



703 Market St., Suite 2000  
San Francisco, CA 94103  
Telephone: 415-546-7000  
Fax: 415-546-7007  
nhlp@nhlp.org  
www.nhlp.org

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**Submitted via regulations.gov**

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 States and Insular Area –  
Information Collection: Solicitation of Comment First 30-Day Notice Under Paperwork  
Reduction Act of 1995, Docket No. FR-5173-N-08-B

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP). We are 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 States and Insular Areas (State Assessment Tool or Assessment Tool)<sup>1</sup>, 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.

**A. Instructions and questions in the Tool should reflect an examination of fair housing issues for the entire state**

We appreciate HUD's consideration of feedback to amend the questions in the "Community Participation Process" section (Part III) so as to better reflect an examination of fair housing issues from all parts of the State. It is crucial that the resulting assessment provides an accurate, representative snapshot of fair housing issues and their contributing factors from throughout the State, especially of small, rural jurisdictions that are often not afforded robust fair housing analyses. Furthermore, individuals from all parts of the State should have a meaningful opportunity to inform the development of the goals that will ultimately result from the AFH process. Therefore, we believe that it is important

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<sup>1</sup> For the purposes of these comments, we focus on the analysis for States.

that HUD, at minimum, include instructions that require States to explain how they have ensured meaningful community participation from all parts of the State. We recommend that HUD add the following to the instructions for Question 1:

“For question (1), provide a summary of the outreach activities undertaken. In these activities explain efforts made to ensure meaningful community participation from 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 language underlined)

In addition, we recommend that when there is low community participation, States must indicate which areas specifically had low participation rates and explain why. We applaud HUD for adding to the instructions for Question 3 the sentence that provides that States “should include a description of whether comments were received from different parts of the State.” To ensure that low participation is also accounted for, we recommend that the following be added either to the instructions or the *AFFH Rule Guidebook* (specifically, when Section 5 is updated to reflect the State Assessment Tool) in the community participation section:

“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.”

Furthermore, HUD should include more instructions and guidance on when and how a State should conduct a more “granular” analysis of fair housing issues in sub-State areas, especially rural and non-entitlement areas. At minimum, States should use the required community participation and consultation 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 fair housing issues and their related contributing factors. Such guidance could be included in the accompanying instructions, in updates to Section 5 of the *AFFH Rule Guidebook* specific to the analysis for the State Assessment Tool, or in a separate guidance document.

## **B. Questions in Publicly Supported Housing analysis section regarding LIHTCs**

We appreciate that HUD has amended Question 1(c)(i)(5) to include “preservation of existing long-term affordable housing” as an example of “preferences, points or threshold criteria for projects serving particular groups or special purposes.” We continue to strongly urge that there be a separate question that addresses State-adopted priorities, set asides, preferences, or points concerning the use of tax credits to further affordable housing preservation to serve an existing community need among protected class members who wish to remain in their current homes and communities. Having a specific question that addresses this issue would facilitate a discussion on how the State views the relationship between the tax credit program and the need to preserve affordable housing, which disproportionately serves members of protected classes. Similarly, the accompanying instructions should prompt the State to explain whether such preservation objectives are serving the existing needs and preferences of protected class members and other low-income individuals who would like to see rehabilitation of existing affordable housing stock. The instructions should also ask the State to describe any special efforts to preserve affordable housing in areas of opportunity and in revitalizing areas.

In answering Questions 1(c)(i) and 1(c)(ii), States should be required to distinguish between 9-percent tax credits and 4-percent tax credits in their responses. The accompanying instructions state that program participants “may distinguish” between 4-percent and 9-percent credits. 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.

### LIHTC and the Violence Against Women Act

Since LIHTC units are covered by the Violence Against Women Reauthorization Act of 2013 (VAWA), we encourage an additional question in the 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 implementation and compliance within tax credit properties. HUD has acknowledged that domestic violence survivors are overwhelmingly women.<sup>2</sup> Therefore, 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.

### **C. Include specific, detailed questions on disparities in access to opportunity**

We applaud HUD for amending a question in the Additional Information section of “Disparities in Access to Opportunity” to encourage States to consider certain issues – specifically, public safety, public health, housing finance and other financial services, prisoner reentry, emergency management and preparedness, and any other opportunity areas obtained through community participation. We continue to urge that HUD **require** States to consider each of these critical issues because they are important components of the analysis in disparities of access to opportunity and the analysis would provide a starting point for discussion surrounding these issues between States and stakeholders engaging in the community participation process. If States do not have the appropriate local data and local knowledge available to respond to these questions, as with other questions in the Tool, States can include a statement to that effect in their response. However, it is important to at least require States to consider this question, and it is likely that, in many instances, at least some local data and local knowledge—particularly from the community participation process and from various state-level agencies—will be available.

We further ask that HUD add to this question subsections that address the categories of meaningful language access, as well as the access to quality, affordable food, as these areas represent areas where great disparities exist in relation to where a person lives. We also recommend that HUD include “Housing and services for survivors of domestic and sexual violence” as a separate issue category, independent of the “Public Safety” category.

