

November 25, 2014

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Docket No. FR 5173 –N-02
Affirmatively Furthering Fair Housing Assessment
Tool

Dear Sir/Madam:

The National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA) are pleased to jointly submit the following comments with respect to the Notice regarding “Affirmatively Furthering Fair Housing Assessment Tool.” NACCED is a national non-profit organization that represents county government professionals who administer HUD’s affordable housing and community development programs. NCDA is also a national non-profit organization that represents both city and county government professionals that administer HUD’s affordable housing and community development programs. Collectively, our organizations represent over 600 HUD grantees.

This comment letter is endorsed by:

- U.S. Conference of Mayors
- National Association of Local Housing Finance Agencies

At the outset, NACCED and NALHFA strongly recommend that the AFFH Final Rule and Assessment of Fair Housing Tool be Tabled

In a November 3, 2014 judicial ruling, U.S. District Court Judge Richard Leon struck down the Obama Administration’s disparate impact regulations for the Fair Housing Act. The U.S. Supreme Court has agreed to hear the case, which will decide if disparate impact is legal under the Fair Housing Act. ***We ask HUD to table the Affirmatively Furthering Fair Housing Final Rule and the Assessment of Fair Housing Tool Notice until the U.S. Supreme Court has ruled on the legality of the disparate impact regulations,*** which is the foundation upon which the rule and the Tool rest.

As a general comment, CDBG and HOME Help Mitigate Fair Housing Impediments and Enforce the Fair Housing Act

CDBG and HOME grantees are committed to mitigating impediments to fair housing and enforcing the Fair Housing Act. The programs are at the forefront of meeting the housing and community development needs of low- and moderate-income people and their neighborhoods, through such activities as providing important public services, developing affordable rental and homeownership housing, helping people stay in their homes through housing rehabilitation, funding infrastructure projects, building public facilities such as community centers, libraries, and senior centers, and creating economic opportunities in low- and moderate-income neighborhoods. CDBG is also used to fund local fair housing organizations that engage in functions that help enforce the Fair Housing Act. These programs could contribute much more to low- and moderate-income neighborhoods if they were adequately funded; however, both CDBG and HOME have been cut substantially in the last decade and are now being asked to do more, through the development of an AFH tool, that will further erode program resources and take away project funding to help low- and moderate-income people, including the protected classes under the Fair Housing Act.

No One-Size Fits All Approach

With respect to the AFH tool, HUD appears to be taking a cookie cutter "one size fits all" approach, requiring the same level of data and analysis from large grantees and small grantees. We think it would be very difficult and not particularly useful for a small grantee receiving only, say, \$500,000 in CDBG funds to have to produce and analyze all of the data required by the tool. We think HUD needs to scale the requirements based on the size of the grantee, the amount and types of funding the grantee receives and the grantee's administrative authority over the resources and priorities. For example, county grantees do not necessarily have any control over the policies of the local governments within the county.

Guidance on How HUD Will Review the Program Participant's AFH

HUD should provide program participants with some guidance on how they will review its Assessment of Fair Housing. What are the basic standards by which HUD will decide whether an AFH is acceptable or not? HUD should provide a checklist as it does for assessing the Consolidated Plan and Action Plan.

In other areas of the Notice HUD indicates that it will issue guidance at a later date. All of this guidance should be in place before program participants are asked to proceed.

Include Assessment of Fair Housing within the Consolidated Plan

We strongly recommend that Assessment of Fair Housing be a required component of the Consolidated Plan rather than a free-standing pre-requisite for submitting a Consolidated Plan. That would reduce the redundancy of content between the Fair Housing components of the Consolidated Plan and the AFH and streamline the citizen participation process.

Opportunity for Program Participants to Review the Data Prior to the Next 30-Day Review of the Notice

NACCED and NCDA appreciate the effort that HUD went to provide sample tables, data and maps. We think it is important that program participants have an opportunity to review the actual data for their community, including the margin of error for the various measures, before HUD issues the next Notice for the 30-day comment period on the AFH tool.

