August 13, 2015

Regulations Division, Office of General Counsel
451 7th Street SW, Room 10276
Department of Housing and Urban Development (HUD)
Washington, D.C. 20410-0500


To Whom It May Concern:

On behalf of the more than 3,100 agencies and over 20,000 individual members that make up the National Association of Housing and Redevelopment Officials, I would like to offer the following comments in response to the notice of proposed information collection (FR-5173-N-05) entitled “Affirmatively Furthering Fair Housing Assessment Tool: Solicitation of Comment—30-Day Notice Under Paperwork Reduction Act of 1995” published in the Federal Register on July 16, 2015. While NAHRO remains firmly committed to the goals of the Fair Housing Act and our mandate to affirmatively further fair housing, we are deeply concerned by the proposed information collection containing the Assessment of Fair Housing (AFH) tool. According to the Department’s own discussion of the rule, future iterations will be more streamlined and improved. While NAHRO is encouraged by the Department’s recognition of the shortcomings of the revised tool, we are disappointed by the Department’s willingness to nevertheless pursue its implementation.

NAHRO is also disappointed by the perfunctory manner in which the Department summarized in the preamble the public comments received in response to the preliminary version of the AFH. The Department’s responses to the comments largely ignore the majority of the issues raised through the public comment process, suggesting that these concerns were not given serious consideration. As a result, the revised tool fails to address many of the serious flaws that NAHRO and others highlighted in our previous comments.

The AFH tool relies on disparate impact analysis, requiring communities to review their policies and practices and assess their outcomes, even if these policies and practices are facially neutral.
While the Supreme Court recently ruled that disparate impact theory claims are cognizable under the Fair Housing Act (FHA) in the *Inclusive Communities* case, Justice Kennedy’s narrowly constructed opinion did clearly state that there are limits to such claims. In his opinion, Justice Kennedy clearly outlined the requirement that challenges raised under disparate impact theory, the underlying principle behind the AFH, must be able to establish a “causal connection” between the policy or practice and the disparate impact. Kennedy goes on to write that “it may also be difficult to establish causation because of the multiple factors” that go into any particular decision. The AFH tool, however, does not apply this standard. Justice Kennedy acknowledges arguments made by NAHRO and others, emphasizing that disparate impact theory does not override the permissibility of basing decisions on market factors, issues that contribute to quality of life, or other legitimate business interests. The AFH tool, however, even absent a showing of causation, regards any evidence of a disparate impact as a “fair housing issue,” triggering a requirement that program participants set a goal to address the issue. NAHRO believes that this requirement goes far beyond the legal one articulated by the Court, requiring a causal link be shown connecting a program participant’s policies or programs in order to bring a successful disparate impact claim, which then obligates the community to change its practices.

Primary among NAHRO’s concerns are the wide-ranging consequences that the AFH tool, and the AFFH rule which it implements, would have. The tool does not take into account critical factors like resource availability and other program priorities. Instead, the AFH tool requires program participants to set fair housing goals based on a limited, and sometimes irrelevant, set of pre-determined factors, many of which are outside of the control of the program participants. Nowhere in the analysis do the questions acknowledge resource limitations, thereby looking only at disparate outcomes while making no attempt to understand any legitimate factors that led to them. Justice Kennedy acknowledges the potential unintended consequence of disparate impact litigation, noting that if the threat of litigation reduces construction of affordable housing “then the FHA would have undermined its own purpose as well as the free-market system.” Without safeguards, Kennedy warns, “disparate-impact liability might displace valid governmental and private priorities.”

By failing to acknowledge the environment in which HUD program participants work, the tool further contorts the public’s view of the respondent’s work, focusing only on the subset of community needs that relate to fair housing at the exclusion of all other needs and priorities. Program participants are being pressured to set goals that do not fully reflect the needs and priorities of their communities and ignore the real-world constraints under which they operate. Capital needs unrelated to fair housing issues are nowhere represented, but certainly they continue to exist. Simply aligning the timing of the AFH submission with the PHA or ConPlan does not integration make—instead, they may be directly in competition for scarce resources. How does a program participant balance its mandate to continue meeting these needs while being forced into an isolated goal-setting process that ignores these priorities? Such an incongruous set of requirements will interfere with communities’ abilities to make locally-based decisions about their most pressing needs. As Justice Kennedy’s opinion in the *Inclusive Communities* case states, the “FHA is not an instrument to force housing authorities to reorder their priorities.”
Administrative Burden

