March 13, 2020

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

Re: Docket ID FR 6123-P-02

Affirmatively Furthering Fair Housing; Proposed Rule

To the Office of the General Counsel:

Prosperity Now is submitting comments on the U.S. Department of Housing and Urban Development proposed rule on Affirmatively Furthering Fair Housing.

Prosperity Now is a national, nonpartisan nonprofit organization based in Washington, D.C. that works to expand economic opportunity for all Americans by promoting and advocating for asset-building policies and programs. A part of our work focuses on homeownership, which has long been the primary way for families to build wealth in the United States. Owning an affordable home can offer families stability, security and a legacy to pass on to the next generation. In addition, we advocate for access to affordable, safe rental housing, which is essential to allow families the opportunity to save and prepare to purchase a home in a community in which they wish to live. Unfortunately, in too many communities across the United States, families face discrimination, disparate rental and credit terms and other unfair treatment. The impediments disproportionately impact families and communities of color, further exacerbating the racial wealth divide and inequities in the United States.

We write to express our opposition to the Department’s proposal to substantially revise the 2015 rule. That rule, developed over several years, is the result of a comprehensive process, which included a diverse group of stakeholders. We strongly encourage the Department to reinstate the 2015 rule, which, unlike the proposed changes, would be an effective tool to help communities identify, address and prevent housing discrimination.

The most important problem with the proposed rule is, quite simply, it is not a fair housing rule. The rule fails to mention “segregation,” which remains a major result of decades of federal, state and local housing policy. The rule barely cites discrimination, which is what the Fair Housing Act was enacted to contest. It confuses affordability with integration.
Furthermore, the proposed rule ignores the purpose of the Fair Housing Act, which, in Sec. 3608(d), requires HUD to “administer its programs in a manner ‘affirmatively to further the purposes.’” The framework laid out in the proposal, in particular, the sections on consultation, public participation, jurisdictional risk analyses and certifications, fails to establish just how HUD will meet its statutory obligations. The proposal fails to provide guidance to program grantees as well.

**Devaluing public participation**

The proposal eliminates meaningful opportunity for public input in the AFFH process. The proposal envelops AFFH public participation into the five-year Consolidated Planning process. The Consolidated Planning process is a vital tool to identify affordable housing needs, trends and opportunities in a participating jurisdiction or state. The AFFH process had been tailored so that those most affected, or historically most affected, have the specific opportunity to raise their concerns on fair housing. By burying it in the Consolidated Planning process, the Department is intentionally diluting the voices of victims of housing discrimination.

**Conflating housing affordability with housing discrimination**

The proposal focuses on housing affordability and the Administration’s perceived barriers to new housing development, neither of which are related to fair housing. The concept of affordability, which is vital, is absent from the Fair Housing Act. Housing discrimination is present without regard to income. In his 1968 signing statement, President Johnson noted that the Act “proclaims that fair housing for all--all human beings who live in this country--is now a part of the American way of life.” The proposal ignores this.

In a departure from the 2015 rule’s data-driven approach for localities and states, in the proposal, HUD encourages jurisdictions to select from a list of 16 pre-approved goals (under “Certifications”), which HUD implies leads to discrimination. Only three of these goals are remotely related to fair housing. Indeed, many of the goals appear to have been selected to raise up ideological criticisms of certain policy positions such as worker safety and energy efficiency.

The 2015 rule is designed to help communities implement good, fair housing programs, work to integrate neighborhoods and eliminate barriers to equitable housing. The proposed changes would address none of these. In addition, nothing in the proposed rule would lead to the develop of new integrated housing opportunities. This premise is further undercut by recent Administration proposals to reduce or eliminate federal housing programs.
Rendering the role of public housing agencies (PHAs) meaningless

Simply consulting with a jurisdiction, as proposed by the rule, is not enough. PHAs need to actively engage in the process and actively examine their own policies, programs and housing stocks to determine any actual or potential discrimination. PHAs participation in the 2015 rule’s Assessment of Fair Housing (AFH) is essential and the AFH should be retained.

PHAs are key actors in ensuring housing is equitable. Beyond providing public housing and Housing Choice Vouchers, PHAs also decide where to project-base vouchers and the implementation of Small Area Fair Market Rents, two key anti-discrimination responsibilities.

Furthermore, because PHAs are held to higher federal standard on housing accessibility, as per Section 504 of the Rehabilitation Act, robust PHA participation – beyond checking a box on consulting with the locality – is fundamental to ensuring persons with disabilities are treated fairly in the housing market. PHAs typically have strong connections with managers of accessible housing, service providers and others integral to accessibility.

Jurisdictional risk analyses are poorly designed

HUD’s proposed ranking of jurisdictions on nine factors, only two of which relate to fair housing, also largely ignores fair housing. It is unclear, for example, how HUD sees the nexus between vacancy rates and discrimination, and how such a metric would affirmatively further fair housing. The value of many of the other elements in the section is equally unclear.

The proposal later states that “if the jurisdiction or, for a local government, any PHA operating within the jurisdiction, has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice to be in violation of civil rights law” that entity cannot receive the outstanding designation. This is a metric with little value, as the vast majority of such complaints are settled prior to trial and that both HUD and Justice has pursued very few such cases in recent years.

In closing, while the Department tries to frame the proposed rule as a reasonable extension of the 2015 Supreme Court case, Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., it fails to do so. In his opinion in that case, Justice Anthony Kennedy said something very different than what the proposed rule does. He wrote that “the Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.” HUD needs to do so as well, by abandoning its flawed proposal and reinstating the 2015 rule and fully enforcing the Fair Housing Act.

Thank you for the opportunity to respond to Affirmatively Furthering Fair Housing; Proposed Rule. Feel free to contact Doug Ryan at dryan@prosperitynow.org or at 202-207-0155.

Sincerely,

Prosperity Now