July 2, 2025

Submitted via www.regulations.gov.

Secretary Scott Turner
United States Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

Re: Comment Regarding "Rescission of Affirmative Fair Housing Marketing Regulations" Proposed Rule, Docket No. HUD-2025-0015, 90 Fed. Reg. 23491 (June 3, 2025).

Dear Secretary Turner:

Governing for Impact ("GFI") submits this comment on a proposed rule, "Rescission of Affirmative Fair Housing Marketing Regulations" ("proposed rule"), issued by the Department of Housing and Urban Development ("HUD") on June 3, 2025.[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2] We appreciate the opportunity to comment, and we write in opposition to the proposed rule.

This comment does not address HUD's substantive assertions in the proposed rule, which would rescind HUD's Affirmative Fair Housing Marketing ("AFHM") regulations. Instead, we comment on the proposed rule's procedural shortcomings under the Administrative Procedure Act ("APA"). If finalized, HUD's proposed rule would sweep away a 50-year regulatory regime, but it relies on inadequate reasoning and provides for an unusually short, 30-day comment period, depriving interested parties of the opportunity to meaningfully comment. HUD should issue a new notice and comment proceeding, expanding on its justifications for rescinding the AFHM regulations and providing at least a 60-day comment period.

I. HUD's proposed rule does not allow interested parties to meaningfully comment because it relies on inadequate reasoning and improperly shortens the comment period.

The purpose of notice and comment is: "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[3] In order to achieve this purpose, agencies must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[4]

[1] 90 FR 23491 (June 3, 2025).
[2] Governing for Impact, https://governingforimpact.org/.
[3] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (quotation omitted).
[4] *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007) (quotation omitted); *see also Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (proposed rules must include "sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]he notice ... must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.").

HUD's proposed rule fails to meet this standard because its justifications consist of cursory explanations that do not "allow for meaningful and informed comment."[5] HUD asserts that the longstanding AFHM regulations—which HUD promulgated to fulfill its obligations under critical civil rights laws, and which require owners seeking to participate in federal mortgage insurance or rental assistance programs to adopt affirmative fair housing marketing policies—"should be rescinded for six independent reasons."[6] As a threshold matter, the "reasons" HUD provides are not in fact independent: they mainly boil down to HUD's newfound view that the AFHM regulations require, rather than prevent, discrimination.

In addition, HUD's "reasons" lack sufficient reasoning to enable the public to meaningfully comment. For example, HUD claims that the AFHM regulations exceed HUD's statutory authority because that authority is "cabined to those rules necessary to prevent discrimination."[7] But HUD supports this assertion with a single citation to a 2017 federal district court decision, depriving interested parties of any understanding of HUD's statutory interpretation and analysis, including with regard to how it is or is not consistent with HUD's previous views of its authority.[8] Even taking that interpretation as a given, HUD does not really explain *why* the AFHM regulations do not prevent discrimination. Interested parties are left to guess why "attract[ing] minority persons" to federal housing programs does not qualify.[9]

HUD then asserts that the AFHM regulations violate the Constitution's Equal Protection Clause and nondelegation doctrine in two short paragraphs that contain nearly no analysis or explanation. The first applies the Supreme Court's 2023 decision in *Students for Fair Admissions* without any attempt to explain how a case about college admissions systems translates to this very different context.[10] The second finds a nondelegation problem even though the Court has not done so since 1935[11] and, to the contrary, has upheld "a host of statutes giving agencies significant discretion"[12]—all in a handful of sentences that state unadorned, and clearly contestable, conclusions. Concision is to be commended, but not at the expense of clearly conveying the reasoning behind novel legal assertions. In order to meaningfully address HUD's dubious assertions, the public needs more.

HUD's insufficient reasoning for the proposed rule does not end there. HUD further asserts that "moral considerations" "outweigh[]" the AFHM regulations' benefits, but does not provide an analysis explaining that determination.[13] HUD also states that "it is wrong to put the economic burden on innocent private actors to achieve [the AFHM regulations'] benefits[,]" but does not articulate the economic burden, or address other significant, viable alternatives that may alleviate an economic burden without rescinding the AFHM regulations.[14] HUD even concludes that the "AFHM regulations are not a priority" but does not explain why.[15]

---

[5] *Reno*, 57 F.3d at 1132.
[6] 90 FR 23492.
[7] *Id*.
[8] *Id*.
[9] *Id.*
[10] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).
[11] *See Gundy v. United States*, 588 U.S. 128, 162 (2019) (Gorsuch, J., dissenting).
[12] *FCC v. Consumers' Rsch.*, 606 U.S. ___, 2025 WL 1773630, at *13 (2025).
[13] 90 FR 23492.
[14] *Id*.
[15] *Id*.

