March 16, 2020

Mr. Aaron Santa Anna  
Acting Associate General Counsel  
Regulations Division  
Office of General Counsel  
451 7th Street SW, Room 10276  
Department of Housing and Urban Development  
Washington, DC 20410-0500

Via electronic submission through www.regulations.gov

Dear Acting Associate General Counsel Santa Anna:

AARP, on behalf of our millions of members and all older Americans nationwide, appreciates the opportunity to comment in response to HUD’s proposed rule for Affirmatively Furthering Fair Housing.¹

AARP believes HUD’s proposed Affirmatively Furthering Fair Housing (AFFH) Rule is inadequate to meet HUD’s statutory obligations.² In contrast, continued implementation of the 2015 AFFH Rule is consistent with the Fair Housing Act (FHA). AARP continues to support the 2015 AFFH Rule for its creation of a fair housing planning process that builds meaningful community participation, provides relevant guidance – including data and maps to help conduct fair housing analysis – and requires HUD review.

AARP urges HUD to withdraw the proposed rule and fully implement the 2015 AFFH to ensure that the promise of the FHA becomes a reality for people in all communities.

² 42 U.S.C. § 3608.
The Proposed Rule Eliminates A Framework for Public Engagement, Collaboration, and Development of a Plan Focused on Fair Housing Issues

AARP supports retaining the community participation requirements of the 2015 AFFH rule, which ensure that a broad range of stakeholders engage with local officials in the community participation process. Communities need to develop greater capacity to improve the livability of their communities and their quality of life as they age. Collaborative participation across multiple sectors in a community has been demonstrated repeatedly to positively impact planning. To ensure stakeholders and local officials maintained a critical focus on fair housing, the 2015 AFFH rule had jurisdictions first develop their fair housing plan before they turned their attention to spending issues through the Consolidated Planning (ConPlan) process. The proposed 2020 AFFH rule’s elimination of a separate fair housing focused community engagement process would be a step backwards. For example, the proposed rule would eliminate the 2015 rule’s practices for inclusion of people with disabilities and other protected classes in the fair housing planning process. The 2020 AFFH rule’s proposed planning process is more deficient than the one the Government Accountability Office (GAO) viewed as poorly structured and not well administered and which led to a 2010 GAO request that HUD accelerate its AFFH regulatory process.

Without HUD’s oversight, some program participants will not make community participation a priority, with historically marginalized communities – e.g. seniors, individuals with disabilities, people of color – most likely to be excluded. Jurisdictions will not be able to identify fair housing goals and the barriers to those goals most important to the affected communities. In particular, based on AARP’s experience conducting training and developing numerous toolkits and survey instruments that assist people to evaluate and improve their housing and transportation in their communities, jurisdictions will not be prepared to address the aging of their population in a fair housing context.

The Proposed Rule Inaccurately Defines AFFH and Fails to Address Segregation

The 2020 AFFH rule fails to define AFFH and narrows its funding recipients’ obligations under AFFH to only “acting in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice.” Its definition of “housing choice” only touches on discrimination and makes no mention of segregation. Instead, the proposed rule overwhelmingly addresses the development and production of housing. While AARP generally supports efforts by HUD and local jurisdictions to increase the supply of affordable housing, affordable housing in general is not the same as housing that is available to people in the FHA’s protected classes. More importantly, the proposed rule does not address the distribution, equality,
or integration of housing within and throughout a community. Moreover, the rule’s approach to increasing affordable housing through increasing housing supply in total has not been demonstrated to efficiently or effectively result in more affordable housing or housing choice.8

