



April 23, 2023

Via Electronic Submission

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

Re: Docket No. FR-6250-P-01, Affirmatively Furthering Fair Housing

New York Appleseed, together with Nebraska Appleseed, Texas Appleseed, and the Appleseed Foundation (collectively, the “Appleseed Centers”), are each non-partisan, non-profit, 501(c)(3) organizations and part of the Appleseed Network, a national network of 18 justice centers across the United States and Mexico that work together to reduce poverty, combat discrimination, and invigorate democracy.

As part of this work, the Appleseed Centers are frequent contributors on fair housing issues in addition to a broad cross-section of other social sectors affected by discriminatory and segregative housing policies - including infrastructure equity, school segregation, environmental justice, disaster recovery, fair financial services, and criminal justice - that are intimately intertwined with the pursuit of fair housing policies. This Comment is submitted on behalf of the Appleseed Foundation and three Appleseed Justice Centers: New York Appleseed, Texas Appleseed, and Nebraska Appleseed, and further supported by the undersigned New Jersey Appleseed and Georgia Appleseed Center for Law and Justice. The broad geographic reach of our Centers, in addition to our vast local knowledge across multiple states, allows this Comment to provide the Department with a valuable perspective on housing issues affecting urban, suburban, and rural areas.

The Appleseed Centers would like to commend HUD on issuing this Proposed Rule to implement the Affirmatively Furthering Fair Housing (“AFFH”) provisions of the federal Fair Housing Act (“Act”) that have regrettably grown dormant for much of the Act’s history. The Proposed Rule is an important and meaningful step in ensuring that fair housing is accessible to all. This Comment will focus on three issues addressed in the Proposed Rule: (I) Ensuring that jurisdictions carry out a balanced approach to fair housing; (II) Ensuring that accountability and compliance measures are accessible, reliable, and effective; and (III) Ensuring that robust community engagement is implemented and supported. In addition to highlighting the Proposed Rule’s strengths and potential areas of improvement related to each of these three areas, this Comment will also provide valuable insights, experiences, and recommendations from each Appleseed Center related to their specific geographic locations.

## I. Balanced Approach

The Appleaseed Centers would like to commend HUD for the requirements that jurisdictions implement a balanced approach to fair housing. The importance of this goal is well encapsulated in the definition of “Balanced Approach” provided for in the Proposed Rule. § 5.152 This definition, which highlights the importance of both “place-based strategies” and “mobility strategies”, is essential to achieving the dual goals of the Fair Housing Act itself—eliminating discrimination and remedying the continuing legacy of public and private policies and practices that deliberately create and perpetuate segregated communities and inequity. In order for the Proposed Rule to make a meaningful difference in the goal of affirmatively furthering fair housing, both of these strategies must be pursued in tandem to ensure that families and children of protected classes are not left behind, nor excluded from valuable community resources available to others. **Any alterations to this Proposed Rule must retain these twin aims.**

This balanced approach is well articulated and incorporated into the Proposed Rule in the following ways:

- Definition of “Community Assets” in § 5.152. The definition provided highlights the breadth of resources that are of crucial importance when evaluating access to fair housing, including schools, employment opportunities, transportation services, parks and community centers, libraries, support services, grocery stores, retail establishments, financial institutions, and a healthy environment. Each of these resources is vital to providing families and children meaningful access to opportunity and must be considered when evaluating the fair housing opportunities that are available.
- Scope of analysis required in the Equity Plan in § 5.154. The Proposed Rule requires that an Equity Plan must address disparities in access to opportunity, inequitable distribution of local resources, and discrimination in access to community assets. All of these considerations are necessary to ensure that program participants carry out a balanced approach, and must be included in any final rule.
- Analysis of local and state policies and practices impacting fair housing. § 5.154(d)(7). It is crucial to analyze and evaluate the barriers to fair housing options in exclusionary areas for protected classes. These barriers often take the form of zoning restrictions and lawsuits opposed to additional development in exclusionary areas, however, the list of gatekeeping policies and practices localities and states have used over the years is evergrowing. It is of paramount importance to the mobility considerations that program participants analyze, evaluate, and seek solutions to all existing impediments.