HUD's Office of CPD Should Have the Authority to Approve the AFH Tool

HUD maintains 10 regional offices and 81 field offices. CPD and FHEO staff is located in approximately 44 of the field offices, which have responsibility for monitoring and enforcing AFFH requirements. There is no clear consistency among these offices regarding the interpretation of program regulations; therefore, we recommend that the AFH tool be approved solely by the headquarters office of CPD, with input from the Office of FHEO, since CPD currently oversees the Consolidated Plan, Annual Action Plan, and CAPER completed by grantees that will also develop the AFH tool.

The completion of the AFH tool will take more than 200 hours.

As a further general comment, NACCED and NCDA believe that the task in completing the tool is overwhelming. We very much doubt that completing the AFH tool can be accomplished in the 200 hours set forth in the Notice. Upon analysis, one of our members stated the completing the tool could be more than twice that amount of time, estimating that 200 hours would be needed for analysis of the HUD-provided data alone and at a minimum an additional 250 hours for generating the necessary local data and local knowledge.

Another grantee has documented that conducting a fair housing zoning analysis of the 43 municipalities within the County has taken over 5,500 hours. This is the equivalent of three full-time staff working only on this element of the Assessment of Fair Housing for over one year. This is just one component of the data to be analyzed using the AFH tool. Moreover another program participant has pointed out that the AFH tool is of a very broad, analytical nature, and it is their belief that given the financial and staffing constraints most municipalities have been under for several years, this tool (as it stands now) will ultimately provide little to no reduction in the burden on program participants of putting together a concise fair housing planning document that is results-driven versus process-driven.

The Analysis of Racially or Ethnically Concentrated Areas of Poverty

With respect to the required analysis of Racially or Ethnically Concentrated Areas of Poverty (R/ECAPS), NACCED and NCDA would point out that poverty is not a protected class. We do not understand the relevance of analyzing economic status data in particular areas among particular groups, and somehow connecting the latter to fair housing *choice* for protected classes

under federal, state and local laws. Certainly, the program participant has no control over market forces/pressures and the perceived and/or actual value of real estate in specific areas of the jurisdiction. Quite simply, a person's or family's economic status has always priced persons out of specific areas and into other, more affordable areas. There is no discrimination involved in such a situation. The deciding factor in that situation is not the person's race/color/national origin/etc., but rather their economic status.

HUD's presumption that concentrations of any sort are *de facto* segregation rather than a reflection of citizens' exercising their right to associate freely with the community or neighbors of their choosing. As an example, jurisdictions have welcomed refugees from across the world, and, as a result, many of these displaced persons have sought connection with other refugees from their country which has resulted in a concentration in certain neighborhoods. This is not the result of discriminatory practice, but is rather, the result of people exercising their preference to live in a certain area with others who share their cultural identity. The presumption that a concentration of any particular group is a *prima facie* instance of segregation is inappropriate. A deeper analysis of any and all concentrations would be better suited as well as a study of factors that lead into and out of an area of concentration. While it is possible that areas of concentration are the result of segregation, it is also possible that areas of concentration arise due to personal choice. Any new measure must take that possibility into consideration.

One final general comment: at the end of all this analysis, will it be clear what a program participant is supposed to do? It seems that the tool will generate a type of action plan based on determinant ranking, but what if the program participant rates a determinant as very significant, but the program participant has no control over implementing anything that would affect that determinant? What if the program participant could influence a determinant, but it doesn't have the resources to do so? What is the actual desired outcome of this using this AFH tool?

Question 1. Sources of Data and Information to Complete the Assessment of Fair Housing.

The Notice states that HUD will provide uniform, national data to program participants including patterns of integration and segregation, racially and ethnically concentrated areas of poverty, access to education, employment, low poverty neighborhoods, transportation and environmental health, among other community assets, disproportionate housing needed, data on individuals with disabilities and families and children.