Each of these examples demonstrate that the proposed rule's reasoning does not include sufficient detail or analysis, severely constraining interested parties' ability to meaningfully comment.[16] HUD's "reasons" hardly satisfy the APA's purpose to allow interested parties to engage in "an exchange of views, information, and criticisms between interested persons and the agencies" in order to "make criticism or formulation of alternatives possible."[17]

Finally, the public requires more than 30 days to "meaningfully review ... and provide informed comment[s]" on the proposed rule.[18] Despite HUD's longstanding policy requiring a 60-day comment period, 24 CFR 10.1, HUD "determined that it is in the public interest to rescind the AFHM regulations as expeditiously as possible" and notes that "interested members of the public are familiar with these regulations and should be able to respond effectively within the 30-day period."[19] However, 30-day comment periods are not "necessarily sufficient[,]" particularly when the proposed rule involves complex issues.[20] This one does. HUD's proposed rule relies on bold legal justifications—including, for instance, asserted violations of the Equal Protection Clause and the nondelegation doctrine—to overturn a regulation that has served the public well for decades.[21] The public should have been given more than 30 days to comment, including to provide interested parties with time to actually discern and consider HUD's novel reasons.

II. If finalized, HUD's proposed rule would be arbitrary and capricious.

In addition to depriving interested parties of the opportunity to meaningfully comment, HUD's proposed rule does not meet the APA's requirement for reasoned decisionmaking. Under the APA, "an agency must cogently explain why it has exercised its discretion in a given manner" and demonstrate "reasoned decisionmaking."[22] As discussed above, HUD's proposed rule relies on insufficient reasoning. Take, as an example, HUD's treatment of the Equal Protection Clause in a single paragraph, citing a singular case to conclude that the AFHM regulations are unconstitutional.[23] Reasoned decisionmaking requires more than conclusory statements relying on incomplete analysis.

Moreover, the proposed rule also fails to consider alternative policies short of full rescission of the AFHM regulations. Considering "responsible alternatives" and providing explanations for rejecting such alternatives "goes to the heart of reasoned decisionmaking."[24] "[E]ven when an agency determines that its previous decision was illegal," which HUD asserts to be the case here, "it still must go on to consider alternatives to simply

[16] 5 U.S.C. § 553(b), (c).
[17] *Prometheus*, 652 F.3d at449 (quoting *Home Box Office*, 567 F.2d at 35–36).
[18] *Chamber of Com. of U.S. v. Sec. & Exch. Comm'n*, 670 F. Supp. 3d 537, 552 (M.D. Tenn. 2023) (quotation omitted).
[19] 90 FR 23493.
[20] *See Chamber of Commerce*, 670 F. Supp. at 552 (collecting cases), *aff'd*, 115 F.4th 740 (6th Cir. 2024) ("periods around 30 days—and even, on occasion, longer than 30 days—have been held to be insufficient in light of the complexity of the issues involved and the practical difficulties imposed by the underlying situation"); *see also Hous. Study Grp. v. Kemp*, 736 F. Supp. 321, 334 (D.D.C. 1990) (Even when HUD asserts an emergency action is needed to alleviate "laudable purpose[s]," the agency is not relieved from its full notice and comment requirements.).
[21] 90 FR 23492-93.
[22] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983); *see FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (agency actions must be "reasonably explained").
[23] 90 FR 23942.
[24] *Spirit Airlines, Inc. v. Dep't of Transportation & Fed. Aviation Admin.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (quotation omitted).

revoking the prior action."[25] While "HUD specifically invites comments regarding any less burdensome alternatives to this proposed rule that will meet HUD's objectives as described in the preamble,"[26] the agency has a responsibility itself to consider less drastic alternatives.[27]

HUD's proposed rule is also arbitrary and capricious because it determines that "there is no reliance interest in an unlawful regulation" without any additional explanation or reasoning.[28] While an agency "might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight," HUD is not exempt from considering reliance interests altogether.[29] In fact, an agency must explain why the purported unlawfulness of a regulation nullifies any reliance interests, and properly consider "options of retaining forbearance or accommodating particular reliance interests" even for regulations it determines to be unlawful.[30] As noted above, this comment does not purport to respond to the substance of HUD's proposed rule, but it is not difficult to imagine strong reliance interests in regulations that have been on the books for decades, whether from consumers who depend on the marketing notices or housing providers who have conformed their practices to longstanding regulations.

* * *

HUD should withdraw the proposed rule and issue a new one that provides adequate reasoning and sufficient time for the public to meaningfully comment.[31] Specifically, HUD should provide a comment period of at least 60 days in a new proposed rule that actually explains its reasons for rescinding the AFHM regulations, considers alternatives, and addresses reliance interests.

Sincerely,

Mia Harris
Legal Policy Intern, Governing for Impact
Email: mharris [at] governingforimpact.org

Anna Rodriguez
Policy Counsel, Governing for Impact
Email: arodriguez [at] governingforimpact.org

[25] *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 476 (5th Cir. 2024) (emphasis omitted).
[26] 90 FR 23493.
[27] *See State Farm*, 463 U.S. at 48 (finding that the "[t]he first and most obvious reason for finding the rescission arbitrary and capricious is that [the agency] apparently gave no consideration whatever to modifying the [previous regulation]"); *see also Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986) ("fail[ure] to consider an obvious and less drastic alternative" is arbitrary and capricious).
[28] 90 FR 23492-93.
[29] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 32 (2020).
[30] *Id.* at 33.
[31] *See Cook Inletkeeper v. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) ("[A] new notice-and-comment period 'would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.'")