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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: Docket No. FR-5173-N-08 Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas: Solicitation of Comment – 60-Day Notice Under Paperwork Reduction Act of 1995

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP), as well as the undersigned 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 issuing its final affirmatively furthering fair housing (AFFH) regulation in July 2015, and for taking a series of steps to implement this important rule. Among these steps is the issuance of the draft AFFH Assessment Tool for States and Insular Areas (“Draft State Tool”). The following comments reflect suggestions and recommendations that could further strengthen the Tool so as to ensure that States and Insular Areas (hereinafter “States”) are equipped to engage in a

robust, meaningful fair housing assessment that furthers the aims of the Fair Housing Act's (FHA) AFFH mandate.¹

A. The Instructions and Questions in the Tool Should Reflect an Examination of Fair Housing Issues from the Entire State

The State AFH process will be crucial to successful implementation of the AFFH rule. Since the State AFH process will focus on both entitlement and non-entitlement jurisdictions alike, it is crucial that the resulting assessment provides a representative, accurate snapshot of fair housing issues such as segregation and disproportionate housing needs in areas throughout the State – ranging from large metropolitan areas to small, rural jurisdictions. Accordingly, we make the following recommendations and comments.

First, questions in the “Community Participation Process” section (Section III) of the Draft State Tool must recognize that the community participation process on a state level differs from the process at the local government level. Thus, the language in the State Tool should somewhat differ from the language in the Local Government Tool. 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.

- In Section III, Question 1, the question should include the following language, added to 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”* (proposed additional language in italics).
- Similarly, incorporating language from 24 C.F.R. § 91.110(a) (State consultation requirements), Section III, Question 2 should ask, “Provide a list of organizations consulted during the community participation process. *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”* (proposed additional language in italics). The instructions should note that “social service

¹ These comments are written with the recognition that, to the extent that the analysis for Insular Areas may necessarily differ (due to unavailability of HUD data, for example), these comments may not be applicable to them.

organizations” includes “those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, and homeless persons.”²

- Section III, Question 3 should ask, “How successful were the efforts at eliciting meaningful participation *from all parts of the State*? If there was low participation, *including in particular parts of the State or within specific sub-State areas, identify what areas of the State exhibited low participation and provide the reasons* (proposed additional language in italics).

Second, the Draft State Tool’s accompanying instructions should provide more guidance about how the required data analysis should be analyzed at a State or regional level. The instructions for the Draft State Tool currently state, “Although a State is not generally expected to provide the level of neighborhood analysis that local governments conduct, HUD is providing States with the similar data in the AFFH Data and Mapping Tool so that this more granular analysis can be conducted where necessary or appropriate.”³ While the instructions do acknowledge that places in the State for which local jurisdictions are not submitting AFHs are “an important area of focus for States,” the instructions also rightly acknowledge that “the AFH must also include an analysis of fair housing issues throughout the State.”⁴ States as well as stakeholders seeking to comment on the State’s AFH would benefit from a more in-depth discussion about when a “granular” analysis versus a more high-level analysis is appropriate.⁵ The suggestion included in the introductory instructions about States possibly using “sub-State areas” for the purposes of its analysis, as well as referring States to local governments’ Analyses of Impediments or AFHs, are good starting points, but the instructions would benefit from additional suggestions or guidance, such as using the required community participation⁶ and consultation⁷ processes to identify areas of the State that warrant a more “granular” analysis, based on concerns expressed by stakeholders (particularly those that serve or represent members of protected classes) about existing or potential fair housing issues.

B. Questions in the Publicly Supported Housing Analysis Section Regarding LIHTCs Should be Clarified

² 24 C.F.R. § 91.110(a).

³ Draft State Tool Instructions at 17 (emphasis added).

⁴ Draft State Tool Instructions at 17.

⁵ The Federal Register Notice accompanying the State Tool notes, “HUD intends to generally provide States with thematic maps at the county or statistically equivalent level in the AFFH Data and Mapping Tool. HUD intends to provide additional functionality to allow States to zoom in to the dot density maps that are currently provided for local governments and PHAs submitting an AFH using the Local Government Assessment Tool issued on December 31, 2015.” Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas: Solicitation of Comment – 60-Day Notice Under Paperwork Reduction Act of 1995, Notice, 81 Fed. Reg. 12,921,12,924 (Mar. 11, 2016). Again, the provision of data at the county level simply underscores the need for additional discussion about when States should consider engaging in a more granular-level analysis.

