

November 25, 2014

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

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

Dear Office of General Counsel:

The NAACP Legal Defense & Educational Fund, Inc., (LDF) is pleased to submit comments on the Affirmatively Furthering Fair Housing Assessment Tool proposed by HUD to accompany its revised procedures for compliance by HUD program participants with the “affirmatively furthering” obligation of the Fair Housing Act of 1968.

For years, LDF has urged HUD to adopt a more rigorous analysis in evaluating compliance by its program participants with their obligations to affirmatively further fair housing. Section 3608 of the Fair Housing Act—which requires HUD’s programs and activities to be administered in a manner that affirmatively furthers the goals of the Act—is a critical tool for combatting the entrenched patterns of residential segregation which continue to exist today. In addition to banning discriminatory housing practices, Congress adopted this proactive obligation to specifically redress the federal government’s own role in creating and perpetuating residential segregation through redlining, underwriting, and the siting and admissions policies of public housing. Given the government’s own longstanding contribution to racially segregated housing conditions, it is incumbent upon HUD to robustly counteract the effects and vestiges of these policies which still pervade our communities today. Richard Rothstein’s recent and powerful description of how the current racial segregation in Ferguson, Missouri emanated from the “explicit intents of federal, state, and local governments to create racially segregated metropolises” is a stark testament to the present-day impact of these harmful governmental policies.¹

The Assessment Tool is a vital component in revising and strengthening the evaluations HUD program participants must conduct as part of their compliance with the Fair Housing Act. We appreciate HUD’s strong emphasis on examining patterns of housing segregation and identifying its determinants. LDF believes that the Assessment Tool should be improved in the following ways:

¹ Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles* 1, Economic Policy Institute (2014), available at <http://www.epi.org/publication/making-ferguson/>.

1. The Assessment Tool should include more detailed requirements regarding program participants' use of local data and local knowledge.

LDF supports the requirement that HUD program participants must “use available local data and local knowledge to inform their assessments” of the extent of racial segregation and other fair housing indicia in their jurisdictions.² Certainly, the collection of local information—both historical and current—is key to developing an effective fair housing plan and will promote reliance on community engagement. We recommend that the Assessment Tool clarify this requirement by listing examples of the types of available local data and knowledge which program participants should use in their assessments. This data could include but is not limited to: school demographic and performance data, state and local health department data by neighborhood, environmental data, data about access to transportation, municipal services data, data about the availability of community-based services from state and local Medicaid agencies and disability services departments, unemployment data, incarceration rates, data regarding homelessness, and reports and studies already completed by state and local research and advocacy groups. Additionally, as discussed below, program participants should actively seek local data from community stakeholders during the public participation process. Failure to do so should result in HUD finding that the Assessment of Fair Housing (AFH) is “substantially incomplete and therefore unacceptable.”³

2. The Assessment Tool must require program participants to identify action steps to achieve their fair housing goals.

In our comments regarding the proposed affirmatively furthering fair housing regulation, LDF applauded the replacement of the Analysis of Impediments with the more rigorous review of a HUD program participant's fair housing plan required by the AFH. We stressed the importance of HUD's requirement that participants take proactive steps and meaningful action to foster integrated housing and to promote access to community assets: “It is critical that participants be asked to identify the strategies by which their fair housing compliance will be measured.”⁴ We also urged the adoption of mechanisms by which to measure those steps or actions by participants to ensure that the articulated fair housing goals are in fact realized.

The Notice for the Assessment Tool states that “the new approach is designed to assist program participants in analyzing their fair housing environment, identifying fair housing issues and the related determinants, setting and prioritizing fair housing goals, and, ultimately, *taking meaningful actions to affirmatively further fair housing*.”⁵ To that end, the Assessment Tool must be designed to assist program participants in developing a plan that not only complies with the procedural requirements of the AFH, but is substantively designed to achieve meaningful fair housing opportunity.

