



30-30 Northern Blvd., Ste. 302 | Long Island City, NY 11101

p: 212-400-8201 | f: 212-400-8203

www.fairhousingjustice.org

July 23, 2018

Office of General Counsel, Regulations Division
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, D.C. 20410-0001

Re: Docket No. FR-5173-N-17; Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments

Submitted via [Regulations.gov](https://www.regulations.gov)

Dear Office of General Counsel:

These comments are submitted on behalf of The Fair Housing Justice Center to express our strong opposition to HUD's May 23, 2018 Federal Register Notice (Notice), "Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments," which effectively suspends the implementation of the 2015 Affirmatively Furthering Fair Housing (AFFH) Rule until after October 2020. The Fair Housing Justice Center (FHJC), a nonprofit civil rights organization based in New York City, is dedicated to eliminating housing discrimination promoting policies that foster open, accessible, and inclusive communities, and strengthening enforcement of fair housing laws. The FHJC serves all five boroughs of New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester, over 3% of the United States' population.

Removing the Assessment Tool Effectively Suspends the AFFH Rule

The Fair Housing Act ("FHA" or "Act") does more than prohibit public and private housing discrimination. When the Act was originally enacted in 1968, Congress recognized that government policies had played a significant role in entrenching patterns of residential segregation. Consequently, Congress required that the Department of Housing and Urban Development take proactive actions to undo the harms that these government policies had created. Explicitly Congress required all federal executive agencies to "administer their programs and activities relating to housing and urban development...in a manner affirmatively to further the purposes of this [Act]."¹ The language of the Act that "instructs HUD to administer its grant programs so as 'affirmatively to further' the Act's fair housing policy requires something more

¹ Fair Housing Act, 42 U.S.C. § 3608(d) (2012).

of HUD than simply to refrain from discriminating itself.”² In fact the Act “reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”³ For many years HUD failed to formally implement this part of the Act by not engaging in formal rulemaking. This lack of clear guidance from HUD led to many grantees not engaging in any meaningful fair housing activity.⁴ The AFFH Rule and Assessment Tool (“Tool”) developed by HUD attempted to remedy this error and provide a framework for HUD grantees to legitimately engage in AFFH activities.

While the current notice is less extreme than the January 2018 full suspension of the AFFH rule, the effect is constructively the same. Withdrawing the Assessment Tool for Local Governments removes the questions and instructions required for grantees to complete the Assessment of Fair Housing (“AFH”), rendering the AFFH process meaningless

HUD Provides No Rationale for this Withdrawal

In both the initial AFFH Rule suspension and this notice, HUD asserts that grantees need more time and more technical assistance to compile their AFH. Accepting for the moment, that this statement is factually accurate, HUD has put forth no plans or timeline as to how or when it plans to provide such support and guidance. Rather than make the effort and investment in providing the additional support to grantees, HUD appears more interested in abandoning the entire effort. The FHJC questions whether HUD has any intent to move forward with meaningful efforts to affirmatively furthering fair housing.

The evidence HUD points to in withdrawing the Tool is woefully illogical. HUD relies upon the inadequacies in AFH that grantees had submitted to date. HUD mentions an assessment that only allowed for three days of public comment instead of the required minimum thirty days.⁵ This example shows only that the grantee jurisdiction referenced did not comply with the required notice and comment period, not that there is any problem or deficiency with the Tool. HUD continues on to explain that “many of the 49 AFH submissions identified contributing factors which did not logically connect to the analysis of fair housing issues undertaken.”⁶ And again these issues are not caused by the Tool, but rather by years of inadequate Analysis of Impediments (AI) processes that have left jurisdictions unable to appropriately identify barriers to fair housing. If anything, these deficiencies provide compelling evidence of the urgent need to move forward with the AFH submissions with additional guidance provided by the Assessment Tool. Instead of providing additional education and technical assistance to grantees to aid them with their submissions, HUD has apparently opted to abandon the AFH process and remove the guidance contained within the Assessment Tool from its website, rendering grantees helpless to effectively implement their legal obligations.

² NAACP v. Sec’y of HUD, 817 F.2d 149, 154 (1st Cir. 1987).

³ *Id.* at 155.

⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (2010).

⁵ Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23922, 23924 (May 23, 2018).

⁶ *Id.*

The AI Process Solves None of the Problems HUD Identifies

In withdrawing the Tool, HUD instructs grantees to use the AI process indefinitely. The issues identified by HUD as reasons to withdraw the Tool are not at all addressed by use of the AI process. HUD alleges that the Tool caused grantees difficulty in developing a schema that would measure their progress in affirmatively further fair housing, and this misunderstanding resulted in certain AFH being returned to the grantee. However, HUD has not adopted any metric to measure whether this (a few inadequate AFH) is better or worse than the AI process because, as HUD admitted it “generally did not require AIs to be submitted to HUD for review.”⁷ In fact HUD’s complaints about the Tool are no different than those complaints about the AI process. HUD grantees had similar issues with the AI process, which HUD was well aware of for many years. The Government Accountability Office noted in 2010 that “HUD’s limited regulatory requirements and oversight” resulted in HUD grantees failing to maintain their obligations or ensure “that their AIs serve as effective planning tools.” The GAO went on to note that despite HUD requiring updated AIs every five years, 29% of the AIs examined were written more than five years ago, and 11% were written more than ten years before.⁸ The AFFH Rule was in fact issued to remedy the weaknesses and failure of the AI process. *See* 80 Fed. Reg. at 42, 348. Now instead of working with grantees to help them identify barriers to fair housing in their area, HUD is choosing to return to a process that results in grantees simply not completing AIs or, even when completed, taking no meaningful action to affirmatively further fair housing by removing impediments to housing choice and reducing residential segregation.