⁶ See generally 24 C.F.R. § 91.115 (outlining requirements for States’ citizen participation plans).

⁷ See generally 24 C.F.R. § 91.110 (consultation requirements for States).

We support the inclusion of the focused questions within the Publicly Supported Housing Analysis section regarding the Low Income Housing Tax Credit (LIHTC) program (within Section V.C.), and offer several suggestions for the questions and instructions for this section.

First, Question 1(c)(i) fails to clarify whether the question is intended to address only the siting of new tax credit units, or whether the question is also intended to address policies that have influenced the locations of tax credit units since the inception of the LIHTC program. The Draft State Tool’s use of the phrase “that may influence the location of LIHTC units” seems to imply future siting, but could also include the current locations of existing tax credit properties. The policies that influenced past and current locations of tax credit properties, as well as those policies that will impact future siting decisions, both provide important context to assessing present and future potential fair housing issues. The context is crucial for analyzing fair housing issues, as the subsequent identification of contributing factors and ultimate goal-setting may change depending on whether the discussion centers upon the past allocation of tax credits versus future allocations. For example, the public participation process may reveal that low-income communities in certain parts of the State seek future allocations of tax credits to construct affordable housing in areas of higher opportunity, while also seeking tax credits to accomplish rehabilitation and preservation objectives for existing affordable properties in underserved areas. However, low-income communities within other parts of the State may have different perspectives on how tax credits can be allocated in a manner that addresses existing fair housing issues. Accordingly, HUD should amend Question 1(c)(i) to ensure that the question encapsulates both the siting of new tax credit units as well as the location of current units. Additionally, the accompanying instructions should also be updated to avoid confusion. Currently, the instructions note that, “[i]n answering these questions, program participants may distinguish between different uses of LIHTC, including new construction and rehabilitation.”⁸ However, we urge HUD to require that States distinguish between the different ways in which tax credits are being used in order to provide for a more fully informed fair housing assessment.

Second, Question 1(c)(i) should also ask the State to consider how the Qualified Allocation Plan (QAP) and other state/local policies or laws impact racial and ethnic minorities—in addition to the current part of the question that asks how families with children, persons experiencing disabilities, and the elderly are affected differently by these provisions. A fair housing analysis of the QAP and other policies that influence the allocation of tax credits would fall short if such an analysis did not include a discussion of how QAP provisions and other tax credit policies specifically affect racial and ethnic minorities, as compared with other groups.

Third, Question 1(c)(i) should include an additional sub-question (#6) that asks the State to list “Other State-adopted priorities, set asides, preferences, or points concerning the use of credits to further preservation of affordable housing to serve an existing community need among protected class members.” This additional question will facilitate a discussion on how the State views the relationship between the tax credit program and the need to preserve affordable housing, which usually

⁸ Draft State Tool Instructions at 31 (emphasis added).

disproportionately serves members of protected classes. Additionally, the accompanying instructions should prompt the State to explain whether such preservation objectives are serving an existing need among protected class members and other low-income persons for the rehabilitation of existing affordable housing stock. Additionally, the instructions should ask the state to describe any special efforts to preserve affordable housing in areas of opportunity and in revitalizing areas.

Fourth, in answering Questions 1(c)(i) and 1(c)(ii), States should be required to distinguish 9-percent tax credits and 4-percent tax credits in their responses. Currently, the accompanying instructions state that program participants “may distinguish” between 4-percent and 9-percent credits.⁹ Acknowledging the distinction between 9-percent and 4-percent credits in the State Tool would allow both the State and interested stakeholders to evaluate patterns of investment concerning both types of credits; in turn, such an examination may reveal fair housing issues concerning the awards of one or both types of credits. Additionally, the accompanying instructions should clarify that a state’s QAP is relevant for both 9-percent and 4-percent credits, not just 9-percent credits.¹⁰