In addition, the Notice states that participants need to incorporate local data and local knowledge into preparation of the AFH.

Comment: Where does HUD get this data and how do program participants know that the data is complete and accurate? Except for a few instances, such as using it in the sustainable communities grant program, participants have not used this data before. They will need to review it before they can incorporate it into the AFH tool. NACCED and NCDA are concerned that, to the extent that the American Communities Survey (ACS) will be used for data analysis,

that the data is not available for small geographic areas. The Associations are also concerned that the margin of error in ACS data may exceed the actual data determinations, which calls into question the reliability of this data as a data source.

The notice indicates that much of the local data that can be used for the AFH tool is already publicly available and reasonably easy to access. One program participant believes that this is an overly optimistic assumption. For example, foreclosure information (needed to identify foreclosure patterns) requires a paid service (CoreLogic); an analysis of residential real estate steering requires testing; and a study on occupancy restrictions requires extensive research and compilation. There are areas where no current, free existent data set(s) exist for one program participant.

It is not clear what the standard would be for requiring the local data, how it would be obtained, whether it is accurate, and whether it is relevant. This subjective standard will invite a variety of interpretations and could lead to disputes at the local level between interested parties with regard to which data should be used as the “local data.” HUD should establish a standard for data; how it’s gathered, how it’s disseminated, and how its veracity will be proven.

Question 2. Structure of the Assessment Tool: Section III (Community Participation Process)

Participants are responsible for obtaining, evaluating, and deciding how best to consider and respond to public comments on, and including public comments in, the AFH tool.

Comment: HUD has indicated that agencies are responsible for obtaining, evaluating and deciding how to consider and respond to public comments and incorporate information into the analysis section of the AFH. Obviously, the outreach process should be inclusive and take into consideration the protected classes of the Fair Housing Act; however in an earlier training with recipients of Community Development Block Grant, HOME and Emergency Solutions Grant funds, HUD referenced that, pursuant to 24 CFR 570.506, the following groups should be reached in the citizen participation process: senior citizens, battered spouses, persons living with AIDS, abused children, homeless, illiterate adults, migrant farm workers, and low- and moderate- income persons. The AFH tool may need to reemphasize the meaning and the intention of citizen participation.

NACCED and NCDA wonder whether HUD will establish any minimum standards for conducting surveys to maximize citizen input? Will use of tools like Survey Monkey be encouraged or discouraged? Will surveys need to be in multiple languages? Will public comments need to reach beyond a grantee’s border to hear from those who do not live in the jurisdiction, to learn why they do not live in the jurisdiction or what difficulties they have encountered that have prevented them from moving into the jurisdiction?

Again, we further recommend that the Community Participation Process for the AFH tool be included in the program participant’s Citizen Participation Plan within the Consolidated Plan

rather than as a stand-alone process. This is consistent with our comment letter on the AFFH proposed rule.

Question 3. Structuring the Assessment Tool: Section IV (Analysis – Assessment of Key Fair Housing Issues)

Participants are asked to identify and rank determinants that influence or contribute to fair housing issues. The AFH is designed to elicit a participant’s meaningful assessment of the fair housing environment that informs fair housing goal-setting and prioritization. Does the assessment ask the right questions and provide the right list of determinants to provoke a meaningful assessment? HUD anticipates providing further guidance to help participants in identifying determinants.

Comment: This section looks at identifying and ranking determinants that influence or contribute to fair housing issues and the general housing equality environment with respect to goal-setting and prioritization. A heavy emphasis is placed on demographics and an analysis of segregation and integration particularly with regard to racially and ethnically concentrated areas of poverty, immigrant populations, national origin groups and Limited English Proficiency (LEP).

In addition, it is suggested that surveys be structured in a manner where research analysis can have a strong focus on sociological, economic and cultural parameters within a human relations scope. The assessment should be within the context of community development and housing with an emphasis on issues, policies and practices that impact, affect and effect housing choice.

