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

Re: Affirmatively Furthering Fair Housing: Assessment Tool for Public Housing Agencies –
Information Collection: Solicitation of Comment 30-Day Notice Under Paperwork Reduction
Act of 1995, Docket No. FR-5173-N-09-B

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP), and the undersigned advocacy organizations. NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for racial and ethnic minorities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. Since 1968, NHLP has been dedicated to advancing housing justice for low-income individuals and families.

NHLP applauds HUD for continuing to refine the Assessment of Fair Housing (AFH) Assessment Tool for Public Housing Agencies [hereinafter “PHA Assessment Tool,” or “Assessment Tool”], and for soliciting public comment and feedback through the Paperwork Reduction Act process. The following comments outline additional suggestions to further improve the Assessment Tool’s effectiveness. We also reiterate and incorporate a series of comments from our prior comment letters regarding the AFH Draft Assessment Tools for PHAs and for Local Governments.

A. Responses to Particular Questions from the September 2016 Federal Register Notice

Question 5: Tailoring the Assessment Tool for Use by PHAs

Part III: Community Participation Process

HUD has made several positive amendments to Part III of the Draft PHA Assessment Tool (“Community Participation Process”); for example, Question 4 was amended to include information about recommendations by the Resident Advisory Board. Additionally, Question 1 now includes a reference to “other resident outreach.” Given the importance of community participation and consultation to the success of the AFH process, we write to share further suggestions related to the Draft PHA Tool’s Part III (“Community Participation Process”).

In Question 1, the question should be updated to include the following (proposed language underlined): “Identify media outlets used and include a description of efforts made to reach the public, including those representing populations that are typically underrepresented in the planning process such as persons who reside in areas identified as R/ECAPs, persons who are limited English proficient (LEP), and persons with disabilities. Describe efforts to conduct outreach to residents of public housing (including members of resident councils), Section 8 Housing Choice Voucher households, and persons eligible to be served by the PHA (including those currently on PHA-administered waitlists). Also, briefly describe how the documents associated with the AFH, including the draft AFH itself, were provided to public housing tenants, Voucher holders, and other interested parties.” If this language is not included in the text of the question, HUD should alternatively consider including similar text in the accompanying instructions. For example, such instructions could read (proposed additions underlined), “For question (1), provide a summary of the outreach activities undertaken; include a description of any meetings with the Resident Advisory Board. Specifically, the PHA should briefly describe its efforts to conduct outreach and provide AFH-related documents to public housing residents (including members of resident councils), Section 8 Housing Choice Voucher households, persons eligible to be served by the PHA (including those currently on PHA-administered waitlists), and other interested parties.” Furthermore, any subsequent HUD guidance specific to PHAs should include suggestions regarding publicizing public meetings and hearings about the AFH process, such as: mailing materials to current tenants, applicants, and persons on PHA waitlists; postings in common areas of all PHA properties; and providing easily accessible information about the AFH process on the PHA’s website (including dates, times, and locations of public hearings). The guidance should also recommend making the draft AFH and related documents easily accessible at each PHA development, as well as on the PHA’s website as a means of ensuring “meaningful community participation” and employing “communications means designed to reach the broadest audience.”¹

¹ 24 C.F.R. § 5.158(a). The regulation states, “To ensure that the AFH is informed by meaningful community participation, program participants must give the public reasonable opportunities for involvement in the development of the AFH and in the incorporation of the AFH into the consolidated plan, PHA Plan, and other required planning documents. To ensure that the AFH, the consolidated plan, and the PHA Plan and any plan incorporated therein are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. Such communications may be met, as appropriate, by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the program participant’s official government Web site, and as well at libraries, government offices, and public places.”

We strongly agree that HUD should include instructions concerning community participation regarding the solicitation of resident “feedback on preservation of properties and resident relocation and mobility from R/ECAPs to more integrated neighborhoods of opportunity.”² As HUD notes in the Federal Register Notice accompanying the release of the September 2016 Draft PHA Assessment Tool, PHAs can solicit feedback via “surveys, community participation meetings with residents of impacted developments, and public hearings.”³ HUD should suggest these approaches to gathering PHA resident feedback specifically on these important issues in the accompanying instructions. The instructions should also note, however, that conducting residents surveys is a supplement, not a substitute, for complying with the PHA’s participation requirements outlined in 24 C.F.R. part 903, and the general AFFH Rule’s community participation, consultation, and coordination requirements set out at 24 C.F.R. § 5.158.

Part IV: Assessment of Past Goals, Actions, and Strategies

The instructions for Question 1 of Part IV should add that “other relevant planning documents” referenced in Question 1 include (but are not limited to) Admissions and Continued Occupancy Plans (ACOPs), Administrative Plans, past PHA Plans (including the Five-Year Plan and Annual Plan), and Language Assistance Plans—to the extent that the PHA has adopted policies, practices, or procedures that implicate fair housing choice. The policies and procedures outlined in documents such as an ACOP or Administrative Plan govern the PHA’s day-to-day operations and administration of its programs, and are likely to be very relevant to examining the extent to which a PHA’s policies, practices, and procedures are promoting or detracting from advancing fair housing choice and access to opportunity. For example, a PHA’s use of admissions preferences outlined in its ACOP would be very relevant to conducting a fair housing assessment of that PHA.

