule revises the definition of fair housing choice to emphasize increasing affordable housing supply. Relying on studies demonstrating discrimination in the housing market despite sufficient housing supply, the 2015 Rule explicitly directed participants to address historic patterns of segregation and discrimination. The Proposed Rule fails to provide a reasoned explanation for disregarding those findings and fails to address the forgone benefits of addressing segregation and discrimination.

HUD emphasizes throughout the Proposed Rule that its goal is “to promote and provide incentives for innovations in the areas of affordable housing supply”⁶⁸ and that “[h]aving a supply of affordable housing that is sufficient to meet the needs of a jurisdiction’s population is crucial.”⁶⁹ The 2020 RIA discusses housing choice in terms of “[m]arket and regulatory barriers” like “lack of affordable housing and inability to use existing housing subsidies.”⁷⁰ But in the 2015 RIA, HUD cited studies finding that even in markets with an adequate supply of affordable housing, discrimination still impedes housing choice for minorities. The Ondrich et al. study, for example, found that real estate agents were more likely to show customers homes that “deviate from the initial request when the customer is black than when the customer is white.”⁷¹ The study authors concluded that the findings were “consistent with discrimination on the part of real estate agents and [that] such behavior on the supply side will result in restricted housing choice for minorities.”⁷² Similarly, the Urban Institute’s 2012 Housing Discrimination Study (“HDS”) found that “minority home seekers are told about and shown fewer homes and apartments than whites, raising the costs of housing search and limiting housing.”⁷³ Thus “housing discrimination still exists in more nuanced forms and persists in both rental and sales markets.”⁷⁴

These findings suggest that more nuanced forms of discrimination perpetuate patterns of segregation that cannot be addressed simply by expanding housing supply. In 2015, HUD expected that addressing housing discrimination and segregation would produce benefits in the form of improved welfare and dignity for residents facing these fair housing impediments. The 2015 RIA identifies improving equity, fairness, and dignity as “the crux” of the 2015 Rule, and predicts that the 2015 Rule could result in “significant” improvements to these qualitative

⁶⁷ CIRCULAR A-4, *supra* note 46, at 4.

⁶⁸ 2020 Proposed Rule, 85 Fed. Reg. at 2043.

⁶⁹ *Id.* at 2048.

⁷⁰ 2020 RIA, *supra* note 53, at 8.

⁷¹ 2015 RIA, *supra* note 4, at 3 (citing Jan Ondrich, Stephen Ross & John Yinger, *Now You See It, Now You Don't: Why Do Real Estate Agents Withhold Available Houses From Black Customers?*, 85 R. ECON. & STAT. 854, 854-73 (2003)).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

values.⁷⁵ In contrast, the Proposed Rule and the 2020 RIA do not acknowledge that, by repealing the 2015 Rule’s requirement that program participants evaluate segregation and housing discrimination, the 2020 Rule imposes costs in the form of forgone improvements to equity, fairness, and dignity. In fact, the words “segregation,” “poverty,” “equity,” “fairness,” and “dignity” never appear in the 2020 RIA.

- iv. *HUD fails to acknowledge the forgone benefits that will result from altering the obligations of program participants in an ambiguous manner*

The Proposed Rule eliminates the 2015 Rule’s requirement that program participants “take meaningful actions” to address impediments to fair housing and replaces it with a duty to “act[] in a manner consistent” with reducing obstacles to fair housing choice.⁷⁶ However, HUD does not explain whether the new provision will produce the same benefits as those expected under the 2015 Rule and, if not, why forgoing these benefits is justified.