During a time of historically low funding, it simply is not appropriate or feasible to add additional administrative burdens. While the tool is well intentioned, it requires a tremendous expenditure of time and resources on the part of grantees. In addition, it is worth noting that not only are no additional resources being made available to support this increased administrative requirement, but that resources to meaningfully enhance fair housing choice are already insufficient. In recent years, PHAs have experienced devastating cuts in funding for both Public Housing and the Housing Choice Voucher program. Additionally, appropriations for the Community Development Block Grant and the HOME Investment Partnerships have also continued to decline. Ironically, these scarce resources will be diverted to complete the administrative burdens of the AFH tool, reducing the funds available for carrying out the programs themselves.

According to the preamble published in the Federal Register, “the primary purpose of comment under the Paperwork Reduction Act is to determine the burden of any information collection.” Put simply, the AFH represents an enormous burden. The notice further goes on to ask “[w]hether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.” We believe that this information collection is exponentially more burdensome than its associated utility. The AFH tool is so unreasonably detailed as to be a technocratic study of the conditions at play in the respondent’s jurisdiction and region. Many of these conditions are entirely outside of the control of the respondent, rendering the analysis nothing more than an academic exercise with little ability to advance the goals of the Fair Housing Act.

The final rule acknowledges the limitations of authority, but continues to insist that the analysis is useful because another entity may be able to set a goal to address it. NAHRO objects to this logic, given that each entity will be required to do its own analysis and is unlikely to even be aware of the analysis included in the submissions of others. Given that the analysis will be duplicated by the program participant that has authority over the issue, NAHRO continues to believe that such analyses should not be required. The Department’s continued assertion that such analysis is “important” simply fails to address the fundamental limitations of any given grantee’s ability to actually have any impact.

Completion of the tool requires substantial investment of resources, but HUD is not proposing providing incremental resources. As a result, respondents will have no choice but to divert already scarce resources away from program efforts to pay for the added administrative work. The irony of this situation should be clear to all. What’s more, the AFH tool does not align the required analysis with the programmatic tools available to each grantee. PHAs do not generally have any influence over the location of high quality schools, jobs, government services, public transportation, etc. As a result, the only possible means of intervention would be to ensure that their housing is within close proximity to these amenities. However, in any given year, the vast majority of PHAs make no decisions about siting because they are not doing new development. The tool’s essential failure to recognize the fixed nature of real estate is among its greatest shortcomings. The tool also fails to recognize the zero-sum nature of grantees’ resource allocation
choices. Increasing HCV payment standards to allow individual households access to higher-cost areas would necessitate a reduction in the number of families served. While this may further the fair housing opportunities afforded to the families who are able to access the program, it comes at the direct expense of the choices available to the families who remain on the waiting list.

According to the preamble, designing the assessment tool so program participants would be able to use it to prepare an AFH that would be accepted by HUD without unnecessary burden was one of the Department’s key objectives. The preamble goes on to declare, despite voluminous public comments to the contrary, that “HUD does not anticipate the need for any program participant to turn to outside consultants to collect data and conduct the assessment.” Whether or not HUD anticipates this need, however, has little to do with whether such a need will exist, and NAHRO members have been vociferous in their assessment that many communities will need to expend significant resources in order to complete the tool, either in-house or through a consultant. The large majority of submitters will need to acquire significant data collection, quality control and analysis skills in excess of the skill sets of current staff in order to gather local data and knowledge, assess the quality, reliability and robustness of those data and knowledge, and analyze and interpret local information. Although outside contractors or consultants have not yet determined the costs associated with an engagement to help complete an Assessment of Fair Housing, one group that has done considerable business with small and medium sized HAs has reported that the costs would be significant.

The Department argues that the burden is less significant because the estimate does not reflect a net increase in estimated burden; however, the Department fails to recognize that, particularly in a time where PHAs and others are receiving dramatically less funding than even the Department’s own analyses indicate is necessary for the proper operation of the program, even the existing administrative burdens are unsustainable.

