

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5173-N-08-B]

## Affirmatively Furthering Fair Housing: Assessment Tool for States and Insular Area—Information Collection: Solicitation of Comment First 30-Day Notice Under Paperwork Reduction Act of 1995

**AGENCY:** Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice solicits public comment for a period of 30 days, consistent with the Paperwork Reduction Act of 1995 (PRA), on the State and Insular Area Assessment Tool. This Assessment Tool will be used by States, including for joint or regional collaborations where the State is the lead entity and they are joined by local governments and PHAs. The Assessment Tool issued for public comment under this Notice includes a streamlined analysis for “small program participants,” which are either QPHAs or local governments that received a CDBG grant of \$500,000 or less in the most recent fiscal year prior to the due date for the joint or regional AFH or a HOME consortium whose members collectively received less than \$500,000 in CDBG funds or received no CDBG funding in the most recent fiscal year prior to the due date for the joint or regional AFH.

In addition, this Assessment Tool will be used by other local governments and public housing agencies when these entities collaborate with a State agency that is acting as the lead entity for a joint assessment of fair housing. HUD recognizes that questions within this Assessment Tool have been written primarily for States with inserts for QPHAs and small program participants. After this 30-day public comment period HUD commits to update the Assessment Tool to facilitate collaborations with local governments and PHAs which are not QPHAs or other small program participants.

On March 11, 2016, HUD solicited public comment for a period of 60 days on the State and Insular Area Assessment Tool. The 60-day notice commenced the notice and comment process required by the PRA in order to obtain approval from the Office of Management and Budget (OMB) for the information proposed to be collected by the State and Insular Area Assessment Tool. In this Notice, HUD is also announcing an extended two-stage process for soliciting public feedback on

this Assessment Tool. This process is being implemented in response to the substantial public comments received during the 60-day comment period for this Assessment Tool. HUD is committed to providing the public with this opportunity. This 30-Day Notice is intended to solicit comment relating to the Assessment Tool, the instructions that accompany the Assessment Tool, and the descriptions of the contributing factors contained in the Appendix. The second stage is intended to elicit feedback on the beta Data and Mapping tool for States, allow for feedback on the interaction of the Assessment Tool and the supporting Data and Mapping Tool, and make any feasible improvements to the final Data and Mapping tool for States, as well as make any necessary conforming changes to the Assessment Tool. This process is described in more detail in the Notice below.

To facilitate public input on the State and Insular Area Assessment Tool, HUD will post the revised Assessment Tool as well as a compare of this revised Assessment Tool to the proposed Assessment Tool from the 60-day public comment period at [www.hudexchange.info/programs/affh](http://www.hudexchange.info/programs/affh).

**DATES:** *Comment Due Date:* October 28, 2016.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and

interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Note:* To receive consideration as public comments, comments must be submitted through one of the two methods specified above. All submissions must refer to the docket number and title of the notice.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals who are deaf or hard of hearing and individuals with speech impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

### FOR FURTHER INFORMATION CONTACT:

Sunaree Marshall, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street SW., Room 5246, Washington, DC 20410; telephone number 866-234-2689 (toll-free). Individuals with hearing or speech impediments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1-800-877-8339.

### SUPPLEMENTARY INFORMATION:

#### I. The 60-Day Notice for the State and Insular Area Assessment Tool

On March 11, 2016, at 81 FR 12921, HUD published its 60-day notice, the first notice for public comment required by the PRA, to commence the process for approval of the State and Insular Area Assessment Tool. The State and Insular Area Assessment Tool was modeled on the Local Government Assessment Tool, approved by OMB on December 31, 2015, but with modifications to address the differing authority that States and Insular Areas have, and how fair housing planning may be undertaken by States and Insular Areas in a meaningful manner. As with the Local Government Assessment Tool, the State and Insular Area Assessment Tool allows for collaboration among program participants.

The 60-day public comment period ended on May 10, 2016, and HUD received 50 public comments. Section II explains the two-stage process for public comment and feedback for this Assessment Tool. Section III highlights changes made to the State and Insular Area Assessment Tool in response to public comment received on the 60-day notice, and further consideration of issues by HUD. Section IV responds to the significant issues raised by public commenters during the 60-day comment period. Section VI provides HUD's estimation of the burden hours associated with the State and Insular Area Assessment Tool, and further solicits issues for public comment, those required to be solicited by the PRA, and additional issues which HUD specifically solicits public comment.

## **II. Two-Stage Process for Public Comment and Feedback for the Assessment Tool for States and Insular Areas**

Based on the need for the public to have an opportunity to comment on the AFFH Data and Mapping Tool (AFFH-T) for States and Insular Areas, HUD is adding a second 30-day comment period.

This extended process will include two stages with notices for public review and comment. This Notice is the first 30-day comment period, and relates to the Assessment Tool itself, as well as the instructions that accompany the Assessment Tool, and the descriptions of contributing factors in the Appendix. Once this comment period has closed, HUD will consider the comments received and make any needed changes. Please note, however, that States and Insular Areas will not be required to begin undertaking an AFH until after the second 30-day comment period has closed, and HUD subsequently publishes a final Notice announcing the availability of this Assessment Tool for use. The purpose of this extended comment process is to allow the public advanced review of the requirements in the Assessment Tool as HUD continues to finalize the AFFH-T. As part of the first stage of this extended PRA process, HUD will also conduct usability testing regarding the Assessment Tool. This usability testing includes HUD soliciting feedback to improve the Assessment Tool and the potential data and user interface IT components.

Following this first stage of the extended PRA process, HUD will provide an updated version of the Assessment Tool. States and Insular Areas will not be required to use the Assessment Tool to complete an AFH until such time HUD publishes a final

Notice announcing the availability of the final Assessment Tool and final AFFH-T for States and Insular Areas. This final Notice will not be published until after the second stage of this extended PRA process has been completed. By providing the updated version of the Assessment Tool prior to issuance of the final Notice, HUD is providing an opportunity for the public and program participants to have advanced review of the proposed requirements.

The second stage of this extended PRA process will include a second Notice to solicit public comment and will be accompanied by an updated version of the AFFH-T with components designed specifically for use by States. In addition to the Notice soliciting comment, this second stage will also include additional usability testing intended to elicit feedback on the interaction between the Assessment Tool and the AFFH-T, to inform any necessary changes to the Assessment Tool itself.

This extended PRA process will allow for HUD to issue policy of relevant AFFH documents at several stages as well as result in a more accurate estimate of burden for States based on interactive feedback and more realistic conditions for evaluating the information collection instruments being proposed while maintaining a meaningful fair housing analysis. This extended process is also intended to help HUD fulfill the commitment it announced in the Preamble to the AFFH Final Rule, "that HUD will provide versions of the Assessment Tools . . . that are tailored to the roles and responsibilities of the various program participants covered by this rule. HUD [agrees] that a one size Assessment Tool does not fit all and that Assessment Tools tailored to the roles and responsibilities of the various program participants, whether they are entitlement jurisdictions, States, or public housing agencies (PHAs), will eliminate examination of areas that are outside of a program participant's area of responsibility." 80 FR 42349 (July 16, 2015).

## **III. Changes Made to the State and Insular Area Assessment Tool**

The following highlights changes made to the State and Insular Area Assessment Tool in response to public comment and further consideration of issues by HUD.

*Inserts.* In addition to the insert HUD proposed in its first solicitation of public comment for Qualified Public Housing Agencies, HUD has created a streamlined set of questions (an

"insert") that may be used by local government consolidated plan program participants that receive relatively small CDBG grants and collaborate with a State, where the State is the lead entity, using this Assessment Tool. HUD is proposing that local governments that received a CDBG grant of \$500,000 or less in the most recent fiscal year prior to the due date for the joint or regional AFH may use the insert as part of a collaboration. HOME consortia whose members collectively received less than \$500,000 in CDBG funds or received no CDBG funding, in the most recent fiscal year prior to the due date for the joint or regional AFH would also be permitted to use the insert. HUD welcomes input with regard to the utility of the proposed QPHA insert and the proposed insert for local governments that receive smaller amounts of CDBG funds for conducting the jurisdictional and regional analysis of fair housing issues and contributing factors as well as the classifications of grantees that would be permitted to use the inserts as part of a collaboration. HUD will continue to assess the content of such inserts at the next opportunity for Paperwork Reduction Act approval.

Further, HUD has committed to issuing a fourth assessment tool to be used by Qualified PHAs (including joint collaborations among multiple QPHAs). HUD is also committed to continue to explore opportunities to reduce the burden of conducting AFFH analyses by consolidated planning agencies that receive relatively small amounts of HUD funding.

*Segregation/Integration Section.* HUD has clarified the questions in this section so that they are more applicable to States. HUD has also clarified how the State should analyze trends relating to patterns of segregation and integration in the State.

*Racially or Ethnically Concentrated Areas of Poverty (R/ECAPs) Section.* HUD has clarified the scope of the analysis that States must conduct when analyzing R/ECAPs. HUD has also clarified how the State should analyze trends relating to R/ECAPs in the State.

*Disparities in Access to Opportunity Section.* HUD has changed the questions throughout this section of the Assessment Tool to address the scope of the analysis at the State-level. HUD has also included a question in the "Additional Information" subsection of the Disparities in Access to Opportunity Section that relates to other categories of opportunity. This question is limited to information obtained through the community participation process regarding disparities in access to opportunity by protected class groups

and place of residence. These other categories may include State level programs, resources, or services related to: Public safety (e.g., crime, fire and emergency medical services, and services for survivors of domestic violence); public health (e.g., chronic disease prevention); housing finance and other financial services (e.g., State lending programs, tax incentives, and other housing finance programs); prisoner re-entry (e.g., re-entry housing, employment, counseling, education, and other opportunities for offenders transitioning back into the community); emergency management and preparedness (e.g., prevention, protection, mitigation, response, and recovery); and any other opportunity areas obtained through community participation.

**Disproportionate Housing Needs.** HUD has clarified the question in this section relating to how States should analyze trends relating to disproportionate housing needs in the State.

**Publicly Supported Housing.** HUD has clarified the questions in the Low Income Housing Tax Credit (LIHTC) subsection.

**Disability and Access.** HUD has clarified the questions in the Housing Accessibility subsection. HUD has also added a question to the Integration of Persons with Disabilities Living in Institutions or Other Segregated Settings subsection that relates to the Money Follows the Persons Program, Medicaid, and other State programs serving individuals with disabilities in integrated settings. In the Disparities in Access to Opportunity subsection of the Disability and Access Section, HUD has revised the opportunities included in the first question. Program participants are now asked to assess the extent to which persons with disabilities are able to access the following and other major barriers faced: State government services and facilities; State-funded public infrastructure; State-funded transportation; State-funded proficient schools and educational programs, including post-secondary and vocational educational opportunities; State jobs and job programs; State parks and recreational facilities; and State-funded criminal justice diversion and post-incarceration re-entry services.

**Fair Housing Monitoring and Enforcement, Outreach Capacity, and Resources.** HUD has revised the heading of this section of the Assessment Tool to include "Monitoring" due to the role States play with respect to fair housing. HUD has also included two additional questions in this section. The first relates to the State's monitoring and

enforcement of sub-recipients to ensure compliance with the obligation to affirmatively further fair housing and other fair housing and civil rights requirements. The second relates to how the State ensures that projects comply with Federal, state, and other accessibility requirements (e.g., monitoring, inspection, training, etc.), and how the State enforces these requirements.

**Instructions.** HUD has added clarifying language throughout the instructions to the Assessment Tool. For example, HUD has clarified that States will have flexibility should they choose to select sub-state areas to facilitate their fair housing analysis. HUD has provided additional guidance relating to how program participants might consider assessing the success of their community participation process. In the instructions that relate to the Disparities in Access to Opportunity section, HUD has provided revised instructions for the new question structure that has been adopted in that section of the Assessment Tool, as well as additional guidance on how to use the Opportunity Indices to conduct a fair housing analysis at the State-level. HUD has included additional potential sources of local data and local knowledge specifically related to the Disability and Access analysis. HUD has also provided general instructions, as well as question-by-question instructions for the two inserts—for QPHAs and Small Program Participants.

#### **IV. Public Comments on the State and Insular Area Assessment Tool and HUD's Responses**

Several commenters commended HUD on the Assessment Tool, complimenting HUD on the structure of the tool, and expressed appreciation of HUD's efforts to clarify responsibilities and expectations with respect to the Assessment of Fair Housing for States and Insular Areas. Some also asked HUD to require additional analysis in certain parts of the Assessment Tool, including additional questions. However, other commenters expressed concerns about and disagreement with components of the Assessment Tool published for purposes of the 60-day Paperwork Reduction Act comment period.

##### **Comments on the Assessment Tool**

**Do not base the State Tool on the Local Government Tool.** Commenters stated that HUD should reconsider the development of a de novo tool for States rather than adapting the one created for local governments because of the different scales involved. The

commenters stated that most States are much larger and more geographically and demographically diverse than individual communities. The commenters also stated that the tool does not provide sufficient differentiation between entitlement and non-entitlement areas of the State. The commenters stated that the State tool should provide a structure for an appropriately scaled State-level analysis, which would offer States the flexibility to incorporate detailed, local-level analysis if necessary.

Several commenters stated that the tool appears to be developed for local jurisdictions where detailed evaluation can occur; aggregating the information up to the State level dilutes the level of detail and specific circumstances that need to be addressed to promote access to safe, decent, and affordable housing. The commenters stated that the expanded scope of the AFH compared to the Analysis of Impediments (AI) will raise the cost substantially and will be less useful because it will divert resources to collaborating with PHAs, analyzing data, and reporting to HUD. Another commenter stated that States do not have the planning or mapping departments that many local municipalities have to do the comparisons or overlaying of factors.

Other commenters stated that the tool for States and Insular Areas includes components not found in the other program participants' tool, such as a far greater extent of analysis in each section, requiring State grantees to include an assessment of past fair housing goals of other public entities goals, actions, and strategies, requiring State grantees to conduct AFHs for small PHAs, including limited English proficiency (LEP) persons in every section of the tool for only State grantees, and no option to collaborate with other program participants in a regional AFH without being the lead entity.

**HUD Response:** HUD understands and appreciates the commenters' concerns. The AFFH Regulation sets forth the broad framework that each of the assessment tools must follow in terms of assessing the regulatory categories of fair housing issues, identifying and prioritizing contributing factors, and setting fair housing goals. While the proposed State Tool adopts the framework of the Local Government Assessment Tool, HUD has adapted the content to try to account for the different scope, level of geography, and role of States. With regards to concerns about the scope, HUD notes that States must set priorities and goals for overcoming significant contributing

factors and related fair housing issues. See 24 CFR 5.154(d)(iii). That standard applies to all program participants that must comply with the AFFH Rule. See 24 CFR 5.154(b). HUD also notes that in each Assessment Tool, program participants must use the HUD-provided data, which includes limited English proficient (LEP) persons; as such, this requirement is not limited to States.

*The tool is and is not a good mechanism for affirmatively furthering fair housing.* Commenters stated that the tool is costly and will produce nothing but higher areas of poverty, and HUD should instead spend taxpayer money on programs that create opportunities for low-income people to become self-sufficient. A commenter stated that HUD should identify areas of high economic growth within each State and work to increase affordable fair housing opportunities in these areas. Another commenter similarly stated that HUD should simply adopt clear definitions of areas of opportunity and areas of concentrated revitalization initiative, and require HUD funding recipients to dedicate a specified percentage of the HUD resources to addressing those two categories.

In contrast to these commenters, other commenters praised HUD's renewed focus on affirmatively furthering fair housing and expressed support for revamping the existing AI planning tool into an assessment that will provide meaningful analysis of fair housing issues and fully supports the goals of the Fair Housing Act and spirit of the Assessment of Fair Housing. Another commenter applauded HUD's efforts to draw attention to systemic housing disparity and encourages HUD to recognize the difference between State and local authority, information, and context. A commenter commended HUD for designing an AFH that incorporates fair housing more logically into the planning process, strengthens robust community participation, and provides program participants with nationally uniform data and data tools for analysis.

There were also other commenters that stated HUD should have retained the AI. A commenter stated that the AI continues to be an excellent means of affirmatively furthering fair housing. Another commenter stated that it recently completed its AI and attempted to complete the analysis outlined in HUD's rule and found it awkward for a State-wide analysis. Another commenter stated that the tool shifts a substantial amount of uncertainty to State grantees on whether they are meeting their obligation to affirmatively further fair housing in order to receive HUD funds.

*HUD Response:* HUD believes that the Assessment Tool will assist States' efforts to affirmatively further fair housing and is committed to improving the Assessment Tool based on feedback received and experience going forward. HUD also notes that the focus of the Assessment Tool is primarily on the protected classes under the Fair Housing Act, as opposed to poverty or income, but the tool does include certain areas of analysis and HUD-provided data relating to poverty or income.

*Terminology-related comments.* A commenter stated that because "area" is not a defined term it appears to be interchangeable with "region," allowing the State to conduct its analysis on a county basis, an intrastate regional basis, or a census tract basis. The commenter stated that only the census tract basis would capture R/ECAPs. A commenter stated that definitions of "region" or "local area" may differ for funding purposes based on the particular State agency or program within a State agency, which may be relevant for States when prioritizing fair housing goals. Another commenter asked that HUD provide clarification on the term "characteristics" versus "protected classes." A commenter stated that HUD must define disparities in access to opportunity and explain how such analysis is to be operationalized by HUD. The commenter asked what counts as a disparity. Another commenter stated that HUD must define what metrics, statistics, and other quantifiable information would be subject to a determination of statistical validity by HUD with respect to local data. A commenter stated that HUD should clarify when a "granular" analysis (as provided in the instructions for the Draft State Tool) versus a more high-level analysis is appropriate. The commenter stated that, for example, HUD may want to suggest using the required community participation and consultation processes to identify areas of the State that warrant a more "granular" analysis. Another commenter stated that HUD should use the more generic word "area" instead of "neighborhoods." A commenter stated that the following sentence appears at two points in the Draft State Tool's instructions—"Note that the percentages reflect the proportion of the total population living in R/ECAPs that has a protected characteristic, not the proportion of individuals with a particular protected characteristic living in R/ECAPs"—and that this sentence is unclear; restating this distinction and

including an example would help better clarify this point.