In our seven-county service area, we have experienced first-hand how the preparation of an AI does not assure a grantee would affirmatively further fair housing. Westchester County was sued in 2007 alleging that it had falsely certified compliance with its AFFH requirements. While the County had been writing and updating AIs to receive over \$50 million in HUD funds, it never examined “race at it pertaine[d] to impediments to fair housing choice.”⁹ Despite a court-ordered consent decree in 2009 requiring the County to build 750 units of affordable housing in predominately white communities, Westchester County continues to suffer from deeply entrenched patterns of segregation, perpetuated by some HUD grantees.

In the last several years, FHJC has brought several lawsuits in the New York City region based on racial discrimination to attempt to ameliorate ongoing segregation. Our lawsuits have not been solely focused on landlords, real estate brokers, or other private housing providers; we have brought suits against three Westchester municipalities alleging racial discrimination: Town of Yorktown, Town of Bedford, and Town of Eastchester. In our case against the Town of Bedford, we alleged that residency preferences in the Town’s middle income housing perpetuate segregation in Bedford, a Town that is overwhelmingly majority white. That case settled in June 2018 with the Town agreeing to eliminate the discriminatory preferences from its zoning code. We currently are involved in litigation against the Town of Eastchester. Our complaint was recently amended to allege both disparate impact and intentional discrimination under the Fair Housing Act as a result of Town’s administration of its Housing Choice Voucher Program and

⁷ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42275 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

⁸ *See* GAO-10-905 at 9.

⁹ *Anti-Discrimination Center vs. Westchester County* 668 F.Supp.2d 548, 564 (SDNY 2009).

senior housing zoning classification. HUD's Assessment Tool gives guidance and oversight that would aid in identifying, preventing, and eliminating policies and practices by grantees, such as these Towns, that continue to perpetuate residential segregation. Many of these policies and practices have gone unchecked for decades, which has allowed the New York Metro Area to retain its dubious distinction as being one of the most segregated areas in the country.

Withdrawal of the Assessment Tool Is Consistent with HUD's Continuing Failure to Vigorously Enforce and Effectively Implement the Fair Housing Act

After examining the evidence that HUD has put forth in support of withdrawing the Tool and reinstating the AI process, it can only be concluded that the withdrawal is part of a concerted effort to not comply with the Act's affirmatively furthering fair housing requirement. Since the appointment of HUD Secretary Carson, HUD has been consistently chipping away at enforcement of federal fair housing policy. The process began when HUD initially decided to illegally withdraw the AFFH rule altogether. That process was challenged, and HUD shifted to an approach that would instead render the AFFH rule meaningless. Additionally, HUD has frozen high-priority fair housing investigations and enforcement actions and is questioning the 2013 discriminatory effects rule. Regardless of the views of the current administration, the duty to affirmatively further fair housing is a long-standing statutory obligation that Congress has bound HUD to implement under the Act. To actively undermine the AFFH Rule by withdrawing this Tool is not within HUD's power. If Congress wishes to alter HUD's obligations, it is free to do so, but in absence of that action, HUD must continue to implement the affirmatively further fair housing provision of the Fair Housing Act.

Questions

In reviewing the notice and preparing our comments, some questions have become apparent:

1. Without the Assessment Tool, how would HUD ensure that future AIs will identify fair housing impediments and describe plans to remove them, in light of both the deficiencies identified by the GAO and the decades of failures to comply with the AI process in Westchester, Nassau and Suffolk counties as described in this comment letter?
2. While HUD identifies a number of factors that led to publication of this notice and the withdraw the of the Assessment Tool, the Tool only recently went into effective. What changes have occurred since HUD created the Tool?
3. HUD asserts that grantees require more time and guidance before using the Assessment Tool; what plans does HUD have to formulate additional guidance? And what is the time frame for sharing that guidance with the public?

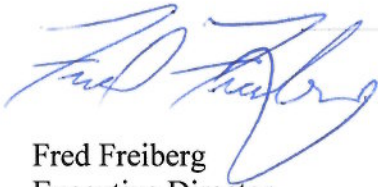
Recommendations

In light of the pretextual reasons given by HUD for removing the Tool, the inadequacies of the AI process, and HUD's clear intent to further undermine fair housing, it is the recommendation of the Fair Housing Justice Center that HUD reverse its withdrawal of the Assessment Tool. Instead, HUD should examine the decades of inadequate oversight and guidance that has led to grantees' inability to uphold their legal obligations to comply with the Fair Housing Act. If the Assessment Tool is truly proving inadequate or difficult for some grantees to use, HUD should

put forth a detailed plan and timeline for providing the necessary technical assistance before simply abandoning the effort and withdrawing the Tool. FHJC supports continued implementation of the AFFH Rule, and hopes that this crucial, but neglected component of the Fair Housing Act will aid us in building a nation of more open, equitable, and inclusive communities.

If you have any questions, please do not hesitate to contact the Fair Housing Justice Center Legal Coordinator, Cooper Sirwatka at csirwatka@fairhousingjustice.org or 212-400-8201.

Sincerely,



Fred Freiberg
Executive Director
The Fair Housing Justice Center



Cooper Sirwatka, Esq.
Legal Coordinator
The Fair Housing Justice Center