



PROPOSED ACTION
MEMORANDUM

Restoring the Affirmatively Furthering Fair Housing Process

Department of Housing and Urban Development
December 2020

I. Summary

Housing discrimination, and especially residential segregation, remains one of the most important mechanisms by which racial inequality is entrenched. Yet one of the Fair Housing Act's (FHA's) most important tools for addressing discrimination, the mandate that the federal government and its grantees "affirmatively further fair housing" (AFFH), has gone nearly unenforced for most of its fifty-year history. The Obama administration sought to change this, promulgating a new, more robust AFFH framework in 2015; unfortunately, this framework was only in place for a short time before the Trump administration undid it.

This memorandum proposes that the Department of Housing and Urban Development (HUD) restore the 2015 AFFH Rule, and thereafter make any desired updates to the guidance and other sub-regulatory devices (particularly the "Assessment Tools" used by state and local jurisdictions to comply with the AFFH rule). It further suggests that, given the profound irregularities with the manner in which HUD repealed the 2015 rule, there is a strong argument for proceeding quickly and without going through notice-and-comment rulemaking. HUD may wish to consider a post-promulgation comment period, both to allow for any desired revisions to the 2015 rule and to further reduce the risk of litigation over HUD's finding of good cause for proceeding without comment.

II. Justification

Although the Fair Housing Act was enacted more than fifty years ago, housing discrimination remains a pressing, and largely unresolved, concern. Paired testing consistently reveals serious discrimination against racial and ethnic minorities, people with disabilities, and LGBTQ people (and discrimination based on characteristics not directly protected by the Fair Housing Act, such as holding a housing voucher).¹ Racial segregation poses a particularly acute, unaddressed problem. In 2010, the average American metropolitan area had a Black–White dissimilarity index of seventy-three, meaning that 73% of Black people would need to move within the region to achieve integration.² And while progress in reducing Black–White segregation has been painfully slow, there has been no progress at all in reducing Latino–White and Asian–White segregation levels since 1980.³ Housing segregation has profoundly negative effects: reducing Black and Latino earnings;⁴ widening racial gaps in educational outcomes;⁵ and causing a variety of poor health outcomes in communities of color.⁶

Under-enforcement of the FHA's mandate to further fair housing affirmatively is one of the main reasons that housing law has largely failed to address discrimination. This provision, unique in civil rights law, goes beyond a prohibition on discrimination in housing, requiring instead that the federal government act affirmatively to end discrimination and segregation.⁷ This affirmative mandate is particularly important for overcoming racial segregation because of the profound and sustained public sector involvement in the maintenance of

¹ Urban Institute, *Exposing Housing Discrimination*, <https://www.urban.org/features/exposing-housing-discrimination> (last visited Nov. 8, 2020) (collecting studies).

² Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Spatial Segregation*, PATHWAYS: STATE OF THE STATES 30 (2015).

³ Jorge De La Roca, Ingrid Gould Ellen & Katherine M. O'Regan, *Race and Neighborhoods in the 21st Century: What Does Segregation Mean Today?*, 47 REGIONAL SCI. & URB. ECON. 138 140 (2014).

⁴ David M. Cutler & Edward L. Glaeser, *Are Ghettoes Good or Bad?*, 112 QUARTERLY J. ECON. 827 (1997); Jorge De la Roca, Justin Steil & Ingrid Gould Ellen, *Does Segregation Matter for Latinos*, 40 J. HOUSING ECON. 129 (2018).

⁵ Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PNAS 845 (2008); David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, (Nat'l Bureau of Econ. Research, Working Paper No. 12078, 2006).

⁶ Jens Ludwig et al., *Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults*, 337 SCIENCE 1505 (2012); Ingrid Gould Ellen, *Is Segregation Bad for Your Health? The Case of Low Birth Weight*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 203 (2000).