*HUD Response:* HUD notes that the AFFH rule defines "Geographic Area" as "a jurisdiction, region, State, Core-Based Statistical Area (CBSA), or another applicable area (e.g., census tract, neighborhood, Zip code, block group, housing development, or portion thereof) relevant to the analysis required to complete the assessment of fair housing as specified in the Assessment Tool." 24 CFR 5.152. HUD understands that States in particular may experience differing regional fair housing issues, and for that reason HUD is providing States with certain flexibility when conducting a regional fair housing analysis. To facilitate this regional analysis, HUD uses the phrase "to the extent [a fair housing issue] extends into another state or broader geographic area . . ." in particular questions where a regional analysis is required. HUD believes that this phrase provides States with flexibility, within certain parameters, rather than a definition, with respect to their regional analysis, since States may vary in terms of the regional fair housing issues affecting their jurisdictions. HUD acknowledges that States may use the term "region" to refer to areas within their State; however, in the context of the AFFH rule, the term region refers to a geographic area that is larger than the jurisdiction (i.e., the State). For this reason, to avoid confusion, HUD is using the term "sub-State area" to refer to areas within the State. The Assessment Tool provides States with flexibility, within certain parameters, rather than a definition, with respect to their areas of analysis, since States will vary with respect to the regional fair housing issues that impact their jurisdictions. States must assess their entire State, and in certain places in the Assessment Tool, "a broader geographic area" extending beyond the State. HUD believes program participants are in the best position to determine how broad that area must be with respect to their fair housing issues, based on the HUD-provided data, local data, and local knowledge, including information gained through community participation.

With respect to the "granular" analysis, HUD has added the following language to the instructions in the Assessment Tool: "A State is not expected to conduct the same analysis that local governments conduct using the Assessment Tool designed for use by Local Governments, however HUD is providing States with similar data in the AFFH Data and Mapping Tool (AFFH-T) so that more granular analysis can be

conducted where appropriate. For example, during the community participation process a State may receive information that is not reflected in the HUD-provided County level maps, which may require further analysis using dot density maps. Additionally, the AFFH-T provides functionality for States to select sub-State areas to facilitate their analysis. The assessment of areas not covered by AFHs conducting by local governments is an important focus for States as they determine how their AFFH oversight responsibilities should be carried out throughout the State.” HUD also notes that it has removed the word “neighborhood” from the Assessment Tool where appropriate.

HUD has previously stated how local data will be subject to a determination of statistical validity. HUD stated in the Preamble to the Final Rule this provision is intended to ‘clarify that HUD may decline to accept local data that HUD has determined is not valid [and not] that HUD will apply a rigorous statistical validity test for all local data.’” 80 FR 81848 (Dec. 31, 2015).

HUD notes that the terms protected class and protected characteristic are defined by the AFFH rule at 24 CFR 5.152. The Final Rule provides: “Protected characteristics are race, color, religion, sex, familial status, national origin, having a disability, and having a type of disability.” 24 CFR 5.152. The Final Rule provides: “Protected class means a group of persons who have the same protected characteristic; *e.g.*, a group of persons who are of the same race are a protected class. Similarly, a person who has a mobility disability is a member of the protected class of persons with disabilities and a member of the protected class of persons with mobility disabilities.” 24 CFR 5.152. HUD will continue to provide clarification relating to protected class where necessary in the Assessment Tools.

HUD appreciates the commenters’ request for clarification with respect to language in the instructions, specifically regarding R/ECAPs. In response to these comments, HUD has added the following language to the instructions: “The table provides the demographics by protected class of the population living within R/ECAPs. It does not show the proportion of each protected class group that live in R/ECAPs compared to the proportion of each protected class that live in the jurisdiction outside of R/ECAPs or the jurisdiction as a whole”

*Including entitlement jurisdictions in the State’s assessment should not be required.* A few commenters stated that the tool was not clear whether States

have to include entitlement areas in their assessment. For commenters who are aware that States must include entitlement areas in their assessments, several commenters stated that since each entitlement jurisdiction will prepare its own assessment, State assessments should not be required to include these areas in the State assessment but they may choose to do so. The commenters stated that the State tool should only mandate analysis of geographical and subject matter where the State agency responsible for applying the AFFH rule has jurisdiction. The commenters stated that each State should be encouraged, but not required to pursue analysis beyond those boundaries to the extent it possesses such authority.

Commenters stated that the State tool should be restructured to eliminate the need for extensive, repetitive, and local-level analysis. The commenters stated that it is redundant and wasteful to include entitlement jurisdictions, will create confusion between State grantees and entitlement jurisdictions, and State grantees have no authority over how entitlement jurisdictions spend their funds and cannot meaningfully impact contributing factors in those areas. Commenters stated that States be able to rely on the analysis conducted by local governments and PHAs. The commenters further stated that Community Development Block Grant (CDBG) programs cannot serve entitlements, and those funds cannot be used to help address housing issues within entitlements. The commenters stated that the analysis performed by entitlement communities should be linked to the State analysis instead of requiring States to duplicate efforts and analyze the same data to create a separate plan.

Commenters also stated that inconsistencies and incompatible action steps could be developed if the State must analyze the entitlement areas. The commenters stated that because the State and Local Government tools may have inconsistent results, HUD will be placed in the position of having to determine which AFH is “more right” for a given area, given that conclusions may not be coordinated within the HUD review process. The commenters stated that HUD must clarify the relationship between the State assessment and the local participating jurisdiction assessments since they are not only duplicative, but could have competing results. States should have the opportunity to adopt those assessments where another participating jurisdiction has a current assessment.

Commenters stated that the proposed tool should limit States’ obligation to consult with entitlement jurisdictions and PHAs and tailor the tool to State activities. The commenters stated that contrary to statements in HUD’s response to commenters published with the AFFH final rule, the AFH tool does not explicitly limit the consultation obligations to non-entitlement areas and by referring to 24 CFR 91.110 without further clarification, the tool appears to require consultation with all local PHAs operating in the jurisdiction. The commenters stated that the proposed tool should only focus on and use data for non-entitlement jurisdictions, since State grantee’s programmatic responsibility is for rural areas not covered by entitlement jurisdictions.

A commenter similarly stated that HUD should not require inter-State analysis as it would require the collection and analysis of information from other jurisdictions that would significantly increase the burden of compliance, and the analysis should only expand outside the jurisdiction when applicable. Another commenter stated the entire State should be covered by an assessment, however, conducting a full State analysis should be optional if seamless coverage of the State could occur through other means, and States should have the flexibility of conducting a sub-State analysis that is meaningful.

In contrast to these commenters, other commenters stated that because contributing factors are at the very core of the fair housing goals and priorities, the conclusions of entitlement jurisdictions within a State will significantly influence the State analysis, and States should not simply accept the conclusions without an independent analysis.

*HUD Response:* HUD understands the concerns of these commenters. HUD notes that the final Rule requires an assessment of the entire jurisdiction, or State in this case, not just non-entitlement areas, and for this reason States are expected to consider statewide policies and investments that affect fair housing issues. At the same time, HUD recognizes that the State is not expected to do the analysis that local governments conduct in their AFHs (for example, neighborhood-by-neighborhood analyses). HUD has added language to the instructions clarifying that while the entire State must be analyzed, the program participant may take into account the different fair housing issues and contributing factors affecting different parts of the State. For instance, more rural, non-entitlement parts of the State may have different fair

housing issues, which the State should take into account particularly for setting priorities and goals in the AFH.

HUD also notes that States may use information contained in an AFH of a local government. States are accountable for the information contained in its AFH that is submitted to HUD. If States are utilizing information from another AFH, States should consider the following: (1) Whether the AFH has been accepted by HUD; (2) whether the AFH is a draft AFH that was published for the purposes of conducting the community participation process; and/or (3) whether the AFH meets the criteria for local data and local knowledge under 24 CFR 5.152 and the instructions to the Assessment Tool.

HUD plans to provide the States with data that cover the entire State, as well as data that are specific to the non-entitlement areas of the State, which may provide for useful comparisons when conducting a fair housing analysis. While local governments may identify different contributing factors and fair housing issues in their AFHs from States, these are separate planning documents related to different HUD grantees' fair housing planning. With respect to public housing or Housing Choice Voucher programs, the State shall consult with any housing agency administering public housing or the Housing Choice Voucher program on a Statewide basis as well as all PHAs that certify consistency with the State's consolidated plan. If a PHA is required to implement remedies under a Voluntary Compliance Agreement, the State should consult with the PHA and identify actions the State may take, if any, to assist the PHA in implementing the required remedies.

Additionally, HUD notes that fair housing issues are not confined to jurisdictional, geographic, or political boundaries; for that reason, a regional analysis broader than the State in order to provide context for the fair housing issues identified and to assist in developing regional solutions for overcoming contributing factors and related fair housing issues.

*Elaborate on list of organizations consulted.* A commenter stated that Question 2 of Section III should incorporate language from 24 CFR 91.110(a) and elaborate on the requirement that States provide a list of organizations consulted. The commenter stated that the question should include the following language: "Describe how the organizations consulted (including, but not limited to, State-based and regionally-based organizations that represent protected class members and organizations that

enforce fair housing laws, health services organizations, social service organizations, and public and private agencies providing assisted housing—including any State housing agency that administers public housing) reflect a representative selection of organizations from all parts of the State, including entitlement and non-entitlement jurisdictions and social service organizations should be defined as those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, and homeless persons." A commenter stated that HUD should clarify whether the State must consult with every Resident Advisory Board or just those in the limited number of jurisdictions that are non-entitlement entities.

*HUD Response:* HUD appreciates this commenter's suggestion, but declines to include the proposed language in the Assessment Tool. The instructions for Question 2 in Section III specifically include the requirements of 24 CFR 91.110. The requirement to consult with PHAs applies to those PHAs that receive a certificate of consistency with the consolidated plan of the State. The references in this Assessment Tool to meetings with Resident Advisory Boards is only applicable when a PHA is conducting a joint or regional AFH with the State. HUD will provide additional guidance for States and Insular Areas on the community participation process, as well as general guidance relating to the Assessment of Fair Housing, once OMB approves this Assessment Tool.

*Elaborate on community participation requirements and coordination with other entities.* A few commenters asked whether States are obligated to conduct community participation within entitlement jurisdictions and tribal areas. Other commenters asked HUD to clarify whether comparing the turnout for public meetings, the number of substantive comments received, and the number and quality of responses to public and stakeholder surveys is an acceptable approach to measuring the success of the community participation process. The commenters also asked HUD to provide an explanation of what "meaningful" means in the context of "meaningful community participation." A commenter stated that the community participation process is a vital part of the fair housing assessment, and that this section of the assessment tool should elicit more detailed information, including more specific details about outreach activities. The commenter further stated that outreach to persons with disabilities should include

outreach targeted to those living in both institutional and community-based settings. Another commenter made a similar comment that the tool should provide meaningful guidance and robust instructions for the community participation process.

A commenter asked HUD to clarify whether "any" oversight, coordination, or assistance of other public entities' goals, actions, and strategies is optional. The commenter stated that the final rule suggests that it is not optional, but the question in the Assessment Tool seems as if it is optional. The commenter added that States do not have legal authority to oversee or control local program participants' AFH processes and many will not welcome State involvement in their planning efforts.

*HUD Response:* In the AFFH Rule Guidebook, available at <https://www.hudexchange.info/resource/4866/affh-rule-guidebook/>, HUD has provided guidance on conducting community participation. HUD will continue to provide technical assistance and guidance to program participants on the requirements surrounding the community participation process.

HUD understands that there are State and local constraints on which entities have authority to operate and monitor the actions of other entities. HUD encourages collaboration to the extent feasible and permitted by State and local law.

*Encourage coordination between States and local jurisdictions to eliminate duplicative work and possible inconsistencies.* Commenters stated that it would be an important improvement if there was encouraged coordination between the local jurisdictions and the State so that the findings are complimentary, rather than redundant. The commenters stated, for example, States could be involved in the development of the local PHA's plans so that the information is consistent and allows the State to focus on the balance of state geographies and the impacts of State policy on access to housing. The commenter stated that sharing findings from local jurisdictions in a systemic and organized way would also be helpful.

*HUD Response:* HUD has and will continue to encourage collaboration among various types of program participants that must conduct and submit an AFH to HUD. HUD also recognizes that its program participants need flexibility as they embark on conducting an AFH, and for that reason, HUD is not prescribing how such collaboration is to be achieved. Instead, HUD leaves this up to program participants that conduct a joint or

regional AFH, as described at 24 CFR 5.156. HUD will also continue to provide technical assistance and guidance to program participants with respect to the issues raised by these commenters.

*States reaching out to PHAs for certification of consistency with the State's consolidated plan is not reasonable or practicable.* A commenter stated that while it is reasonable to expect a local government to consult and reach out to local PHAs that seek certification of consistency with the State's consolidated plan, it is not reasonable or practicable to expect the same of a State with a large number of local PHAs. Another commenter stated that the AFH Final Rule and tool seem to suggest that States are obligated to independently evaluate the AFH analysis and methods for addressing fair housing issues in jointly prepared PHA AFHs for which PHAs seek certification of consistency with the State plan. However, States may be hesitant to certify a PHA plan when they do not agree with its goals and priorities for addressing fair housing issues, which sets up a potential conflict between PHAs and States. This is an unfair consequence because States do not administer the HUD-funded programs that the certifications pertain to. The commenter stated that HUD should eliminate this requirement or not require States to certify consistency until after HUD has approved the PHA's AFH.

Another commenter stated that a State cannot truthfully certify that it is in compliance with its obligation to AFFH if it is not monitoring the compliance of its subrecipients. The commenter recommended that subrecipients be required to report certain information to the State demonstrating compliance. The commenter also recommended the development and implementation of a streamlined AFH process for non-entitlement communities based on the Analysis of Impediments to Fair Housing—Texas (FHAFT). The commenter stated that the FHAFT allows the State to monitor its subrecipients' compliance with the AFFH certification and make its own truthful certification. The commenter recommended that to make the process more effective the approach should be modified so that the assessment form is tailored to the size of the jurisdiction, that there be more robust training and technical assistance provide, and ensure that training and technical assistance focuses on the meaning of AFFH beyond housing programs.

*HUD Response:* HUD disagrees with the commenters' characterization of the

requirements under the AFFH rule HUD notes that several of the comments appear to reference requirements that are not within the scope of the AFFH Rule or the assessment tool. States are not required to independently evaluate the analyses conducted by other program participants. Note, if the State is involved in conducting a joint or regional AFH, program participants may divide work as they choose, but all program participants are accountable for the analysis and any joint goals and priorities, and each collaborating program participant must sign the AFH submitted to HUD. See 24 CFR 5.156(a)(3). Note that collaborating program participants are also accountable for their individual analysis, goals, and priorities to be included in the collaborative AFH. See 24 CFR 5.156(a)(3).

HUD appreciates the concerns of the commenters regarding the State's role in monitoring subrecipients. In response, HUD has added two questions to the final section of the analysis section of the Assessment Tool to account for this responsibility. Examples for States to consider regarding the oversight of the AFFH requirements—such as the FHAFT example—may be considered for additional guidance.

As previously stated, HUD will continue to provide training, guidance, and technical assistance to program participants with respect to implementation of and compliance with the AFFH rule.

*Level of analysis required by tool is inappropriate for States.* Commenters stated that the proposed tool requires far greater analysis from a State given its larger jurisdiction with respect to size and diversity of local jurisdictions within it. A commenter expressed concern that most, if not all, of the issues will not be in the State's domain to take action. The commenter recommended that it would be helpful if HUD provide a clear statement of how HUD intends to utilize the Assessment and what the expectations are for States.

A commenter stated that this is challenging for States with hundreds of cities and towns with considerable autonomy under State law, and many of the directed questions and contributing factors are of a municipal-level nature and would require a State to obtain and review municipal data and to conduct significant fact finding. A commenter stated that examples of areas for which significant fact finding would be needed include community opposition, land use and zoning, local policies and practices, lack of private and public investments, infrastructure, accessibility of government services, sidewalks,

pedestrian crossings, infrastructure, access to proficient schools, educational programs, recreational facilities for persons with disabilities, education policies, and access to financial services.

Another commenter stated that the tool requires States to carry out an in-depth assessment, set priorities, and develop action timeframes based on a set of metrics that involves agencies besides housing and community development, including participation by public and private stakeholders, and numerous State agencies that are not recipients of HUD funding but are instead subject to oversight from other federal agencies.

Several commenters stated that it is not feasible or appropriate for States to drill down to a neighborhood-by-neighborhood analysis. The commenters stated that States need flexibility in tailoring the content of the assessment to ensure that analysis conducted will be meaningful and under the authority of state housing agencies. The commenters stated that States should have the flexibility to use the HUD data at appropriate scales, drilling down into local analysis of areas such as opportunity for employment, education, and transportation in locations of the State where they are most impactful. The commenters also stated that census tract analysis is not feasible for States, and data should be consolidated at a higher level (county, MSA, regional). The commenters stated that many of the opportunity questions in the State Assessment Tool should be removed because they are only appropriate at the neighborhood level. The commenters stated for a large State, local decision making and local policies are the bases for determining whether housing is "fair" since it is not reasonable to expect State residents to move long distances from their current locations to access housing opportunities.

*HUD Response:* As previously stated, HUD understands the limitations States may have with respect to their authority in certain areas of the State due to State or local law. The AFH is intended to assist States in engaging in meaningful fair housing planning. HUD has made several modifications to the assessment tool in order to clarify the level of detail and analysis that are required. The descriptions of numerous contributing factors have also been amended to better reflect a state-level rather than municipal level analysis.

HUD has also added language to clarify that States are not generally required to conduct a neighborhood-level analysis. This language, added in several key questions throughout the



assessment tool states, “[participants] should focus on trends that affect the state or trends that affect areas of the state rather than creating an inventory of local laws, policies, or practices.” They are not required to create inventories of local ordinances or policies that are having an effect at the local or neighborhood level. HUD notes, however, that local ordinances or policies may be considered local data or local knowledge. States are expected to focus on patterns or trends affecting fair housing issues in the State, including those that may be having an effect across the State’s region.

In contrast to the data provided to local governments and PHAs, which HUD is providing data at the census tract level, HUD is providing States with data at the county level, and will allow States to create “sub-state areas,” which may be comprised of groupings of counties. This flexibility is intended to allow States to conduct their analysis while reducing burden by raising the level of geography at which States must conduct their analysis. A State is not expected to conduct the same analysis that local governments conduct using the Assessment Tool designed for use by Local Governments; however, HUD is providing States with similar data in the AFFH-T so that more granular analyses can be conducted where appropriate.

