
COMMENT OF THE AMERICAN CORNERSTONE INSTITUTE
ON INTERIM FINAL RULE DOCKET NO. FR-6249-I-01: RESTORING
AFFIRMATIVELY FURTHERING FAIR HOUSING DEFINITIONS AND
CERTIFICATIONS

Respectfully submitted by the American Cornerstone Institute.

The American Cornerstone Institute (ACI) appreciates Secretary Fudge’s endorsement of Secretary Carson’s determination that President Obama’s ill-informed, expensive, and burdensome 2015 AFFH assessment requirement was unnecessary to achieving the goal of furthering fair housing. We disagree, however, with the incorrect assertion in the interim final rule that the Promoting Community and Neighborhood Choice (PCNC) rule was not “consistent with statutory requirements.” 86 FR 30783. And we are concerned that HUD’s new definition of “affirmatively furthering fair housing” goes beyond its statutory mandate, is confusing, and puts unnecessary litigation risk on providers of housing for low-income Americans. But since this rule follows PCNC’s framework of requiring simply that funding recipients self-certify that they are taking steps to affirmatively further fair housing, while jettisoning the *ultra vires*, expensive, and ultimately useless Analysis of Impediments (AI) and Assessment of Fair Housing (AFH) requirements that were in place preceding PCNC, ACI supports the outcome of this rule as written. We suggest, though, that HUD revert to the clear, unambiguous, statute-based definition of AFFH that was set forth under the PCNC rule.

I. The new definition of “Affirmatively Furthering Fair Housing” is confusing, unnecessary, unmoored from the relevant statute, and could lead to expensive, frivolous lawsuits against program participants

While ACI strongly supports the jettisoning of the burdensome AI and AFH tools as contemplated in this rule, we are concerned that the proposed definition of “affirmatively furthering fair housing” will lead to frivolous, but costly, litigation against program participants due to its lack of clarity and overbreadth. The issue is that HUD, in this rulemaking, is putting forth a blunderbuss definition that is both unrelated to the statutory term it purports to interpret and will be difficult if not impossible with which to prove compliance. ACI, for instance, is unfamiliar with an objective definition of “meaningful actions.” What is the threshold over

which a program participant's actions become "meaningful" rather than just garden-variety actions? And upon which statute is HUD basing this new definition?

The definition then goes on to say "Specifically," but the words that follow "specifically" are notably non-specific and written in a confusing jumble of tenses. A program participant is required to certify that it is "taking meaningful actions that" "address," "replacing," "transforming," and "fostering" various additional undefined or ill-defined terms. By requiring program participants to certify that they have "meaningfully" acted to achieve "balanced living patterns" and "transform[] racially or ethnically concentrated areas of poverty into areas of opportunity," HUD is opening them up to significant litigation risk by frivolous actors under the False Claims Act.

Under this new definition of AFFH, a program participant, for instance the Gary Housing Authority in Gary, Indiana, whose job it is to provide decent, safe, and sanitary housing free of discrimination to impoverished residents in its locality, could be sued by an unserious individual claiming that it has not "meaningfully" (and unrealistically) transformed Gary, Indiana into an area of opportunity. Transforming Gary into an area of opportunity is certainly a laudable goal, but it boggles the mind to imagine such an outcome is a reasonable request of an entity charged with providing housing to needy Americans. Yet HUD's new rule opens the Gary Housing Authority up to litigation simply because it has not achieved that outcome. And good luck to any court trying to determine whether the Gary Housing Authority's actions were "meaningful" as applied to any of the listed, required outcomes dictated by HUD in this rule.

II. Conclusion

Stated simply, consigning the 2015 AI and AFH tools to the ash heap of history ensures that more HUD dollars go towards providing housing for those American families and

individuals who need it most, rather than requiring local housing authorities to spend money on over-priced consultants who write reports that no one will read, let alone act on. This interim final rule takes HUD one more step toward finally keeping those consultants out of this flow of housing dollars. ACI hopes, for the sake of America's neediest, that HUD under Sec. Fudge will stay the course laid out by Sec. Carson and this interim final rule, and continue to simply require self-certification of AFFH obligations, while jettisoning the confusing, unnecessary, and potentially costly new definition of AFFH.