⁷ N.A.A.C.P. v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.).

segregation (through tools like redlining and exclusionary zoning, among many others) and because of the highly disaggregated nature of housing market participants.⁸ Immediately after the FHA's enactment, then-HUD Secretary George Romney moved aggressively to implement the AFFH provision, developing a plan to withhold all infrastructure funds from suburbs that resisted racial integration, including through exclusionary zoning measures or efforts to keep out subsidized housing.⁹ President Nixon opposed Romney's efforts, however, and Romney's "Open Communities" efforts were quickly ended; the AFFH provision was barely enforced thereafter.¹⁰ Under the Clinton administration, HUD promulgated regulations and guidance requiring state and local government grantees to comply with their AFFH obligations by producing an "Analysis of Impediments" document identifying obstacles to fair housing in their jurisdictions. But when HUD moved to create a meaningful enforcement regime for the AFFH process, public opposition (most notably from the U.S. Conference of Mayors) led then-Secretary Andrew Cuomo to withdraw HUD's proposed rule.¹¹ A subsequent GAO investigation found that the Clinton-era AFFH regime had minimal requirements, which were weakly enforced by HUD and often ignored by local jurisdictions.¹²

Against this backdrop, the Obama administration took another run at promulgating meaningful regulations to enforce the AFFH requirement.¹³ Consistent with the Clinton-era planning-based strategy, the regulations required covered jurisdictions—including municipalities, public housing authorities, and states—to develop an Assessment of Fair Housing (AFH), a document that replaced the earlier Analysis of Impediments. Through this process, state and local governments were required to evaluate data (much of which was provided directly by HUD) and solicit public comment to identify obstacles to fair housing in their jurisdictions. They were then required to develop a plan of action, with clear metrics and milestones, for how to overcome those obstacles and advance fair housing goals, as well as to assess progress in meeting any past goals. HUD was to review AFHs, but only for completeness and not for the question of ultimate compliance with the statutory obligation to AFFH (i.e., HUD could reject an AFH for failing to solicit community feedback or for failing to set measurable goals). Substantively, HUD took what it called a "balanced approach" to fair housing which incorporated both place-based efforts to revitalize so-called "racially and ethnically concentrated areas of poverty" and mobility-based measures to ensure that members of protected classes could access housing equally in high-opportunity locations.

As this description makes clear, the AFFH rule was modest in its ambitions. It did not mandate any particular actions from covered jurisdictions. Rather, it created a framework in which jurisdictions would be required to grapple with fair housing issues in a data-driven manner, engage with stakeholders and community members over these topics, and develop their own goals and strategies for addressing obstacles to fair housing. For better and for worse, this was a very flexible, bottom-up strategy for implementing the AFFH provision of the statute. It was neither very prescriptive nor very intrusive.

Research shows that in the short period in which the Rule was in effect, it was starting to have a positive impact. The community engagement process used to generate the new AFHs was significantly better than before, in both quality and quantity.¹⁴ Jurisdictions' AFHs were of considerably higher quality than the documents they had produced under earlier guidance, and, notably, committed to more new policies with more measurable objectives.¹⁵ For the first time, HUD's engagement with the AFHs was robust. HUD only

⁸ Olatunde C. Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1204 (2011).

⁹ Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015), <http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

¹⁰ *Id.*

¹¹ *Id.*; see also U.S. DEPT OF HOUS. & URB. DEV., 1 FAIR HOUSING PLANNING GUIDE 1-3 (1996), available at <https://www.hud.gov/sites/documents/FHPG.PDF>.

¹² GAO, *HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans* GAO-10-905, (Sept. 14, 2010), <https://www.gao.gov/new.items/d10905.pdf>.

¹³ See generally *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (Jul. 16, 2015).

¹⁴ NYU Furman Center for Real Estate and Urban Policy, *Comment Letter on Proposed Rule Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants 3* (Mar. 6, 2018), http://furmancenter.org/files/NYUFurmanCenter_CommentsAFHDelay_6MAR2018.pdf.

¹⁵ Justin P. Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUSING POLICY DEBATE 85 (2019).

accepted 18 of 49 AFHs upon initial submission; it accepted fourteen more after revisions, and required the remaining seventeen to formally re-submit a new AFH.¹⁶ However, because the program was in effect for only a little over a year, it is not clear whether HUD would have imposed sanctions on any of the seventeen jurisdictions that failed to submit adequate AFHs, or whether this much-improved process would have translated into substantive changes at the state and local level.