The AFFH-T will provide users with the flexibility to shift their level of focus between the maps provided for States at the County level, with more detailed maps that provide data below the County level. For instance, dot density maps are also available in the AFFH-T. A dot density map (also known as dot distribution map) uses a color-coded dot symbols representing the presence of a specified number of individuals sharing a particular characteristic to show a spatial pattern. Thematic maps can obscure patterns of segregation within a County and a dot density map maybe useful to see more granular patterns. When viewing a dot density map, the presence of residential segregation may appear as clusters of a single color of dots representing one protected class, or as clusters of more than one color of dots representing a number of protected classes but still excluding one or more protected classes. More integrated areas will appear as a variety of colored dots.

HUD has also revised the questions in the Disparities in Access to Opportunity section of the Assessment Tool based on the commenters’ concerns.

On a more general note, HUD announced the second stage of the extended public comment process, as described above.

*The Assessment Tool does not take into consideration “home rule” States.* Several commenters stated that the tool does not take into consideration a “home rule” State in which the state Constitution grants every city and town the right of self-governance in local matters. The commenter stated that in addition to the burden of gathering and analyzing local data, it is unclear how HUD expects them to be addressed, and within the timeframes, under the Fair Housing Goals and Priorities Section of the tool because the State lacks the legal authority to overcome locally imposed impediments to fair housing, thus an analysis of this information will not likely enhance efforts to affirmatively further fair housing at the State level. The commenters stated that each unit of local government creates its own policies and programs, which often do not align with the State. The commenters stated that for example, North Carolina has 100 counties, more than 500 incorporated municipalities, with 115 school districts and as many charter schools, and that even if actions identified through the collection of local data and the analysis can impact change relative to fair housing, it would be outside of the State agency’s authority to and ability to impact.

*HUD Response:* HUD understands that there are State and local constraints on which entities have authority to operate and monitor the actions of other entities. HUD encourages collaboration to the extent feasible and permitted by State and local law.

HUD also notes that in order to set fair housing priorities and goals, the State must understand the local and regional context for the fair housing issues and contributing factors it identifies in its assessment.

HUD has clarified that several questions are asking state agencies to focus on trends or patterns, “that affect the state or trends that affect areas of the state rather than creating an inventory of local laws, policies, or practices.” A similar instruction was added stating that, “For broader questions about policies and laws, HUD expects that States use information available to it through the community participation and consultation process and does not expect the State to collect all possible sources of data or create inventories of local laws or policies throughout the State. Program participants can reference studies or reports issued by other State agencies, and these studies or reports may be necessary and relevant for the completion of the AFH. Referencing such studies and reports may be useful in certain areas of the fair housing analysis when the program

participant does not, itself, have first-hand knowledge of the topic at hand. HUD acknowledges that such reports will have been conducted for purposes other than informing an AFFH analysis and these may still provide valuable information.”

*Requirement for regional analysis is burdensome and meaningless.* Several commenters stated that HUD continues to insist that State grantees conduct an exhaustive analysis for all regions within the geographic boundary of their State (including entitlement jurisdictions) on a broad range of factors, many outside of the State grantee’s expertise, authority, and ability to impact. Commenters stated that the scope of the tool must be scaled back significantly so that State grantees can reasonably conduct a meaningful AFH on issues they can meaningfully address. Another commenter suggested that the tool acknowledges that the content of responses required by these sections is categorically not being viewed from a position of subject-matter expertise.

Several other commenters stated that the ability to access and meaningfully analyze data beyond the State’s boundaries is not feasible. The commenters stated that the requirement that States conduct a regional analysis where there are “broader regional patterns or trends affecting multiple states” by analyzing local data and knowledge, and that consulting the existing AIs and AFH’s of neighboring States and jurisdictions is not achievable without additional resources and time.

Other commenters suggested that including regional data should be optional for States and States should be able to determine when regional perspectives on specific topics or fair housing issues is appropriate and relevant and will enhance the AFH. The commenters stated that HUD should not require inter-State analysis as it would require the collection and analysis of information from other jurisdictions that would significantly increase the burden of compliance, and the analysis should only expand outside the jurisdiction when applicable. The commenters stated that if the purpose is just to assess issues in neighboring States without attempting to change policy, then that requirement is understandable. However, if the purpose is to change policy in another State, then this will be problematic. The commenters concluded by stating that this analysis is more appropriate at the local level or possibly at the metropolitan statistical area (MSA) level that share a local policy-making body or mechanism.



A few commenters stated that the currently proposed format of the tool that incorporates regional analysis throughout the sections is preferable to a regional section. The commenters stated that actual placement of the questions currently is not problematic; however, only Statewide and sub-State analysis should be required when data are provided.

Other commenter requested clarification on what regional analysis means. A commenter stated that its State is divided into 8 regions, and asked if HUD is requiring an analysis of each of these regions. Another commenter stated that the proposed tool is vague on whether the regions within the states would be established.

A commenter requested that HUD provide separate sub-sections to address multi-State issues, with the opportunity to reference, rather than restate the jurisdictional analysis.

**HUD Response:** As stated above, HUD notes a regional analysis is not only meaningful when conducting a fair housing analysis, but is required by the regulation. In particular, fair housing issues are not confined to jurisdictional, geographic, or political boundaries; for that reason, certain regional analyses may be required, as directed by the Assessment Tool, in order to provide context for the fair housing issues identified and to assist in developing regional solutions for overcoming contributing factors and related fair housing issues. HUD also notes that understanding how regional fair housing issues affecting the State are influenced by external factors may provide insight into how the State can overcome the effects of contributing factors and related fair housing issues. HUD understands that States will not necessarily be able to affect policy in another State, but it may better implement its own fair housing-related policy. In response to the public comments on the interstate regional analysis requirements of the AFH, HUD has made a number of changes. These include removing separate questions calling for such an interstate analysis. Instead several key questions were amended to state that, “to the extent that [such patterns] extend into another state or broader geographic area, identify where that occurs.”

HUD also distinguishes between a “regional” analysis in this Assessment Tool, which is larger than the State and an analysis within the State that may be comprised of “sub-state areas.” HUD recognizes that many jurisdictions may also use the term “region” to refer to an area within the State. HUD is seeking comment on the use of terms that would

be clearest to program participants and the public when referring to these different types of geography.

**Analysis of the entire State is important.** Commenters stated that the instructions for and questions in the tool should require an analysis of the entire State, not just the non-entitlement areas. The commenters stated that HUD should make clear that participation by stakeholders in entitlement jurisdictions during community participation is important because they are affected by State-wide laws, policies, and practices. The commenters stated that HUD should modify questions in Section III to ensure that States will conduct the community participation process in a manner that is representative of all areas of the State, both entitlement jurisdictions as well as non-entitlement jurisdictions. The commenters stated that Question 1 of Section III should include the following language at the end of the existing question: “In these activities, explain efforts made to ensure meaningful community participation representative of all parts of the State, including entitlement and non-entitlement jurisdictions. If sub-State areas are utilized in the analysis, identify community participation efforts conducted in each sub-State area.”

Other commenters stated that the tool appropriately takes into consideration that States and State housing finance agencies administer programs between CDBG, Emergency Solutions Grants (ESG), Home Investment Partnerships (HOME), and Housing Opportunities for Persons With AIDS (HOPWA), including LIHTC and State affordable housing trust programs. The commenters stated that since Fair Housing is complex and extensive, it is appropriate that a variety of State functions are taken into account and evaluated as a whole; and that such efforts should be taken into account when considering a State’s progress towards affirmatively furthering fair housing.

Some commenters stated that inclusion of entitlement jurisdictions within the State’s analysis is a pivotal distinction and a necessary condition for any meaningful fair housing analysis at the State level. The commenters stated that State agencies administer the largest federal affordable housing program (LIHTC) predominantly within entitlement jurisdictions; many entitlement jurisdictions only receive direct allocation of CDBG funds from HUD while other formula grant programs are administered by States or other large grantees; state-level policies and practices often establish the framework that defines the policy

options that are available to local governments, including entitlement jurisdictions; and this approach is required by the language of the regulation. The commenters stated that unlike under the Analysis of Impediment requirements, States should not omit entitlement jurisdictions from their scope of analysis.

**HUD Response:** HUD appreciates these commenters’ suggestions and observations. However, HUD declines to change the questions in Section III of the Assessment Tool, as the questions are based on the requirements of the AFFH rule, HUD program-related program regulations, and other fair housing and civil rights requirements. However, the scope of the questions in this Assessment Tool include an analysis of the entire State, including entitlement and non-entitlement areas.

HUD has made several changes to clarify the scope of analysis for States and to clarify how States may choose to consider the unique needs and issues facing rural areas of their State. For state agencies that administer programs that primarily benefit rural and non-entitlement areas of the State, the Assessment Tool provides for specific focus on the fair housing issues affecting these areas, while still considering State-wide fair housing issues.

**All non-housing related questions should be optional.** Commenters stated that the State’s analysis should focus on areas of opportunities related to housing, which is the focus of a State’s qualified allocation plans (QAPs), in which points are provided for developments based on their physical location relative to that opportunity, and the metric is assessed by its outcome and not the underlying policies in these areas that result in these outcomes. Commenters stated that non-housing related questions should be optional. Commenters stated that the new areas of emergency preparedness, prisoner re-entry, public health, and public safety should be optional because there is no HUD-provided data, and they are only tangentially related to housing and are outside of the authority of State agencies that administer HUD grant funds. Commenters stated that a State should focus on a thorough policy and program analysis of factors directly related to housing and in areas that are within the authority of the agencies administering the grant funds, instead of a full policy analysis of all tangentially related areas, which is burdensome and would necessitate the hiring of outside consultants with expertise in each area. Commenters stated that HUD’s proposal to add even more questions for States that would additionally involve State

public health, public safety, corrections, health care, and emergency management/preparedness makes the task of completing the AFH unwieldy; analysis of a multitude of local conditions renders the AFH impracticable for States given the time allotted and inadequacy of resources.

Commenters stated that HUD may well be interested in learning about the impact of education related to laws, policies, and practices that affect the ability of residents in different areas of the state to attend post-secondary and vocational education, shifting the significant burden of researching and analyzing information on to entities that receive HUD funding is inappropriate. The commenters questioned whether the information gathered under such a sweeping request will be of practical utility since program participants will be required to engage in research and analysis regarding a host of broad policy areas to attempt to learn and opine on the detailed requirements and policies of areas besides the creation and provision of housing, calling into question accuracy and conclusions. The commenters stated that if the ultimate goal is to help program participants develop thoughtful and coherent strategies to further fair housing, a tool that requires devoting time and resources to learning and documenting policy in other areas is not clearly targeted to the ultimate goal and may result in a less robust analysis of the data and policies directly related the provision of fair housing.

Other commenters stated that it is appropriate for States to have to describe laws, policies, and practices affecting affordable rental housing, homeownership, and mortgage access in the State; but HUD should not ask States to analyze other issues for which they do not have expertise. The commenters stated that requiring an in-depth analysis of the data and “laws, policies, and practices” regarding the wide array of topic areas that the AFH covers goes above and beyond what is necessary for the proper functions of HUD. Another commenter stated that the vastness of the request and the questionable nature of the conclusions drawn makes these types of questions in the tool an untenable exercise. A commenter similarly stated that the repeated use of the clause “demographic trends, laws, policies, or practices” as it requests information on specific subject areas is too broad. The information to be gathered is potentially unlimited and its actual causality is speculative at best.

In contrast to these comments, a commenter stated that States must be required to discuss “other indicators of

environmental health based on local data and local knowledge,” including the siting highways, industrial plants, waste sites, and Superfund and brownfield sites. The commenter stated that limiting any examination of environmental health hazards to air pollution would miss the continuing impact of environmental racism on communities of color in cities such as Flint, Michigan, and in the Donna colonias in the Rio Grande Valley in Texas. The commenter stated that vulnerability to the effects of a natural disaster should also be considered part of the environmental health of a neighborhood. Another commenter stated that the following should be included in the opportunity section—include an analysis of early education programs, especially quality early education programs and the relationship of access to state programs, policies, and funding, including child care subsidy policies, explicitly include state tax policies in the list of state actions to be analyzed, and include questions related to income, including minimum wage policies and access to income supports.

**HUD Response:** HUD appreciates the commenters’ feedback on these issues. HUD notes that the question relating to the other opportunity areas (*i.e.*, the question on emergency preparedness, prisoner re-entry, public health and public safety) have now been included in the “Additional Information” section of the Disparities in Access to Opportunity section of the Assessment Tool. This question is limited to information the State obtains through the community participation process.

HUD appreciates the comments received recommending the addition of various additional types of opportunity measures that might be considered. HUD is aware that the state agencies responsible for administering HUD programs, including CDBG and HOME, have limited expertise and access to information on the numerous other types of opportunity areas that might be considered. Being mindful of adding excessive burden, HUD has chosen not to require the analysis of the other opportunity areas proposed in the 60-day Notice. HUD is also aware that some issues may be more salient in some States but not others. In recognition of these considerations, HUD instead has added a new component to the “additional information” questions in the Disparities in Access to Opportunity section. HUD notes that such other categories may be “identified through the community participation process,” and “may include State level programs, resources, or services related to . . . [public safety, public health, housing

finance, prisoner re-entry, emergency management, or other opportunity areas].” These additional information questions provide a space for State program participants that choose to include information relevant to their State and their assessment.

HUD has also revised the “laws, policies, and practices” questions such that they are to be informed by information obtained through the community participation process.

Under the AFFH rule, program participants must undertake an analysis that will identify significant disparities in access to opportunity for any protected class within the jurisdiction and region. See 24 CFR 5.154(d)(2). It is important to assess whether protected classes experience disparities in access to opportunity, such as education, employment, transportation, environmental health, low poverty, among others.

HUD appreciates the commenter’s suggestion to have States discuss “other indicators of environmental health based on local data and local knowledge.” The contributing factor “Location of environmental health hazards” is included in the State Tool within the “Disparities in Access to Opportunity” section in the version submitted during the 60-day public comment period. The definition of this contributing factor is available in the Assessment Tool’s appendix.

**Requirement to analyze disparities in access to opportunity and to identify significant contributing factors exceeds requirements of the Fair Housing Act.** Commenters stated that many States consider the requirement to analyze disparities in access to opportunity to be overstepping the requirements of the Fair Housing Act and is not necessary to reasonably determine impediments to fair housing choice. Commenters stated that for a State to thoroughly evaluate segregation/integration, it must evaluate the context of each occurrence of segregation to determine its validity and characteristics. Other commenters stated that States must make an interpretive leap to identify contributing factors to observed patterns, but these are uniquely local variables that will exert influence in different ways in different jurisdictions and therefore states will be compelled to fracture the AFH into an “analysis of boundless sets of local circumstances in order to meaningfully isolate variables that contribute to certain fair housing issues.” Other commenters stated that the tool requires States to draw conclusions as to segregation and causation, which is an analysis State agency staff are not equipped to undertake and draw

conclusions from complex data correlations. The commenters stated that to make a causal analysis anything but double blind experiments or other highly sophisticated research techniques would be legally irresponsible and may result in significant legal ramifications arising from incorrect conclusions.

Other commenters stated that the tool erroneously requires that any finding of disparate impact is a fair housing issue. A commenter stated that this requirement goes far beyond the legal one articulated by the Supreme Court in *Texas Department of Housing and Community Affairs Inclusive Communities Project, Inc.* The commenter stated that it would be legally flawed to make general conclusions of causation without significant substantive proof and an understanding of the origin and application of policies outside the State's purview.

**HUD Response:** HUD notes that the affirmatively furthering fair housing mandate under the Fair Housing Act is distinct from the theories of liability under the Act, such as disparate treatment and disparate impact. In order to set meaningful fair housing goals with respect to affirmatively furthering fair housing, program participants must assess whether residents of their communities' experience disparities in access to opportunity on the basis of race, color, national origin, religion, sex, familial status, or disability. For these reasons, an analysis of disparities in access to opportunity is vital to conducting a meaningful fair housing analysis.

**Requirement to undertake an AFH must come with funding.** A commenter stated that it is not aware of any similarly sweeping assessment obligation from a Federal agency without a commitment of Federal resources to assist in implementation. The commenter stated that for example, the Department of Education offered \$500,000 planning grants to support its Promise Neighborhoods Program, which similarly recognized the importance of breaking down agency "silos" to ensure Federal, State, and local cooperation, but also recognized the enormous scope of the work and need for commitment of substantial resources to carry it out, even within a very limited target geography.

**HUD Response:** HUD notes that States already had an obligation to undertake fair housing planning by completing an Analysis of Impediments to Fair Housing Choice. The Assessment of Fair Housing is largely similar to the prior existing process, but updates it with the

HUD-provided data and tools and creating a standardized form for use by HUD's grantees and public housing agencies. Subject to program rules and limits, funding for program administration including fair housing planning continues to be an allowable use of HUD funding.

**Information needed for the tool will be extremely difficult to collect.** Several commenters stated that the tool requests an extraordinary amount of information that will be extremely difficult for States to collect and analyze in a meaningful matter and relies too much on local data. The commenters stated that some questions are nearly impossible to answer from a State-wide perspective, such as questions on education policy, which will vary from district to district, and questions on zoning and land use policies.

A commenter stated that the tool encourages broad and sweeping interpretations about policies of sister agencies without participation in the policy making process and without the availability and understanding of all relevant information. The commenter stated that this would be legally irresponsible as the responses in the tool could be used as a basis for a fair housing complaint against the State or other State agencies (e.g., questions related to education, employment, and transportation). The commenter stated that the State does not have the legal authority to compel the cooperation of other agencies in the analysis or the goals. The commenter provided an example of its State transportation department, which has 5,700 employees and the state has regional, county, and local transportation agencies. The commenter stated that to be able to analyze all aspects of this topic would be unduly burdensome.

Another commenter requested that States not be required to answer questions that will necessitate the collection of new local data.