² Affirmatively Furthering Fair Housing Assessment Tool: Solicitation of Comment—60-Day Notice Under Paperwork Reduction Act of 1995, 79 Fed. Reg. 57949, 57951 (Sept. 26, 2014).

³ *Id.*

⁴ Letter from Leslie Proll, Director, Washington, D.C. Office of the NAACP Legal Defense and Educational Fund, Inc. to the Office of the General Counsel, Department of Housing and Urban Development (Sept. 17, 2013), available at http://www.naacpldf.org/files/case_issue/Fair%20Housing.PDF.

⁵ *Id.* at 57950 (emphasis added).

We are concerned that, although Part V of the proposed Assessment Tool requires program participants to identify fair housing goals, nowhere does the Assessment Tool require them to identify and describe the specific actions they will take to achieve these goals and further fair housing within their jurisdictions. In fact, the Notice states that “actions and funding decisions are not a requirement of [the Fair Housing Goals and Priorities] section,” but that “the objective of the section is to concretely think through how significant fair housing determinants and fair housing issues would be addressed.”⁶ LDF disagrees with this approach. According to the Notice, a program participant’s AFH should include an Executive Summary that “present[s] a general overview of the AFH’s findings and recommended actions,”⁷ but such statement is incomplete without an affirmative requirement in the Assessment Tool that program participants describe their proposed action steps in connection with their fair housing goals. Thus, HUD should add such a requirement to the final Assessment Tool in order to achieve the purpose of the proposed rule. The development of concrete proposals to combat the perpetuation of segregation and promote racially diverse and inclusive communities must remain the primary objective of this regulation, just as those concepts have always been central to the purpose of the Fair Housing Act.

3. HUD must strengthen public participation provisions in the Assessment Tool.

HUD has specifically requested comment on the Community Participation section of the Assessment Tool. We are pleased that HUD recognizes the vital role of citizen and community participation both in obtaining local information and in ensuring that the voices of local stakeholders meaningfully contribute to the development of a jurisdiction’s plan for improving housing opportunities. However, we believe that this section is incomplete and insufficient to ensure that community stakeholders and others with important information and views to contribute will be actively involved in the development of the AFH.

Put simply, the Community Participation section should require much more information about community engagement. First, clarification is needed about the types of outreach program participants are expected to conduct. For example, the Assessment Tool should provide a non-exhaustive list of state and local civil rights organizations to be contacted and asked for comments or data, such as the NAACP and National Urban League, fair housing organizations, local civil rights lawyers, local legal services offices, education advocacy organizations, and other organization or entities which address issues of race discrimination at the local level. Importantly, a program participant’s description of outreach activities should not only highlight efforts to reach limited English proficient populations or people who are disabled, as currently required by the proposed Assessment Tool, but also should include a description of specific activities designed to reach communities of color, ethnic minorities, low-income communities, and *all* stakeholders in a community’s fair housing planning decisions. Second, the Assessment Tool should require detailed reporting on outreach activities conducted, including the target audiences reached; the success of the outreach, i.e., the number of persons contacted and participating; and the substantive nature of the contribution by community members. If the data, information, or views of the community member or group are not used in the AFH, the reasons therefore should be identified. Finally, it is imperative that local housing and housing-impacted policies and data, as well as HUD data tools and maps, are publicly accessible through websites

⁶ 79 Fed. Reg. at 57954.

⁷ *Id.* at 57951.

and/or other means in order to maximize community participation. While all public comments should be summarized (with agreement or disagreement noted) and made publicly available, we urge HUD to encourage jurisdictions to address information obtained through the public comment process directly in its analysis under the AFH, rather than merely listing the comments offered.