One area that requires further clarity is how a balanced approach is incorporated into the prioritization of fair housing issues in a program participant’s equity plan. § 5.154(f). The

Proposed Rule currently mandates that “program participants shall give highest priority to fair housing issues that will result in the most effective fair housing goals for achieving material positive change for underserved communities[.]” Although the rule requires this prioritization “within each fair housing goal category” and that “a program participant’s fair housing goals must work together”, HUD should clarify that in order for any prioritization to “result in meaningful actions that affirmatively further fair housing” participants cannot prioritize one approach over another; program participants **must** pursue a balanced approach when prioritizing issues and developing fair housing goals. Program participants should not be allowed to neglect mobility strategies by prioritizing place-based strategies or vice-versa. We request that these provisions related to the prioritization of fair housing issues be amended to clarify that a balanced approach must be considered and pursued in developing a program participant’s priority issues.

Nebraska Appleseed has observed the importance of adopting these dual strategies in tandem. In Lincoln, Nebraska, resource-rich areas often lack access to public transportation. However, where there is a high concentration of affordable housing and easier access to public transportation, there tend to be fewer other resources, such as health services, grocery stores, or retail establishments. A balanced approach is needed to ensure people are able to live in areas most convenient and affordable to them, without sacrificing access to important services.

In Texas, the City of Houston reflects longstanding national patterns of investing affordable housing dollars in low-income and historically disinvested neighborhoods without investments in community assets and infrastructure or providing families with housing choices in well-resourced neighborhoods. Families of color, in particular, were confined by ongoing city policy to neighborhoods with substandard infrastructure (80% of the open ditch drainage in Houston, for example, is in majority Black and/or Latinx neighborhoods, and over 40% is inoperable), low-rated schools, and overexposure to environmental hazards that cause asthma, cancer, and other health conditions.

Houston has also repeatedly allowed high-income white neighborhoods to exclude affordable housing, often for openly racist reasons, and HUD has found that Houston’s policies and actions violated Title VI of the Civil Rights Act of 1964.<sup>1</sup> More recently, the City has facilitated gentrification and displacement in historical neighborhoods of color not only by providing tax incentives and other public resources to developers to improve infrastructure but by directly intervening to prevent affected communities from negotiating community benefits agreements with those developers that would have preserved affordable housing units and ensured that current residents could benefit from new investments in community resources.

While New York City may be seen as a progressive metropolitan area for housing policy, much of the disparities and their causations highlighted by our fellow Centers are also echoed here. Between 2014 to 2021, over 67,000 affordable housing units were built in NYC, and yet several districts across the City contributed little to this number when compared to others.<sup>2</sup>

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<sup>1</sup> HUD, Letter Finding Non-Compliance with Title VI of the Civil Rights Act of 1964, Case No: 06-16-R001-6, January 11, 2017.

<sup>2</sup> David Brand, [17 Units Here. 8,555 There. See Where NYC Builds Its Affordable Housing](https://citylimits.org/2022/05/18/17-units-here-8555-there-see-where-nyc-builds-its-affordable-housing/), City Limits (May 18, 2022), <https://citylimits.org/2022/05/18/17-units-here-8555-there-see-where-nyc-builds-its-affordable-housing/>

Nearly half of NYC's 51 council districts produced fewer than 500 affordable units in comparison to districts representing historically Black and Latinx neighborhoods in the Bronx and Brooklyn that accounted for thousands within the same time span.<sup>3</sup> This is a predictable result of low-density, often affluent neighborhoods being allowed to continue restrictive zoning and exclusionary land use policies. It also illustrates that even in cities producing thousands of housing units, segregation and exclusion can persist when place-based need isn't coupled with considerations for mobility and integration. Mandating a balanced approach is vital to furthering fair housing, even in progressive cities like New York City, as nowhere is immune to long-standing policies and practices used nationwide to keep neighborhoods segregated and inaccessible for historically marginalized groups.