**HUD Response:** There are limitations on what information program participants must use when completing an AFH. The definitions of local data and local knowledge at 24 CFR 5.152 and the instructions to the Assessment Tool explain what local data and local knowledge are and when they must be used. HUD understands the limitations of coordinating with various agencies or departments on issues relating to access to opportunity; however, the Assessment Tool is designed to assist program participants in identifying where issues are present and then figure out how they might go about solving them. In addition, HUD has clarified in certain questions in the Assessment

Tool when the analysis is intended to focus on any trends in demographics, law, policies, or practices that could impact fair housing issues. These questions are to be informed by the community participation process, any consultation with other relevant government agencies, and the State's own local data and local knowledge. HUD has also included the following language to clarify the focus of these questions: "Participants should focus on trends that affect that State or trends that affect areas of the State rather than creating an inventory of local laws, policies, or practices."

**The evaluation of all publicly supported housing in the State is important to the State assessment.** Several commenters expressed support for the evaluation of all publicly supported housing in the State as part of the assessment including LIHTC. A commenter requested that the definition of publicly supported housing include State-funded housing programs and the federal LIHTC program, consistent with the definition in the local government tool, and possibly include Rental Assistance Demonstration (RAD). The commenter stated that to provide a meaningful analysis, the locational analysis of publicly supported housing needs to be conducted at the census tract level or otherwise local level geography, not the county level.

**HUD Response:** HUD appreciates this comment and notes that the instructions to the Assessment Tool make clear what is considered publicly supported housing for purposes of conducting an AFH. The instructions state that the term "publicly supported housing" refers to housing assisted, subsidized, or financed with funding through Federal, State, or local agencies or programs. HUD also notes in the instructions that other publicly supported housing, aside from the categories for which HUD is providing data, relevant to the analysis includes housing funded through state and local programs, or other Federal agencies, such as the U.S. Department of Agriculture and the U.S. Department of Veterans Affairs, or other HUD funded housing not captured in the HUD-provided data.

HUD appreciates the commenters' concern about the level of the geography of the publicly supported housing analysis. HUD also recognizes the burden that conducting an analysis at the census tract level might place on States, and believes that the level of geography for this part of the analysis in the Assessment Tool will provide for a meaningful fair housing analysis. However, HUD notes that States may receive information in community

participation that indicates a need to evaluate a fair housing issue at a lower level than a County.

*Analysis of publicly supported housing should include information from residents.* Commenters stated that in the publicly supported housing section, the tool should direct program participants to include information about whether residents prefer their developments to be improved and preserved or prefer assistance in moving to areas that may offer other opportunities. The commenters stated that the tool should also require a description of efforts made, underway, or planned to preserve project-based section 8 developments at risk of opting out of the program or prepaying their mortgage, or of other HUD multifamily assisted developments from leaving the affordable housing stock due to Federal Housing Administration (FHA) mortgage maturity. The commenters stated that the tool should also require a description of efforts to preserve LIHTC developments including at year 15 and beyond year 30. A commenter stated that the tool should require program participants to identify areas where residents are suffering from or at risk of displacement due to gentrification.

*HUD Response:* HUD appreciates the suggestions of these commenters and agrees that this sort of outreach would lend invaluable information to States when conducting their AFH. HUD notes that States must comply with the requirements for community participation, consultation, and coordination as set forth at 24 CFR 5.158, and the applicable regulations in Part 91.

*Restore the section on mobility for residents of publicly supported housing.* Commenters stated that HUD should restore the discrete section on mobility for residents of publicly supported housing to all AFH Assessment Tools. Commenters stated that the discrete subsection on mobility for residents of publicly supported housing must be restored because of the various level involvement of States—i.e., State-level agencies in 30 States administer the HCV program, two States administer public housing throughout the State or in most of the State, many States have State-level agencies that have oversight for HUD's multifamily assisted properties, and State housing agencies have the potential to play a catalytic role in facilitating housing mobility for residents of publicly supported housing, including properties converted under RAD. The commenters stated that HUD should at least include State-administered HCV and public housing

programs in the list of programs for which information is required under section V(C)(1)(d)(i) of the tool.

Another commenter stated that the policy options for increasing mobility at the county level as opposed to the neighborhood level are significantly more challenging. The commenter stated that to make funding decisions accordingly, the State would need to completely rework its method of distribution and scoring criteria for grant applications.

*HUD Response:* HUD appreciates the suggestions of these commenters, HUD has stated previously that it decided to address many issues related to mobility in the contributing factors, such as the contributing factors of “Impediments to Mobility.” HUD also asks about mobility in the additional information questions at the end of each section of the Assessment Tool. HUD also appreciates the commenters’ recommendation to add State-administered HCV and public housing programs to the “Other State Administered Programs Related to Housing and Urban Development” subsection. At this time, HUD declines to include this reference.

*Clarify the analysis needed for Rental Assistance Demonstration (RAD) units.* Another commenter suggests that the final tool instructions should clarify why RAD units should be analyzed as part of HCV and not project-based Section 8 subsidies.

*HUD Response:* HUD has clarified the instructions to the Assessment Tool that now state data on projects converted under RAD is included in the data on project-based Section 8 or HCVs. HUD has provided the following language in the instructions: “Relevant information may also include assisted housing converted under the Rental Assistance Demonstration (RAD) program. Data on RAD-converted properties are not provided separately, but are included in the overall data on Project-based Section 8 and for Project Based Vouchers in the overall data on Housing Choice Vouchers.”

*Limit analysis for the State to the use of HUD funds.* Commenters stated that the State Assessment Tool should not cover funding sources outside the purview of HUD. The commenters stated that LIHTC and the State's QAP, as well as, “other State-administered programs related to housing and urban development” are outside HUD's statutory authority given to it by Congress. The commenters stated that States do not agree that accepting HUD funds requires the State to use non-HUD funds in a manner proscribed by HUD. A commenter stated that such requirement poses serious concerns

under the Tenth Amendment to the United States Constitution. The commenter stated that the tool, as crafted, effectively creates a process that promotes race-based decision-making by recipients of HUD funds in violation of the Equal Protection Clause of the United States Constitution.

*HUD Response:* The Fair Housing Act provides HUD specific authority over programs and activities relating to housing and urban development. Program participants are required to analyze Low Income Housing Tax Credits (LIHTC) data as a part of their Assessment of Fair Housing (AFH). LIHTC are the primary producers of affordable housing nationwide. Additionally, LIHTCs are required to include a certain proportion of affordable units and accept vouchers, and States play a pivotal role in deciding where this housing is located. For these reasons, an analysis of this type of affordable housing is highly useful and appropriate when conducting a fair housing analysis.

*LIHTC questions are important to a State's analysis, but need to be more detailed.* A commenter stated that the questions relating to the analysis of LIHTC are an appropriate information collection process that will have practical utility for evaluating States' AFFH obligations. Another commenter similarly stated that a statewide analysis of LIHTC will not only allow the State to identify issues in its own administration of the program, but to identify areas where the lack of LIHTC developments indicates there may be policies preventing affordable housing from being located in high-opportunity areas. The commenter stated that “concerted community revitalization plans” must be defined in a way that ensures they are meaningful and effective, and must set out clear standards for review and assessment of these plans, and that allowing jurisdictions to simply designate nominal “revitalization” areas perpetuates segregation by steering LIHTC developments into distressed neighborhoods. The commenter further stated that since LIHTC is a housing production program, the State's primary concern in assessing its QAP and program administration must be whether it is producing housing opportunities in high opportunity areas. A commenter supportive of the LIHTC questions stated that HUD, however, should respect the LIHTC administering agencies, Department of Treasury and Internal Revenue Service (IRS), and provide States with considerable discretion in designing their QAPs.

Other commenters stated that in addition to describing program-by-program demographics and distributions, States should describe the combined distributions and overall demographics in macro to fully evaluate the impacts of publicly supported housing together, since different programs often have inherently different demographic and geographic distributions (for example, market-driven home mortgages and demand-driven LIHTC).

Another commenter recommended that HUD include a question asking about efforts to leverage the LIHTC program to increase the supply of housing units that are accessible to persons with disabilities.

A commenter stated that HUD should clarify how States with sub-allocators should handle the analysis of states' LIHTC and QAPs. A commenter pointed out that the State of Minnesota has a unique system in which the development of QAPs are a separate process for the State and several local level sub-allocators. The commenter stated that sub-allocators are participating jurisdictions and will be conducting their own assessment of fair housing, so when applicable, local participating jurisdictions with their own QAPs and States should be required to provide analysis of only the QAPs that are in their control. The commenter stated that while the evaluation of LIHTC properties funded through 9 percent and 4 percent tax credits will be valuable, the commenter clarifies that the 9 percent credits are those most impacted by QAPs.

A commenter stated the LIHTC questions are important but need more detail, including the differing weights assigned to preferences and incentives; the question must also discuss results. The commenter stated that additional guidance is also needed with respect to the analysis of LIHTC, including recommendations for local data sources that are easily accessed by states, improvements to the instructions for this section, examples of the types of agreements that include restrictions against discrimination of voucher holders, and the opportunity for states to include any regional policies and initiatives. The commenter stated that the LIHTC section of the publicly supported housing section is confusing as written. The commenter stated that it seems to require the State to research all local land use law in over 200 communities in the State and provide an explanation, town-by-town of how each influence the location of LIHTC units. The commenter stated that it believes the question was meant to

determine access to LIHTC units instead. Another commenter stated that more robust instructions would help ensure that the LIHTC sub-section prompts a meaningful fair housing analysis; the instructions should explain that 26 U.S.C. 42(m)(1)(B)(ii)(II) requires that housing finance agencies give priority among selected developments in high-poverty qualified census tracts if those developments contribute to concerted community revitalization, but the statute does not more broadly require incentives for developments in high poverty neighborhoods.

*HUD Response:* HUD appreciates these commenters' observations and recommendations. HUD has revised some of the questions in the LIHTC subsection of the Publicly Supported Housing section of the Assessment Tool. HUD believes that the questions relating to LIHTC in the Assessment Tool now address these issues more fully. For instance, HUD has included language in the questions relating to units for persons with disabilities, permanent supportive housing, and preservation of existing long-term affordable housing.

HUD will continue to provide guidance and technical assistance to program participants, and will further address the analysis of LIHTC when it updates the AFFH Rule Guidebook. HUD also notes that, as with all questions in the Assessment Tool, program participants need only use local data and local knowledge when they meet the criteria specified at 24 CFR 5.152 and the instructions to the Assessment Tool. In the case of "local data," under the regulation's definition, such data are "readily available at little or no cost." In the case of "local knowledge," under the regulation's definition, such information, "is known or becomes known" to the program participant, indicating it is either already within the state agency's own information or it is made available, for instance from another agency or through information that can be considered in the community participation process.

*Comments on local data and local knowledge.* Commenters stated that while the AFFH final rule defines "local data" and "local knowledge" as readily available information that requires little to no cost to obtain, it also notes that local data may be more relevant and current than HUD-provided data and requires program participants to supplement HUD-provided data with local data when it is relevant and easily obtainable. The commenters stated that this creates an expectation of analysis, instead of an allowance of, local data without considering the enormity of data that is available to states through a

reasonable amount of searching the internet alone. The commenters stated that jurisdictions with strong affordable housing and academic research communities that provide a wealth of information at little to no cost are penalized because they have a higher burden of reviewing and analyzing locally available data since more high quality data is available. The commenters also stated that absent dedicated funding from HUD, a State is unlikely to be able to analyze and properly present local data in a manner consistent and relatable with other components of the tool, nor can State housing agencies adequately compile and analyze local data that is available at little to no cost with respect to the non-housing elements that the tool instructs States to analyze. The commenters further stated that without HUD provided guidance to its grantees and the public regarding the extent to which local data must inform conclusions and be displayed within the AFH, States are vulnerable to complaints even where HUD considers a State to have met its burden; oral comments from HUD staff are not sufficient and States will expend more resources defending complaints, as will HUD in processing such complaints.

Other commenters stated that HUD should give States the flexibility to use HUD-provided county data, tract level data, or locally supplied data as appropriate. The commenters stated that, for example, educational access is not a meaningful indicator at the county level, and while the local level (tract based) is more appropriate, the state would utilize data directly from its department of education.

Other commenters stated that collecting the data required to provide meaningful explanations would be extremely challenging at best and although States are not required to collect primary data they are uncertain of how to compile the information for the assessment without doing so. The commenters stated while the tool says States are not required to collect primary data, it is unclear how States will otherwise acquire local data besides administrative data sources. The commenters stated that even though collecting primary data is not required, it would require time consuming and costly surveys to amass the other primary qualitative data to conduct analyses in areas such as education.

Commenters stated that HUD should not permit program participants to assert that data and knowledge are unavailable, which HUD currently proposed to be a potentially "complete and acceptable response." Rather, HUD

should require the use of local data and local knowledge, including for persons with disabilities served in home or community-based settings and those served in institutions, assisted living facilities, and those ready for discharge from psychiatric hospitals. Another commenter stated that program participants should be required to describe efforts to identify supplemental data and local knowledge from sources such as universities, advocacy organizations, service providers, planning bodies, transportation departments, school districts, healthcare departments, employment services, unions, and business organizations, and they should be required to summarize and report what information it chose to use and why.

Other commenters stated that States should have flexibility to determine when including fine-scale local data is appropriate. Commenters stated that States should be allowed to use their own data to complete the tool and HUD data should be optional since State data may be more representative of the State's true characteristics.

A commenter stated that HUD should not impose a statistical validity test on State and local data that is so strict as to prevent States from using certain data sources that may be helpful in their planning efforts.

Another commenter asked whether HUD data supersede local data. The commenter stated that it appears that local data needs to validate HUD data and it is unclear what happens when the data results are inconsistent.

A commenter stated that the tool should be structured such that the tool provides recommendations on the use of local data and knowledge including on scope of issues, best practices for information-gathering, and coordination with local agencies.

*HUD Response:* HUD appreciates all of the commenters' suggestions and recommendations. HUD has provided language in the instructions to the Assessment Tool regarding the use of local data and local knowledge. Additionally, the AFFH Rule Guidebook addresses the issue of when to use this information. Further, HUD has explained that HUD-provided data must be used when conducting the AFH; however, in the event that the program participant has local data that is more current or accurate than the HUD-provided data, the program participant is welcome to use such data, so long as it provides HUD with the local data and an explanation of why it is being used in place of the HUD-provided data. HUD has explained how it will assess the statistical validity of local data above.

*An analysis of income-levels is important.* A commenter stated that when discussing affordability of housing units in the definitions section and throughout, it is important to clarify that it is not sufficient to have units that are affordable at 80 percent of area median income (AMI) or other moderate incomes. The commenter stated that when looking at inclusionary zoning or other affordable housing policies, it is important to consider which income levels are included and excluded. The commenter further stated that availability of housing at different affordability levels should be included in the definitions of "location and type of affordable housing" and "availability of affordable units in a range of sizes."

*HUD Response:* HUD appreciates these suggestions, and notes that some of the HUD-provided data does include income levels. In addition, consideration of the level of affordability of housing for lower income groups is included in the contributing factors, "availability of affordable units in a range of sizes," "lack of affordable, accessible housing in a range of unit sizes," and "location and type of affordable housing. HUD will further consider additional guidance as it relates to the affordability of housing and how it might relate to fair housing issues.

#### *Comments Specifically Directed to Burden*

While many commenters commented on burden; the following comments supplemented the comments already provided on burden by specifying the number of hours they believe it will take to complete the AFH.

Several commenters stated that the estimate of 1,000 hours per year to complete this paperwork is excessive. The commenters asked what paperwork can be eliminated in order to complete this form. The commenters also asked what is going to be done with this information once HUD collects the information. A commenter stated that HUD should hire contractors and not place the task onto PHAs. Another commenter stated that if the State of Massachusetts assumes even half of the estimated burden of 120 hours of staff time per PHA that the State coordinates with, based on HUD's estimate that one-third of PHAs may seek to enter into joint AFHs with their relevant State, this would be an additional burden of approximately 7,800 hours of staff time.

Commenters stated that HUD's estimate of the burden of compliance with the proposed tool is not accurate, that the tool will take at least 2,500 hours to complete. Commenter stated

that the estimate of 1,500 hours may be too low considering the volume of information and scope of work, which falls outside the normal activities for most agencies. Commenters stated that they would need to devote a full-time staff person to do the AFH for 37 weeks. A commenter stated that it estimates the burden at 2,000 hours and a cost of \$150,000 to \$200,000. Another commenter stated that the burden estimate is glaringly low and will be four to five times the 1,500 hours that HUD estimated. Another commenter stated that it spent 6,000 hours to complete its last AI over a two-year period. Another commenter stated it will take 4,000 hours to complete the AFH. Another commenter stated that it took two individuals 6 months to complete the AI and expect completion of the AFH to take considerably longer. A commenter stated that its State is considering hiring additional staff, reallocating staff resources, and/or contracting out, but this will have major budget implications for the agency, especially because of the level of specialized experience required to administer the tool and analysis.

Another commenter stated that in the State of Ohio, acquiring and evaluating the data would involve a significant obligation of resources from at least 11 different State agencies and would require an estimated 1,500 hours. The commenter stated that the State of Ohio will likely be forced to contract with an outside vendor and could cost hundreds of thousands of dollars which will likely have to come out of funding for Training and Technical Assistance and administration of the State's HUD programs. A commenter stated that the assessment will be very expensive, and that the State of Iowa spent \$148,000 on a consultant to prepare the 2015–2019 Consolidated Plan and Analysis of Impediments to Fair Housing and expects the cost to prepare the proposed tool to be even greater; with CDBG and HOME programs experiencing considerable reductions since 2010. Commenters stated that States have fewer administrative dollars to pay for the development of such plans. A commenter stated that the Massachusetts Department of Housing and Community Development estimates that the time required would be at least 5,000 hours of staff time plus approximately \$150,000 in consultation fees.

*HUD Response:* HUD appreciates and understands the concerns of these commenters. Now that HUD has announced that there will be a second 30-day comment period relating to the data in and functionality of the AFFH—

T for States and Insular Areas as described above, the public will have an additional chance to provide HUD with feedback.

HUD appreciates the work of its program participants in this area. HUD is committed to and will continue to find ways to reduce burden for its program participants while still providing for an appropriate fair housing analysis and the setting of meaningful fair housing goals. Furthermore, HUD will continue to provide training and technical assistance to program participants to increase their capacity to conduct a meaningful AFH.