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<sup>2</sup>HUD, 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, at 8 (Sept. 13, 2016) (“For example, nationally, women comprise approximately 80 percent of all individuals subjected to domestic violence each year.”).

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. Contributing factors**

##### **a. Source of income discrimination**

We recommend the following change to the existing description for the contributing factor “Source of income discrimination,” to include an additional specific reference to housing subsidies (addition underlined):

“The term “source of income discrimination” refers here to the refusal by a housing provider to accept tenants based on type of income. This type of discrimination often occurs against individuals receiving assistance payments such as Supplemental Security Income (SSI) or other disability income, social security or other retirement income, or tenant-based rental assistance, including Housing Choice Vouchers. Source of income discrimination may significantly limit fair housing choice for individuals with certain protected characteristics. The elimination of source of income discrimination and the acceptance of payment for housing, regardless of source or type of income or housing subsidy, increases fair housing choice and access to opportunity...”

##### **b. Lack of source of income protection**

We applaud HUD for including “Lack of source of income protection” as a contributing factor. We recommend that a definition of the factor be included in Appendix C, and propose the following definition, which is largely based on the definition of the same factor in the last draft of the Assessment Tool for Local Governments, with several proposed edits:

##### **Lack of source of income protection**

This contributing factor refers to the lack of protection for renters from refusal by housing providers to accept tenants based on type of income or receipt of tenant-based rental assistance. This type of discrimination often occurs against individuals receiving assistance payments such as Supplemental Security Income (SSI) or other disability income, social security or other retirement income, or tenant-based rental assistance, including Housing Choice Vouchers. Refusal to accept some sources of income may significantly limit fair housing choice for individuals with certain protected characteristics. Legislation to eliminate source of income discrimination and the acceptance of payment for housing, regardless of source or type of income or housing subsidy, may increase fair housing choice and access to opportunity.

We propose that HUD add “Lack of source of income protection” into the remaining sections of the fair housing analysis: Segregation; Racially/Ethnically Concentrated Areas of Poverty; Disproportionate Housing Needs; Disparities in Access to Opportunity; Disability and Access; and Fair Housing Enforcement, Outreach Capacity, and Resources.

##### **c. Land use and zoning laws**

We appreciate the inclusion of the words “lack of” before the state and local policies examples bullet listing “inclusionary zoning practices that mandate or incentivize the creation of affordable units.” We further urge that HUD edit the first bullet in that list so that the examples provided in that item present a variety of State laws that can be used for establishing the parameters for local land use decisions. Therefore, we recommend the following edit:

“State laws establishing the parameters for local land use decisions, such as permitting and prohibiting local exclusionary zoning; requiring, incentivizing, or prohibiting local inclusionary zoning efforts; or a state provision allowing for the appeal of decisions preventing affordable housing development.”

d. Loss of affordable housing

We applaud HUD for including a new contributing factor and an accompanying definition to the Assessment Tool – “Loss of affordable housing.” We propose the following edits in order to more fully explore the variety of circumstances that may result in a loss of affordable units:

“The loss of existing affordable housing can limit the housing choices and exacerbate fair housing issues affecting protected class groups. Affordable housing may be lost from the long-term stock due to deterioration, abandonment, or conversion to more expensive housing types, especially in sub-markets experiencing economic improvement. Buildings can leave the affordable inventory through owner opt-outs from project-based Section 8 contracts; maturing long-term mortgages; ~~and expiration of use agreements (e.g. LIHTC at 15 or 30 years)~~ termination or expiration of state or local subsidies or restrictions (e.g. LIHTC or bonds at 15 or 30 years); public housing demolition, disposition, or conversion; agency-initiated project-based contract terminations; and USDA Rural Development rental assistance contract expirations or terminations. Loss of this housing can affect multiple fair housing issues. For example, loss of affordable housing can lead to reduced access to areas with access to opportunity; displacement of protected class residents which may result in increased levels of segregation; a decrease in availability of affordable units resulting in disproportionate housing needs; or to disinvestment in segregated neighborhoods or R/ECAP communities. Potential efforts to prevent loss of existing affordable housing can include funding and indirect subsidies for rehabilitation and recapitalization to maintain physical structures, refinancing, renewal and extension of affordable use agreements, conversion to alternative subsidy types (e.g. Rental Assistance Demonstration), transfer of assistance to newer buildings or in alternative locations (e.g. PBRA Transfer Authority), ~~and~~ incentives for owners to maintain affordability (e.g. property tax abatement), and transfers of properties to higher capacity ownership. Similarly, such efforts can also include addressing backlogs of repairs and maintaining the infrastructure of existing affordable housing, including publicly supported housing, such as through modernization or other improvements, when such efforts are part of concerted housing preservation and community revitalization efforts designed to affirmatively further fair housing. Efforts to prevent the loss of affordable housing can be part of a balanced approach to affirmatively further fair housing consistent with the Rule and HUD Guidance.”

e. Nuisance laws

We commend 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 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 disparities in access to opportunity, disproportionate housing needs, and, as noted above, can impact access to housing by persons who experience disabilities, we further recommend that this contributing factor be added to these respective sections of the Assessment Tool (Disparities in Access to Opportunity, Disproportionate Housing Needs, and Disability and Access Analysis).