## II. Accountability and Compliance Measures

The Applesseed Centers would also like to commend HUD on the inclusion of a number of accountability and compliance measures that are aimed at ensuring that program participants are successful in meaningfully affirmatively furthering fair housing access.

These accountability and compliance goals are well articulated in the Proposed Rule in the following ways:

- Progress Evaluation required in § 5.154(i). The evaluation of program participants' own progress is a crucial aspect of meaningful accountability and compliance measures. By requiring each program participant to evaluate and document in a public way its progress in achieving stated goals, there is positive pressure on program participants to actually take meaningful steps towards achieving the goals each participant committed to. Ensuring that these progress evaluations are public documents is an indispensable aspect of the Proposed Rule that allows the public to provide meaningful accountability for program participants. Additionally, requiring program participants to identify impediments to progress under the Equity Plan is an important aspect of continuing to identify the barriers to fair housing.
- Acceptance of information from the public in § 5.154(j)(3). It is vitally important that HUD accept and consider information submitted by the public in the review of Equity Plans. Public involvement in reviewing Equity Plans is one of the best tools for providing meaningful accountability to program participants and the public is a crucial ally for HUD in ensuring compliance with the provisions of the Proposed Rule. HUD must ensure that this obligation to receive information from the public is maintained in any updates to this Proposed Rule, and must work to ensure that the public is well informed of its ability to provide information on program participants to HUD.
- Incorporation of Equity Plans into subsequent planning documents in § 5.156. The requirements that the Equity Plans required by the Proposed Rule be implemented into subsequent planning documents are necessary to ensure that

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<sup>3</sup> *Id.*

HUD program funds are used in a non-discriminatory way that affirmatively furthers fair housing.

- Certification Requirement in § 5.166. The ability of HUD to challenge the certification required by the Proposed Rule provides HUD an important vehicle to create quick and meaningful accountability in the event that a program participant is not abiding by AFFH rule requirements. We agree with explicitly reminding program participants that their AFFH certification is a condition of eligibility for federal funds and of HUD's remedies for false certifications in the text of the rule.

While the Centers commend the above goals, we remain concerned that this still lacks enforcement of the accessibility and transparency required for the public to firmly hold entities accountable. HUD must substantially strengthen the publication requirements of § 5.154(j). HUD should publish not only submitted Equity Plans but HUD responses to Equity Plan submissions, final Equity Plans, and progress evaluations on a HUD-maintained website and require program participants to post Equity Plans and progress evaluations on their own websites. The public should not be burdened to request these documents, they should be available online in formats that comply with all applicable civil rights and accessibility requirements. HUD and program participants should also ensure that all subsequent planning documents that are required to incorporate the Equity Plan are either included on these web pages or accessible from the Equity Plan website.

In Texas, it was often difficult to even obtain copies of a jurisdiction's Analysis of Impediments (AI) because these documents were not available online, and in some jurisdictions, members of the public might have to make an appointment and review the document in person in order to provide public comment on draft AIs. Any attempt to gather multiple AIs required contacting multiple jurisdictions. To get copies of AIs from jurisdictions outside Texas in order to see examples of more comprehensive AIs or specific types of analysis, Texas Appleseed has had to obtain copies from the consultants who prepared an AI because there was no way to access AIs through the HUD website. Tracking a program participant's progress on fair housing goals required advocates to review the participant's Consolidated Annual Performance and Evaluation Report (CAPER), and for the public to know what a CAPER was and that it contained fair housing information.