#### *Comments in Response to HUD Specific Issues for Comment*

As noted earlier, HUD solicited comment on 6 specific issues. The issues and the comments received in response to these issues are as follows:

#### *Content of the Proposed State and Insular Area Assessment Tool*

*1a. Which approach to the opportunity indicators would be more beneficial in eliciting an appropriate fair housing analysis from States and insular areas?* (That is, more general questions or targeted questions)

Commenters were divided on the approach to take. A few commenters stated that they preferred more general questions, as opposed to the targeted ones, as proposed by HUD. The commenters stated that more general questions would enable States to structure and prioritize their analysis as well as discern when it is appropriate to apply a more targeted analysis in smaller communities and rural areas. The commenters further stated that targeted questions go too far into some areas that are only tangentially related to housing. Other commenters stated that the targeted questions require an analysis of information and policies that are beyond the State's purview, control, and understanding. The commenters stated that they would not be able to provide meaningful answers to guide program decisions and allocations of CDBG funds, so these questions should be eliminated from the State tool.

Another set of commenters supported adding targeted questions regarding the five topics proposed by HUD. The commenters suggested specific areas of focus within each of these topics: (1) For re-entry, the tool should ask about existing laws, policies, and practices that help or hinder successful re-entry of members of protected classes to housing, employment, education, counseling, and other opportunities; (2) for emergency management, the tool

should add a question focused on emergency preparedness and response for people with limited English proficiency (LEP); (3) for public safety, the tool should refer to access to housing for women and children encountering or threatened with domestic violence; (4) for public health, the assessment tool should refer to lack of access to quality, affordable food and should ask about the impact of the policies, practices, and resources of neighboring states/the broader geographic area.

*HUD Response:* HUD appreciates the commenters' feedback on this issue. As stated above, HUD has included certain opportunity areas for consideration if they arise during community participation. HUD has decided to include additional opportunity areas in the "Additional Information" section of the Disparities in Access to Opportunity section of the Assessment Tool and has specified that this portion of the analysis is limited to information obtained through the community participation process. HUD notes that other categories that are not listed may also be identified through the community participation process.

*1b. Has HUD captured the appropriate level of information from States and insular areas? Are there additional areas of analysis that should be included given the areas of responsibility, programs, policymaking, and jurisdictions of States and insular areas?*

Several commenters stated that the tool requests an extraordinary amount of information that will be extremely difficult for States to collect and analyze in a meaningful matter and relies too much on local data; some questions are nearly impossible to answer from a statewide perspective, such as questions on education policy which will vary from district to district and questions on zoning and land use policies. The commenters stated that the scope of the proposed tool must be scaled back significantly so that State grantees can reasonably conduct a meaningful AFH on issues they can meaningfully address.

Other commenters identified specific targeted questions for inclusion. A commenter stated that a discussion of both segregation and integration are important, but HUD only asks States to identify groups living in these areas; a more meaningful assessment would include case studies outlining characteristics, such as favorable policies and programs evident in integrated areas. The commenter also stated that assessing the demographic trends over time with respect to

segregation and integration is important, but that it would be valuable to require States to identify within areas that experienced a significant demographic change, any patterns that can be attributed to laws, policies, practices, or market forces. The commenter stated that this will aid in identifying local and regional forces that are counter to the State's obligation to AFFH. The commenter further stated that while it is important for the State's to assess laws, policies, and practices, it is also important to review a history of laws, policies, and practices that contributed to the demographic patterns currently evident in a State because understanding the history of segregation and the public policy that shaped it is indispensable to an assessment of fair housing. Another commenter stated that States should consider fair housing issues affecting protected classes that are protected by State fair housing laws—even if those groups are not explicitly protected by the Fair Housing Act (*e.g.*, members of the LGBT community, section 8 voucher holders).

Another commenter stated that HUD should reconsider the development of a *de novo* tool for States rather than adapting the one created for local governments because of the different scales involved. The commenter stated that most States are much larger and more geographically and demographically diverse than individual communities. The commenters stated that States need flexibility in tailoring the content of the assessment to ensure that analysis conducted will be meaningful and under the authority of state housing agencies. The commenters stated that States should have the flexibility to use the HUD data at appropriate scales, drilling down into local analysis of areas such as opportunity for employment, education, and transportation in locations of the State where they are most impactful. The commenters stated that many of the opportunity questions in the State Assessment Tool should be removed because they are only appropriate at the neighborhood level. The commenters stated for a large State, local decision making and local policies are the bases for determining whether housing is "fair" since it is not reasonable to expect State residents to move long distances from their current locations to access housing opportunities.

A commenter stated that the tool should instruct State participants to examine how State level policies affect fair housing to avoid the hazard that AFH may produce a compilation of local level issues while failing to



document meaningful responsibilities of the States and State-level structural issues. The commenters stated that HUD should make this explicit throughout the guidance, such as: Adding instructions and expanding lists in the discussions of contributing factors; inserting a paragraph or two that illustrates this in the instructions; adding examples of structural State-level goals into the example goals on page 42; and amending the contributing factor descriptions.

This commenter also stated that States should be prompted to consider the following issues: State tax structures; fiscal systems, such as revenue distribution with regard to transportation (*i.e.*, highway or transit funding), or funding programs that incentivize certain development patterns, *e.g.*, economic development of greenfields; laws and regulations in areas that affect redevelopment, such as foreclosure, bankruptcy, land banking; State-level laws and policies that affect or incentivize zoning and other land use structures; administration and funding programs of social services; ways that States create barriers or disincentives (or can set goals that encourage) regional cooperation among local jurisdictions, as with tax-sharing, government consolidation, joint planning and program implementation, and shared services; and executive decisions to sign into law legislation which prevents local governments from adding protected classes to their local fair housing laws.

**HUD Response:** HUD appreciates all of the recommendations of the commenters. While HUD is maintaining the basic structure of the Assessment Tool as outlined by the AFFH Rule, HUD has made significant modifications to this Assessment Tool to account for the differing level of geography, authority, and role of States. HUD remains committed to issuing Assessment Tools that are tailored to each type of program participant, appropriate to their roles and responsibilities, in a manner that strives to reduce burden, while still achieving a meaningful fair housing analysis. Part of this commitment is being implemented with the additions of the extended PRA process, including a second 30-day comment period on the State level data in the AFFH-T so that the public and program participants may see how the data HUD is providing will be tailored to the State.

In response to the comments offering specific suggestions for improvements, HUD has made a number of changes. These include amending some of the contributing factor descriptions based

on these commenters' suggestions. For example, HUD has amended the description of "Land use and zoning laws" so that it is more specific to the role of States. HUD also acknowledges the limitations of States in terms of their authority or lack thereof imposed by State and local law. HUD has added language to the questions and instructions to clarify that States are not required to compile inventories of local laws and practices but should focus on trends affecting fair housing issues in the State or areas of the State.

In terms of the comments on requiring analysis of entitlement areas, HUD has declined to remove consideration of all areas of the State, but has made some clarifying modifications. The Assessment Tool still requires State wide assessment, including fair housing issues across the state, including entitlement areas.

Nonetheless, HUD believes that in order for the State to set meaningful fair housing goals, it must conduct an analysis of the entire State. As stated above, States may refer to AFHs of entitlement jurisdictions within the state, but should keep the considerations mentioned above in mind. Note, States are accountable for the information contained in the AFH they submit to HUD.

#### *States With Rural Areas, Tribal Areas and Other Key Differences Among States*

*2a. Are there particular questions that HUD should include in the State and Insular Area Assessment Tool to ensure the appropriate focus on rural areas? What sources of information do States have access to when considering fair housing issues in rural areas? HUD seek comment on any additional questions or additional data that should be included and the applicable section of the Assessment Tool to address how States and insular areas can assess rural areas.*

Commenters stated that, in most cases there would be little or no local data for the balance of the State. Commenters stated that local data is likely to be administrative such as public housing units, vouchers, and associated geographic and demographic data for those units/vouchers and the State does not have access to this data. Commenters stated that other possible sources include social services, school, and health department data, but the State does not have access to this data either and it is unclear at this time how feasible it would be to obtain it.

Commenters stated that the Ohio Poverty Report, published by the Ohio Development Service Agency, identifies areas of highest concentration of people

living in poverty, and these counties have predominantly white populations. The commenters asked whether HUD considered that these areas are predominantly white, not because of discrimination but because minorities do not want to move to areas that are limited on employment, transportation, medical care, grocery stores and other services. The commenters stated that diversifying these counties will ensure fair housing but will not help people rise from poverty because these areas are impoverished.

A commenter stated that HUD should prioritize establishing housing in areas with access to services, employment, and medical care and not move people away from these services.

Other commenters stated that county-level maps and data are likely to be misleading, particularly in States with large rural areas. The commenters stated that data quality and availability is a severe impediment to accurate analysis in States with large rural areas, and acquiring local data is prohibitively burdensome. The commenters stated that the tool should explicitly incorporate flexibility for States to determine the appropriate scale for addressing their rural areas. Another commenter stated that the characteristics of a small city could strongly influence the data value for a county, and thereby misrepresent the non-urban portion of that county.

Commenters stated that HUD data is limited on rural areas and therefore States should be able to use their own data instead of HUD data. A commenter stated that HUD should provide guidance instructing States to consider additional local data for rural areas when evaluating the dissimilarity index for rural communities, and should provide examples of potential data sources.

Other commenters stated that rural areas have particular challenges regarding data quality with respect to all areas of analysis required in the AFH. The commenters stated that the HUD provided data on areas of opportunity are not as applicable in rural areas as in urban, and said, for example, there is less transit in rural areas so these areas would be unfairly biased. The commenters also said that HUD data is also biased for quality schools in rural areas since there is usually only one choice for school attendance in the area, unlike in an urban area, so prioritizing locations based on school quality could dismiss many markets who otherwise have significant needs for affordable housing. Another commenter stated that it is not clear how States are expected to analyze public infrastructure in rural

areas, and the lack of certain infrastructure that requires higher population densities may or may not imply poverty or lack of opportunity. The commenters stated that a State cannot use its CDBG or HOME funding in HUD direct entitlement/urban areas of the State and these are where the population is densest, so the tool will indicate the best place for resolving fair housing impediments are in the urban areas yet state's federal funding cannot be used there.

A commenter stated that in rural areas, there are more cases of a lack of education on the part of local leaders or business people to the needs of fair housing and a lack of ordinances to assist development in these areas.

Other commenters stated that there will be significant differences between States that are rural and those with large urban cores or a combination of both, but there is not enough information to determine how the assessments might be made and how the tool might make these distinctions since a fully functioning map tool is not yet available.

A commenter expressed concern about the specific questions in the tool that will apply in a rural context; it is hard to interpret the phrase low or high poverty in a rural context when "neighbors" may be ¼ mile or more away from each other. The commenter stated that the tool does not contemplate significant differences in States' geographic, demographic, organizational, and governance structure. The commenter described itself as a State with 159 counties and 188 PHAs and diverse geographic areas, and that it is unclear how the analysis for rural areas will be achieved.

Another commenter stated that determining indicators for access to opportunity in rural areas will be difficult and in smaller States, low-income households tend to live in metropolitan areas in order to access what they need if they do not own an automobile. A State commenter stated that the template does not define "low poverty neighborhood," but requires an analysis of it in both urban and rural areas. The commenter stated that this is not realistic for rural areas because there is often no data available, even at the local level. The commenter stated that the basic needs of rural areas are different from urban areas; therefore, analyzing general issues such as employment, education, and disaster emergency preparedness does not reflect the primary challenges of the State's rural communities.

A commenter stated that so long as a community provides services and

resources, people with vouchers should be allowed to use them wherever they wish. The commenter stated that by requiring various populations to move for the sake of opportunity would mean moving out of small town America and require vouchers to be used only in large metropolitan areas where we as a nation believe all opportunity exists.

**HUD Response:** HUD appreciates the views of the commenters and their feedback. HUD acknowledges that data in rural areas presents certain challenges for States and is committed to providing technical assistance and guidance on how to assess fair housing issues in rural areas. In response to comments on the unique needs of rural areas, and how State agencies may consider rural issues, HUD has added the following language to the instructions:

"HUD acknowledges that the HUD-provided data on some opportunity indicators, such as transit and jobs proximity index, while potentially useful for assessing metropolitan and suburban areas will be less applicable for rural areas. State agencies may also need to utilize measures that are more relevant for their rural areas. For example, water and sewer and the need for basic infrastructure may be appropriate and necessary to analyze. Some HUD-provided data may be interpreted differently in rural areas and urban areas (e.g., the R/ECAP thresholds and opportunity indicators). This is not intended to result in comparisons between different parts of the state that would result in inappropriately setting goals for affordable housing and economic development activities. HUD does not intend the analysis to limit investment decisions for affordable housing or community development in rural areas when compared to other parts of the State. HUD programs, including CDBG, HOME and Section 8 play an important role in addressing the needs of rural areas. The State's analysis of non-entitlement areas can inform goal setting within those areas. States should take into account the unique housing and economic development needs of rural areas in informing their program-related goals."

**2b. HUD seeks comment on any key areas beyond those HUD has presented in the State and Insular Area Assessment Tool.**

Several commenters asked that HUD not add any areas to the tool, but rather, reduce the areas of analysis expected of States.

Another commenter stated that the tool should require States and Insular areas to set as many goals as are necessary to address each contributing

factor. The commenter stated that the tool should clarify that inclusionary zoning is a strategy for addressing contributing factors rather than a contributing factor itself by including the phrase "lack of" in front of "inclusionary zoning" in the bullet list of relevant types of land use and zoning laws. A commenter suggests that the definition in the Appendix be changed to reflect this.

Another commenter suggested very specific questions for inclusion in the tool. The commenter stated that the tool should ask more specific questions about gentrification and displacement, since these patterns pose a risk of contributing the re-segregation of city neighborhoods; States and Insular Areas play an important role in the administration LIHTC and other programs so there is a great deal they can do to ensure that revitalizing neighborhoods in cities emerge as stable, integrated communities of opportunity in which resident choice and autonomy is respected. The commenter also stated that the tool should ask specific questions about the administration of relocation assistance and the location of replacement housing, particularly because States have a unique role in administering federal disaster relief and recovery funds. The commenter further stated that HUD must include a question about whether a State has a truly "substantially equivalent" fair housing law in the Fair Housing Enforcement, Outreach Capacity, and Resources Analysis, and HUD must ask whether States have adopted legislation that limits the ability of local governments to protect the fair housing rights of individuals and families. The commenter stated that the tool should clarify the definition of "substantially equivalent" in the context of State and Local Fair Housing laws by explaining that the Federal Fair Housing Act provides a floor and not a ceiling, and they must also have procedures for adjudication and enforcement that conform with those under the Federal Fair Housing Act. The commenter stated that there is evidence that some States do not know what the term "substantially equivalent" means, and in light of actual or threatened changes to State fair housing laws and failure to properly administer programs funded under the Fair Housing Assistance Program, it is likely that States are out of compliance with their purported substantial equivalency. The commenter stated that HUD should provide examples of barriers to fair housing present in the procedures or practice of

enforcing the law. The commenter stated that the tool should provide recommendations on use of Fair Housing goals to inform planning processes, including examples of relevant goals and steps that can be taken to connect fair housing with community and interagency planning.

**HUD Response:** HUD appreciates these commenters' suggestions. HUD has revised the description of land use and zoning in the Appendix to reflect the commenters' recommendations regarding inclusionary zoning. HUD also notes that the Assessment Tool previously and continues to include questions and contributing factors relating to State or local laws that have been determined to be "substantially equivalent" to state and local fair housing laws. HUD has also revised the questions in the Publicly Supported Housing Section, including the LIHTC-related questions in response to the recommendations from commenters.

*2c. Does the Assessment Tool adequately take into account, including in the terminology used, the issues and needs of Indian families and tribal communities while also factoring in the unique circumstances of tribal communities?*

A commenter stated that tribal areas should not be required to be included as part of any required full State analysis since reservations are primarily in remote locations without access to opportunities and often have concentrations of poverty, and these areas are sovereign nations within the borders of the State and are not required to provide the State with data. Another commenter stated that HUD must use appropriate indicators to assess fair housing in tribal areas. The commenter stated that these areas are likely to score poorly on measures such as use of public transportation and concentration of poverty. The commenter expressed concern that there will be penalties when these areas score low when considering disparities in access to opportunity. Another commenter stated that the tool does not adequately take into account the needs and issues affecting tribal communities, and the tool should focus on infrastructure that will help raise the standard of living in these communities.

**HUD Response:** HUD appreciates the feedback from these commenters. HUD notes that the Assessment Tool does not explicitly require an analysis of tribal areas, but notes that inclusion of such an analysis, where appropriate and consistent with applicable law would be encouraged. If there are areas of analysis States believe to be of particular importance with respect to tribal areas,

and to the extent allowed by law, they can set goals to address these fair housing issues, and HUD would encourage States to do so. HUD continues to seek comment on the needs and considerations regarding Native American reservations and trust lands and the unique government to government relationship between Native American tribal governments and the United States government. A specific request for public comment on these issues is included at the end of this Notice.

#### *Disability and Access*

*3. Is the Disability and Access section of the Assessment Tool adequately clear such that it includes the analysis of prior sections as it relates to disability and access issues?*

A commenter stated that HUD should allow and encourage States to structure the disability and access section of the assessment with their Olmstead planning efforts by giving flexibility in the format and structure of this section. The commenter stated that, for example, Minnesota's Olmstead plan established baseline data and demographic analysis including segregated setting counts and the State would use these baseline data and metrics and subsequent research in its Assessment of Fair Housing, where applicable. Another commenter stated that in the housing accessibility questions, include language relating to State actions to ensure compliance with Federal and State accessibility requirements and require a description of pending or settled Olmstead-related lawsuits, settlements, or other agreements. In contrast to this latter comment, a comment stated that the sentence in the Disability and Access section, which states—"Include the extent to which individuals with disabilities who require accessible housing move out of or into the State to obtain accessible housing"—will be difficult if not impossible for States to determine this.

Other commenters stated that HUD should clarify that definitions of persons or people with disabilities is consistent with the definition of the Americans with Disabilities Act, where an individual with a disability is a person who: (1) Has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Another commenter stated that while a portion of the tool does cover assessing the needs of persons with disabilities, so much of the tool correlates to quantitative map results

that are focused entirely on race and national origin raises concerns that it may be hard for the State to defend policy decisions to assist persons with disabilities if the same policy decision is not in harmony with the more quantified race-based results of the tool. The commenter stated that many of the questions relating to disability are highly localized, making State policy in this regard more imprecise.