States maintain only a limited ability to step into the void left by the Trump administration's deregulatory action. In response to HUD's rollback of the 2015 AFFH rule, the state of California has enacted its own statutory framework to recreate the Obama-era AFFH process, with some revisions.¹⁷ Implementation in California is ongoing, but the state's AFFH requirements are meant to mirror largely the 2015 AFFH process and require the creation of an Assessment of Fair Housing, a tool which, as described below, sprung from the 2015 AFFH rule the Trump administration purports to have rescinded.¹⁸

III. Current State

Under the Trump administration, HUD moved in stages to end the AFFH process and eventually purported to repeal the 2015 Rule as well as unspecified "1994 AI requirements where they appear in regulation." First, HUD extended the deadlines for jurisdictions to submit their AFHs from dates beginning on January 1, 2019, until after October 31, 2020.¹⁹ Then HUD withdrew the Assessment Tool that provided data and a fixed framework for the production of an AFH, which in effect excluded any local government from the requirement to develop an AFH.²⁰

HUD next began to develop its own alternative AFFH rule. Its proposed rule, released in January 2020, was an internally conflicted document, seemingly reflecting divisions within the administration over whether to use the AFFH process as a tool to attack regulatory barriers to housing production (an important goal, but one that excludes many of the most important elements of fair housing) or whether instead to erect new hurdles to federal oversight and generally withdraw from scrutinizing local housing policies.²¹ After comments were submitted, the Trump campaign seized on AFFH as a racially charged wedge issue,²² and HUD reversed course again.

Suddenly, HUD issued a final rule in August 2020, outside normal notice-and-comment procedures (as described in more detail below) that essentially withdraws all AFFH obligations.²³ The Final Rule not only repealed the Obama-era regulations, but also the earlier Clinton-era process as well, and required only that covered jurisdictions certify that they have or will "take any action" (no matter how small) that is "rationally related" to promoting "any attribute" of fair housing.²⁴ It is hard to see how any state or local government

¹⁶ Justin P. Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUSING POLICY DEBATE 736 (2019).

¹⁷ Cal. Assem. Bill No. 686 (2017-18 sess.), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB686.

¹⁸ See Memorandum from Cal. Dep't Hous. & Comm. Dev., AB 686 Summary of Requirements (Apr. 23, 2020), https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/ab686_summaryhousingelementfinal_04222020.pdf.

¹⁹ HUD Notice, Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018).

²⁰ See HUD Notice, Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018); HUD Notice, Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments, 83 Fed. Reg. 23,927, 23,927 (May 23, 2018). See also Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018) (challenge to HUD actions, dismissed for plaintiffs' lack of standing).

²¹ Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020).

²² Op-Ed, Donald J. Trump & Ben Carson, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133>.

²³ Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

²⁴ 24 CFR §5.150(b) (2020).

would be unable to make such a certification; this Final Rule, in effect, leaves HUD without any AFFH process at all.

HUD's Final Rule is not the finalization of the January 2020 proposed rule, nor does HUD claim that it is.²⁵ Rather, HUD relies on a somewhat circuitous argument that the Final Rule falls within the APA's exemption from notice-and-comment for rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."²⁶ Because the AFFH rule relates to the obligations of grantees, HUD argued, its repeal falls under this exception.

However, because HUD's programs almost all involve grants (or contracts, loans, and benefits, which are also exempt from notice and comment under the same exception), HUD promulgated a "Rule on Rules" under which HUD agreed to use notice-and-comment procedures for all rulemakings, even those involving grants and contracts.²⁷ Under this rule, courts have found that notice and comment is required for HUD programs.²⁸ HUD's Rule on Rules contains a provision allowing for the Department to waive the notice-and-comment requirement "if the Department determines in a particular case or class of cases that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."²⁹ HUD does not rely on this specific waiver provision, presumably because waiving notice and comment here does not meet the relevant standard.