NAHRO is disappointed that the Department has failed to see the development of the AFH as an opportunity to undertake an honest assessment of whether the administrative burdens of fair housing planning are justified by the fair housing outcomes they produce. In fact, by touting the fact that the administrative burden being proposed is not a net new burden, the Department is clearly declining this opportunity, condoning not only the existing burden but also the increases that the new AFH would entail. At the same time, the Department recognizes the need for burden reduction, noting that “for program participants that will submit an AFH in later years, HUD anticipates taking additional steps to reduce regulatory burden.” NAHRO strongly urges the Department to delay implementation of the AFH until such time as an appropriately streamlined version is available. It simply is not appropriate to unnecessarily divert resources from the programmatic efforts of cash-strapped program participants already struggling to serve their communities.

While NAHRO strongly supported delaying the initial submission dates for small program participants, we do not believe this is a solution to the overly burdensome requirements of the AFH. While we are pleased to see that these entities will not be immediately impacted by the
tool, we are disappointed that HUD has not done more to address the burdens themselves, instead electing simply to “kick the can down the road.” The Department must do more to streamline the requirements before they are implemented for small agencies, as these program participants will experience the greatest proportional costs relative to their overall resources.

While HUD’s consolidation of questions may improve the organizational structure of the AFH, it does not reduce the burdens associated with completing the tool. For example, while the preliminary version of the tool asked about disproportionate housing needs of each protected class in a separate question, the revised tool combines these questions into one; while it appears that there are fewer questions, responding to the newly consolidated question requires no less information than was previously being requested.

*Inappropriate Forum for Policy Making*

NAHRO is disappointed that the Department has chosen to shift some of the policy making associated with AFFH implementation into the information collection approval process rather than including it in the rulemaking process where it more appropriately belongs. The PRA process is not intended as a forum for vetting policy and therefore should not be used for this purpose. For example, rather than define the “region” which program participants will be required to address in their analysis through rulemaking, the Department shifted this decision over to the PRA process. Given the concerns about the scope of the analysis, both in terms of the range of issues and the areas of geography, articulated elsewhere in this letter, it is clear that this definition is far more than a technical issue that drives much of the policy around the rule. In addition, the Tool, not the rule, is the place where the Department intends to provide “specificity on program types” that are covered as part of the analysis.

*Inaccessibility of HUD Data*

While HUD is providing some data to assist with the completion of the tool, this data is unwieldy and hard to understand. In some cases, it relies on complex social science indices (e.g., dissimilarity index) whose meaning is largely unintelligible to most users and the general public. The level of sophistication required to understand this information is at odds with the emphasis on public participation.

*Correlation Is Not Causation*

In our previous comments, NAHRO raised the concern that the earlier version of the tool required respondents to identify “determinants” of fair housing issues. NAHRO noted that, while data and local knowledge may be sufficient to draw a correlation, PHAs and others would be hard-pressed to prove a causal relationship as the tool so blithely does. The change from the use of the term “determinants” to “contributing factors” is an improvement, but it continues to suffer from the same lack of underlying validity. As a result, the tool continues to promote the creation of policy on the basis of incomplete information and personal perceptions, casting doubt over its ability to truly increase fair housing choice.
Furthermore, in *Inclusive Communities* Justice Kennedy clearly outlined the requirement that challenges raised under disparate impact theory, the underlying principle behind the AFH, must be able to establish a “causal connection” between the policy or practice and the disparate impact. Kennedy goes on to write that “it may also be difficult to establish causation because of the multiple factors” that go into any particular decision. NAHRO contends that this is the appropriate standard that should be applied to all analysis required by the AFH.

**Mapping Tool**

While NAHRO appreciates the Department’s efforts to provide communities with the data they will need to complete the AFH, we do not believe the tool, in its current format, is sufficient. According to the preamble, the tool available for review is incomplete. What’s more, the tool was not available for a number of days at the beginning of the 30-day comment period. Given the importance of the tool to the completion of the AFH, it is impossible for the public to fully assess the AFH without access to a complete version of the mapping tool. For example, will the mapping tool be able to provide information to communities where multiple entities elect to submit a joint AFH? In its current form, the tool cannot do this. Due to the nature of data, it is not possible for program participants to simply generate maps and tables for each of the jurisdictions and combine them without getting skewed results. Clearly this is a major limitation of the tool.

**Inappropriate Level of Analysis**

NAHRO is deeply concerned about the Department’s continued insistence on requiring respondents to conduct analyses beyond their own jurisdictions as well as factors that are outside of a program participant’s ability to impact. For example, HUD grantees are unlikely to have control over the taxi services available to community residents (see page 12 of the proposed tool). PHAs are unlikely to have influence over zoning or source of income legislation. Cities and counties are unlikely to have control over PHA waiting list preferences. To require each grantee to expend significant resources to analyze and describe issues over which they do not exercise influence is unnecessarily burdensome and wasteful. It sets unrealistic expectations for members of the public, creating conflict rather than partnership between the community and the respondent. HUD should eliminate sections requiring grantees to report on housing they do not control. So doing would eliminate the duplication in responses created by respondents with overlapping jurisdictions, and would appropriately recognize the limitations of each grantee’s authority.