HUD should also consider strengthening the accountability and compliance provisions of the Proposed Rule by being clear about the public's ability to challenge the certification required by § 5.166. Although the Proposed Rule is clear that HUD has the ability to challenge the accuracy of a program participant's AFFH certification, the Proposed Rule is vague as to the public's ability to challenge or object to a certification. Additional and explicit language is needed in § 5.166 (b) to clarify that "evidence that could be used to challenge the accuracy..." includes complaints submitted under § 5.170 and any such complaint should trigger the procedures outlined in § 5.166(b). Providing such a right to the public is consistent with the Proposed Rule's intent to provide meaningful access to the public in order to provide crucial accountability for program participants, and such a right would only further strengthen the rule by providing HUD with more allies in its enforcement of the Proposed Rule.

Holding program participants accountable and obtaining fair housing enforcement from HUD, particularly related to AFFH requirements, has historically been extremely difficult. While we do not discount the particularly deep, broad, and ongoing resistance to residential integration, this only makes HUD's accountability and enforcement functions more critical. The federal government's history of creating, enforcing, and perpetuating segregation and inequality, particularly through racially discriminatory housing policies, mandates that it take its responsibilities to undo that discrimination, redress the effects of discrimination and segregation, and ensure that public resources are not used to discriminate.<sup>4</sup>

In Texas, Appleseed has seen both the positive effects of HUD's fair housing enforcement and the negative effects of its failures to enforce the state's civil rights obligations, particularly in federal disaster recovery and mitigation programs administered by HUD through its CDBG-DR and CDBG-MIT programs. In 2009, HUD withheld \$1.7 billion in CDBG-DR funding until the State of Texas resolved allegations that it had violated the Fair Housing Act, including by failing to AFFH, in a complaint filed by Texas Appleseed and co-complainants Texas Housers. (Case No: 06-10-0410-08/9) The Conciliation Agreement resolving that Complaint resulted in Texas conducting a new AI, reviewing programs and projects for AFFH compliance that doubled the amount of funding for home repair and rebuilding going to the lowest-income homeowners, increasing funding for programs benefiting low- and moderate-income disaster survivors by \$150 million, and moving hundreds of public and affordable housing units to safer and more well-resourced areas.<sup>5</sup>

In April 2022, HUD issued a letter of findings (Case No: 06-21-1483-6/9) that Texas had distributed over \$1 billion in CDBG-MIT funding using funding formulas and criteria that discriminated on the basis of race, color, and national origin. However, HUD has so far failed to enforce this finding, allowing the state to distribute an additional \$1 billion in CDBG-MIT funding in a way that replicates many of the same outcomes. These distribution criteria also operated to deny funding to the areas of the Gulf Coast hardest hit by Hurricane Harvey with the greatest need for mitigation from future disasters.

In New York City, efforts to abide by the 2015 AFFH rule by moving forward in 2018 despite its suspension were initially applauded. However, the draft AI, (also referred to as the *Where We Live Plan*) and its subsequent iterations made a mockery of the original intent of the 2015 AFFH rule requirements. Despite numerous public comment letters and testimony—provided by New York Appleseed and many other prominent housing organizations such as the Fair Housing Justice Center—citing the draft AI to be a failure, only minor edits were made before producing an equally disappointing final document.<sup>6</sup> The *Where We Live* process in NYC serves as an example of what type of plan can be allowed forward when there is a lack

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<sup>4</sup> Consistent with President Biden's January 26, 2021 *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies*.  
<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>

<sup>5</sup> These provisions remedied alleged discrimination against members of protected classes who were disproportionately impacted by problems with the CDBG-DR programs for Hurricanes Ike and Dolly.

<sup>6</sup> New York Appleseed, Draft *Where We Live* NYC Report Public Testimony, Mar 6, 2020,  
<https://www.nyappleseed.org/wp-content/uploads/NY-Appleseed-Comments-on-WWL.pdf>

of accountability mechanisms in place. NYC's attempt at AFFH rule compliance when no strings were attached should be considered foreshadowing to HUD if it does not make its accountability measures more robust and inclusive to public oversight.

We hope that the accountability and review processes in the proposed rule should help reduce the need for future enforcement by ensuring jurisdictions have compliant Equity Plans in place and are engaged in ongoing review and revision of those plans and actions, but HUD must also be willing to take legally mandated enforcement action when appropriate, including in order to comply with its own AFFH obligations.