Lists of determinants are contained in the AFH tool in several places (IV. B.5; IV.B.9.; IV.B.10; IV.C.4; IV.D.5; IV.E.5 and IV. F.4) and total more than 50 issues. Therefore, it seems that while there are a sufficient number of determinants listed, it is undetermined how such a list will “provoke a meaningful assessment” without better definition of the depth of analysis that is expected to rank the determinants. The expected depth of analysis is crucial in determining the staffing of this project. For example, there are determinants connected with education; one county commented that there are 42 school districts located within its boundaries. This will be an enormously burdensome and time-consuming task that may take months, if not longer. There are determinants connected with public officials, which we assume will mean county public officials and the public officials of 37 municipalities located within the county. There are determinants connected with land use and zoning laws; as a non-home rule county, staff has no control over land use and zoning laws, but would need to obtain data from 37 municipalities. All the data required to rank each determinant is certainly available, but staff estimates the collection and analysis to take anywhere from 2-10 hours per determinant. Citizen engagement and surveying of persons residing in R/ECAPs will also be essential to determine what the “other” determinants may be; however, experience suggests that this is the most difficult population to engage. This engagement will, most likely, also occur in multiple languages. Therefore, while

the approach is reasonable, depth of analysis is not clear and must be determined. It would also appear that the time involved to complete the assessment has been seriously underestimated.

Will HUD have a checklist of issues it expects to see identified in each participant's responses? Would a better way be to ask participants to give an assessment of housing discrimination in their jurisdiction?

Some of the issues and factors are beyond the control or scope of the program participant. Again, the data in this section will be subjective and lend itself readily to conjecture and anecdotal evidence. The questions should be refined to reflect a more objective assessment.

Question 4. Structuring the Assessment Tool: Section IV (Analysis – Location and Demographic Makeup of Residents of Publicly Supported Housing)

Which types of participants should be required to include project level data in tabular format for various categories of publicly supported housing? Should they be included in the body of the Analysis section or as appendices?

Comment: Those program participants which administer the publicly supported housing programs should be responsible for providing the location and demographic makeup of residents in those projects covered by the program (i.e., PHAs should be responsible for providing the data for projects covered under Public Housing, Project-Based Section 8, and the Housing Choice Vouchers. Local government participants should provide data on locally administered CDBG, HOME, Section 202, Section 811, and other locally funded housing projects. The State agency administering housing programs such as the Low-Income Housing Tax Credit Program received by a local government program participation should have responsibility for providing the project data to the local program participant.)

Question 5. Structuring the Assessment Tool: Section IV (Analysis – Disability and Access)

HUD specifically seeks comment on whether the Assessment Tool, by addressing Disability and Access issues separately, has failed to consider any key fair housing issues that relate to individuals with disabilities.

Comment: Issues and barriers regarding persons with disabilities are unique. There should also be a review of basic standards associated with accessibility compliance and a cross relationship to the Americans with Disabilities Act. There should be a focus on defining basic terminology of what is a disability and how common issues may be addressed and handled.

Some program participants are concerned that disability discrimination is the most prevalent discrimination for which complaints are filed in their jurisdictions and should not be minimized.

Question 6. Structure of the Assessment Tool: (Analysis – Fair Housing Compliance and Infrastructure)

HUD has designed the Assessment Tool to address many of the most common fair housing issues. HUD asks whether the Tool is sufficiently clear that a participant may address additional fair housing issues or that a particular fair housing inquiry cannot be addressed due to a lack of HUD-provided data, available local data and local knowledge responsive to the inquiry.

Comment: The AFH has “other” determinant list(s), but it is not entirely clear where the program participant (and to what length the program participant would discuss an additional determinant or multiple determinants or additional data). It is also unclear where or how a respondent would state that the inquiry cannot be answered due to lack of data (whether HUD-provided or local). At what point, and by whom, is it determined that the investment required to obtain the data is too great and it is acceptable to state that local data is “not available?”