For the same reasons, HUD should also eliminate the requirement to analyze both the jurisdiction and the region. While fair housing issues may be regional, a grantee’s authority to act is not. In its response to public comments, the Department has failed to provide a reasonable justification for why regional analysis is important.

**Continued Lack of Coordination between FHEO and Program Offices**

NAHRO is concerned that the revised tool does not address many of the comments received noting the incompatibilities between the goals that the tool requires each program participant to
set and the realities of the program implementation landscape. The revised tool does little to address these issues, suggesting that the input of program offices was either not sought or largely ignored in the development of this tool. NAHRO notes the strong language included by the Senate Appropriations Committee in the report accompanying its FY 2015 T-HUD bill criticizing HUD for failing to seek program office input.

Lack of Clarity Surrounding Review Process

The final rule declines to specify which portion of HUD will be responsible for review of the AFH. NAHRO is deeply troubled by the possibility that these reviews could be conducted by a person who does not have direct knowledge of the core functions that program participants undertake. The numerous mistakes in the AFFH final rule (e.g., the reference to budget cuts experience by HOME in the section discussing issues related to PHAs) suggest a lack of understanding, presumably on the part of the FHEO staff responsible for the drafting of the rule, of even the basic entity types that will be submitting AFHs. Given the complex nature of HUD program operations, it is essential that the staff charged with reviewing the AFH understand the myriad requirements program participants face, not just fair housing.

One of the goals that the Department described in the preamble to the tool is that the “assessment tool must clearly convey the analysis of fair housing issues and contributing factors that program participants must undertake in order for an AFH to be accepted by HUD.” While NAHRO believes that the questions in the revised tool are clearer than in the previous version, there remains substantial lack of clarity about the standard for acceptance of an AFH from HUD. According to the final AFFH rule, HUD will not accept an AFH that is “inconsistent with fair housing or civil rights requirements.” NAHRO is deeply troubled about the range of possible interpretations that could be ascribed to this standard.

Tool Continues to Focus on Protections beyond the Fair Housing Act

NAHRO is concerned that the analysis required by the tool continues to treat income as a protected class. For example, in many questions HUD asks whether persons have differences in access to opportunity based on familial status. NAHRO is concerned that the Department is using this indicator as a proxy for income, as unmarried households tend to have lower incomes. Aside from income, what other way could familial status have any relationship to access to “environmentally healthy neighborhoods?” For better or for worse, the duty to affirmatively further fair housing relates to the marital status of the household, not the income. This is but one example of a problem that is pervasive in the structure of the analysis.

In its response to public comments, HUD failed to acknowledge concerns raised by NAHRO in our previous letters that the AFH tool would require HUD grantees to fundamentally violate the Fair Housing Act. At its core, the Fair Housing Act prohibits discrimination on the basis of certain protected characteristics including race, color, familial status, national origin, or handicap. The Fair Housing Act, however, does not give additional protections to individuals within these categories; immigrants are not to be treated differently than native-born residents, women are not to be treated differently than men, families are not to be treated differently than individuals. The
purpose of the Fair Housing Act is to ensure that these characteristics are not the basis for discrimination. However, the proposed tool asks HUD program participants to do just that by requiring them to set policies on the basis of data related to various sub-groups of these protected classes. How can grantees make policy decisions on the basis of these characteristics without violating these protections?

*Lack of Clarity Regarding Local Knowledge*

NAHRO appreciates the added specificity limiting local data to that which “can be found through a reasonable amount of searching, are readily available at little or no cost.” However, NAHRO is concerned about the revised definition of local data. These validity of these data, which are generally combined with local knowledge, is not always “statistical.” It is not quite clear how the Department can at the same time consider the public participation requirements “as a tool to acquire additional information to reduce burden” while also requiring that local data meet an undefined Department standard of “statistical validity.” In fact, nowhere does the Department meaningfully address the burdens associated with collecting information through the public participation process and then responding to each comment received, including supplying an explanation for why each view was not accepted.