Question 6: Contributing Factors and their Descriptions

We applaud HUD for introducing several important contributing factors, including the “lack of meaningful language access” contributing factor, the “lack of job training” contributing factor, and contributing factors concerning survivors of domestic violence. These contributing factors will provide for a more robust and meaningful fair housing analysis. In response to Question 6 posed in the September 2016 Federal Register Notice, we offer the following additional recommendations regarding the contributing factors for the Draft PHA Assessment Tool.

Adverse Housing Decisions and Policies Based on Criminal History.

² Affirmatively Furthering Fair Housing: Assessment Tool for Public Housing Agencies – Information Collection: Solicitation of Comment 30-Day Notice Under Paperwork Reduction Act of 1995, 81 Fed. Reg. 64,475, 64,482 (Sept. 20, 2016) [hereinafter “Federal Register Notice”].

³ *Id.*

As HUD recently acknowledged in its April 2016 fair housing guidance, due to the disproportionate rates of arrest, conviction, and incarceration experienced by the African-American and Hispanic communities, “criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”⁴ Similarly, these barriers have a disparate impact on persons with disabilities, who are disproportionately represented in the criminal justice system. Accordingly, the use of criminal history records to make adverse housing decisions creates barriers to housing choice and raises fair housing concerns when members of protected classes are disproportionately impacted, or when criminal records policies are used as pretext to deny housing to persons protected by the FHA. Thus, the PHA Assessment Tool should include a proposed contributing factor with an accompanying description that focuses on policies resulting in adverse housing decisions due to criminal history.

While the Assessment Tool references “Credit or criminal record policies” in the contributing factor “Admissions and occupancy policies and procedures, including preferences in publicly supported housing,” criminal history policies are simply listed as one of a number of policies and procedures. The prevalence of such exclusionary criminal history policies warrants an individual contributing factor for consideration by PHAs in completion of their AFHs. We recommend the following contributing factor and accompanying description:

Adverse Housing Decisions and Policies Based on Criminal History

Proposed Description: Housing decisions are often based, at least in part, on whether an individual or household member has a criminal history. To the extent that these decisions and policies have a disproportionate effect on members of one or more protected classes, or are applied more stringently (or as pretext for discrimination) against members of one or more protected classes, such policies and practices can raise fair housing concerns. “Adverse housing decisions” on the basis of criminal history include, but are not limited to, denial of admission to rental housing, eviction, subsidy termination, failure to renew a lease, refusal to add a family member to the household, and refusal to sell a dwelling. “Adverse housing policies” on the basis of criminal history include, but are not limited to, applying blanket bans that categorically exclude persons with any criminal history from housing, applying unreasonable look-back periods, adopting one-strike policies, using crime-free lease addenda, using arrests (as opposed to convictions) to justify adverse housing decisions, steering, zoning restrictions that exclude transitional housing for individuals leaving prisons and jails, and relying on negative generalizations and stereotypes regarding persons with criminal histories in making housing decisions. Conversely, housing policies that individually assess applicants or tenants by considering circumstances such as the seriousness of the offense, the individual’s age when the offense occurred, how recently the offense occurred, evidence of the individual’s ability to meet tenancy requirements, and steps taken to reduce the individual’s likelihood of returning to the criminal justice system, may increase housing choice. Publicizing this criteria widely to applicants, tenants, reentry service providers, and parole and probation officers may further increase housing choice. HUD has recently issued guidance on the consideration of criminal history. The first two guidance documents, Notice PIH 2015-19 and H 2015-10, inform PHAs and federally-assisted owners that the use of arrest records alone cannot be the basis “for

⁴ HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, at 2 (Apr. 4, 2016).

denying admission, terminating assistance, or evicting tenants.”⁵ The underlying rationale is the fact that an arrest occurred does not prove that criminal conduct occurred. These notices also remind PHAs and owners that adoption of one-strike policies is not required, and applicants and tenants have due process rights prior to denial or termination. The notices also reference best practices with respect to policies related to criminal history. HUD has also issued guidance, “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions,” that outlines how housing decisions based on criminal history would be analyzed under the Fair Housing Act. The guidance suggests that blanket bans on people with criminal history may be illegal under federal fair housing laws. Additional HUD guidance, “Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services,” discusses how crime-free ordinances may be suspect under the Fair Housing Act if they require housing providers to evict on the basis of an arrest or simply the preponderance of the evidence that criminal activity occurred.

This proposed contributing factor should be included in the possible contributing factor lists in the Segregation, R/ECAPs, Disparities in Access to Opportunity, Disproportionate Housing Needs, Publicly Supported Housing Analysis, and Disability and Access Analysis sections.

Displacement of residents due to economic pressures.