When the AFH tool is in its final form, instructions should be clear that each question or item in each section should be answered regarding fair housing issues. Tabular data and questions should be easily worded so that there is no misunderstanding. There may be instances where some questions/items are not relevant to certain program participants. As such, the response could be “not applicable”. There should also be some leeway for program participants to expound on broader issues that may be more relevant to their programmatic structure and/or service area. For example, an agency that receives Fair Housing Assistance Program funds may need to tailor some responses accordingly.

Question 7. Section D Disparities in Access to Community Assets and Exposure to Adverse Community Factors.

This Section asks participants to elaborate on “access to public transportation, quality schools and jobs, and exposure to poverty, environmental health hazards and deteriorated or abandoned properties.”

Comment: NACCED and NCDA believe that asking the program participant to identify goals to inform strategies related to education, transportation and the environment seems inappropriate and outside the boundaries of the Fair Housing Act. In most communities the program participant or PHA has no involvement or role in these matters, which are overseen by other regional boards and/or governmental entities. We believe that analyzing the exposure to community factors as mentioned in the AFH is intrusive into local and state policies, for which program participants have no control or authority and little knowledge.

Question 8. Solicitation of comments on the Assessment Tool Only.

Can program participants complete the Assessment Tool independently (i.e. without assistance from consultants or outside contractors)?

Comment: *It is hard to say without seeing the data.* Some will be able to work with it using in-house staff, while others will not. Preparation of the Assessment Tool is going to cost money,

perhaps double what the cost of preparing the existing Analysis of Impediments to Fair Housing. This means that activities that would otherwise be undertaken with program dollars will be diverted into this effort.

The following sections of the Assessment Tool can be easily completed by the program participants: Section II: Executive Summary, Section III: Community Participation Process

The following sections of the Assessment Tool may not be so easy to complete and may require outside assistance from consultants or contractors, particularly with the completion of the first Assessment of Fair Housing: Section IV: Analysis and Section V: Fair Housing Goals and Priorities (to be conducted in consultation with the program participant based on the outcome of Section IV: Analysis). Section IV of the Assessment Tool will encompass the most work as will Determinants of Segregation/R/ECAPs. There is no quick answer to “what extent do each of the following factors impact the Jurisdiction and the Region by contributing to segregated housing patterns or R/ECAPs” without a comprehensive study of each of these factors, which may be outside the expertise and scope of many CDBG and HOME grantees, particularly small grantees.

It appears HUD will only provide data for 4 categories of publicly supported housing: Public Housing, Project Based Section 8, Other Multifamily, and the Housing Choice Voucher Program. The program participant will be responsible for considering other publicly supported housing, including the LIHTC, and other federal, state and local housing programs, USDA and VA, and other HUD-funded data not captured in the data. Again, this will involve time and cost to the local program participant to gather this data.

Again, smaller entitlement program participants may not have the planning staff to complete the preparation of the AFH tool in-house. Moreover, instead of the development of a costly Assessment, HUD should use the program reports already in place to monitor the progress of the programs. These reports could be marginally modified to include fair housing indicators.

Question. What kinds of additional instructions would be helpful for participants completing the Assessment Tool?

Comment: NACCED and NCDA recommend that HUD provide an additional opportunity for comment once the HUD data is received. We also believe that an additional period is needed to review the HUD guidance. In addition, we recommend that HUD share with participants a checklist of what HUD wants to see in a completed Assessment Tool for it to be approved. Furthermore all HUD field offices must be required to use the same checklist and have training on how to use it.

In addition, It would be useful if HUD could provide training for grantees on the AFH tool, such as in-person workshops (held at the field offices or in locations that can be easily accessed by all grantees) webinars, on-site TA, FAQs posted to the HUD Exchange, establishment of an AFH tool listserv where grantees could communicate with one another, and the establishment of a

phone helpline at HUD. HUD may want to consider encouraging regional fair housing planning through financial incentives and allow smaller jurisdictions to come together (like HOME Consortia) to conduct fair housing analysis.