The proposed rule sets out 16 pre-approved goals for jurisdictions to choose among, only three of which relate to fair housing.9 While the proposed rule does not require that one of the 16 pre-approved selections be chosen as goals to work on, there is an incentive to do so because local officials are only required to provide an explanation if they choose a barrier to address that is not one of the 16. AARP thus objects to the scope of the preferred list, its lack of local relevance or response to local circumstances, and its lack of explanation for any resulting choices. In contrast, the 2015 AFFH rule created a data-driven, locally flexible, and targeted planning framework that defined AFFH as a means to achieve all aspects of fair housing, including integrating communities, eliminating concentrated areas of poverty, and encouraging compliance with civil rights and fair housing laws. AARP also objects to including local resident protections such as certain rent control10, labor requirements,11 and wetlands or environmental regulations12 as “inherent barriers to fair housing choice.”13 This improperly asserts other administrative concerns into a process that by statute must be keenly focused on ensuring fair housing for protected classes. The proposed rule is thus inconsistent with long-established legal standards that defined the statutory mandate for AFFH under 42 U.S.C. § 3608.14

AARP is also particularly concerned that the proposed rule, in contrast to the 2015 AFFH rule, has deleted its more comprehensive guidance addressing persons with disabilities and its incorporation of community integration concepts derived from the Supreme Court’s *Olmstead* decision.15 Without this guidance, jurisdictions may be left unprepared for their changing demographics. As a result, people as they age will be increasingly subject to discrimination and segregated into institutions because of their disabilities. In addition, the proposed rules fail to include consideration of transit-based housing or transportation.

AARP believes that the proposed rule also falls short in its creation of a mechanism and standard for evaluating jurisdictions’ compliance with the rule. Jurisdictions will be scored and ranked not

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8 See e.g. https://www.citylab.com/perspective/2019/06/housing-supply-debate-affordable-home-prices-rent-yimby/591061/ (For every 100 higher income, luxury units built, eventually 10-20 moderate income households will vacate units in lower-income neighborhoods, reducing demand in those neighborhoods.)

9 Proposed rule 24 C.F.R. § 91.325 Certifications (a)(1).

10 Proposed rule 24 C.F.R. § 91.225(a)(1)(i)(I)

11 Proposed rule 24 C.F.R. § 91.225(a)(1)(i)(P)

12 Proposed rule 24 C.F.R. § 91.225(a)(1)(i)(L)

13 Proposed rule 24 C.F.R. § 91.225(a)(1)(i)

14 See e.g., Shannon v. U.S. Dept. Of Housing and Urban Development, 436 F.2d 809 (3d Cir. 1970) (Sec. 3608 is intended to promote not just nondiscrimination against individual minorities, but racial integration for the benefit of entire communities), Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir 1973) (“action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat”), Boston NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149, 155 (3608 requires HUD to “consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area”), Anti-discrimination Center of Metro New York v. Westchester County, 2009 WL970866 (S.D.N.Y. 2009) (“an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.”)

on whether the jurisdiction has “complied with the Fair Housing Act,”\textsuperscript{16} but on “the extent to which there is an adequate supply of affordable and available quality housing for rent and sale to support fair housing choice”\textsuperscript{17} and include market factors such as median rent and home values. Although the availability of accessible housing will be included in the rankings, the proposed rule does not include data that would relate accessible housing to integrated settings or accessible transportation. AARP believes that a system for ranking or evaluating a locality’s efforts at furthering fair housing should include an examination of data and results measured in reference to the protected classes. Finally, the proposed rule fails to provide a sufficient mechanism for incentivizing or enforcing fair housing outcomes. Preference points for Notices of Funding Availability for high-ranking jurisdictions is a weak incentive and the proposed rule lacks any consequences for jurisdictions that ignore fair housing issues. The lack of robust enforcement and effective incentives is another reason AARP urges the withdrawal of the proposed AFFH rule and the continuation of the 2015 rule.

Thank you for the opportunity to provide comments on this vital issue. If you have any questions or comments, please feel free to contact Debra Alvarez in our Government Affairs Department at (202) 434-3814 or dalvarez@aarp.org.

Sincerely,

David Certner  
Legislative Counsel and Policy Director  
Government Affairs

\textsuperscript{16} Proposed rule 24 C.F.R. § 5.155 Jurisdictional Risk Analysis (a).

\textsuperscript{17} Proposed rule 24 C.F.R. § 5.155 Jurisdictional Risk Analysis (c).