This existing contributing factor description should also include a specific reference to landlords who choose to exit the Housing Choice Voucher program due to economic pressures such as (1) so that the landlord can obtain higher rents than permitted under a PHA’s payment standard or (2) the landlord is at risk of losing his/her property insurance because of the decision to rent to voucher families. These external financial pressures on landlords could result in involuntary displacement of Voucher households from their desired communities.

Lack of public and/or private investment in specific neighborhoods, including services or amenities.

The latest draft of the PHA Assessment Tool merges two contributing factors by eliminating the individual factors “Lack of private investment in specific neighborhoods” and the “Lack of public investment in specific neighborhoods, including services or amenities.” It is unclear why these contributing factors were merged, and we are concerned that PHAs will not consider the role that the lack of both public investment and private investment each play in contributing to fair housing issues within a PHA’s service area or region. Both considerations – the lack of private investment and the lack of public investment, respectively-- are important for a robust fair housing analysis. We recommend that these contributing factors remain separate; alternatively, at minimum, we recommend changing the name of the new factor slightly to read “Lack of public and/or private investment in specific neighborhoods, including services and amenities.” By including “and/or,” the Tool acknowledges that

⁵ HUD Notice PIH 2015-19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, 2 (Nov. 2, 2015); HUD Notice H 2015-10, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, 2 (Nov. 2, 2015).

the lack of *either* public or private investment can create, contribute to, perpetuate, or increase the severity of one or more fair housing issues. As written, the Tool could be read to suggest that the lack of both public and private investment must be present in order for fair housing issues to be implicated.

Lack of meaningful language access.

We highly commend HUD's inclusion of the new contributing factor "lack of meaningful language access." The relationship between limited English proficiency and fair housing choice is an important consideration that PHAs should consider, as PHAs and other federally assisted housing providers have an obligation under Title VI of the Civil Rights Act of 1964 to provide meaningful language access to limited English proficient (LEP) persons. HUD's 2007 LEP Guidance⁶ recommends taking steps such as conducting a four-factor analysis to assess the need for language assistance, developing a language assistance plan, providing oral interpretation, and providing written translation of vital documents. A PHA's failure to engage in these activities can have an impact on fair housing choice; for example, the failure of a PHA to translate vital documents such as recertification documents could jeopardize a family's housing security should that family fail to timely recertify. Furthermore, as HUD has recently articulated in guidance, failure to comply with existing legal requirements to provide language assistance may also violate the Fair Housing Act.⁷ Accordingly, we propose the following changes (additions underlined; strikethroughs represent proposed deletions) to the contributing factor description included in the Draft PHA Assessment Tool:

Lack of meaningful language access and discrimination on the basis of limited English proficiency

Proposed Description: ~~Individuals with limited English proficiency (LEP) includes anyone "who does not speak English as their primary language and who has a limited ability to read, write, speak, or understand English..." (HUD LEP Guidance, 6872 Fed. Reg. 273244) (Jan. 22, 2007).~~ A limited English proficient (LEP) person is anyone who, due to national origin, does not speak English as his/her primary language and who has a "limited ability to read, write, speak, or understand" English,⁸ or who speaks English "less than very well." The lack of meaningful language access poses barriers to LEP individuals seeking publicly supported housing. Public housing agencies (PHAs) and other federally-assisted housing providers have obligations under Title VI of the Civil Rights of 1964 as well as other federal and related state legal authorities not to discriminate against housing applicants and tenants who are LEP. It is important that housing providers are in compliance with language access requirements to ensure that all individuals have access to information regarding affordable housing. Both HUD and USDA Rural Development have issued LEP guidance outlining a series of steps that certain recipients of HUD and RD funding should take to further Title VI compliance. See generally 72

⁶ See generally Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Notice, 72 Fed. Reg. 2732 (Jan. 22, 2007) [hereinafter "HUD LEP Guidance"].

⁷ HUD, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, at 6 (Sept. 15, 2016). ("If a housing provider is required to provide housing-related language assistance services to LEP persons under federal, state or local law, or by contract, and the housing provider fails to comply with that requirement, this too may constitute intentional discrimination.[.] By failing to comply with a requirement to provide language assistance, the housing provider may be denying individuals, based on their national origin, an equal opportunity to enjoy the housing benefits to which that requirement entitles them.[.]") (internal footnotes omitted).

⁸ HUD LEP Guidance, 72 Fed. Reg. at 2751 (App. B).

Fed. Reg. 2732 (Jan. 22, 2007) (HUD LEP Final Guidance); 79 Fed. Reg. 70,771 (Nov. 28, 2014) (USDA LEP Guidance). These steps include conducting a four-factor analysis to assess the need for language assistance; creating a language assistance plan based on the findings of the four-factor analysis; translating vital documents (i.e., those documents necessary to ensure meaningful access); and offering oral interpretation, if needed. HUD has further recognized the relationship between national origin discrimination and limited English proficiency under the Fair Housing Act through administrative enforcement and guidance. See generally HUD, Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency (Sept. 15, 2016). Therefore, housing providers who discriminate against prospective or existing tenants who are LEP on the basis of national origin may violate the Fair Housing Act. HUD's recent 2016 guidance also notes that a failure to provide language assistance as required by federal, state, or local laws, or under contract, may constitute discrimination under the FHA.