A commenter stated that the section on disability and access is clear as it relates to disability and access issues, but should be condensed to include focus areas that the State can really affect change in. A commenter similarly stated that local governments also have Olmstead obligations. The commenter stated that the Assessment Tool for Local Governments and the Guidebook provide little guidance in this regard. The commenter recommended that HUD develop additional guidance to better ensure that connections are made between the State and local governments engaged in AFH planning.

Another commenter stated that HUD should ask States about the steps they take to monitor their publicly supported housing to ensure compliance with accessibility requirements and about where accessible units are located in relation to areas of opportunity and significant amenities. The commenter stated that HUD should omit the question asking States to assess whether persons with disabilities have had to move out of State to obtain accessible housing.

A commenter stated that HUD should clarify that "sheltered workshops" rather than supported employment services raise civil rights concerns. This commenter also stated that HUD should clarify that the focus of educational opportunities for persons with disabilities should be on opportunities in integrated educational settings.

**HUD Response:** HUD thanks the commenters for these recommendations. HUD recognizes that there is a lack of nationally-uniform data related to disability compared to other protected characteristics; however, no protected class under the Fair Housing Act is more important or more deserving of a fair housing analysis than another. HUD will continue to explore options for including additional data related to disability.

HUD has included two questions related to the State's monitoring in the Fair Housing Monitoring and Enforcement, Outreach Capacity, and Resources section of the Assessment Tool.

HUD appreciates the numerous comments suggesting clarifying,

technical and grammatical edits in the Disability and Accessibility analysis section, the accompanying instructions and relevant contributing factors. In response, a number of clarifications and revisions have been incorporated into the assessment tool. For example, regarding the commenters' recommendation regarding "sheltered workshops," language was added to distinguish such institutionalized or segregated settings from other supported employment services that are not delivered in such settings. Similar clarifying and technical edits were made to the instructions and relevant contributing factors.

HUD appreciates the other comments and intends to provide further guidance in support of the Assessment Tools to assist program participants in meeting their AFFH obligations under the Final Rule.

#### *Contributing Factors*

*4a. Are there additional contributing factors that should be included in the State and Insular Area Assessment Tool that are of particular importance for States and insular areas?*

Commenters stated that the following contributing factors should be added to the disability and access section: Community opposition, location and type of affordable housing, occupancy codes and restrictions, private discrimination, access to financial services, availability, type, frequency and reliability of public transportation, lack of state, regional, or other intergovernmental cooperation, admissions and occupancy policies and procedures including preferences in publicly supported housing, impediments to mobility, lack of private investment in specific areas within the State, lack of public investment in specific areas in the State including services and amenities, siting selection policies, practices, and decisions for publicly supported housing, and source of income discrimination. A commenter requested that HUD add the contributing factor of "Threats to affordable housing preservation" and the commenter provided a description of this factor as well. Another commenter stated that environmental hazards should be listed as a contributing factor to R/ECAPs.

A commenter requested that HUD add "Access to public space for people experiencing homelessness" as a contributing factor throughout the assessment because laws that criminalize the homeless or otherwise burden the use, or access to, public space for those without shelter or housing a deleterious and segregative

impact on living patterns and fair housing opportunity that is not captured in any of the contributing factors. The commenter stated that HUD could create a factor that mirrors "regulatory barriers to providing housing and supportive services for persons with disabilities" to include laws that have the effect of restricting provision of services to persons experiencing homelessness.

A commenter stated that HUD should examine and consider the potential unintended consequences of major transportation investments on land use patterns, and hence housing affordability, since this is an area of policy over which States do have some control and some analysis tools have already developed. The commenter stated that in many ways, the patterns of inequity and segregation that the AFFH rule seeks to dismantle are byproducts of transportation policies and plans implemented by State agencies, particularly highway departments. The commenter stated that it recently completed a research project that made sophisticated econometric models of how real estate markets respond to transportation projects available within the planning tools commonly used to protect future land use conditions. The commenter stated that as a result, it is now possible to quantify and compare the impacts of alternative transportation plans on housing costs burdens and display this information on a map or chart for easy review.

*HUD Response:* HUD appreciates these recommendations and has made certain revisions to the Assessment Tool in response to the comments. HUD has added contributing factors that were included in the Assessment Tool to other sections of the Assessment Tool, and has revised some of the descriptions of the contributing factors located in the Appendix. HUD has also added two new contributing factors of "Nuisance Laws," and "Loss of Affordable Housing." HUD has attempted to strike a balance between the number of potential contributing factors that are listed in each section of the analysis in order to focus on those factors that are most likely to pertain to that section while considering program participant burden to review each of the listed potential factors. Program participants may also consider additional contributing factors, including those listed in the appendix or other factors that do not appear in the overall list. HUD has also incorporated language into the descriptions of certain contributing factors relating to survivors of domestic violence and homelessness in response to comments received.

#### *4b. Contributing Factors Comments Generally.*

Commenters stated that the contributing factors are uniquely local variables that, by definition, will exert influence in different ways in different jurisdictions. The commenters stated that the tool should allow States to focus on appropriate scaled State-level contributing factors and provide the flexibility to incorporate detailed local level analysis if necessary. Other commenters stated that the list of contributing factors should be clarified as being examples and certain examples related to local policies and laws should be removed, such as land use and zoning laws.

Commenters stated that only nine of the provided contributed factors are amendable to broader State analysis: (1) Lack of assistance for transitioning of assistance for transition from institutional settings to integrated housing; (2) state or local private fair housing outreach and enforcement; (3) state or local public fair housing enforcement; (4) lack of public investment in specific areas within the state, including services or amenities; (5) state, regional, or other inter-governmental cooperation; (6) state or local fair housing laws; and (7) siting selection policies, practices and decisions for publicly supported housing, including discretionary aspects of Qualified Allocation Plans and other programs; (8) State or local laws, policies, or practices that discourage individuals with disabilities from being placed in or living in apartments, family homes, and other integrated settings; and (9) unresolved violations of fair housing or civil rights law.

A commenter stated that collecting information on contributing factor requires States to collect information that is not readily available to them, such as information from school districts, county health departments, and public transit agencies.

Another commenter stated that contributing factors definitions in Appendix C are thoughtful and provide clarity as well as actual language that may be incorporated into the analysis. A commenter stated that in using the definitions in Appendix C, a more robust analysis of contributing factors should be required and recommend that rather than matching factors to issues, the State should be required to explain and analyze why a particular factor contributes to the identified fair housing issue.

Other commenters stated that the nature of the contributing factors renders factors outside the authority or feasible control of States; zoning bylaws,

ordinances, policies, and decisions will remain critical gateways and potential barriers to housing opportunities in local communities regardless of whether the State is willing to allocate housing tax credits and/or funding. The commenters stated that some contributing factors may be outside the ability of program participants to directly control or influence, so HUD should clarify which methodologies would be acceptable for identifying the significance of these factors, as the tool's instructions require. The commenters stated that if there are no standardized methodologies for determining significance and they are instead subjective classifications, HUD should remove the reference to "significant" as the term applies to specific statistical benchmarks. The commenters also stated that the list of contributing factors throughout the tool provide helpful context and examples for the States, but the complete list is out of scope with a statewide analysis as each area is not applicable or meaningful in every State.

Another commenter suggested that States play an important role in the regulation of land use because State-level laws directly control land use and others set the parameters for effective action, and HUD should expand the list of examples of land use and zoning in its definition of this contributing factor since they are different in kind from the types of regulations that local governments use to control land use. The commenter stated that, for example, States laws could include environmental regulations and coastal preservation laws, and State laws that control parameters including zoning enabling acts and laws that allow for the appeal of zoning decisions that prevent development of affordable housing.

A commenter stated that the Fair Housing Act does not directly prohibit source of income and HUD should not characterize property owners' business decisions as "discrimination" because such characterization ignores the many legitimate reasons property owners choose not to participate in the programs.

A commenter asked whether HUD would accept qualitative bases for a State's assertions with respect to the identification of a particular factor, or must the State provide data to substantiate the claim that the factor is a contributing factor.

Other commenters requested that HUD remove the contributing factors analysis section from the Assessment Tool. The commenters stated that this section would require States to conduct an extraordinary amount of new research to show whether individual

contributing factors have a statistically significant impact on specific fair housing issues. The commenters stated that otherwise the determinations will be subjective, leaving the States vulnerable to liability. The commenters further stated that States should not be required to rank contributing factors when setting their goals due to the difficulty of proving causation.

A commenter asked that HUD not add any new contributing factors and only retain those that are within the State's power to address. Another commenter stated that identifying contributing factors goes beyond the skill set of State PHA staff. Another commenter stated that States should be required to consider State tax structures, State education funding, and State transportation funding as part of contributing factors.

**HUD Response:** HUD thanks the commenters for their feedback. HUD notes that the identification of contributing factors is required by the regulation at 24 CFR 5.154(d)(ii). Fair housing contributing factors are defined at 24 CFR 5.152 as factors that create, contribute to, perpetuate, or increase the severity of one or more fair housing issues. Further, goals in an AFH are designed to overcome the effects of one or more contributing factors and related fair housing issues, as provided in 24 CFR 5.154. Because program participants are required to prioritize contributing factors, giving the highest priority to factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance, and set goals in accordance with that prioritization, it is possible that not every contributing factor will have a goal associated with it. However, program participants are required to have a goal for each fair housing issue that has significant contributing factors.

HUD will continue to provide guidance and evaluate ways to refine the descriptions of contributing factors, and notes that program participants are free to consider any additional factors that meet the criteria of the definition at 24 CFR 5.152.

HUD has considered the public comments on contributing factors and made certain changes. States, like the other program participants subject to the AFFH rule, are required to identify and prioritize significant contributing factors as part of their AFH. HUD will continue to consider comments relating to the contributing factors, as well as the descriptions of contributing factors as included in the Assessment Tool for public comment.

### *Regional Analysis*

*5a. HUD is seeking comment on the best approach for States to conduct an effective fair housing regional analysis addressing the fair housing issues and contributing factors affecting their State. (Region throughout the Assessment Tool in specific questions vs. regional section).*

Commenters stated that the ability to access and meaningfully analyze data beyond the State's boundaries is not feasible. The commenters stated that the requirement that States conduct a regional analysis where there are "broader regional patterns or trends affecting multiple States" by analyzing local data and knowledge and consulting the existing analyses of impediments (AIs) and AFH's of neighboring States and jurisdictions is not achievable without additional resources and time.

Other commenters stated that including regional data should be optional for States and States should be able to determine when regional perspectives on specific topics or fair housing issues is appropriate and relevant, and will enhance the AFH. The commenters stated that HUD should not require inter-State analysis as it would require the collection and analysis of information from other jurisdictions that would significantly increase the burden of compliance, and the analysis should only expand outside the jurisdiction when applicable. Another commenter stated that if the purpose is to assess issues in neighboring States alone, that is fine, but if the purpose is to change policy in other State, that this will be problematic. A commenter stated that this analysis is more appropriate at the local level or possibly at the MSA level that share a local policy-making body or mechanism.

Commenters stated that the currently proposed format that incorporates regional analysis throughout the sections is preferable to a regional section. The commenters stated that actual placement of the questions currently is not problematic; however, only Statewide and sub-state analysis should be required when data are provided.

A commenter stated that the AFFH regulation provides for voluntary collaboration among program participants so in this way, a State and one or more entitlement jurisdictions could formally coordinate data, analysis, and goals in a collaborative effort.

**HUD Response:** HUD appreciates the views and recommendations of these

commenters and has clarified where a regional analysis is required in the Assessment Tool. As stated above, a regional analysis that extends beyond the State is required by the AFFH regulation and is a crucial part of an analysis of fair housing issues. A regional analysis is important because fair housing issues are often not confined to jurisdictional, geographic, or political boundaries.

*5b. HUD seeks comment on whether the proposed format appropriately provides for Insular Areas to describe regional fair housing impacts without imposing undue burden. HUD welcomes recommendations for specific questions tailored to capture regional fair housing analysis for Insular Areas while not imposing unnecessary burdens in view of the unique characteristics of Insular Areas.*

No comments were received in response to this question.

#### Data

*6a. Due to limitations of the Jobs Proximity Index at the State level, HUD is seeking comment on providing additional types of data (e.g., by education level, sector of the economy, race/ethnicity, numbers of jobs by location) that might be most useful for States in conducting an appropriate fair housing analysis in connection with disparities in access to employment opportunities.*

A commenter stated that HUD-provided data is generally limited to certain federal housing programs and census data and does not address other sources of data relating to education, transportation, jobs, and environmental health. Other commenters stated States cannot determine the labor market index and other information would be of assistance, which would include basic statistical facts, sample size, margin of error, level of significance, standard deviation and other guidance in understanding the meaning and limits of the indices provided.

Other commenters stated that each of the opportunity indicators would require a tremendous amount of work to analyze, and the commenters asked what constitutes an area of opportunity.

Another commenter stated that its contracted consultants examined the indices and the only index that was considered applicable at the state level was the School Proficiency Index.

Other commenters recommended that HUD either provide its own complete data on disparities in access to opportunity to States that can be used in the development of the AFH, significantly change its expectations on the extent of analysis of the basic

opportunity areas, or delete this requirement. The commenters stated that if HUD is going to require the analysis of school assignment policies, criminal justice diversion and post incarceration reentry services, it must provide data related to these areas. The commenters stated that, at the very least, HUD should be providing data on direct housing issues, such as foreclosures and evictions.

Commenters asked that HUD consider using ACS commute time and section and income by location for evaluating employment opportunities. The commenters stated that in many rural areas, the number of jobs in the immediate market area is not a clear indication of economic opportunity as residents travel long distances to work. The commenters stated that ACS data includes data on commute time that may be useful in describing the economic opportunities available. The commenters also stated that HUD should not be using the untested Jobs Proximity Index for non-entitlement jurisdictions—measuring the location of jobs is not appropriate in rural areas or small cities.

*HUD Response:* HUD appreciates the views and recommendations of the commenters. HUD will continue to evaluate how it can improve its provision of data with respect to disparities in access to opportunity, but at this time is making no changes to the opportunity data it is providing. HUD notes that where program participants have local data that meet the criteria set forth at 24 CFR 5.152 and the instructions to the Assessment Tool they must use such data. Local data and local knowledge, including information obtained through the community participation process, may be particularly useful in assessing disparities in access to opportunity.

*6b. What data are available to States and Insular Areas, including data at the local level, that would be relevant and most helpful to States and Insular Areas in conducting their respective analyses of fair housing issues and contributing factors in their jurisdiction and region?*

Commenters stated that States should have flexibility to determine when including fine-scale local data is appropriate. The commenters stated that the State's assessment will result in aggregated county data that will not identify the neighborhood disparities that exist in smaller communities. Another commenter stated that since counties encompass various types of smaller jurisdictions, such as cities, villages, and unincorporated rural areas, it will be difficult for a State to evaluate how different sets of sub-county data

influence the overall county data value, and a single small city can strongly influence the data value for a county and thereby misrepresent the non-urban portion of the county. Other commenters stated that States should be allowed to use their own data to complete the tool and HUD data should be optional since state data may be more representative of the State's true characteristics.

Several commenters stated that HUD should require States to seek out and use sub-State data and knowledge relating to individuals with disabilities. The commenters stated that States should also be required to use national data available on persons with disabilities experiencing homelessness from HUD's Homeless Management Information System, and data from the Money Follows the Person program available from the Center for Medicare and Medicaid Services. The commenters stated that HUD should also include data on persons with disabilities living in nursing facilities and intermediate care facilities for individuals with developmental disabilities (available from CMS). The commenters further stated that States should be required to gather information on individuals with disabilities, consult with disability rights/advocacy organizations, Centers for Independent Living, Qualified Fair Housing Organizations, local HUD offices, local Fair Housing Assistance Program (FHAP) offices, and other relevant government and non-profit organizations.

Commenters stated that the State would need to request data from a large number of agencies, which would be a lengthy, difficult process. The commenters stated that the State would not want to apply the data in a manner that creates conflict between the AFH and other planning processes for which the agencies originally collected the data. The commenters stated that not all data collected by other agencies may be easily included at the regional level, and that some data would be included by reference to existing reports or plans rather than analyzed as raw data.

A commenter stated that the State has data relating to employment, poverty, and disadvantaged communities at the county level, but that the State lacks data for urban and rural areas. The commenter stated that the State does not have data relating to emergency preparedness, public safety, and prisoner reentry, as this data is not available for State housing agencies. The commenter stated that to obtain would require cooperation of many state agencies.

*HUD Response:* HUD thanks the commenters for these recommendations. HUD notes that where program participants have local data that is more current or accurate than the HUD-provided data and wish to use that data instead of relying on the HUD-provided data, program participants may use such data and explain why it is more useful than the HUD-provided data.

Additionally, HUD notes that program participants need only use local data and local knowledge when they meet the criteria set forth at 24 CFR 5.152 and the instructions to the Assessment Tool.

HUD has also included in the instructions to the Assessment Tool some of the examples of sources of local data provided by commenters, such as Federally-funded independent living centers, among others, that might be useful to program participants when conducted an AFH.

#### *6c. Data Comments Generally.*

Commenters stated that the maps are very vague and unclear as to what information they are trying to convey, and the directions on how to use the information is confusing and hard to navigate. The commenters stated that the data and maps are not useful as presented. The commenters stated that HUD should ensure that the Data and Mapping Tool has incorporated the data and maps for States before the subsequent re-issuance of the Draft State Tool for the upcoming 30-day comment period. The commenters stated that, without access to that tool, only the following recommendations respecting data can be made: Ensure that counties and R/ECAPs are clearly labeled on the maps; provide the same level of detail for Housing Credit- and USDA-financed housing as provided for HUD-financed housing; ensure that demographic data can be interpreted at the county level; provide CBSA and county level data. The commenters stated that the data and mapping tool should include the ability to select and overlay layers (comparing multiple maps) and should provide county and CBSA data tables. The commenters stated that without an active tool with which to engage, any assessment cannot be fully complete, and the commenters stated they therefore cannot and do not know what technical issues will arise. The commenters stated that they would like to avoid having to upload multiple attachments into the system.

Commenters stated that collecting the data required to provide meaningful explanations would be extremely challenging at best and although States are not required to collect primary data they are uncertain of how to compile the information for the assessment without

doing so. The commenters stated that while the notice says States are not required to collect primary data, it is unclear how States will otherwise acquire local data besides administrative data sources. The commenters further stated that even though collecting primary data is not required, it would require time consuming and costly surveys to amass the other primary qualitative data to conduct analyses in areas such as education.