Additional Comments Concerning the Publicly Supported Housing Analysis Section Regarding LIHTCs

As discrimination against Section 8 Housing Choice Voucher holders is a serious barrier to housing opportunity for families nationwide, we applaud the inclusion of Question 1(c)(iii) regarding discrimination against voucher holders or other protected class members by LIHTC properties. We also support the inclusion of the portion of the question inquiring about the State’s “oversight and enforcement of use agreements prohibiting discrimination against voucher-holders.”¹¹

Furthermore, LIHTC units are covered by the Violence Against Women Reauthorization Act of 2013 (VAWA)¹²—which includes a series of housing protections for survivors of domestic violence, dating violence, sexual assault, and stalking who reside in or apply for admission to LIHTC properties. We support inclusion of an additional question in the State Tool that asks for a description of any steps taken by the State, including the state housing finance agency and other agencies responsible for administering LIHTCs, to ensure VAWA 2013 implementation and compliance within tax credit properties. As HUD has acknowledged, domestic violence survivors are overwhelmingly women.¹³

⁹ Draft State Tool Instructions at 31.

¹⁰ See 26 U.S.C. § 42(m)(1)(D) (noting that the exception from the credit cap for bond-financed properties (usually using 4% credits) will not apply unless such a project “satisfies the requirements for allocation of a housing credit dollar amount under the qualified allocation plan applicable to the area in which the project is located”).

¹¹ Draft State Tool, Section V.C., Question 1(c)(iii)

¹² See generally 42 U.S.C. § 14043e-11; see also 42 U.S.C. § 14043e-11(a)(3)(J) (noting the inclusion of the LIHTC program as a “covered housing program” under the statute).

¹³ Sara K. Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs, Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA), at 2 (Feb. 9, 2011) (citing statistics). See also ACLU, Safe Homes, Safe Communities: A Guide for Local Leaders on Domestic Violence and Fair Housing (2015), available at:

https://www.aclu.org/sites/default/files/field_document/equ15-report-safehomes-v04_0.pdf (providing background on the

Thus, the degree to which tax credit properties (as well as other publicly supported housing covered by VAWA 2013) protect the housing rights of domestic violence survivors has important fair housing implications.

Data Regarding Occupancy of LIHTC Units

While HUD is providing data regarding the occupancy of publicly supported housing developments (including public housing, project-based Section 8, the Section 8 Housing Choice Voucher program, and other HUD multifamily developments), HUD is not providing occupancy demographic data for LIHTC developments. Additionally, the focus of Question 1(c)(i) within the expanded LIHTC sub-section (within the Publicly Supported Housing Analysis section) primarily concerns location and ability to access LIHTC units, as opposed to the actual occupancy of these units across each State (which is addressed in an earlier, more general question about publicly supported housing demographics as compared with demographics of an area of a State). However, the occupancy demographics of LIHTC units (i.e., the populations that are currently served by these properties) are similarly important in assessing the extent to which members of protected classes are living within existing tax credit properties. Thus, the State Tool should take additional steps to ensure occupancy demographics of LIHTC units are adequately factored into the existing analysis.

Currently, the instructions for Question 1(b)(iv) in Section V.C. refer States to local data and local knowledge sources for information about occupancy demographics for LIHTC properties. However, we suggest that the instructions for this question reference LIHTC data submitted to HUD by state housing finance agencies pursuant to Housing and Economic Recovery Act of 2008 (HERA) reporting requirements.¹⁴ In March 2016, HUD issued *Data on Tenants in LIHTC Units as of December 31, 2013*,¹⁵ which provides state-level data regarding LIHTC tenant demographics. While the data collection described in this report has considerable limitations and does not constitute a comprehensive accounting of occupancy demographics for LIHTC developments in every State, to the extent that State-level data is provided, it provides a useful starting point – particularly when supplemented by other available local data and local knowledge that can address data collection gaps. Furthermore, we recommend that the instructions note that, to the extent that housing finance agencies retain (or retain in the future) similar occupancy data at the development level, that States should use this information (to the extent it is readily available) in circumstances where a more “granular” analysis concerning LIHTC developments in a particular part of the State is appropriate.

intersection between domestic violence and housing, including discussions of VAWA and the Fair Housing Act – including the duty to affirmatively further fair housing).