Location of environmental health hazards.

Due to the incidence of lead paint in public housing, we recommend adding “Location of environmental health hazards” (which references “lead based paint”) to the contributing factor list for the Publicly Supported Housing Analysis.

Policies related to payment standards, FMR, and rent subsidies.

We applaud the addition of this contributing factor to the contributing factor lists for “Segregation” and “R/ECAPs.”

As we noted in our previous comment letter regarding the PHA Assessment Tool, we recommend that the description of this contributing factor also include a reference to the PHA’s policies and practices regarding rent reasonableness determinations in the context of the Voucher program. PHAs may not approve a Voucher tenancy or execute a HAP contract until the PHA has determined that several factors have been met—including a determination that the rent is reasonable.⁹ This requirement is intended to ensure that Voucher holders are paying rents that are in line with what an unassisted household would pay for a similar unit on the private market.¹⁰ However, despite the fact that all PHAs administering the Housing Choice Voucher program make rent reasonableness determinations¹¹ on every unit, PHAs’ considerable discretion in making this determination results in wide variation and a lack of uniformity in how PHAs approach the question of “reasonableness.” Many PHAs rely upon databases with rental listings that paint an incomplete picture of what actually constitutes a reasonable rent for a specific unit in a particular area. Thus, in some instances, rents for units in certain neighborhoods (such as concentrated areas of poverty) are more likely to be deemed “reasonable,” whereas rents for units in lower-poverty areas are more likely to be deemed “unreasonable” because they are not really comparable in terms of location. In some areas, PHAs compare the rent of the unit in question to rent paid by other Voucher holders, rather than to comparable private units, resulting in a distorted “market value,” especially in higher opportunity areas that have historically lacked a large number of Voucher holders.

⁹ See 24 C.F.R. § 982.305; 24 C.F.R. § 982.507.

¹⁰ See 24 C.F.R. § 982.507(b) (noting that the “PHA must determine whether the rent to owner is a reasonable rent in comparison to rent for other comparable unassisted units”).

¹¹ PRRAC, *Constraining Choice: The Role of Online Apartment Listing Services in the Housing Choice Voucher Program*, at 2 (June 2015) (noting that GoSection8 provides PHAs access to rent reasonableness software).

Private discrimination.

It is unclear why this contributing factor was removed entirely from this draft of the PHA Assessment Tool. Private discrimination creates, contributes to, perpetuates, or increases the severity of one or more fair housing issues, including segregation, racially/ethnically concentrated areas of poverty, disproportionate housing needs, disparities in access to opportunity, as well as in the contexts of publicly supported housing and access for persons with disabilities. Private discrimination impacts access to housing opportunities for persons served by the PHA; for example, Housing Choice Voucher holders can experience discrimination by private landlords, such as the failure of a housing provider to provide a reasonable accommodation, or overly restrictive housing rules that impact families with children. Just because a PHA administers publicly funded programs does not mean that private discrimination plays no role in a PHA's fair housing assessment. Furthermore, the *AFFH Rule Guidebook* section outlining the AFH content for local governments states that contributing factors that are outside of a local government's ability to influence or control must still be identified.¹² In fact, the proposed Instructions for the Draft PHA Assessment Tool make a similar statement.¹³ Accordingly, this contributing factor should be reincorporated into the Draft PHA Assessment Tool.

Survivors of domestic violence, dating violence, sexual assault, and stalking, and harassment

Domestic and sexual violence are leading causes of homelessness for women and families and we continue to receive numerous reports that survivors are being denied housing (both at the admissions stage and through evictions) by PHAs because of the abuse committed against them. Therefore, we continue to strongly urge that PHAs, as part of their assessments, be required to answer specific questions regarding their efforts to serve survivors. To do this, PHAs can use information regarding survivors that they are already required to report under federal and local laws. For example, the Violence Against Women Act mandates that PHAs address the housing needs of survivors in their planning documents. In the 5-Year Plan, PHAs are required to include a statement of the goals, objectives, policies, or programs that will enable the PHA to serve the needs of survivors.¹⁴ In the Annual Plan, PHAs are required to include a description of activities, services, or programs that are provided by a victim service agency to survivors that help survivors to obtain or maintain housing, and that prevent violence or enhance survivor safety in assisted families.¹⁵ If PHAs are meeting these reporting requirements, then they should have readily available data and information that will help them assess the challenges that survivors face in maintaining and accessing affordable housing.

We applaud HUD for including the "Lack of safe, affordable housing options for survivors of domestic violence" as a contributing factor in the Publicly Supported Housing Analysis section. We further recommend that this contributing factor include survivors of sexual assault, dating violence, and stalking (as these categories of survivors are also protected under the Violence Against Women Act).

