October 20, 2016

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


To Whom It May Concern:

On behalf of our agency members--who manage over 970,000 units of Public Housing and 1.7 million Housing Choice Vouchers--and the more than 20,000 individual members that make up the National Association of Housing and Redevelopment Officials (NAHRO), I would like to offer the following comments in response to the notice of proposed information collection (FR-5173-N-09-B) titled “Affirmatively Furthering Fair Housing: Assessment Tool for Public Housing Agencies-Information Collection: Solicitation of Comment 30 Day Notice Under Paperwork Reduction Act of 1995” and published in the Federal Register on September 20, 2016. NAHRO would like to thank the United States Department of Housing and Urban Development (HUD or the Department) for the opportunity to comment on this proposed tool.

NAHRO was pleased that HUD made certain changes to the Public Housing Agency Assessment of Fair Housing Tool (PHA Tool). NAHRO is glad that HUD removed Public Housing from the Fair Housing Analysis of Rental Housing. Since Public Housing Agencies (PHAs) that only administer public housing have only fixed units, the utility of doing an analysis of the surrounding rental market would have been negligible. On the other hand, the amount of time and staff capacity it would take to complete this section would have been significant. HUD’s removal of this requirement for Public Housing only PHAs is commendable. NAHRO was also pleased to see the inclusion of the Qualified PHA (QPHA) insert with the PHA Tool and to hear that HUD is currently committed to drafting a separate QPHA tool. Qualified PHAs should have the option to complete a streamlined assessment tool without being forced to collaborate with States. Qualified PHAs should be able to complete a streamlined process, while collaborating...
with other non-State entities or without collaborating at all. NAHRO looks forward to commenting on the QPHA tool.

While NAHRO remains committed to the goals of the Fair Housing Act (FHA) to both fight discrimination and to affirmatively further fair housing, NAHRO has serious concerns about the PHA Tool, should PHAs choose to complete their Affirmatively Furthering Fair Housing (AFFH) Assessment of Fair Housing (AFH) using this tool. The Fair Housing Act’s mandate to affirmatively further fair housing can be conducted in a way that both makes a substantial on-the-ground impact, while still balancing the concerns of interested stakeholders. NAHRO hopes that the Department will consider the feedback provided in this comment letter.

Furthermore, NAHRO, along with our industry partners, urges HUD to propose additional funding in its FY 2018 budget request, so that states, local jurisdictions, and public housing authorities (PHAs) may have the resources to develop, complete and begin to implement their AFH plans.

This comment letter is divided into three major sections. The first section details some of NAHRO’s larger concerns with the implementation of this tool. The second section delves into specific issues with the PHA tool and addresses several HUD requested questions. The third section is a short, non-exhaustive, list of recommendations that NAHRO proposes to improve the tool.

1. NAHRO’s Broad Concerns

NAHRO’s broad concerns reflect general points about the PHA tool that should be rethought. Many of these overarching comments will apply to the other tools too and would require a substantial rethinking of the tool to be implemented properly.

A. Inappropriately Prioritizing Planning Priorities

Since the tool still does not take into account resource availability, it forces PHAs to prioritize fair housing activities. For all other affordable housing activities, PHAs must consider available resources (e.g., when deciding to make an investment in capital). The tool forces PHAs to set goals and take “meaningful actions” towards those goals irrespective of the other needs or priorities that the PHA may have. This centralized directive does not take into account a community’s local needs or priorities in how the PHA or community wants to allocate its scarce resources. The tool also ignores the real-world constraints under which entities operate. The question of how a PHA balances its mandate to continue meeting local needs, while being forced into an isolated goal-setting process that ignores these priorities is one that every PHA will have to face.

B. Administrative Burden

As it has in the past, NAHRO would like to stress that the administrative burden imposed by this tool is excessive. Resources that could be put into housing related tasks are being funneled into completing the tool and its associated administrative tasks. The notice asks “[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.” NAHRO still does not believe that the information asked by the PHA tool and required by the AFFH rule is necessary to further the FHA’s mandate to affirmatively further fair housing.