¹⁴ HERA “specifically requires HFAs to submit to HUD information concerning race, ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments of households residing in LIHTC properties.” U.S. Dep’t of Hous. and Urban Dev., *HUD issued Data on Tenants in LIHTC Units as of December 31, 2013* at 1 (Mar. 2016). Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, Div. B, Title VIII, Subtitle B, § 2835(d), 122 Stat. 2654, 2874 (2008) (codified at 42 U.S.C. § 1437z-8).

¹⁵ This report is available at: <https://www.huduser.gov/portal/publications/data-tenants-LIHTC.html>.

C. HUD Should Include Specific, Detailed Questions on Disparities in Access to Opportunity for Areas Such as Re-Entry and Emergency Preparedness (Specific Comment Solicitation)

In the Draft State Tool, HUD prompts States to describe identified disparities in access to opportunity including “e.g., opportunities or lack thereof related to emergency preparedness, public safety, public health, housing finance and other financial services, prisoner re-entry” as they relate to place of residence and protected class membership.¹⁶ The inclusion of these areas as they relate to disparities in access to opportunity is a very welcome addition. Currently, the Draft State Tool features these categories as examples of areas where the State may have identified disparities in access to opportunity, within the context of a single question. HUD is soliciting comment about whether more targeted questions about each issue area are appropriate. Given the impact each of these areas has on access to housing choice and opportunity, we urge HUD to require States to consider each issue in a series of individual, targeted questions. We believe this will not only help elevate these issues as an important component of the analysis in disparities of access to opportunity, but it will also provide starting point for discussion surrounding these issues between States and stakeholders engaging in the community participation process. We also offer specific suggestions for several of the targeted questions outlined within the Notice.

- *Disparities Related to Emergency Management and Preparedness.* HUD should consider adding specific a specific sub-question concerning disparities in access to resources concerning emergency preparedness and response for persons with limited English proficiency – specifically, how one’s ability to communicate in English can directly impact access to services related to emergency preparedness and recovery.¹⁷
- *Re-Entry.* Building upon the existing question in the Notice accompanying the Draft State Tool, HUD should consider adding a question about existing laws, policies, and practices that exist within the State (including at the locality level, to the extent known) that facilitate or hinder successful re-entry of members of protected classes to housing, employment, education, counseling, or other opportunities within the State.¹⁸
- *Public Health Services.* HUD should consider adding a question about the impact of the policies, practices, and resources of neighboring states/the broader geographic area

¹⁶ Section V.B., Question (iii)(2)(b).

¹⁷ For example, HUD’s Conciliation Agreement and Voluntary Compliance Agreement with the State of New Jersey concerning the State’s Superstorm Sandy response included a significant language access component, demonstrating the importance of meaningful language access—particularly in times of emergency. *See generally*, Voluntary Compliance Agreement and Conciliation Agreement Between U.S. Dep’t of Hous. and Urban Dev., Latino Action Network, New Jersey State Conference N.A.A.C.P., Fair Share Hous. Ctr., and the State of New Jersey (Apr. 3, 2013), available at: <http://portal.hud.gov/hudportal/documents/huddoc?id=NewJerseyAgreementsigned.pdf>.

¹⁸ Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas, Notice, 80 Fed. Reg. at 12,925 (asking States to [d]escribe the demographics of the State’s population involved in re-entry in terms of race, ethnicity, national origin (including LEP persons), sex, and disability” and asking States about “[w]hich protected class groups are least successful in accessing housing, employment, counseling, education, or other opportunities in the State”).

(similar to the question about emergency preparedness)¹⁹ upon access to public health programs/resources and exposure to public health hazards.

We ask HUD to add questions about the following issue areas in the section on disparities in access to opportunity, as they represent areas where great disparities also exist in relation to where a person lives: meaningful language access; access to quality, affordable food; and disparities in access to housing and services for survivors of domestic and sexual violence. Of course, this is not an exhaustive list.