4. The Analysis section of the Assessment Tool must include a more comprehensive set of measures of segregation.

The Analysis section of the Assessment Tool calls for program participants to consider the dissimilarity index for the geographic area(s) they cover, which shows how many people of a particular racial or ethnic group in any given census tract would have to move in order for the demographic composition of that tract to resemble the demographic composition of the entire jurisdiction. While the dissimilarity index may be useful in identifying racially-isolated census tracts in a racially diverse jurisdiction, in a jurisdiction in which one single racial or ethnic group makes up the overwhelming majority of the population, the dissimilarity index is not a meaningful metric. In such hyper-segregated jurisdictions, HUD should require program participants to calculate the dissimilarity index for a larger geographic area, such as a county or region, and analyze whether there are additional action steps the program participants can take to decrease segregation and increase access to open, integrated housing in areas of opportunity for residents of their jurisdictions. This must include an analysis of the steps program participant will take to increase access to predominantly white communities and areas of extreme exclusion or concentrated privilege.

Additionally, the Assessment Tool should incorporate the use of other measures of segregation, including the exposure index (which measures the proportion of residents of a particular race as compared to residents of another race within a jurisdiction) and a race and income index (which measures the difference between the predicted and actual share of the population in the jurisdiction for various racial or ethnic groups, adjusted for income). Including such measures will provide a more complete picture of segregation within a jurisdiction than will reliance on the dissimilarity index alone.

Numerous other data points should be included in any analysis of the extent of local segregation. First, historical policies and practices must be part of the equation. As Richard Rothstein's study of racial segregation in Ferguson, Missouri demonstrates,⁸ the impact on current housing patterns of decades of governmental and private redlining, exclusionary zoning and race-based urban renewal, development, or transportation decisions is discernible at the local level.

HUD should also require program participants to take advantage of the extensive information maintained at the local level with respect to racial composition of public schools. This includes race and poverty demographics for each elementary school, middle school, and high school in the jurisdiction. It also includes information on the racial identification of local schools, district lines and attendance zones, funding disparities, and school quality. The Analysis should also consider the existence of current or recent federal court orders or consent decrees regarding the elimination of segregation or other racial discrimination, including school desegregation orders.

⁸ See generally Rothstein, *supra* note 1.

Where such orders or decrees exist, program participants should be required to assess their content for relevant information useful to the Analysis such as the duration of the order or decree, the basis for the order, whether and how the population of the jurisdiction has changed, claims or findings that the order has been violated, and how the program participant will increase housing opportunity in a manner that facilitates compliance with existing court orders or consent decrees.

5. Program participants should consider the location of publicly-assisted housing across the region as well as patterns of segregation within each program.

Given the federal government's own role in creating segregated public housing and the continuing obstacles which exist today to full integration of all publicly supported housing programs, LDF believes it is imperative that the Assessment Tool include comprehensive analysis of publicly supported housing patterns. Federally-assisted housing, in the form of subsidized units or subsidies provided to tenants, clearly provides a significant opportunity for overcoming racial concentrations of poverty, particularly when coupled with counseling or mobility assistance.

LDF agrees with the Assessment Tool's requirement that local patterns of segregation within each government-assisted housing program should be identified. However, the analysis should be required not only within a program participant's jurisdiction, but for all programs on a regional level in each program participant's AFH. Our recent case, *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005), demonstrated that, due to high levels of segregation and concentrated poverty within cities, an exclusive focus on affordable housing needs within specific jurisdictions often does little to address broader patterns of housing segregation. The Assessment Tool should require program participants to consider the location and occupancy of publicly-assisted housing regionally and to determine what steps they can take to ensure that public housing residents have meaningful housing choice in racially and ethnically integrated communities "offering vital assets such as quality schools, employment, and transportation."⁹

6. The Assessment Tool should require program participants to identify communities undergoing development or gentrification and redevelopment and to consider how to maintain affordable housing opportunities for the residents of those communities and/or create additional affordable housing.