¹² *Affirmatively Furthering Fair Housing Rule Guidebook*, 107-108 (Dec. 2015) ("Contributing factors may be outside of the ability of the program participant to control or influence. However, such factors, if relevant to the jurisdiction or region, must still be identified."). While this section of the *Guidebook* is written for local governments completing the AFH, there is no reason why a PHA would not be similarly required to assess contributing factors outside of its control.

¹³ AFH Instructions (Introduction) ("A contributing factor may be outside the ability of a PHA to directly control or influence; however, such factors must be identified if they are significant. Identifying 'external factors' and barriers to achieving goals is, among other things, a useful planning and performance management component.").

¹⁴ 42 U.S.C. § 1437c-1 (West 2016).

¹⁵ *Id.*

This contributing factor should also be defined; we propose a change to the name of this contributing factor to make it more inclusive regarding concerns of displacement¹⁶ due to acts of domestic violence, dating violence, sexual assault, and stalking. Accordingly, we propose the following name and description of this contributing factor:

Lack of safe, affordable housing options for; displacement of; and lack of housing support for victims of domestic violence, dating violence, sexual assault, and stalking.

Proposed Description: Federal laws, such as the Violence Against Women Act (VAWA) and the Fair Housing Act (FHA), offer protections from housing discrimination to victims of domestic violence, dating violence, sexual assault, and stalking because of the abuse committed against them. Despite these safeguards, many victims continue to experience adverse housing decisions made by housing providers due to their status as victims. Many state and local jurisdictions have enacted laws and policies that provide housing protections for victims that mirror and often exceed the federal protections available. For example, approximately half of the states have eviction defense and early lease termination provisions for victims of domestic and sexual violence, as well as other crime victims. However, many states and local jurisdictions do not have housing laws designed to protect victims, which impede victims' abilities to access and maintain their current housing as well as quickly find safe alternative housing. Furthermore, local nuisance and crime-free ordinances that punish victims who are contacting the police for protection against abuse can violate federal and state civil rights laws. As stated by HUD in guidance issued in 2016, one step a local government can take towards meeting its duty to affirmatively further fair housing is to eliminate disparities by repealing a nuisance or crime-free ordinance that requires or encourages evictions for using emergency services, including 911 calls, by domestic violence and other crime victims. Additionally, public housing agencies are required by VAWA to describe in their annual plans and five-year plans to HUD any activities, services, or programs offered to victims that help them access and maintain housing, or enhance victim safety. For instance, some public housing agencies, in an effort to increase housing access, have admissions preferences for victims applying for certain federal housing programs, such as public housing and the Section 8 voucher programs.

We propose that this contributing factor be included in the following sections of the Fair Housing Analysis: Disparities in Access to Opportunity, Disproportionate Housing Needs, and Publicly Supported Housing Analysis (where the current contributing factor "Lack of safe, affordable housing options for survivors of domestic violence" is listed).

In addition, we urge that HUD include a separate contributing factor that considers survivors of harassment, including sexual harassment. We propose the following contributing factor and description:

Displacement of and lack of housing support for victims of harassment based on membership in a protected class

¹⁶ We note that, while the accompanying Federal Register Notice referenced a new contributing factor entitled "Involuntary displacement of survivors of domestic violence," no such standalone contributing factor was included in the Draft PHA Assessment Tool. We also note that displacement of domestic violence survivors is referenced as part of the contributing factor "Admissions and occupancy policies and procedures, including preferences in publicly supported housing."

Proposed Description: Harassment on the basis of race, color, sex, religion, national origin, familial status, or disability, when occurring in and/or around one’s home or prospective home, or in connection with a housing transaction, can violate the Fair Housing Act. Harassment can be perpetrated by housing providers, housing provider employees or staff, or other tenants or neighbors. HUD regulations recognize harassment under two legal theories: (1) quid pro quo harassment and (2) hostile environment harassment. “Quid pro quo harassment” refers to “an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to” the sale, rental, or availability of a dwelling, or is otherwise related to a residential real estate-related transaction.¹⁷ For example, a housing provider engages in quid pro quo harassment on the basis of sex by demanding sexual favors from a tenant as a condition of making repairs in the tenant’s unit. An unwelcome “request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.”¹⁸ “Hostile environment harassment” refers to unwelcome conduct “that is sufficiently severe or pervasive as to interfere with” the sale, rental, or use or enjoyment of a dwelling, or otherwise interferes with a residential real estate-related transaction.¹⁹ Hostile environment harassment “does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.”²⁰ When perpetuated on the basis of sex stereotyping, quid pro quo or hostile environment harassment against the LGBT community can raise fair housing concerns.

We propose that this contributing factor be included in the following sections of the Fair Housing Analysis: Disparities in Access to Opportunity, Disproportionate Housing Needs, and Publicly Supported Housing Analysis.