Additionally, the State Tool should include questions requiring States to describe any past or current activities undertaken to address disparities in access to opportunity for all of the above-listed areas.

D. Additional Comments and Recommendations

In addition to the above comments, we include the following recommendations:

- While the sample maps provided by HUD in anticipation of this public comment period are appreciated, full availability of HUD data and maps allows commenters to more fully evaluate the efficacy of the Draft State Tool when used in conjunction with HUD’s Data and Mapping Tool. The Notice accompanying the issuance of the Draft State Tool states that “HUD intends to provide additional functionality to allow States to zoom in to the dot density maps that are currently provided for local governments and PHAs submitting an AFH using the Local Government Assessment Tool issued on December 31, 2015,” and that “HUD is currently in the process of compiling such data, which will be incorporated into the AFFH Data and Mapping Tool prior to the final issuance of the State and Insular Area Assessment Tool.”²⁰ We urge HUD to 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.
- Table 10-1, entitled “R/ECAP and Non-R/ECAP Demographics by Publicly Supported Housing Program Category,” is unclear as currently presented. For the sake of clarity, each protected category should be included as a separate, distinct table. For example, the races/ethnicity categories listed in Table 10-1 should be listed in a single table (without reference to other protected categories) so that readers can see that the featured race/ethnicities (here, “White,” “Black,” “Hispanic,” “Asian or Pacific Islander”) add up to approximately 100 percent. Similarly, the “Families with Children,” “Elderly,” and “% with a Disability” categories should each be featured in individual tables. This avoids confusion since it appears that there is likely crossover among the categories as presented. For

¹⁹ Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas, Notice, 80 Fed. Reg. at 12,925.

²⁰ Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas, Notice, 80 Fed. Reg. at 12,924 (emphasis added).

instance, the disability category would have crossover with the race/ethnicity category. Note that the “Total # units (occupied)” category should be included in all individual tables.

- 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.”²¹ This sentence is unclear; restating this distinction and including an example would help better clarify this point.
- At several points in the Tool’s instructions, the Draft State Tool refers to housing converted through the Rental Assistance Demonstration (RAD) program. Under the RAD program, units convert to project-based Section 8 subsidies, which include both project-based rental assistance and project-based Vouchers. The instructions, however, note at several instances that, “[r]elevant information may also include housing converted through RAD, which may be analyzed as part of Housing Choice Vouchers.”²² The final State Tool’s instructions should clarify why RAD units should be analyzed as part of Housing Choice Vouchers and not project-based Section 8 subsidies.
- HUD should consider including questions (or drafting accompanying instructions to existing questions) prompting the State 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 FHA (*e.g.*, members of the LGBT community, Section 8 Voucher holders).
- In the definitions of contributing factors in Appendix C, the definition of “land use and zoning laws” includes “[i]nclusionary zoning practices that mandate or incentivize the creation of affordable units.”²³ Inclusionary zoning is included alongside policies, such as occupancy restrictions and minimum lot sizes, which can be used to limit housing choice. However, since inclusionary zoning is a tool by which communities can *expand* affordable housing choice, the words “lack of” should be added, such that the listing says “Lack of inclusionary zoning practices that mandate or incentivize the creation of affordable units.” Thus, when examining land use and zoning laws as a possible contributing factor, States will be contemplating whether the absence of inclusionary zoning policies serves as a barrier to fair housing choice.

In closing, we sincerely appreciate HUD’s recent steps to implement the AFFH regulation, including the issuance of the Draft State Tool. Thank you for your consideration of these comments. If

²¹ Draft State Tool Instructions at 24, 37.

²² In the State Tool, this sentence appears on pages 30, 31, and 39 of the instructions. Note that the same instructions appear in the Assessment Tool for Local Governments, issued in December 2015.

²³ Draft State Tool, Appendix C, at 8. Note that this is also the definition used in the Local Government Tool and the draft PHA Assessment Tool.

you have questions, please contact NHLP Staff Attorney Renee Williams at rwilliams@nhlp.org, or (415) 546-7000, ext. 3121.

Sincerely,

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National Housing Law Project

The Public Interest Law Project

Western Center on Law & Poverty

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Public Justice Center

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