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

We also recommend that HUD include a new contributing factor, “Lack of meaningful language access, and discrimination on the basis of limited English proficiency.” This proposed contributing factor should be included in the possible contributing factors lists in the Segregation, R/ECAP, Disparities in Access to Opportunity, Disproportionate Housing Needs, and Publicly Supported Housing Analysis sections. We propose the following contributing factor and description:

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

Proposed Description: 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,<sup>3</sup> 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 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.

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<sup>3</sup> HUD LEP Guidance, 72 Fed. Reg. at 2751 (App. B).

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.

g. Survivors of domestic violence, dating violence, sexual assault, 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 landlords and owners because of the abuse committed against them. Therefore, we continue to strongly urge that States, as part of its assessment, be required to answer specific questions regarding their efforts to promote anti-discrimination laws and policies that protect survivors in accessing and maintaining safe housing. For example, many States have enacted laws providing specific housing protections for survivors, such as lock change laws and eviction defense laws.<sup>4</sup>

HUD should include as a 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” (the categories of survivors protected under the Violence Against Women Act) in the following sections: Disparities in Access to Opportunity, Disproportionate Housing Needs, and Publicly Supported Housing Analysis. We further propose the following definition:

**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.**

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

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<sup>4</sup>See generally NHLP, *Housing Rights of Domestic Violence Survivors: A State and Local Law Compendium* (Oct. 2015), <http://nhlp.org/files/CombinedD-HousingStateLawCompendium.pdf>.

or encourages evictions for using emergency services, including 911 calls, by domestic violence and other crime victims. Additionally, public housing authorities 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 authorities, 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.

In addition, we urge that HUD include a separate contributing factor that considers survivors of harassment, including sexual harassment. 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.

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

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.<sup>5</sup> 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.”<sup>6</sup> “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.<sup>7</sup> 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.”<sup>8</sup> When perpetuated on the basis of sex stereotyping, quid pro quo or hostile environment harassment against the LGBT community can raise fair housing concerns.

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 the Violence Against Women Act, 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.

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<sup>5</sup> 24 C.F.R. § 100.600(a)(1) (2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 100.600(a)(2).

<sup>8</sup> *Id.*

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:

“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.”

### **E. Inserts for Qualified PHAs (QPHAs) and Small Program Participants**

As we have noted in prior comment letters regarding the latest drafts of the Local Government and PHA Assessment Tools, we again write to express concerns about the proposed inserts for QPHAs and Small Program Participants. While we certainly understand HUD’s efforts to streamline this process for entities that have comparatively few resources, these questions run the risk of sending a message to QPHAs and Small Program Participants that they are being held to a different standard of analysis. We note that the AFFH Rule itself already affords smaller program participants considerable flexibility in their joint or regional collaborations. The AFFH Rule clearly states that collaborating program participants “may divide work as they choose.”<sup>9</sup> Introducing additional questions and instructions for smaller program participants 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. It also seems problematic that important stakeholders—particularly those residents served by the QPHA or those living in smaller entitlement jurisdictions—seeking to comment on the AFH will be examining 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 conducted and goals, remain in the main Assessment Tool responses.

We do note that the QPHA insert now has insert-specific instructions, while the Small Program Participant insert simply cross-references the main Assessment Tool’s instructions. Additionally, the inclusion of references to the Local Government Assessment Tool in the Small Program Participant insert is confusing and could benefit from additional explanation.

### **F. Additional comments**

We greatly appreciate that HUD has made the following amendments to the Tool:

- Deleting the confusing instruction “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 replacing it in one instance with a clarified instruction on page 34 of the redlined draft – “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.”

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<sup>9</sup> 24 C.F.R. § 5.156(a)(3) (2016).

- Adding “project-based Section 8” to the instructions concerning analyses of conversions through the Rental Assistance Demonstration (RAD) program.

We also continue to urge HUD to consider including questions (or drafting accompanying instructions to existing questions, or supplemental guidance) prompting the State to examine 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).

Finally, the instructions that immediately precede the lists of contributing factors for each section of the fair housing analysis (*i.e.*, “Consider the listed factors...”) should not be changed to reflect the edits in this version of the draft State Tool. Specifically, the reference to “and any other factors” should not be removed, as this instruction serves as a reminder that program participants must identify contributing factors not on the list if those factors “create, contribute to, perpetuate, or increase the severity of one or more fair housing issues.”<sup>10</sup> By removing this phrase and relying on the presences of the “Other” contributing factor, inclusion of contributing factors that do not appear on the list--but that meet the above criteria--could be perceived as optional.

Thank you for your consideration of these comments. If you have any questions, please contact NHLP Staff Attorneys Karlo Ng, [kng@nhlp.org](mailto:kng@nhlp.org), and Renee Williams at [rwilliams@nhlp.org](mailto:rwilliams@nhlp.org).

Sincerely,

/s/

Susan Stern  
Interim Executive Director

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<sup>10</sup> AFFH Rule Guidebook at 108 (“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.”).