Furthermore, we commend HUD for amending the definition of the contributing factor “Admissions and occupancy policies and procedures, including preferences in publicly supported housing” to have procedures that may relate to fair housing that include individuals displaced because of domestic violence. Since, under VAWA , HUD has consistently encouraged PHAs to adopt admissions and occupancy policies and procedures that facilitate survivors accessing and maintaining housing, we urge that HUD amend this part of the definition to include also the displacement of survivors of dating violence, sexual assault, and stalking.

Similarly, the definition of the contributing factor “Lack of state or local fair housing laws” should be amended to reflect laws that protect categories of survivors beyond domestic violence. We suggest the following edit to this sentence of the existing definition (additions underlined, deletions denoted by a strikethrough): “Examples of state and local laws affecting fair housing include legislation banning source of income discrimination; protections for individuals based on sexual orientation, age, survivors of domestic violence, dating violence, sexual assault, and stalking, or other characteristics; mandates to construct affordable housing; and site selection policies.”

Nuisance laws

¹⁷ 24 C.F.R. § 100.600(a)(1) (2016).

¹⁸ *Id.*

¹⁹ *Id.* § 100.600(a)(2).

²⁰ *Id.*

We applaud HUD for including a new contributing factor to the assessment tool – “Nuisance laws,” and that this factor has been inserted into the sections of the analysis examining the contributing factors to Segregation, R/ECAPs, as well as in the contributing factor list for the Disability and Access Analysis, and the Publicly Supported Housing Analysis. We think that the proposed definition for this factor is superb, and only suggest that the definition reflect the fact that these types of laws also can impact individuals with disabilities. Therefore, we recommend the following amendment (represented by underlined text): “...Local nuisance ordinances can negatively impact crime victims by endangering their housing security and housing choice by creating barriers through evictions and/or threats to evict, as well as penalties for property owners based on the number of times police are called. Nuisance laws can also undermine housing security for people with disabilities, whom may be swept up in enforcement of ordinances that include any 911 call as the basis for citation when these individuals need to access emergency medical assistance. An eviction record...” In addition, since the existence and enforcement of nuisance and crime-free laws can also contribute to local disparities in access to opportunity and disproportionate housing needs, we further recommend that this contributing factor be added to these respective sections of the Assessment Tool.

Question 7: Qualified PHA (QPHA) Insert

There are about 3,300 small PHAs in the country, administering fewer than 550 units. Many small PHAs are in metropolitan areas and surround a city core. While we certainly understand HUD’s efforts to streamline this process for small PHAs that have very limited resources, the QPHA insert questions run the risk of sending a message to QPHAs that they are being held to a different standard of analysis. As discussed further below, the current structure and content of the QPHA insert also risks creating confusion, particularly for stakeholders wishing to comment on their QPHA’s AFH. We recommend elimination of the QPHA insert, or, at minimum, substantial revisions and restructuring to this insert.

The AFFH Rule itself already affords QPHAs considerable flexibility within their joint or regional collaborations. The AFFH Rule clearly states that collaborating program participants “may divide work as they choose.”²¹ Introducing additional questions and instructions for QPHAs becomes confusing, particularly when important aspects of the fair housing analysis—including the identification of contributing factors—remain in the main Assessment Tool questions and are not specifically included in the insert. The accompanying insert instructions simply direct Qualified PHAs using the inserts to refer to the contributing factor lists and more detailed instructions in the main Assessment Tool. It also seems problematic that important stakeholders—particularly those residents served by the QPHA—seeking to comment on the AFH will be examining their QPHA’s AFHs with the fair housing analysis separated from the rest of the Assessment Tool responses, while other questions, such as a description of community participation and goals, remain in the main Assessment Tool responses.

Additionally, certain questions include several areas of focus, and appear to combine several questions or concepts from the main Assessment Tool; for example, the Qualified PHA section on Disparities in Access to Opportunity asks the Qualified PHA to “Describe any disparities in access to the following opportunities for households in the service area (and region, if applicable), based on protected class:” Educational Opportunities, Employment Opportunities, Transportation Opportunities, Low Poverty Exposure Opportunities, and Environmentally Healthy Neighborhood Opportunities.

²¹ 24 C.F.R. § 5.156(a)(3) (2016).

Combining all of these important opportunity indices into a single question in the general section (and a follow-up in the Publicly Supported Housing Section) is not conducive to a meaningful analysis about the PHA's service area concerning each distinct concept or Opportunity Index. While the instructions correctly acknowledge that HUD can still decide not to accept the QPHA's portion of the AFH if "the QPHA analysis does not meet the standards for an acceptable AFH,"²² these questions do not provide sufficient guidance about the appropriate level of analysis HUD expects from QPHAs using this insert.