*Exposure to Legal Liability*

The AFH tool would shift a tremendous amount of uncertainty to HUD program participants. The AFH tool and the AFFH rule do not provide grantees’ with even a modicum of certainty as to when they have met their AFFH obligations. In commenting on the proposed AFFH rule, NAHRO and others noted their concern over the lack of concrete guidance and the absence of safe harbors, but the tool does nothing to remedy the uncertainty. For example, if a PHA were to set goals that involve revitalizing properties in minority neighborhoods, would they be contributing to segregation? Conversely, if the PHA were to concentrate its investments in neighborhoods with relatively small minority populations would it be contributing to segregation? If a PHA sets its payment standard below 110 percent of FMR in order to stretch its available funds to serve additional families, would it be guilty of concentrating poverty? By failing to provide clear guidance as to what kinds of activities are expected, the tool may set up unrealistic expectations on the part of residents, advocates, and the general public. Contrary to the Department’s stated intention to reduce litigation, uncertainties such as these are pervasive throughout the rule, thereby increasing the likelihood of expensive, protracted litigation on the basis of grantees’ AFH submissions.

Justice Kennedy’s *Inclusive Communities* opinion also recognizes the importance of creating new opportunities as well as revitalizing disinvesting neighborhoods, noting that “the FHA does not decree a particular vision of urban development” and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.” Despite language added to the preamble of the AFFH final rule indicating that HUD encourages a balanced approach between place-based solutions and mobility initiatives, such a balance is not easily
found in the regulatory text. NAHRO is concerned that safeguards ensuring that such a balance, in keeping with the Supreme Court’s opinion, are not embedded in the AFH or AFFH final rule.

Specific Comments about the Revised Tool

-The AFH should not require that historical analyses date back to 1990. A more appropriate standard would be dynamic instead of static, requiring data from a certain number of censuses rather than always requiring that program participants reach back to 1990. A static standard will result in an increasingly long historical analysis as time passes.

V(A)(1): This question is far too broad, giving respondents no parameters around which to describe demographic patterns. What level of detail is the Department seeking? Besides providing generally interesting information, what purpose does the question serve that is not addressed through other questions? NAHRO believes that this question is duplicative of the detailed questions contained in V(B) and should be eliminated.

V(B): This section conflates “access” with “ability to attain.” While “access” connotes the general availability of a certain thing, the questions in this section seek information about whether or not persons actually attain them. These outcome measurements mask the influences of confounding factors, including individual behavior, which can determine which of the available opportunities a person participates in. For example, if charter school enrollment is open on an equal basis to all students through a lottery system, but only some students apply, does that signify disparities in access?

V(B)(3)(1)(a): This is not only a subjective question, but also one that requires data which is not readily available. For example, how would a program participant know about the educational opportunities accessible to children from families in which parents are married or unmarried? Many of HUD’s program participants, particularly PHAs, will not only have no control over school enrollment policies, but are also unlikely to have readily available information regarding what those policies even are.

V(B)(3)(1)(b) and V(B)(3)(1)(c): Aside from issues of transportation, NAHRO believes the only way in which a person’s place of residence can be shown to determine his/her access to jobs and labor markets is with respect to issues of transportation. While it is certainly true there are high incidences of other issues like low educational attainment or criminal backgrounds, it is unfair to suggest the impact of these factors on a person’s ability to access jobs is the result of the location of their residence. The Department should not conflate location with other factors, unrelated to housing, that may limit a person’s ability to secure employment. As a result, NAHRO recommends that question V(B)(3)(1)(b) be eliminated.

V(B)(3)(1)(e): This is a subjective question. There are no generally understood, objective standards for what makes a neighborhood “environmentally healthy.”
V(C): As discussed previously, this question should be entirely eliminated for entitlement communities. Only the owners of assisted housing should be required to analyze their own housing, given that they are the only entity with control over the property.

VI(2): As previously discussed, this question is simply untenable as constructed. Earlier sections of the AFH require program participants to identify fair housing issues over which they have no control, but this section requires that the program participant set goals for each of these issues. What types of goals does the Department envision these agencies will do?

As always, NAHRO is appreciative of the opportunity to comment on this important notice. We look forward to continuing our work together to find a reasonable, appropriate mechanism for furthering the goals of the Fair Housing Act. Please do not hesitate to contact us if we can provide additional information or clarification.

Sincerely,

Tamar Greenspan
Director of Policy and Program Development