The 2015 Rule defined “meaningful actions” as “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”⁷⁷ In issuing that rule, HUD considered but ultimately declined to instead require program participants to take “proactive steps” to address fair housing impediments.⁷⁸ HUD feared that the term “proactive steps” could be interpreted “in a manner that conflicted with the well-established case law” under the FHA because the phrase had “various meanings and [did] not have a body of case law applying the term in the civil rights context.”⁷⁹ By contrast, “meaningful actions” is a concept that has been used by the Supreme Court in civil rights cases and “provides greater clarity on the actions that program participants are expected to take in carrying out their duty to affirmatively further fair housing.”⁸⁰ For example, HUD found that “the term ‘meaningful actions’ encompasses actions to either address historic or current fair housing problems, or both, as well as proactively responding to anticipated fair housing problems.”⁸¹

As noted above, the Proposed Rule replaces the requirement to take meaningful actions with a requirement to “act[] in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice.”⁸² However, HUD does not explain whether “acting in a manner consistent” with reducing fair housing impediments will encourage program participants to address both historic and current fair housing problems and thereby produce the qualitative benefits expected under the 2015 Rule. Nor does HUD explain whether this phrase requires program participants to affirmatively take steps to address fair housing issues rather than simply refraining from taking steps contrary to furthering fair housing.

⁷⁵ 2015 Final Rule, 80 Fed. Reg. at 42,349.

⁷⁶ *Id.* at 42,353; 2020 Proposed Rule, 85 Fed. Reg. at 2053; *see also* 24 C.F.R § 5.150.

⁷⁷ 24 C.F.R § 5.152.

⁷⁸ 2015 Final Rule, 80 Fed. Reg. at 42,279.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 2020 Proposed Rule, 85 Fed. Reg. at 2053 (emphasis added).

Finally, HUD fails to explain whether “acting in a manner consistent with reducing obstacles” has “a body of case law applying the term in the civil rights context.”⁸³ Without this case law foundation, this new provision is susceptible to the same concerns over lack of clarity HUD had in 2015 with the “proactive steps” terminology and could result in the loss of benefits expected to flow from the 2015 Rule. HUD must either acknowledge these forgone benefits and explain why they are justified, or explain why it is disregarding its findings from the 2015 Rule regarding the importance of using a term, like “meaningful actions,” for which case law provides a clear definition.

II. HUD Overestimates the Cost Savings That Will Result from the Proposed Rule

HUD overestimates the cost savings that will result from replacing the 2015 Rule with the Proposed Rule. First, in analyzing the effects of the Proposed Rule, HUD disregards its previous findings regarding the flexibility afforded to program participants by the 2015 Rule. Second, HUD fails to account for the cost of measuring compliance and providing incentives under the Proposed Rule.

A. HUD overstates the extent to which the Proposed Rule will increase flexibility relative to the 2015 Rule

HUD’s current criticism of the 2015 Rule’s lack of flexibility is inconsistent with its prior conclusion that the 2015 Rule “affords program participants considerable choice and flexibility” in setting their fair housing goals and strategies.⁸⁴ HUD’s analysis of costs in the Proposed Rule thus overestimates the extent to which the Proposed Rule will increase flexibility relative to the 2015 Rule and overstates the expected benefits of the Proposed Rule.

In the Proposed Rule, HUD claims that the 2015 Rule was “particularly burdensome because HUD did not tailor the rule depending on the program participant, other than through creating broad categories.”⁸⁵ HUD expresses concern that all jurisdictions must “go through the same AFH process, without the flexibility to identify their locality’s most relevant issues or to adapt their process to the unique conditions of the jurisdiction.”⁸⁶ The Proposed Rule purports to “provide a more tailored approach that would take into account local issues and concerns by allowing local jurisdictions to create custom approaches based on their unique circumstances.”⁸⁷

But while the 2015 Rule provided a more standardized framework for analysis than the previously used AI process, HUD made clear that it did not dictate specific outcomes or remove program participants’ ability to set their own policy priorities, based on local needs.⁸⁸ Instead, the AFH process was “intended to assist program participants in their own prioritization of how best to allocate scarce resources to meet identified local needs and comply with their duty to affirmatively further fair housing.”⁸⁹ Under the 2015 Rule, program participants continued to “have latitude, if they so choose, to prioritize their goals and strategies in the local decisionmaking process based on the information, data and analysis in the AFH.”⁹⁰ For example, even though all program participants needed to complete an AFH, program participants could adopt different strategies to fulfill their AFFH obligation, including both place-based investment and increasing mobility for members of protected classes.⁹¹ HUD further advised that program

⁸³ 2015 Final Rule, 80 Fed. Reg. at 42,279.