If HUD decides to retain the QPHA insert, we ask that HUD re-examine the insert questions and instructions with an eye towards taking steps to address the concerns outlined above. Furthermore, the "Policies and Practices" section of the Publicly Supported Housing Section should also ask the QPHA to consider its admissions and occupancy policies more broadly, including grounds for denial of admission, as well as grounds for eviction or subsidy termination. The grounds upon which a QPHA decides to admit a family, or to evict or terminate a subsidy can raise fair housing concerns (*e.g.*, overly restrictive admission policies regarding criminal history).²³ Furthermore, this section should also ask the QPHA to outline its policies regarding providing access to persons with disabilities (*e.g.*, processing of reasonable accommodation requests), and persons with limited English proficiency (*e.g.*, whether the QPHA has a language assistance plan, the provision of interpretation assistance, and translation of vital documents). These additional questions would not add significant additional burden because these questions would simply ask the QPHA to evaluate certain aspects of its current policies.

Question 8: Structure of the Disparities in Access to Opportunity Section

Within our prior comments, we noted a series of issues and limitations regarding the opportunity indices offered in the AFFH Data and Mapping Tool. HUD is now proposing that PHAs conducting an AFH would not be required to consult the HUD-provided table listing all of the opportunity indices for a PHA's given service area and region (presumably an analog to current Table 12 in the current version of the AFFH Data and Mapping Tool), but that this table would still be available for PHAs to consider. However, HUD will still require PHAs to consult the HUD-provided maps, which are visual representations of the indices. Rather than eliminating the requirement that PHAs review the table containing the opportunity indices entirely, HUD should work to address the current shortcomings in the HUD-provided data.

Furthermore, this section should ask PHAs to consider the other protected classes under the Fair Housing Act (*e.g.*, sex), to the extent that local data and local knowledge are available, in the context of each opportunity indicator. As suggested in the Federal Register Notice, a question could be added to each sub-section regarding the various opportunity indicators about the protected classes under the FHA for which HUD is not able to provide data, but for which local data and local knowledge may be available. This helps ensure that a thoughtful analysis about access to each respective opportunity indicator is undertaken for all protected classes for which information is available and accessible; a more robust analysis seems more likely if the PHA is asked about each protected class with respect each opportunity indicator separately, rather than it being included in the Additional Information

²² Instructions, Part V(F) ("Instructions for Qualified PHA Insert").

²³ See generally, HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016).

section. If a third question is added, HUD should use instructions that draw upon those in Question (1)(a)(ii), (1)(b)(ii), etc., to the extent that those instructions ask for an assessment of access to opportunity for public housing and Housing Choice Voucher households.

Question 10: Assessment Tool Instructions

We offer the following recommendations regarding the specified Assessment Tool questions and/or accompanying instructions as outlined below. Many of these comments echo comments made by NHLP in previous comments submitted concerning the AFH Local Government Assessment Tool.

General Instructions

Introduction

In discussing local data in the fifth paragraph of the “Introduction” section, the instructions should incorporate the following language from the preamble to the AFFH Rule: “The phrase ‘subject to a determination of statistical validity by HUD’ is included to clarify that HUD may decline to accept local data that HUD has determined is not valid but not that HUD will apply a rigorous statistical validity test for all local data.”²⁴ Including this reminder in the instructions is important so as to remind PHAs that the language “subject to a determination of statistical validity by HUD” is not intended to encourage PHAs to dismiss or reject various kinds of local data presented during the community participation process, but rather that HUD reserves the right to decline local data if HUD does not feel the data has met a standard of statistical validity. PHAs should encourage members of the community and other stakeholders to submit local data as part of the community participation process.

The instructions’ reference to program participants not needing to “expend extensive resources” in considering information received by the participant during the community participation process could be read to mean that a searching or in-depth analysis of information supplied during the community participation process is not required. Additionally, the instructions do not define “extensive” or provide an example of the types of resources HUD is referring to. For large PHAs, for example, a relatively “extensive” review of local data and local knowledge may be required to meet the obligations under the AFFH rule. The *AFFH Rule Guidebook* contains language that is somewhat more specific, stating that “Program participants are not required to incur substantial costs or staff hours to review and consider data received via the community participation process.”²⁵ Again, what constitutes “substantial” is relative, depending on the size and capacity of the PHA. HUD should consider including an example to provide some clarity regarding the agency’s expectations regarding review of local data and local knowledge received in the community participation process. A statement informing program participants that they need not “expend excessive or unreasonable staff time and cost to review data received during the community participation process beyond what is necessary to adequately consider the data in accordance with the AFFH Rule” would provide more clarity.

Additionally, the instructions also state that “PHAs are permitted to include contributing factors that are not listed the Appendix.” This statement could be read to mean that inclusion of contributing factors not otherwise included in the PHA Assessment Tool is discretionary. However, the *AFFH*

²⁴ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,306 (July 16, 2015) (Preamble).

²⁵ AFFH Rule Guidebook at 50.

Guidebook states, “Program participants *must also identify any other factors, not included on the HUD-provided list, if they create, contribute to, perpetuate, or increase the severity of one or more fair housing issues.*”²⁶ While that section of the *Guidebook* is written for the Assessment Tool for Local Governments, there is no indication that PHA-specific guidance would differ on this point. The instructions should, therefore, make clear that PHAs are *required* to identify contributing factors that are not listed if that contributing factor creates, perpetuates, contributes to, or increases the severity of at least one fair housing issue.