Instead, the Final Rule asserts that it can ignore the Rule on Rules' notice-and-comment requirement due to the Secretary's general power to waive regulations under 42 U.S.C. § 3535(q) and 24 C.F.R. § 5.110. This waiver process, distinct from the Rule on Rules waiver, requires a finding of a "good cause." HUD does not directly describe how it meets the "good cause" standard, but it does argue that a waiver is appropriate, because the issues have been extensively debated and commented on in past rounds of notice and comment and in the media.

When HUD last proposed repealing its Rule on Rules, Congress stepped in and mandated that HUD "maintain all current requirements under part 10."³⁰ The legislative history (which HUD cited) states that "this is a prohibition on a HUD rulemaking effort to eliminate HUD public notice and comment." This would seem to further preclude any effort to avoid notice and comment except through the Rule on Rules' own waiver standard. HUD suggests that this provision "maintains" the entire legal framework, including the possibility of a waiver through the Secretary's more general waiver power, and does not abrogate the Secretary's power to grant a waiver here.

As this description makes clear, the logical chain HUD relies on has many links, each of which has its own weaknesses. Those weaknesses include:

- The AFFH rule is only partially about grants. While the rule governs the behaviors of grantees, it stems from an affirmative statutory obligation included in civil rights law, which applies to all HUD activities and includes a broad definition of what it means to affirmatively further fair housing.
- The Rule on Rules has its own waiver mechanism for avoiding notice and comment. Because the specific governs the general, that waiver mechanism, not the HUD Secretary's broader power to waive regulations for good cause, is the one that must be employed. Here, unusually and irregularly, HUD attempted to rely on the Secretary's waiver power. And under the Rule on Rules' waiver

²⁵ For example, HUD does not respond to comments submitted in response to the January proposed rule.

²⁶ 5 U.S.C. § 553(a)(2).

²⁷ 24 C.F.R. § 10.1.

²⁸ *See, e.g.,* Patriot, Inc. v. U.S. Dep't of Hous. & Urban Dev., 963 F. Supp. 1, 5 (D.D.C. 1997).

²⁹ 24 C.F.R. § 10.1.

³⁰ P.L. 104-204, § 215.

mechanism, the reasons for the Secretary's determination must be included in the rulemaking document; here, instead, a general reason for waiving the rules was provided but no explanation was given as to why notice and comment was specifically "impracticable, unnecessary or contrary to the public interest."

- "Extensive debate" is not "good cause" for a waiver even under the Secretary's broad waiver powers. This is especially true because *this* proposal wasn't the subject of comment. The various rulemaking documents issued previously, which did not repeal the AFFH rule entirely but rather created new frameworks, were the subject of comment.
- P.L. 104-204 precludes using the grants exception to the APA to avoid notice-and-comment procedures. The statutory intent was clearly to require notice and comment for even grant-related HUD programs (except where there is good cause or another specific exemption), and nothing in the statute references the maintenance of a general waiver provision. Indeed, the Secretary's overarching power to waive regulations, on which HUD relies, is located outside the notice-and-comment requirements of 24 CFR Part 10, which is what Congress required be maintained.

In sum, HUD's repeal of the AFFH rule was highly irregular and likely procedurally unlawful.³¹

IV. Proposed Action

It is critical to restore a robust AFFH framework, to vindicate the promise of the Fair Housing Act, and begin to address entrenched forms of housing discrimination, especially racial segregation. The Biden campaign's housing platform promised to "implement" the 2015 Rule.³² What remains an open question, however, is how best to move forward, both procedurally (what legal mechanisms should be used) and substantively (should HUD take this opportunity to further improve the AFFH process, particularly in light of any lessons learned from the short period of implementation and the 2020 public comments).

Given the profound irregularities of the recent HUD Final Rule, a full round of notice-and-comment rulemaking should not be required to rescind the 2020 rule in order to reinstate the 2015 rule and the 1994 regulations. If notice and comment was not used to move from the 2015 Rule to the 2020 Rule, it should not be necessary to move from the 2020 Rule to the 2015 Rule.