The commenters stated that HUD supplied data should only include non-entitlement data to auto-populate the tool, because if State grantees operating on “balance of State” programs have to draw conclusions for non-entitlement rural and suburban areas based on data that includes entitlement jurisdictions not eligible for State programs, the assessment will be inaccurate for this area and conclusions could be incorrect.

Several commenters stated that HUD provided data should include a margin of error so that States can see if the information is statistically valid; if it is not valid, States should be able to use other resources. The commenters stated that inaccurate data could result in fair housing complaints against the State in which States would have to expend considerable public resources to present more accurate data in its defense. The commenters stated that by the time the commenter’s AFH is due, the information in the 2010 Decennial Census will be almost 10 years old, calling into question the validity, adequacy, and accuracy of the data as a basis of analysis and heightening the need to rely on local data, increasing the burden on States; the American Community Survey (ACS) also has high margins of error.

A commenter stated that HUD must ensure that the data it provides is accurate, meaningful, and user-friendly. Another commenter stated that the ACS data contains margins of error that increase conversely with sample size, making the data difficult if not impossible to rely on for smaller states. The commenters expressed concern about HUD-provided data’s completeness and statistical relevance. The commenter stated that the tool utilizes shape files in the mapping portion, so HUD should publicly share those to allow for GIS data integration with participating jurisdictions.

Several commenters stated that while the AFFH final rule defines “local data” and “local knowledge” as readily available information that requires little to no cost to obtain, the rule also notes that local data may be more relevant and current than HUD-provided data and

requires program participants to supplement HUD-provided data with local data when it is relevant and easily obtainable. The commenters stated that this creates an expectation of analysis, instead of an allowance of, local data without considering the enormity of data that is available to States through a reasonable amount of searching the Internet alone. Commenters stated that jurisdictions with strong affordable housing and academic research communities that provide a wealth of information at little to no cost are penalized because they have a higher burden of reviewing and analyzing locally available data since more high quality data is available.

Commenters stated that absent dedicated funding from HUD, a State is unlikely to be able to analyze and properly present local data in a matter consistent and relatable with other components of the tool, nor can State housing agencies adequately compile and analyze local data that is available at little to no cost with respect to the non-housing elements that the tool instructs States to analyze. Commenters stated that without HUD provided guidance to its grantees and the public regarding the extent to which local data must inform conclusions and be displayed within the AFH, States are vulnerable to complaints even where HUD considers a State to have met its burden; oral comments from HUD staff are not sufficient and States will expend more resources defending complaints, as will HUD in processing such complaints.

A commenter stated that counties do not represent regions in Massachusetts, and HUD should provide user-friendly data that allows States to disaggregate and aggregate at levels other than the “sub-state areas” identified in the explanation maps and tools published with the tool.

Other commenters stated that all data should be available through tables instead of only time-intensive zooming on maps. A commenter stated that the Table 10–1, entitled “R/ECAP and Non-R/ECAP Demographics by Publicly Supported Housing Program Category,” is unclear as currently presented and it seems that there is likely crossover among the categories as presented. The commenter stated that for the sake of clarity, each protected category should be included as a separate, distinct table.

Another commenter requests that HUD provide underlying data for maps and tables, such as actual figures behind R/ECAPs and ECPAs, in a user-friendly format so that States can refine their analysis as needed without incurring undue consulting costs.



Commenters stated that HUD should grant States the flexibility to use HUD-provided county data, tract level data, or locally supplied data as appropriate. A commenter stated that, for example, educational access is not a meaningful indicator at the county level, and while the local level (tract based) is more appropriate, the State would utilize data directly from its department of education.

Other commenters stated that baseline demographics data provided at the State, county, and user identified sub-State area will be valuable in capturing trends for protected class populations. Another commenter stated that the sample maps relating to certain demographic information such as race, limited English proficiency (LEP) populations, persons with disabilities, and poverty seem to be straightforward and commenter should be able to easily utilize these maps to answer basic questions in the AFH Tool.

Several commenters stated that it is imperative to be able to group counties or areas into sub-States because participating jurisdictions are at both the county and municipality level, so the sub-State regions must be able to be created by groups of counties that exclude specific municipalities. The commenters stated that these sub-State areas should be able to be saved so States do not have to create them each time does it does analysis.

Another commenter stated that sub-State areas should be required rather than optional, and another commenter suggests that if sub-State areas are not used, the State or Insular area should have to explain why it is unnecessary. The commenter stated that the tool's prompt that States and Insular Areas explain the rationale for their selection of sub-State areas should not be a disincentive for the creation of such areas. The commenter stated that the instructions should be expanded upon to provide criteria for the selection of sub-State areas, including but not limited to the contours of regional housing markets and common demographic, economic, and housing characteristics across contiguous rural markets. Another commenter requested that the data and mapping tool have the capability to group data based on the selection of numerous counties to build sub-State areas. A commenter suggested that breaking down a State into sub-State areas may be necessary to conduct a meaningful analysis even in small States because housing markets are not organized along state lines, and the demographics in regions within States may vary considerably thus complicating any analysis of segregation

and integration based on HUD's definitions.

A commenter stated that the dissimilarity index and opportunity indicators are not applicable to analyses at the county or State level since these metrics are locally based and indexed against a national average. The commenter stated that indices should either be flexible to benchmark against a State average or the data should be made available in raw form for States to evaluate.

Commenters stated that evaluating R/ECAP at the State level is not applicable as not all R/ECAPs are in similar markets or have similar circumstances, and that, if such an analysis is required, States should be able to remove tribal census tracts from the evaluation.

Commenters stated that dot density maps are more applicable to census tract level as they are smaller geographies with standardized population totals, and therefore dot-matrix maps are of limited use for States.

Several commenters stated that in the past, data provided by HUD has been error prone and the commenter stated that HUD must take steps to address quality issues. The commenters stated that States should have the authority to use locally produced data as necessary to ensure quality and consistency, and that for LIHTC, HUD should reference data submitted to the agency by State housing finance agencies pursuant to HERA requirements. The commenters stated to the extent that HFAs retain similar occupancy data at the development level, States should use this information if it readily available in circumstances where more granular analysis of LIHTC is appropriate. The commenters stated that HFAs have reported that they have serious concerns about the reliability of Placed in Service (PIS) data, and HFAs are unable to remove properties that are no longer active LIHTC properties from the PIS database.

A commenter stated that it would like to evaluate how the PIS database actually works in the mapping tool. Another commenter stated that States should not be required to look at data dating back to 1990 because of the fluidity of data and there needs to be more flexibility that streamlines the historic look back of data. The commenter further stated that the data is already outdated generally because conditions on the ground are constantly changing. The commenter stated that a longitudinal analysis of demographic patterns is not a productive use of time and resources.

Commenters stated that the tool requires States to comment, correlate

data, and make specific findings regarding the impact that policies of other State agencies have on fair housing issues. The commenters stated that these policies include education, jobs, and transportation, and these policies are driven locally by the needs of communities.

A commenter stated the limits of HUD provided and local data will make meaningful analysis difficult at best, instead, States will just be restating the obvious—that in more urban areas there are both some race and poverty concentrations.

A commenter stated that the School Attendance Boundary Information System, on which the school proficiency index is based, has not been funded and the project has ended so no future data releases are planned. Another commenter urged HUD to reinstitute funding to School Attendance Boundary Information System (SABINS) or use a comparable ongoing service to ensure data reliability. A commenter stated that HUD should provide all disability data by age group.

Another commenter stated that States do not necessarily have agreements or ongoing arrangements with most of the likely sources for local data. The commenter stated that even large States do not have the capacity to collect, analyze, store, and report it. The commenter stated that it is also unclear how States will be able to collect "primary data" beyond the administrative "secondary data." The commenter also stated that it is assumed that surveys, input sessions, consultation, and other methods are all primary qualitative data, which would be very expensive to conduct.

Commenters stated that States have raised concerns about the accuracy and integrity of PIC data, and, stated that due to HUD's lack of transparency concerning this data, those concerns remain unresolved. HUD should provide states access to the raw datasets.

A commenter stated that the segregation analysis should not rely solely on the dissimilarity index and HUD should include the "exposure index" and the "race and income" index. The commenter stated that these indices are necessary to provide a complete picture of segregation within an area, and that using the dissimilarity index alone can present a distorted picture of segregation.

Another commenter stated that the mapping of R/ECAPs does not align with the 2013 Chicago Region Fair Housing and Equity Assessment, and that the data used for that assessment,

there are R/ECAPs that do not appear in the AFH mapping.

A commenter stated that the HUD provided data is unwieldy and hard to understand. The commenter stated that the level of sophistication required is at odds with the emphasis on public participation. The commenter stated that HUD should remember that employees of PHAs, especially QPHAs, will have to stretch their work-related skill set in a new way to complete an AFH. A commenter stated that the map legend with varying shades of grey that are close in color are difficult to cross reference. The commenter stated that maps would be easier to read if there was more variance in the color by use of multiple colors.

**HUD Response:** HUD appreciates and understands the commenters' concerns about not being able to test the AFFH Data and Mapping Tool with respect to State-level data. For that reason, as stated above, HUD has announced that there will be a second 30-day comment period relating to the data in and functionality of the AFFH-T for States and Insular Areas. The public will have an additional chance to provide HUD with feedback.

As previously stated, HUD only requires that program participants use local data and local knowledge when they meet the criteria set forth at 24 CFR 5.152 and in the instructions to the Assessment Tool. Additionally, as noted above, HUD requires that States conduct a fair housing analysis of the entire State, but States may rely on the AFH of local governments. As stated above, States are accountable for compliance with the regulatory requirements for their AFHs. States should ensure that they agree with any other analysis used. Also noted above, States will have flexibility to zoom in or out of various scales of geography when conducting their analysis, but the data provided will be focused at the county level.

HUD will continue to evaluate the suggestions made by commenters with respect to the HUD-provided data, and will continue to provide guidance and technical assistance to program participants as they use the HUD-provided data to conduct an AFH.

#### *State or Insular Area Collaboration With Qualified PHAs (QPHAs)*

*7a. Do other program participant contemplate collaborating with a State or Insular Area on an AFH? Do States and/or Insular Areas and QPHAs anticipate collaborating on a joint AFH? If not, are there ways HUD could better facilitate collaborations between States and QPHAs?*

A commenter stated that States would be a natural partner for the QPHA and it would be mutually beneficial.

However, several commenters stated that the amount of coordination for collaboration presents serious challenges. The commenters stated that States should be required to take the lead in the process, contact and work with the QPHA since the State has the most experience in producing these types of plans. The commenters stated that the responsibilities of each need to be clearly stated as well as the timeline for required work to be started, public hearing requirements, deadlines for submission, etc. The commenters stated that significant State grantee resources including staff, technical assistance, expense, and time would be required to facilitate collaboration with small PHAs, and States do not have authority or management responsibilities relating to PHAs. The commenters stated that to successfully collaborate, better guidance and interpretation from HUD is needed on how to coordinate timing with multiple PHAs on different cycles. The commenters stated that this would be an enormous burden with respect to time, coordination, and monetary costs.

Another commenter states that while it provides QPHAs with data and some analysis if they request it, conducting an AFH with specific analysis for QPHAs would be an unreasonable administrative burden. The commenter stated that a State is concerned that it would not only be taking on the work, but the potential liability of any perceived faulty conclusions were made. The commenter further stated that conclusions made at the State level are not necessarily going to be consistent with the conclusions at the localized QPHA level, causing confusion.

A commenter expressed appreciation for the provisions for the State to include the PHAs under its consolidated planning authority, but stated that because of the distance and differences among PHAs the results of the analysis will be less than desirable.

Several commenters identified individual States that would not be collaborating with QPHAs on a joint AFH because the State does not have an ongoing funding relationship with the QPHAs in the state, nor is the State involved in their operation or administration. The commenters stated that the State will consult with the PHAs that certify consistency with the State's plan, but not collaborate. The commenters stated that collaboration with QPHAs would impose substantial costs on states because they would inevitably serve as the lead entity and

would therefore have to contribute significant resources on the collaboration on top of conducting its own AFH analysis; in some cases, the QPHA would lack the capacity to undertake the analysis or gather local data and the State would have to do it for the QPHA. Virginia has approximately 15–20 qualified PHAs and the State does not have an ongoing relationship with the housing authorities. Significant State resources, including staff, technical assistance, and time would be required to facilitate these collaborations. In Delaware, both PHAs meeting the criteria for QPHAs have ongoing relationships with entitlement jurisdictions and collaboration between these two entities would be more appropriate, as the State has little contact with either PHA. Another commenter adds that this would be redundant since PHAs have to conduct their own AFH. It is impracticable to expect States and QPHAs to collaborate on a joint AFH.

A commenter stated that including small PHAs in a State grantee AFH should be strictly optional. Other commenters stated that the tool does not make clear that collaboration with QPHAs is optional. HUD should ensure the tool makes clear that States are only required to answer questions related to QPHAs if they enter into partnerships with those entities.

Another commenter asked whether a State that is also a PHA be included as QPHA regardless of voucher volume and be able to be collaboratively included in the State tool if the state desires.

A commenter stated that it has 328 QPHAs, and even if one-third wish to collaborate, as HUD estimates, there does not seem to be a decrease in the analysis required for QPHAs, only additional burden for the State to provide data and research to these entities. The commenter stated that there is no incentive to collaborate unless the QPHAs are bound to allocate some portion of their units based on the State-wide goals.

Another commenter stated that the State is interested in exploring the possibility of collaborating with some or all of its QPHAs, but it is unclear of the implications for the level of analysis when collaborating with QPHAs. The commenter stated that the State is concerned it will be required to examine local fair housing issues for the QPHA's jurisdiction at a level that is not consistent with state-level program administration.

A commenter stated that QPHAs do not intend to collaborate with States, that QPHAs are concerned about

establishing relationships with the States, even if States were to conduct the necessary regional analysis for QPHAs. The commenter stated that QPHAs are concerned about the extent to which States will even want to collaborate with them. The commenter stated that States expressed this hesitation, and that coordination will be difficult and QPHAs have concerns about states' abilities to conduct the AFH.

**HUD Response:** HUD appreciates the feedback it received from commenters on whether States and QPHAs anticipate collaborating on a joint or regional AFH. HUD will continue to provide the QPHA insert for use by QPHAs in order to facilitate joint collaborations.

*7b. How can the State and Insular Area Assessment Tool facilitate collaboration with QPHAs and strive to ensure the State's or Insular Area's analysis of the entire State or Insular Area provides a sufficiently detailed analysis to inform the QPHA's fair housing analysis and goal setting?*

Commenters stated that financial resources to make collaboration feasible, programmatic incentives, such as a streamlined AFH for States that collaborate with QPHAs would be beneficial. The commenters stated that adequate data must be provided both at and beneath the county level (a real challenge in rural areas), and that without this data, the QPHA context cannot be feasibly addressed.

A commenter asked HUD to consider offering funds to interested States willing to pilot the concept of State/QPHA collaboration.

Another commenter suggested that HUD streamline questions asked of States making it easier for both states and QPHAs to finish their respective sections of the AFH tool in a timely manner. The commenter stated that HUD should require that States provide all due assistance to QPHAs that may need it to complete their AFHs.

A commenter stated that since the State Assessment Tool maps and data are at the State level, it would not be feasible or appropriate to require the type of granular analysis individual PHAs would need in order to inform their own fair housing analysis and goal setting.

Another commenter stated that coordination with PHAs would not be an efficient use of government resources as it would duplicate HUD efforts in reviewing PHA AFHs and enforcing PHA obligations to affirmatively further fair housing. The commenter stated that under the final rule, PHAs that jointly participate with other PHAs in the

creation of AFH must seek certification of consistency with the consolidated plan of either the local government or State governmental agency in which the PHA is located, which will burden the States by requiring them to review and evaluate large numbers of jointly prepared AFHs on the local level.

**HUD Response:** HUD appreciates the recommendations of the commenters. HUD notes that collaboration can result in a reduction of burden and cost savings for the program participants involved, and provide for a more robust fair housing analysis and regional solutions to fair housing issues. HUD also notes that the AFFH Data and Mapping Tool is expected to allow for different types of program participants to access the data at various levels of geography appropriate to their required level of analysis. Finally, HUD reminds program participants and the public that collaboration is entirely voluntary and the program participants may divide work as they choose should they enter into a collaboration to conduct and submit a joint or regional AFH.

In response to the numerous comments received on the topic of joint collaborations, including with QPHAs, HUD has made a number of changes to this Assessment Tool, as well as the Assessment Tool for Local Governments and the Assessment Tool for PHAs. HUD has also made the commitment to issue a fourth Assessment Tool for use by QPHAs, including for joint collaborations between QPHAs.

*7c. Given that HUD currently intends to focus States on thematic maps at the county or statistically equivalent level, how can the Assessment Tool facilitate collaboration with QPHAs by ensuring the State's analysis of the entire State provides sufficiently detailed analysis to inform the QPHA's fair housing analysis and goal setting?*

A commenter stated that this sort of collaboration is unrealistic. The commenter stated that to facilitate collaboration with QPHAs by ensuring the State analysis of the entire State is detailed enough, HUD would have to provide all data for the QPHA's service area, as well as the county in which the QPHA is located.

**HUD Response:** HUD appreciates the feedback from this commenter and notes that the AFFH Data and Mapping Tool is expected to have added functionality, which will allow program participants to access the data at various levels of geography. HUD believes this functionality will further facilitate collaborations between States and program participants at lower levels of geography. It is HUD's intention to provide data for QPHAs that is relevant

to the QPHA's required analysis. Note that a complete State analysis is expected to fulfill the required regional analysis for a QPHA.

*7d. Is the organizational structure the most efficient and useful means of conducting the analysis or whether these questions should be inserted into the respective sections of the Assessment Tool to which they apply?*

A commenter stated that if States and QPHAs decide to collaborate, then a separate section seems appropriate. Another commenter expressed its support for the organizational structure of the assessment tool with respect to QPHAs. The commenter stated that the part of analysis that QPHAs are responsible for should be kept separate from the other sections of the assessment tool.