The introductory instructions should remind program participants that participation in a joint collaboration with other PHAs does not relieve individual PHAs of their obligations to conduct community participation in accordance with the AFFH Rule.²⁷ This is a very crucial point for PHAs that have entered into a joint submission with one or more additional PHAs. The AFFH Rule requires that the community participation process include “residents, and other interested members of the public, in the jurisdictions of each collaborating program participant, and *not just those of the lead entity.*”²⁸ Importantly, the AFFH Rule states that community participation process must be sufficient for each PHA “collaborating in a joint AFH or regional AFH, to satisfy the notice and comment requirements in 24 CFR part 903.”²⁹

Disability and Access Analysis

For Questions 2(d) and 2(e), the instructions should instruct PHAs to consult available local data and local knowledge to answer these questions. For Question 2(d), information from community participation and consultation with organizations that serve individuals who experience disabilities will provide valuable insights into the efficacy of the PHA’s steps taken to engage in effective communications with persons with disabilities.

B. The Importance of a Balanced Approach

We strongly support a balanced approach to affirmatively furthering fair housing, and feel as though more specific questions regarding viewpoints of residents served by the PHA about preservation of affordable housing, involuntary displacement, and existing community assets are needed in the Draft Assessment Tool.

In the September 2016 Federal Register Notice accompanying the Draft PHA Assessment Tool, HUD expressed its openness to adding questions “on how to evaluate tenant viewpoints on relocation and mobility from neighborhoods of concentration to more integrated areas,” including “HCV families and residents living in publicly supported housing properties in R/ECAPs and segregated neighborhoods.”³⁰ We feel as though PHAs receiving resident feedback on these issues—including feedback concerning the mix of mobility and place-based approaches tenants would like to see—is a crucial part of the community participation process. In addition to questions in the Assessment Tool

²⁶ AFFH Rule Guidebook at 108 (emphasis added).

²⁷ 24 C.F.R. § 5.156(d) (2016).

²⁸ *Id.* (emphasis added).

²⁹ *Id.*

³⁰ Federal Register Notice, 81 Fed. Reg. at 64,481.

itself, we feel as though additional guidance from HUD concerning the engagement of residents about these important questions—which will likely have implications for the types of goals pursued by a PHA and/or by a local government—would be very beneficial.

C. Miscellaneous Comments

- **Transforming R/ECAPs.** At several instances, the PHA Assessment Tool instructions use the phrase “transforming R/ECAPs by addressing the combined effects of segregation and poverty”³¹ to describe an example of a fair housing outcome. Instead of using the word “transforming,” we recommend using the phrase “expanding opportunity into R/ECAPs.” We feel that this term acknowledges that there are community assets that may exist within a R/ECAP that residents would like to retain, while still attracting investment, opportunity, and expanded fair housing choice to the community.
- **Publicly supported housing section.** The instructions for the “Other Publicly Supported Housing Programs” section notes that the HUD-provided map fails to distinguish between developments that serve different populations (families with children, the elderly, persons with disabilities, etc.). HUD, in further developing the AFFH Data and Mapping Tool, should differentiate these categories on the map, so that stakeholders reviewing the maps can easily differentiate between developments that serve different populations. We also renew our request for HUD to add demographic data for individual LIHTC program developments to the AFFH Data and Mapping Tool. Given the prevalence of the LIHTC program, we feel that it is imperative to have this information in order for communities to conduct a robust assessment of fair housing choice in a PHA’s service area and region.
- **Applicability of the Equal Access Rule to HUD Programs.** Despite the Equal Access Rule’s applicability to PHAs (as well as to other forms of HUD-assisted and -insured housing), the Draft PHA Tool completely fails to acknowledge the Equal Access Rule. The Tool should include questions that both explore the extent to which housing choice is denied due to one’s sexual orientation, gender identity, or marital status, and steps that PHAs and other HUD-assisted and -insured housing providers have taken to implement the Equal Access Rule.
- **Disparities in Access to Services and Infrastructure.** The PHA Assessment Tool’s Segregation, R/ECAP, Disparities in Access to Opportunity, Disproportionate Housing Needs, Disability and Access, and Publicly Supported Housing Analysis sections should include a question asking PHAs to describe unequal access to municipal services and infrastructure in the PHA’s service area and region by members of protected classes, including disparities in services and infrastructure experienced by protected class members who are: (1) farmworkers; (2) mobile home park residents; and (3) living in disadvantaged rural areas in the PHA’s service area or region. The PHA would use local data and local knowledge to respond to this question.

³¹ See e.g., Instructions for Question (B)(ii)(2)(b).

In closing, we sincerely appreciate HUD's recent steps to implement the AFFH regulation, including the second issuance of the Draft PHA Tool for public comment. Thank you for your consideration of these comments. If you have any questions, please contact NHLP Staff Attorney Renee Williams, rwilliams@nhlp.org.

Sincerely,

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