Restoring the 2015 Rule Immediately

There are two ways that HUD could immediately, and without notice and comment, rescind the 2020 rule: (1) it could rely on the same argument as the 2020 Rule, or (2) it could waive notice and comment for good cause under the more traditional framework of the APA and HUD's Rule on Rules. (HUD could, of course, go through a standard notice-and-comment process as well.) This memo recommends the second option: relying on good cause. Once the 2020 Final Rule is rescinded, HUD can then commence the process of updating sub-regulatory devices, such as the Assessment Tools and enforcement system to improve implementation and, if it chooses, seek comment on any potential improvements to the 2015 Rule. This approach will maximize speed and minimize confusion among HUD's stakeholders.

³¹ It is also worth noting that the 2020 Rule would also have been vulnerable to substantive challenges given HUD's failure to even consider the costs of reduced civil rights enforcement or to consider the many comments it received in response to its January 2020 NPRM.

³² The Biden Plan for Investing in Our Communities Through Housing, JoeBiden.com, <https://joebiden.com/housing/#> (last visited Nov. 8, 2020).

Because the Trump administration promulgated the 2020 Final Rule without going through notice-and-comment procedures, it may be tempting to rely on the same legal argument to avoid notice and comment to rescind the 2020 Rule. However, for several reasons, the new administration should not do so.

First, HUD's legal support for its 2020 AFFH rule is extremely weak. It is hard to imagine how it could survive judicial review. As noted above, HUD (acting in the heat of campaign season) relied on a dubious argument that the Final Rule falls within the APA's exemption from notice and comment for rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."³³ A Biden administration HUD may not, on policy grounds, wish to sanction the argument that HUD has a free-floating power to waive notice-and-comment requirements.

Second, as a practical matter, there is greater legal risk to reinstating the 2015 rule without notice and comment than there was to rescinding it. Under the Trump administration, HUD may have hoped that it could avoid defending its 2020 Rule on the merits, because no plaintiff would have standing to challenge the Rule.³⁴ In contrast, local governments would unambiguously have standing to challenge (successful or not) the reinstatement of the 2015 Rule because it would (re-)impose legal obligations on them.

The better strategy is for HUD to incorporate its concerns with the process by which the 2020 Final Rule was promulgated into a claim that it has good cause to eschew notice and comment. Under the Administrative Procedure Act, agencies must give interested parties an opportunity to comment on legislative rules as well as on repeals of such rules. Under the APA's "good cause" exception, however, notice and comment is not required where the agency finds that it would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The "good-cause" exception is "an important safety valve to be used where delay would do real harm."³⁵ The same "good-cause" standard governs HUD's waiver rule.

Recently, the D.C. Circuit held that an agency may rescind rules that a court has affirmatively deemed unlawful without providing notice and comment. In *Friends of Animals v. Bernhardt*, the U.S. Fish and Wildlife Service repealed a set of findings pertaining to trophy hunting after the D.C. Circuit in a previous case held that a similar set of findings were "legislative rules illegally issued without notice and comment." The D.C. Circuit held that the Service repealed the related rules lawfully, rejecting the idea that "a government action that illegally never went through notice and comment gains the same status as a properly promulgated rule such that notice and comment is required to withdraw it."

This principle also extends, at a minimum, to regulations that share the same deficiency as a regulation that has been struck down. The regulations that the Service sought to withdraw in *Friends of Animals* had not previously been set aside, but they were promulgated by the same defective process as ones that had been struck down. The district court in *Friends of Animals* was even more explicit on this point, explaining that requiring agencies to wait for a court decision "would force agencies to enforce plainly wrong—and maybe even unconstitutional—regulations until either a Court struck them down or the agency went through the full notice and comment process. That cannot be."

Such a strategy is not guaranteed to succeed. The *Friends of Animals* decision concerned a rulemaking that a court had held to be promulgated illegally; whether an agency may immediately rescind regulations based solely on its own belief that those regulations were unlawfully promulgated is unclear, and could expose the agency to litigation risk. However, in this case, HUD could make clear in the rulemaking that it would adopt the 2020 Rule's procedural logic, only in the alternative, were a court to rule that the 2020 Rule had been promulgated

³³ 5 U.S.C. § 553(a)(2).