⁸⁴ *Id.* at 42,273; *see also id.* at 42,309 (noting that “HUD is not prescribing any ‘one size fits all’ or specific solutions” to local fair housing issues).

participants had “flexibility in developing their AFH to explain actual local conditions in qualitative terms that may not be reflected by [HUD-provided] data.”⁹²

Because the Proposed Rule does not acknowledge these prior findings regarding the flexibility that the 2015 Rule provided to program participants, it overstates the extent to which the Proposed Rule can be expected to yield cost savings relative to the 2015 Rule.

B. HUD fails to account for the cost of measuring compliance and providing “incentives” under the Proposed Rule

Although the 2020 RIA identifies potential cost savings from the elimination of the AFH process, it does not account for the additional costs associated with preparing and administering the Proposed Rule’s new incentive program for high performing jurisdictions. The 2020 RIA also fails to consider additional costs associated with ensuring the compliance of low performers. HUD therefore overstates the cost savings of the Proposed Rule.

HUD suggests that the Proposed Rule will, by eliminating the AFH process, “relieve some of the [2015 Rule’s] burden on HUD staff,”⁹³ but this analysis is incomplete because HUD fails to acknowledge any additional responsibilities or costs that HUD staff will shoulder in implementing the new incentives program. Potential incentives that HUD has identified for high-performing jurisdictions include preferential evaluation for funding opportunities, eligibility to receive additional program funds, and other forms of “regulatory relief.”⁹⁴ Implementing such incentives will require HUD staff to expend time and resources evaluating program participants using HUD’s new metrics, to identify where to award points to qualifying applicants in existing grant competitions, to develop new programs, and to explore other potential “statutory flexibility to reward outstanding AFFH jurisdictions.”⁹⁵ HUD will also have to invest resources to determine which jurisdictions are “outstanding AFFH performers” and therefore eligible for the various benefits.⁹⁶ And beginning with the second cycle, HUD will have to invest resources to determine which jurisdictions had the greatest improvements.⁹⁷

Finally, jurisdictions at the bottom of HUD’s proposed ranking system will have to expend resources providing a written response with “additional information to demonstrate that they are affirmatively furthering fair housing to the best of their ability.”⁹⁸ HUD, in turn, will have to

⁸⁵ 2020 Proposed Rule, 85 Fed. Reg. at 2043.

⁸⁶ *Id.*

⁸⁷ *Id.* at 2045.

⁸⁸ *See* 2015 Final Rule, 80 Fed. Reg. at 42,287 (“[T]he final rule should not specify the benchmarks or mandate certain outcomes. The final rule provides for the establishment of benchmarks, but established by the program participant and not by HUD.”).

⁸⁹ *Id.* at 42,345.

⁹⁰ *Id.* at 42,279.

⁹¹ *Id.*

⁹² *Id.* at 42,341.

⁹³ 2020 RIA, *supra* note 53, at 15 (noting that the 2015 Rule required HUD staff to “review and approve the AFH, help program participants identify and analyze drivers of fair housing choice disparity, and help develop strategies to overcome such disparity”).

⁹⁴ 2020 Proposed Rule, 85 Fed. Reg. at 2048-49.

⁹⁵ *Id.* at 2049.

⁹⁶ *Id.* at 2048.

⁹⁷ *Id.* at 2049.

⁹⁸ *Id.*

expend additional resources determining if the “additional information” is “sufficient.”⁹⁹ And if a jurisdiction disagrees with HUD’s determination, both it and HUD will expend further resources on an appeals process.¹⁰⁰ HUD has not accounted for any of these additional costs associated with the Proposed Rule or assessed the extent to which they offset cost savings associated with eliminating the AFH process.

To satisfy its obligations under Executive Order 12,866 and the APA, HUD must consider the forgone benefits of repealing provisions of the 2015 Rule and accurately assess the cost savings expected under the Proposed Rule. Finalizing the Proposed Rule in the absence of these analytic improvements would be arbitrary and capricious.

Respectfully submitted,

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⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2050.