Additionally, although HUD claims that this tool can be completed without the use of a consultant, in our discussions with our membership, we have found that most PHAs will be using a consultant. For many PHAs, the rule imposes a jurisdictional analysis that is too complex to be effectively completed by staff without specific statistical and mapping knowledge. As housing providers, most staff at PHAs have comparative advantages that lie in providing affordable housing services, but not providing complex statistical data analysis. Forcing PHA staff to do this analysis is an inefficient use of their scarce time.

C. Issues Outside the Scope of Authority and Expertise of PHAs

NAHRO still objects to those portions of the rule that require analysis outside the scope of authority for the entity that is filling out a section of the AFH. While the rationale provided by HUD in this analysis is that there are other entities that can help achieve the goals, it does not make sense to have the entity that does not have authority to achieve these goals conduct the analysis. This is both because that entity would not have specialized knowledge of the field and because equitable considerations would stress that the entity responsible for achieving the goals should be the one conducting the analysis. Setting fair housing goals is another area where this concern occurs. PHAs must set fair housing goals for activities that are outside of their scope of control. Since goals may be in topic areas that are outside their day-to-day experience, a PHA may misjudge the extent to which achieving those goals is feasible (e.g., a public housing agency may not know how difficult or easy it is to change local transportation policy because it lacks expertise in policy matters and transportation matters).

D. Lack of Additional Resources

The AFH does not recognize the extreme constraints many participating entities face. By allocating resources to complete this process, participating entities are not allocating resources somewhere else. Those resources could be used to provide additional housing assistance. While NAHRO is aware that the Department does not control the federal budget, which is within the purview of Congress, NAHRO notes that the FY 2017 President’s budget proposal did not request additional money for PHAs and other participating entities to complete their AFH tools. NAHRO believes that HUD should request additional money for PHAs to complete this tool in its next budget proposal. Requesting additional money is completely within the scope of HUD’s control and would be a strong indicator to all interested stakeholders and Congress that HUD is serious about affirmatively furthering fair housing and is willing to commit resources to the mandate.

E. Legal Implications

Although HUD explicitly noted in the Notice that the Assessment Tool is a planning document and that failure to achieve a goal set in an AFH does not necessarily mean the program
participant has not met its statutory obligation to affirmatively further fair housing, NAHRO still remains concerned about the potential legal implications of the AFH for PHAs in the future. This concern does not necessarily stem from a fear of litigiousness on the side of HUD, but rather from community organizations that may use a PHA’s assessment of fair housing to highlight what they perceive as failures to affirmatively further fair housing on the side of the PHA, when these “failures” actually stem from concerns and issues outside of the control and jurisdiction of the PHA. There are concerns that these groups may not view the AFH as a planning document and instead determine that a PHA should be required to meet any and all goals set forth in a PHA fair housing plan without considering outside factors and actions taken by the PHA.

E. Inaccessibility of HUD Data

NAHRO has previously expressed concern regarding the inaccessibility of HUD data to assist with the completion of the tool. Although NAHRO is still concerned that the level of statistical sophistication required to understand some of the information provided is at odds with the emphasis on public participation, NAHRO was pleased that HUD included enhancements for PHAs in the data and mapping tool. These enhancements are a step in the right direction, however NAHRO believes that the Department should remember that for most employees that work at PHAs, the work that an AFH requires them to do will lie outside the scope of their normal activities in providing affordable housing services. It will require them to stretch their work related skillset in a new way. NAHRO encourages the Department to remember this as they continue designing the tool and they think about the most user friendly way to present complex demographic patterns.

2. Specific Concerns About the PHA Assessment of Fair Housing Tool

NAHRO has specific concerns about how this tool is structured and implemented.

A. HUD Instructions Can Be Improved by Providing a Streamlined Guidance Document and Sample Completed AFHs

A streamlined set of instructions that includes a broad overview of the AFH process as it applies to PHAs would go far in eliminating lingering confusion about the process. This streamlined guidance document can provide a broad overview of the AFH process to PHAs, illustrate their various options among the other tools, and do a quick walkthrough of the process of completing the PHA tool. While NAHRO understands that there are instructions included in the PHA AFH tool and there is an AFFH guidance book--which is over a hundred pages long--NAHRO feels that a shorter pamphlet that explains the difference between the tools, provides an overview of filling out the PHA AFH, and then provides links to all the other sources of information (guidance, regulations, etc.) would be a less intimidating document that busy officials would have time to read.