³⁴ Plaintiffs were denied standing in litigation over the Trump Administration's earlier efforts to delay the implementation of the 2015 Rule. *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018).

³⁵ *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (footnote omitted); see also S. Rep. 79-752, at 200 (1945) ("The exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published.")

legally. In other words, HUD should explain that the 2020 Rule was illegal, but that if plaintiffs were to prevail on showing that it was legal, HUD would adopt its same proposed rule under the legal mechanism relied upon in 2020. If it proceeds in this way, HUD should be able to repeal the 2020 Final Rule almost immediately with only minimal legal risk.

HUD should bolster its claim that notice and comment is unnecessary (and that good cause exists to bypass notice and comment) by showing how the rulemaking records from 2015 and January 2020 remain “fresh.”³⁶ To the extent that all relevant facts and opinions on the merits of the 2015 rule have been recently aired, and circumstances have not since changed materially, this minimizes the value and necessity of additional public comment.

To employ this good cause strategy, however, it is necessary that HUD revert to the 2015 Rule in its entirety, with no alterations—at least at first.³⁷ It would be difficult for HUD to show good cause to implement any revisions to the 2015 status quo in addition to rescinding the 2020 Trump Rule.

Updating the AFFH Process: New Guidance and Implementation Tools and Potential Revisions to the Rule

To make any improvements to the 2015 process, HUD should proceed along two tracks. First, it should update and improve the various sub-regulatory guidance documents and implementation tools that it created in response to the 2015 Rule. Second, if it determines, as a policy matter, that additional changes to the Rule itself are desirable, it should solicit comments on those changes.

Once the 2015 Rule is restored, HUD must also reissue the various supporting guidance documents and implementation tools. Here, there is room for updating and improvement. Although the 2015 Rule was generally considered an important achievement by fair housing advocates, there is an understanding that it was not perfect. The Assessment Tool should be reworked to focus jurisdictions’ attention better on what matters most, including by streamlining and eliminating duplicative questions. Data sets will need to be updated, due to the passage of time. HUD should improve the transparency of the AFH review process by creating a clearinghouse of accepted AFHs and, eventually, HUD-identified best practices. If funding is available, technical assistance should focus on encouraging more regional AFHs. HUD will also need, eventually, to demonstrate its willingness to withhold funds from non-compliant jurisdictions and do so in such a way that clearly communicates to others what their obligations are. None of these changes (or the many others that could be made through guidance, enforcement, and the Assessment Tools) will require notice-and-comment rulemaking, however, and they can be pursued incrementally as an iterative set of improvements.

A large share of the improvements in the AFFH process sought by fair housing advocates can be achieved entirely through these sub-regulatory mechanisms. This further supports the impetus for quickly restoring the 2015 Rule, rather than reopening a lengthy notice-and-comment rulemaking process at the outset. But HUD may decide it prefers to take this opportunity to update the 2015 Rule. As with any government action, the 2015 rule was a compromise of competing interests—and the political climate has changed radically even in that short time period.

If HUD is interested in revising the 2015 Rule itself, this memo recommends treating the reversion to the 2015 Rule as an Interim Final Rule, and then soliciting comment on that rule. HUD could then evaluate the comments and decide how to proceed to finalize the rule. This approach has the additional benefit of

³⁶ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 125 & n.8 (D.C. Cir. 2015) (quoting *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584-85 (D.C. Cir. 1994)).

³⁷ *Friends of Animals v. Bernhardt*, 961 F.3d at 1206.

providing some legal protection for the immediate reinstatement of the 2015 rule. The Supreme Court's recent decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*³⁸ suggests that even absent good cause, an agency can satisfy the APA's requirements by issuing an IFR, seeking post-promulgation comment, and after appropriately addressing comments received, issuing a new rule. Though this path remains untested, it does suggest that HUD could be on stronger legal footing if it seeks post-promulgation comment than if it does not.



³⁸ 140 S. Ct. 2367 (2020).