Question. What costs may be associated with collecting and analyzing the available local data and local knowledge necessary to complete the Assessment Tool?

Comment: *Program participants cannot answer this question without first seeing the HUD data to determine what local knowledge and local data will need to be collected.* The HUD-supplied data is just a small fraction of the required information. Currently there is no readily accessible data source to determine integration and the special impacts of the Olmstead Act or disparities in access and exposure. These and numerous other data sets will need to be created in order to fulfill the proposed reporting requirements. In order to insure the plan is complete many agencies will need to contract with a consultant. It is estimated that it would take over 250 hours of a consultant's time just to compile and analyze the local data.

Question. Do participants expect to use federal funds to complete the Assessment Tool?

Comment: Yes. As NACCED and NCDA commented in our response to the Affirmatively Furthering Fair Housing proposed rule in September 2013, given the amount of expense to carry out the rule we ask HUD to join with us in seeking a statutory change to the CDBG statute that would make efforts to affirmatively further fair housing be a direct eligible activity rather than funded out of the 20% planning and administration cap. Since a statutory change to the CDBG program may take longer than a year to achieve, HUD should set-aside funds in its FY16 budget under a separate line-item, Assessment of Fair Housing Grant Program, to provide grants to all CDBG grantees to help them pay for the costs associated with completing the initial Assessment of Fair Housing.

Question. What low-cost, no-cost strategies can participants use to reduce any burden associated with completing the Assessment Tool?

Comment: There are none that we can think of at this time.

Question. How do participants envision joint participation in completing the template?

Comment: If the participant is preparing the AFH for programs under the jurisdiction of the Office of Community Planning and Development, it should be the lead agency in preparing the AFH, with input from the Public Housing Agency. If the Public Housing Agency is the lead for public housing program it should be the lead agency, with input from the participant. In the case of urban counties joint participation is beyond just Public Housing Agencies, it also includes all of their participating jurisdictions and other entitlement jurisdictions within the county. This is expected to be a huge effort for larger counties with multiple public housing authorities and multiple entitlement cities. Timing could also be a critical factor if any of these other agencies is

on a different schedule than the county.

Participants are also concerned with what may happen when turnover occurs within local jurisdictions and staff is no longer there to complete the AFH in the timely fashion as expected. Of course turnover occurs because of retirements, job changes, election results, and with staff changes, local knowledge may be lost. If a program participant or PHA was relying on an agency to complete the AFH, but that agency has lost the relevant staff, would other participants be left in the dark with the potential of jeopardizing their own grants?

Additional questions for HUD:

HUD states in the Notice that:

HUD may return the AFH, or a portion of the assessment, if it violates fair housing or civil rights laws or is substantially incomplete, which includes priorities or goals that are materially inconsistent with the data provided by HUD. The AFH would be deemed accepted 60 days after the date that HUD receives the AFH, unless before that date HUD provides notification that HUD does not accept the AFH, the reasons why HUD has not accepted the AFH, and the actions that the jurisdiction must take to address these reasons.

Again, what factors will HUD use to approve the program participant's AFH? What constitutes a violation of the fair housing or civil rights laws? How will grantees be held accountable by HUD for implementing the strategies set forth in the AFH? What recourse will participants have when it is believed that HUD's approval is withheld inappropriately?

Finally, does HUD have the staff to provide a meaningful review of program participants' submission of the AFH tool?

Should you have any questions regarding these comments, please contact John Murphy, NACCED Executive Director at 202-367-1257 or Vicki Watson, NCDA Assistant Director at 240-601-9356.

Thank you for your favorable consideration of our views.

Sincerely,

National Association for County Community and Economic Development

National Community Development Association