Another approach to clarifying what is required in particular AFHs is to create sample completed AFHs utilizing each of the tools. These AFHs should be completed for areas that are representative of the diversity of our nation (e.g., a large city, a medium-sized city, a small rural area, a large rural area where very little HUD provided data is available, etc.). These sample
documents which should be made available on HUD’s website. They would show the level of analysis required by various entities as they attempt to complete their AFHs. The sample documents must address scenarios in rural areas where there are no racial and ethnic concentrated areas of poverty (R/ECAPS) and scenarios where there is no meaningful HUD provided data and the local community participation process has not yielded usable local data or local knowledge.

B. The PHA Tool Should Only Incorporate Contributing Factors That Are Related to Housing

The Department’s AFH tool for PHAs should only suggest using contributing factors that are housing-related. Housing-related contributing factors would be contributing factors of which PHAs would have the most knowledge, since those contributing factors are within the scope of their expertise. In doing this analysis—throughout the PHA AFH tool—PHAs are required to infer a causal connection between the contributing factor and the undesirable outcome (e.g., segregation, the creation of a R/ECAP, a disparity in opportunity, etc.). Public Housing Agencies are best suited to infer a causal connection between a contributing factor and an undesirable outcome when they are knowledgeable about the contributing factor. Asking PHAs to infer causal connections between non-housing-related contributing factors and undesirable outcomes will not lead to appropriate fair-housing goal setting.

For example, PHAs are not the entities best situated to know whether “the availability, type, frequency, and reliability of public transportation” are important factors in creating a disparity in access to opportunity in any particular area. Most PHAs will not have staff that are well versed in the intricacies of transportation planning, thus they are not well positioned to know whether there’s a causal connection between the type of public transportation and a disparity in opportunity. This is especially true for communities that have minimal to non-existence public transit options.

While NAHRO acknowledges that some PHAs are large, sophisticated entities with departments that may have staff that can make these sorts of causal inferences, most PHAs will not have this ability. As the list of contributing factors is non-exhaustive, the very few PHAs that may be able to judge whether transportation or education are appropriate contributing factors can add them to their specific AFH independently.

NAHRO suggests including a “complexity of federal regulations” contributing factor, since the current structure of regulations is one of the primary reasons that many landlords do not participate in the Housing Choice Voucher program and this is increasing the severity of fair housing issues in many jurisdictions.

C. R/ECAPs in Rural Areas

While the concept of R/ECAPs makes sense in dense, urban cores, NAHRO is still concerned about how to appropriately define R/ECAPs in rural areas. The Department’s guidance states that “[g]enerally, in rural areas, poverty is more dispersed and segregation patterns often include fewer people of color. Due to these demographic differences, some rural areas may want to
explore how to define R/ECAPs in their areas.” NAHRO believes that HUD should provide suggestions for what PHAs, and other program participants, should do in these scenarios. These suggestions can be articulated in the instructions for the tool or in additional guidance that HUD may promulgate.

D. Use of Consultants

While many in our membership have stated that they will use consultants to complete the AFH process, many have also said that they are still looking into the cost of a consultant. Some PHAs have told NAHRO that they are not yet in a position to decide whether they will hire a consultant or not because they cannot accurately gauge the cost to complete an AFH because the AFH tools are themselves not complete, so it is difficult to decide which AFH the PHA will use and how much it will cost to complete it in-house. These PHAs have also stated that it is hard to know what the price of a consultant will be at this time. The AFH consultant market is still in its infancy, but all agree that given the complexity, the massive amount of time necessary to complete the various AFH tools, and the sophisticated levels of required analysis, there will be a large market of consultants. It is unclear whether the price of consultants will come down as the market for helping participating entities complete their AFHs develops. One member noted that current price quotes may understate the true cost of completing an AFH because many consultants do not understand the full complexity of completing an AFH. A final concern expressed by all PHAs is a worry that they will have a hard time choosing between consultants and figuring out which consultants are able to provide high-quality services.

E. HUD Should Make Sure That Field Offices Are Knowledgeable About the AFH Process and Tools

Our membership remains concern that the HUD’s field offices are not sufficiently knowledgeable about the AFFH rule and the tools that HUD is providing to complete the AFH. NAHRO encourages HUD to make every effort to make sure that field offices are prepared to assist PHAs and other entities as they are preparing their AFHs.