**HUD Response:** HUD appreciates these commenters' feedback and has retained the QPHA insert as a separate section of the Assessment Tool. In the Assessment Tool, HUD has noted that the Small Program Participant Insert is only to be completed when either: (1) A local government that received a CDBG grant of \$500,000 or less in the most recent fiscal year prior to the due date for the joint or regional AFH collaborates with a local government that received a CDBG grant larger than \$500,000 in the most recent fiscal year prior to the due date for the joint or region AFH; or (2) A HOME consortia whose members collectively received less than \$500,000 in CDBG funds or received no CDBG funding partners with a local government that received a CDBG grant larger than \$500,000 in the most recent fiscal year prior to the due date for the joint or region AFH.

For small program participants in the same CBSA as the lead State, the analysis is intended to meet the requirements of jurisdictional analysis while relying on the lead State to complete the regional analysis. For small program participants whose service area extends beyond, or is outside of, the lead State's CBSA, the analysis must cover the small program participant's jurisdiction and region. Small program participants should refer to the Contributing Factors listed in each section above and will have to identify Contributing Factors. Small program participants must also identify any individual goals.]

#### *Insular Areas*

HUD received no comments in response to the following questions:

*8a. How can HUD assist insular areas to complete an AFH in terms of providing data, or where data is lacking, are there areas where HUD can provide*

*further assistance or guidance for insular areas?*

No comments were received in response to this question.

*8b. To what extent will insular areas be able to use the Assessment Tool to analyze fair housing issues and contributing factors and set goals and priorities without HUD-provided data?*

No comments were received in response to this question.

*8c. Are there ways in which HUD could adapt the Assessment Tool for insular areas? To what extent do insular areas have access to local data and/or local knowledge, including information that can be obtained through community participation, that could help identify areas of segregation, R/ECAPs, disparities in access to opportunity, and disproportionate housing needs where the HUD-provided data may be unavailable?*

No comments were received in response to this question.

#### *Small Entities That Collaborate With States*

*9a. Will collaboration with a State in conducting an AFH using the Assessment Tool reduce the burden that a small entity such as a QPHA would otherwise have in conducting an individual AFH?*

Commenters stated that PHAs have no staff hours to contribute to this undertaking. Other commenters stated that QPHAs that do not serve metropolitan areas should be exempt from the requirement. The commenters stated that since the goal of including small PHAs into a State grantee AFH is to remove AFH responsibility for small PHAs, a reasonable solution is to waive the AFH requirement for small PHAs altogether.

Other commenters stated that HUD does not appear to be making a significant reduction in administrative burden. A commenter stated that in its State, in addition to the 328 QPHAs in the State, there are 79 entitlement communities, of which 38 received less than \$1 million in CPD funds for FY 2015. The commenter stated any reduction in burden for the QPHA is not actually a reduction in burden, but a shifting of burden to the State.

*HUD Response:* HUD appreciates the suggestions from these commenters and will continue to evaluate how HUD can reduce burden for small entities and States that wish to collaborate. HUD has also developed an insert for local governments that received \$500,000 or less in CDBG in the most recent fiscal year prior to the AFH submission to help allow for collaboration with a State should they choose to collaborate. HUD

notes that it will create another assessment tool, specifically designed for use by QPHAs. The streamlined set of questions for smaller consolidated planning agencies will help facilitate joint partnerships with state agencies using this assessment tool.

*9b. To what extent do small entities, such as QPHAs, expect to rely on outside resources such as a consultant in conducting a collaborative AFH with a State?*

HUD received no comments to this question.

#### *PHA-Specific Comments*

HUD received the following PHA-specific comments.

A commenter stated that PHAs lack control over school policies, access to employment opportunities, access to transportation, or services for or distribution of persons with disabilities.

Another commenter stated that PHA jurisdictional data should be gathered from Census data and information HUD has from PIC. The commenter stated that PHAs do not have access to information about most facilities except what they own and manage.

Another commenter stated that, as a rural PHA serving 15,000 square miles, with communities that do not have any concentrations of a particular class, or race, or household type, the AFH will not affirmatively further fair housing. The commenter stated that it has vouchers in apartment buildings, trailer houses, and single-family homes scattered throughout these communities. The commenter stated that efforts should continue to be used on convincing landlords and property managers to work with our program to make units available to voucher holders. The commenter stated that a PHA mostly serves the elderly and persons with disabilities who appreciate the quality of life offered by small towns.

Another commenter stated that it appears HUD is expecting PHAs to be versed in areas outside the public housing arena, such as demographic trends, laws, policies and practices involving other programs, and asked how is a PHA supposed to know about school enrollment policies?

A commenter stated that in the "Fair Housing Analysis of Rental Housing" section, HUD will need to list the specific protected classes envisioned for analysis here. The commenter stated that there are certain protected classes with optional self-identification such as race, but other protected classes, such as religion, disability, and national origin may not be collected by PHAs. The commenter stated that it is important that residents feel secure and that PHAs

do not unintentionally create requirements that perpetuate discriminatory practices.

Another commenter asked whether State PHAs are supposed to complete the QPHA questions, and that, if so, HUD must describe in greater detail the expectations for State PHAs. The commenter stated that if this is required, the work necessary to complete the QPHA questions will require a contractor, and the commenter stated that its State has over 100 QPHAs, so this would be burdensome.

Another commenter stated that since the tool does not take resources into account, PHAs are forced to prioritize fair housing activities, and consequently the tool ignores real-world constraints under which these entities operate.

*HUD Response:* HUD appreciates these comments relating to PHAs. HUD will continue to evaluate the scope of the analysis required of PHAs, including how PHAs serving rural areas can conduct a meaningful fair housing analysis. HUD also appreciates the comment relating to the inclusion of protected class with respect to the Fair Housing Analysis of Rental Housing. HUD is continuing to evaluate this recommendation. Finally, HUD notes that the QPHA insert is intended for use only by PHAs that are QPHAs. State PHAs may only use this insert if they are conducting a joint or regional AFH with the State and are QPHAs.

#### **V. Overview of Information Collection**

Under the PRA, HUD is required to report the following:

*Title of Proposal:* State and Insular Area Assessment Tool.

*OMB Control Number, if applicable:* N/A.

*Description of the need for the information and proposed use:* The purpose of HUD's Affirmatively Furthering Fair Housing (AFFH) final rule is to provide HUD program participants with a more effective approach to fair housing planning so that they are better able to meet their statutory duty to affirmatively further fair housing. In this regard, the final rule requires HUD program participants to conduct and submit an AFH. In the AFH, program participants must identify and evaluate fair housing issues, and factors significantly contributing to fair housing issues (contributing factors) in the program participant's jurisdiction and region.

The State and Insular Area Assessment Tool is the standardized document designed to aid State and Insular Area program participants in conducting the required assessment of fair housing issues and contributing

factors and priority and goal setting. The assessment tool asks a series of questions that program participants must respond to in carrying out an assessment of fair housing issues and contributing factors, and setting meaningful fair housing goals and priorities to overcome them.

*Agency form numbers, if applicable:* Not applicable.

*Members of affected public:* States and Insular Areas. These include the 50 States, the Commonwealth of Puerto Rico, and 4 Insular Areas (American Samoa, the Territory of Guam, the Commonwealth of the Northern Mariana Islands and the U.S. Virgin Islands). In addition, PHAs and local governments that will be able to choose to collaborate with a State or Insular area, where the State or Insular area is the lead entity.

#### **VI. Estimation of the Total Numbers of Hours Needed To Prepare the Information Collection Including Number of Respondents, Frequency of Response, and Hours of Response**

The public reporting burden for the proposed State and Insular Area Assessment Tool is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The estimate of burden hours is an average within a range, with some AFHs

requiring either more or less time and effort based on the size and complexity of the relevant program participant's assessment. Smaller program participants will have less total burden both in terms of staff hours and costs. A separate estimate for Insular Areas is included, at 240 hours per Insular Area program participant, which is the same level of burden that HUD estimated for the Local Government Assessment Tool.

This estimate assumes that approximately one-third of the 3,942 PHAs may seek to enter into joint AFHs with their relevant State program participant. This is consistent with the burden estimate included in the 30-Day PRA Notice for the Local Government Assessment Tool. The 120 hours per PHA is also consistent with the previous estimate; however, this may be an over-estimate given that numerous smaller sized PHAs may be more likely to enter into joint assessments with State program participants.

This burden estimate assumes there would be cost savings for PHAs that opt to partner with a State agency. For instance, the proposed State and Insular Area Tool includes a distinct set of questions that would be required for Qualified PHAs (*i.e.* those with 550 or fewer public housing units and/or Housing Choice Vouchers). Qualified PHAs would also benefit from having the State agency's analysis fulfill the regional portion of the PHA's assessments. While there may be some

cost savings for Qualified PHAs opting to participate in joint submissions using the proposed State and Insular Assessment Tool, they are still assumed to have some fixed costs, including those relating to staff training and conducting community participation, but reduced costs for conducting the analysis in the assessment tool itself.

While local government program participants may also choose to partner with State agencies, the burden estimate for the Assessment Tool designed for their use included a total estimate for all of the 1,192 local government agencies.

All HUD program participants are greatly encouraged to conduct joint AFHs and to consider regional cooperation. More coordination in the initial years between State and local government program participants one the one hand and PHAs on the other will reduce total costs for both types of program participants in later years. In addition, combining and coordinating some elements of the Consolidated Plan and the PHA Plan will reduce total costs for both types of program participants. Completing an AFH in earlier years will also help reduce costs later, for instance by incorporating the completed analysis into later planning documents, such as the PHA plan, will help to better inform planning and goal setting decisions ahead of time.

Information on the estimated public reporting burden is provided in the following table:

	Number of respondents	Number of responses per respondent	Frequency of response	Estimated average time for requirement (in hours)	Estimated total burden (in hours)
States * .....	51	1	Once every five years .....	1,500	76,500
Insular Areas ** .....	4	1	Once every five years .....	240	960
Public Housing Agencies .....	665	1	Once every five years .....	120	79,800
Total Burden .....					157,260

The estimates represent the average level of burden for these grantee types. It should be noted that this staff cost is not an annual cost, but is incurred every five years.

\* The term 'State' includes the 50 States as well as Puerto Rico. See 42 U.S.C. 5302(2) & 42 U.S.C. 12704(2); The District of Columbia, as a CDBG formula entitlement entity will use the assessment tool developed for local government agencies.

\*\* The term "Insular Area" includes Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa." See 42 U.S.C. 5302(24) & 42 U.S.C. 12704(24).

#### **Explanation of the Change in Burden Estimate**

The total burden estimate of 157,260 hours is a reduction from the previous estimate of 235,140 hours. This change is solely attributable to the revision of the estimated number of potential public housing agency joint partners that will use the assessment tool for States and Insular Areas. While HUD has also revised the State assessment tool to add a new streamlined

assessment tool for smaller consolidated planning agencies, the estimated burden for these agencies is still included in the overall burden estimate for the local government assessment tool. The estimates for public housing agency participation are discussed in more detail here.

HUD is including the following information in the 30-Day PRA Notices for all three of the assessment tools that are currently undergoing public notice

and comment. The information is intended to facilitate public review of HUD's burden estimates.

HUD is revising its burden estimates for PHAs, including how many agencies will join with other entities (*i.e.* with State agencies, local governments, or with other PHAs), from the initial estimates included in the 60-Day PRA Notices for the three assessment tools. These revisions are based on several key changes and considerations:

(1) HUD has added new option for QPHAs, to match the approach already presented in the State Assessment Tool as issued for the 60-Day PRA Notice, to facilitate joint partnerships with Local Governments or other PHAs using a streamlined “insert” assessment. Using this option, it is expected that the analysis of the QPHA’s region would be met by the overall AFH submission, provided the QPHA’s service area is within the jurisdictional and regional scope of the local government’s Assessment of Fair Housing, with the QPHA responsible for answering the specific questions for its own programs and service area included in the insert.

(2) HUD’s commitment to issuing a separate assessment tool specifically for QPHAs that will be issued using a separate public notice and comment Paperwork Reduction Act process. This QPHA assessment tool would be available as an option for these agencies

to submit an AFH rather than using one of the other assessment tools. HUD assumes that many QPHAs would take advantage of this option, particularly those QPHAs that may not be able to enter into a joint or regional collaboration with another partner. HUD is committing to working with QPHAs in the implementation of the AFFH Rule. This additional assessment tool to be developed by HUD with public input will be for use by QPHAs opting to submit an AFH on their own or with other QPHAs in a joint collaboration.

(3) Public feedback received on all three assessment tools combined with refinements to the HUD burden estimate.

Based on these considerations, HUD has refined the estimate of PHAs that would be likely to enter into joint collaborations with potential lead entities. In general, PHAs are estimated to be most likely to partner with a local government, next most likely to join

with another PHA and least likely to join with a State agency.

While all PHAs, regardless of size or location are able and encouraged to join with State agencies, for purposes of estimating burden hours, the PHAs that are assumed to be most likely to partner with States are QPHAs that are located outside of CBSAs.

Under these assumptions, approximately one-third of QPHAs are estimated to use the QHPA template that will be developed by HUD specifically for their use (as lead entities and/or as joint participants), and approximately two-thirds are estimated to enter into joint partnerships using one of the QPHA streamlined assessment “inserts” available under the three existing tools. These estimates are outlined in the following table:

*Overview of Estimated PHA Lead Entities and Joint Participant Collaborations*

	QPHA outside CBSA	QPHA inside CBSA	PHA (non-Q)	Total
PHA Assessment Tool:				
(PHA acting as lead entity) .....	x	x	814	814
joint partner using PHA template .....	x	300	100	400
Local Government Assessment Tool (# of PHA joint collaborations) .....	x	900	200	1,100
State Assessment Tool (# of PHA joint collaborations) .....	665	x	x	665
subtotal .....	665	1,200	1,114	.....
QPHA template .....	358	605	.....	963
Total .....	1,023	1,805	.....	3,942

**Notes:** “x” denotes either zero or not applicable.

*Solicitation of Comment Required by the PRA*

In accordance with 5 CFR 1320.8(d)(1), HUD is specifically soliciting comment from members of the public and affected program participants on the Assessment Tool on the following:

(1) Whether 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;

(2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(5) Whether additional or different contributing factors should be added to

a particular section of the Assessment Tool. If so, please specify the factor, the reason it should be included, and in which section it should be placed. Similarly, whether the descriptions of the contributing factors should be amended. If so, please specify the factor and the recommended amendments to the descriptions.

(6) How can the QPHA insert be improved to provide for the QPHA to conduct a robust fair housing analysis and set meaningful fair housing goals when collaborating with a State.

(7) Whether the Small Program Participant insert will facilitate collaboration among States and smaller local governments (those that receive \$500,000 or less in CDBG and HOME consortia whose members receive \$500,000 or less in CDBG funding or no CDBG funding, both in the most recent year before the collaborative AFH is due), and whether the insert will provide for these small program participant to conduct a robust fair housing analysis and set meaningful fair housing goals.

(8) Whether there are other areas of analysis that are particularly unique to States such that they should be required to consider them as part of their AFH in order to conduct a meaningful fair housing analysis. If so, please explain why these areas of analysis should be included in the AFH.

(9) Whether any alternative or additional questions should be included to address the unique geography of Insular Areas and the fair housing issues they may be experiencing. If so, please provide specific questions and the reasons they should be included in the AFH.

(10) Whether the questions in the Disparities in Access to Opportunity section, as revised, more appropriately reflect the scope States should be required to analyze while still providing for a meaningful assessment of disparities in access to opportunity by protected class.

(11) Whether the revised questions at the end of each section of the Assessment Tool better reflect the analysis States should be required to

conduct when assessing fair housing issues in their jurisdiction.

(12) Native American considerations. Indian tribes receiving HUD assistance are not required to comply with AFFH requirements. However, under certain HUD programs, grantees that are subject to AFFH requirements also provide assistance to tribal communities on reservations. For example, under the HOME program, a State may fund projects on Indian reservations if the State includes Indian reservations in its Consolidated Plan. Does the Assessment Tool adequately take into account, including in the terminology used, the issues and needs of Indian families and tribal communities while also factoring in the unique circumstances of tribal communities?

(13) Organization of contributing factors. Currently the draft assessment tool lists all contributing factors alphabetically. Should these be organized instead by subject matter?

(14) HUD notes that the term “region” has particular meaning in the context of the AFFH rule, which is that a “region” is larger than a jurisdiction. HUD has explained that States have the flexibility to divide their State into smaller geographic areas to facilitate their analysis (so long as the entire State is analyzed), and refers to these smaller geographic areas as “sub-State areas.” How can HUD provide additional clarity with respect to the terminology and is the explanation provided in this Notice

as well as the Assessment Tool clear as to the meaning of these terms?

(15) HUD solicits public comment on ways HUD can better clarify the responsibilities for QPHAs that choose to participate in collaborations with States where the State is acting as the lead entity for a joint AFH. HUD also solicits comment on how HUD can facilitate such collaborations while ensuring an appropriate fair housing analysis consistent with the AFFH rule. In particular, are there ways that HUD can improve the clarity of the questions and instructions for States and QPHAs when collaborating on an AFH, including any analysis of sub-state areas, that will allow for an appropriate fair housing analysis of all program participants in the collaboration.

(16) How can the QPHA insert, which covers the QPHA’s service area, (including HUD-provided maps and data) be improved to facilitate a meaningful fair housing analysis for QPHAs, including those that are in rural areas. What additional guidance can HUD provide to QPHAs to better assist them in establishing meaningful fair housing goals, including how those goals are implemented through actions and strategies, such as, for example through preservation or mobility strategies designed to address the fair housing issues identified by the analysis undertaken.

(16) HUD is generally providing data that is displayed at the County level in the AFFH-T designed for States and

Insular Areas. HUD is not requiring States to conduct a neighborhood by neighborhood analysis, but specifically solicits comment on when more granular data (*e.g.*, dot density maps) may be necessary to identify fair housing issues for the State’s analysis in the AFH. For example, in what situations would States find a more granular analysis necessary to help identify fair housing issues at a more local level—such as, when a fair housing issue raised during the community participation process that is not present in the HUD-provided data or when the State knows of fair housing issues that are not apparent in the HUD-provided data.

HUD encourages not only program participants but interested persons to submit comments regarding the information collection requirements in this proposal. Comments must be received by October 28, 2016 to [www.regulations.gov](http://www.regulations.gov) as provided under the **ADDRESSES** section of this notice. Comments must refer to the proposal by name and docket number (FR-5173-N-08-B). HUD encourages interested parties to submit comment in response to these questions.

Dated: September 23, 2016.

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