LDF is pleased to see, under the subheading "Determinants of Segregation/R/ECAPs" in the Assessment Tool, that program participants must consider, among other factors, "economic pressures, such as increased rents or land and development costs" and "major private investments" that may contribute to neighborhood segregation. However, this section should also explicitly refer to gentrification, which often involves the influx of wealthier, predominantly white residents to a previously "undesirable" or economically-disadvantaged community whose occupants were or are predominantly people of color.

When economically-disadvantaged communities of color experience increased investment and economic development, low-income residents of those communities are often excluded from the

⁹ Affirmatively Furthering Fair Housing, Proposed Rule, 78 Fed. Reg. 43710, 43716 (July 19, 2013).

opportunities that development brings. In neighborhoods that are gentrifying or are targeted for government redevelopment, program participants should be required to identify planned and existing affordable housing and determine whether preservation of such housing, or the construction of additional affordable housing, would promote increased racial and ethnic integration in light of demographic shifts in the neighborhood's population. Conversely, if the preservation or construction of affordable housing in a redeveloped community would not promote integration, HUD should require program participants to plan to create affordable replacement housing in other integrated communities for residents who suffer economic displacement resulting from gentrification. As discussed above, any analysis of affordable housing or plan to create additional housing opportunities for residents displaced by gentrification should consider housing opportunity and segregation on a regional level.

7. Consideration of disparities in access to community assets is an important component of the Assessment Tool.

LDF applauds the Assessment Tool's inclusion of factors regarding access to community assets and exposure to adverse community factors. Any comprehensive analysis of fair housing opportunity by a program participant must necessarily include an examination of how residential location impacts access to good jobs, quality schools, health care and transportation. We agree with the suggestions for inclusion of additional data made by the Poverty & Race Research Action Council and others in their November 4 comment letter.

8. The Fair Housing Compliance and Infrastructure section must require the identification of all information relevant to fair housing enforcement and education.

The Assessment Tool should require significantly more information in its section on Fair Housing Compliance and Infrastructure. First, program participants should be required to identify all current or recent administrative or judicial proceedings relating to fair housing or civil rights, not just those which are unresolved. For purposes of identifying local obstacles to promoting fair housing as well as trends and emerging issues, it is important to capture for the entire jurisdiction the number, type and resolution of fair housing complaints filed in the past ten years by public enforcement agencies, private organizations, or private individuals. Program participants should fully analyze this information along with any housing market audits or other research conducted regarding local segregation patterns.

Program participants should also be required to conduct a comprehensive assessment of the capacity and performance of the local fair housing infrastructure, including both public agencies and private organizations. With respect to resources provided to local fair housing agencies or organizations, it is important to identify the amount and consistency of funding, the level of staffing and training, and an assessment of the capacity for investigation and/or education and outreach. The jurisdiction should be able to answer whether it can, with current resources, educate both housing providers and those seeking housing about their rights and responsibilities under the fair housing laws. Program participants should identify all forms of possible local assistance on fair housing issues; many jurisdictions are not fortunate enough to have local fair housing agencies or organizations. The definition of those who could be expected to offer assistance to program participants should be expanded to include various types of support

potentially available in a particular community such as local civil rights attorneys, legal services lawyers, U.S. Attorney offices, local civil rights leaders, other advocacy or community-based organizations, and university-based or other expert resources.

HUD should clarify that program participants should include in their compliance summary information related not only to classes protected under the federal Fair Housing Act, but also any additional classes established under applicable state or local laws. Further, program participants should discuss whether the complaint data collected by any source suggest the need to provide legal protections for any groups not currently covered.

LDF strongly supports HUD's laudable efforts to strengthen compliance by programs and funding recipients subject to the affirmatively furthering fair housing requirement of the Fair Housing Act. We encourage the adoption of our recommendations for revisions to the Assessment Tool in order to ensure that the goals of this core provision of the Fair Housing Act are finally realized.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Proll", written in a cursive style.

Leslie Proll, Director, Washington D.C. Office
Veronica Joice, Fried Frank Fellow