F. Good Faith Safe Harbor

HUD should include a good faith safe harbor clause specifying that if a PHA makes a good faith effort to comply with this regulation and submits an AFH, then HUD will not only accept the AFH, but also approve it.

3. NAHRO Recommendations

A. Modify the Qualification Threshold

NAHRO believes that the QPHA insert in the Assessment Tool should have a qualification threshold of (at least) 2,000 total units of public housing and Section 8, instead of 550 units. HUD estimates that the PHA Assessment Tool will take an average PHA 240 hours, or about 7 weeks, of administrative time to complete. Based on observations from NAHRO members, it is inconceivable that a housing authority with less than 2,000 units will have the staff capacity or
financial means to conduct and submit its AFH through the PHA Assessment Tool. By increasing the qualifying threshold to (at least) 2,000 total units or less, many additional PHAs would be afforded the opportunity conduct an assessment of fair housing that is less administratively burdensome (compared to the PHA Assessment Tool). Additionally, this change would be beneficial to HUD staff due to the reduction in the overall number of separate AFH submissions that the Department must regularly review.

B. Streamline and Clarify Questions

The Department could better facilitate and encourage collaborations (especially among program participants that do not anticipate collaborating) by further streamlining and clarifying, to the greatest extent possible, the questions asked in the QPHA inserts. This would incentivize program participants with limited capacity to collaborate with a local government, instead of relying on consultants.

C. Public Supported Housing – Disparities in Access to Opportunity

NAHRO recommends the “Disparities in Access to Opportunities” subsection of the “Publicly Supported Housing” section of the QPHA insert should be optional to complete for those areas without good HUD-provided data, recognizing that QPHAs have scarce staff capacity and those staff that they do have do not have the appropriate skillsets to meaningfully analyze transportation or education policies. Many QPHA only a few individuals on staff, often times they are part-time employees or they do not have the expertise for completing an AFH. Asking these severely time-constrained staff to analyze infrastructure patterns, transportation policies, and school enrollment policies will not lead to a meaningful analysis. Staff will either have to spend time conducting research or contacting other organizations to request information. Typically, there are no pre-existing relationships, so ensuring that another entity responds in a timely manner will be a challenge, if they respond at all. This type of analysis will likely fall outside the scope of any of the day-to-day activities of the typical employee at a QPHA and will require more time, effort and a higher level of competence compared to their normal and typical daily activities related to providing affordable housing services.

In the instructions to the AFH, HUD states the following:

*Describe the extent to which assisted households of the QPHA have access to the opportunity assets discussed above. Identify any disparities in access to each opportunity by protected class group in the service area (and region, if applicable).*

“Access” in this context encompasses consideration of infrastructure or policies related to where a person lives that impact an individual’s ability to benefit from an opportunity, such as available transportation to a job, school enrollment policies, program eligibility criteria, or local labor laws. The Department also notes that “local data and local knowledge, including information obtained during the community participation process, may be particularly useful in answering these questions.”
NAHRO is concerned about the ability of QPHAs to consider infrastructure or policies related to where a person lived that impact an individual’s ability to benefit from an opportunity, such as available transportation to a job, school enrollment policies, program eligibility criteria, or local labor laws. QPHAs located in rural areas or other areas with no HUD-provided data may be forced to rely on local data and knowledge. However, there may be no meaningful local data for the same reasons that HUD was not able to provide data--it does not exist. In many rural areas, the community participation process is unlikely to yield useful local data or knowledge because the service area is large, but sparsely populated or because it is hard to collect data for other reasons, this will hamper meaningful analysis.

NAHRO appreciates the opportunity to provide comments on this important Notice and HUD’s efforts in working to streamline and reduce the level of burden PHAs face in conducting their Assessments of Fair Housing. Although NAHRO commends HUD for the steps they have taken thus far, the Tool remains problematic. The Tool requires PHAs to dedicate limited resources to an exercise identifying concerns that remain outside of the control of the PHA. In light of the historically low levels of funding PHAs are currently receiving, PHAs will need some sort of financial assistance in completing their assessments of fair housing, even with HUD’s changes to the PHA Tool. We look forward to continuing our work together to find a reasonable and appropriate mechanism for furthering the goals of the Fair Housing Act.

Sincerely,

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