### III. Community Engagement

Of paramount importance to the success of any AFFH rule is robust community engagement. The communities that program participants serve are the best resources for the identification and analysis of the fair housing issues that exist across our diverse country and as such must be included as much as practicable at every opportunity. The Appleseed Centers, by nature of having locations across the country and having worked in an array of fair housing issues across urban, suburban, and rural areas know firsthand how integral the community engagement process is for identifying fair housing issues that must be addressed to create truly open and inclusive communities. The community engagement provisions in the Proposed Rule must be protected from future alterations to the Proposed Rule.

The role of community engagement is well articulated in the Proposed Rule in the following ways:

- Incorporation of community engagement requirements into Equity Plans in § 5.154(h). The Proposed Rule requirement that Equity Plans include a description of how participants addressed comments received is of the utmost importance and needs to be maintained as a crucial aspect of Equity Plans going forward.
- Complaint process in § 5.170. Allowing the public to file complaints against program participants who are not abiding by the AFFH rule or commitments in their Equity Plans is an essential component of the AFFH Proposed Rule's community engagement. HUD must work to ensure that communities are aware of their ability to file complaints against program participants. HUD must additionally ensure that each complaint received is investigated thoroughly, that the complaint process is accessible and easily navigated, and that the public is not restricted from participation in any proceedings intended to resolve complaints.

One area in which the Proposed Rule can be strengthened is in a clarification of the role of fair housing groups and others serving or representing members of protected classes. Although the current Proposed Rule requires that program participants design their communication methods to reach the broadest possible audience and make efforts to reach members of protected class groups, the Proposed Rule appears to be silent as to the role of fair housing groups and representatives of protected classes. § 5.158(a). The provisions regarding community engagement should make explicit the requirement that program participants engage

with fair housing groups and others serving or representing members of protected classes as part of their community engagement efforts, in part because this may be a particularly effective way to reach the most affected persons and communities.

While the public's ability to file fair housing complaints based on AFFH is critical to the implementation of the rule, HUD's process for resolving civil rights complaints unjustly and unnecessarily excludes complainants and directly impacted persons from that resolution process, often rendering the complaint resolution inadequate to remedy violations of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and other civil rights and fair housing laws. This is not an issue unique to HUD, but meaningful community engagement must take place **at all stages** of the AFFH and Equity Plan process, including compliance and enforcement. We recommend the following changes to §5.170:

- §5.170(b)(3) Any attempt to reach a voluntary resolution of a complaint under this section should include complainants in the voluntary resolution process.
- HUD should solicit feedback from directly affected persons and groups on any resolution of a matter being investigated under §5.170, including on remedies to be included in a Letter of Findings under §5.170(b)(4).
- HUD should provide complainants with a copy of any Voluntary Compliance Agreement or other voluntary resolution when it is approved.
- If complainants are not involved in the voluntary resolution process they should have the right to challenge the Voluntary Resolution Agreement under the same process laid out in §5.170(b)(4) and (5) for Letters of Findings.

Additionally, the Proposed Rule's provisions regarding access to hearings are silent as to the public's right to access such hearings. § 5.174. Where a hearing is provided in accordance with § 5.174, the rule should provide that such a hearing is open to the public, and any party who has issued a complaint related to the relevant hearing should be provided with notice of the hearing and an opportunity to appear at the hearing.

#### IV. Conclusion

The Appleseed Centers would like to thank and commend HUD for issuing the Proposed Rule, which as discussed above, is a crucial step towards increasing access to fair housing and equitable access to opportunity in this country. We are hopeful that this iteration of the AFFH rule will not only incentivize but also demand what is required from local, city, and state actors to affirmatively further fair housing. The Appleseed Centers appreciate the opportunity to submit this Comment and look forward to continuing to engage with HUD on these issues.

Sincerely,

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