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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: Local Government Assessment Tool – Information Collection Renewal: Solicitation of Comment 30-Day Notice Under Paperwork Reduction Act of 1995, Docket No. FR-5173-N-10-B

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP), as well as 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 Local Governments [hereinafter “Local Government 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.

I. General Comments

A. Community Participation Process

NHLP and the undersigned strongly believe that effective, robust community participation is fundamental to successful implementation of the AFFH Regulation. Being able to meaningfully evaluate the community participation process serves as an important accountability mechanism whereby both HUD reviewers and community stakeholders are provided with an overview of what

steps the jurisdiction has taken to engage the community in compliance with the AFFH Rule and related civil rights requirements (*e.g.*, disability access and language access). Accordingly, we commend HUD in its decision to retain language that asks jurisdictions to explain low rates of participation. This question is crucial in assessing the extent to which efforts were made to “give the public reasonable opportunities for involvement in the development of the AFH.”¹ Furthermore, the question also provides jurisdictions a space to engage in reflection with an eye toward subsequent planning processes such that important improvements can be made.

For Question 1, we recommend changing the second sentence of the accompanying instructions for that question² to read as follows (additions underlined; the strikethrough represents a suggested deletion): “For PHAs, also include any meetings with the Resident Advisory Board, ~~including as well as~~ residents of impacted developments proposed for demolition/disposition, required or voluntary conversion, and conversion under RAD. A description of all other PHA resident outreach should also be outlined in the response to Question 1 as well.” The Resident Advisory Board should not be the only resident group with which the PHA engages in outreach surrounding the AFH; instead, the PHA should be reaching out to residents more broadly – and, in particular, to residents living in developments undergoing changes such as a RAD conversion, which would be relevant for a PHA’s fair housing analysis.

For Question 2, in addition to listing the citations from the AFFH Rule regarding consultation requirements for local governments and PHAs, the instructions could be improved by including a checklist of sorts regarding organizations that they are required to consult, as well as other organizations that local governments and PHAs should consider consulting. For example, 24 C.F.R. § 91.100 states that a local government, when preparing the AFH and Consolidated Plan, “shall consult with other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws.”³ Providing a non-exhaustive checklist in the instructions may assist in facilitating outreach and engagement on the part of both local governments and any collaborating PHAs. HUD should also consider adding examples of organizations that may fit within the broader categories such as those outlined in § 91.100. For example, legal services organizations are an example of community-based organizations that serve protected class members.

B. Use of the “Additional Information” Sections Throughout the Assessment Tool

HUD should revise the structure and questions included in the “Additional Information” section such that important considerations are not omitted from the core fair housing analysis, as this analysis informs the selection of contributing factors and goal-setting. For each of the sections referenced below, we agree that it is appropriate to have a question that allows the program participant to include any other information the program participant deems relevant to the fair housing analysis. However, specific activities that the program participant has taken should be included in the main Analysis section.

¹ 24 C.F.R. § 5.158(a) (2016).

² See Draft Local Government Assessment Tool Instructions, at 4.

³ 24 C.F.R. § 91.100(a)(1) (2016).

For example, Question 2(b) of the “Additional Information” section regarding Segregation/Integration includes the following prompt: “The program participant may also describe other information relevant to its assessment of segregation, including activities such as place-based investments and mobility options for protected class groups.”⁴ The instructions further provide that “program participants may include any additional relevant information related to their analysis of segregation in the jurisdiction and region, including the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, housing preservation, and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as increasing integration.”⁵ Such information is critical to a full and meaningful evaluation of fair housing issues, such as segregation. Thus, HUD should not solicit this information using permissive language (*e.g.*, “The program participant *may* also describe...”). Instead, Question 2(b) should be moved, in substance, to the “Analysis” portion of the Segregation section, and the question re-worked by incorporating the language in the question with language from the instructions, with some additions. For example, one re-phrasing of this question could ask program participants:

Discuss, based on available local data and local knowledge, activities such as place-based investments and mobility options for protected class groups in the jurisdiction and region. Such activities include the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation, and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as increasing integration.

A similar change should be made in the R/ECAP part of the analysis, by creating a question with the substance of Question 2(b) in the Analysis section. Again, such a question would incorporate parts of the existing Question 2(b) with text from the instructions, with additions. Such a question could ask program participants:

Discuss, based on available local data and local knowledge, activities such as place-based investments and mobility options for protected class groups in the jurisdiction and region. Such activities include the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation, and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as expanding opportunity into R/ECAPs by addressing the combined effects of segregation and poverty. Relevant information to this question includes local assets and organizations.

For the Disparities in Access to Opportunity section, a similar change could be made by creating a question with the substance of Question 2(b) in each subsection of the Analysis section, by incorporating language from both the existing question and the accompanying instructions, with additions (including an addition from the R/ECAP instructions regarding “local assets and organizations”):

Discuss, based on available local data and local knowledge, any activities aimed at improving access to opportunities for areas that may lack such access, or in promoting access to

⁴ Draft Local Government Assessment Tool (2016), at 2.

⁵ Draft Local Government Assessment Tool Instructions, at 7.

opportunity (e.g., proficient schools, employment opportunities, and transportation) in the jurisdiction and region. Such activities include the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation, and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as increasing access to opportunity. Relevant information to this question includes local assets and organizations.

A similar change should be made in in the Disproportionate Housing Needs part of the analysis, by creating a question with the substance of Question 2(b) in the Analysis section. Again, such a question would incorporate parts of the existing Question 2(b) with text from the instructions. Such a question could ask program participants:

Discuss, based on available data and local knowledge, removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation, and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as reducing disproportionate housing needs. For PHAs, such information includes a PHA’s overriding housing needs analysis.

For the following sections of the Fair Housing Analysis, we propose the following changes, similar to those described above, such that these questions would be moved from the “Additional Information” section into the Analysis sections. Again, these proposed sections incorporate language from the existing questions and the accompanying instructions.

Publicly Supported Housing Location and Occupancy (current Question 2(b))

Discuss, based on available local data and local knowledge, programs, actions, or activities—such as tenant self-sufficiency, place-based investments, or mobility programs—that are relevant to the program participant’s fair housing analysis regarding publicly supported housing. These include the removing of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as reducing disproportionate housing needs, expanding opportunity into R/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high-performing schools, transportation, and jobs.

Disability and Access (current Question 6(b))

Discuss, based on available local data and knowledge, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes in the jurisdiction and region such as reducing disproportionate housing needs, expanding opportunity into R/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high-performing schools, transportation, and jobs.

Fair Housing Enforcement, Outreach Capacity, and Resources (current Question 4(b))

Discuss, based on available local data and knowledge, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, housing mobility programs, affordable housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes in the jurisdiction and region such as reducing disproportionate housing needs, expanding opportunity into R/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high-performing schools, transportation, and jobs.

C. Comments Regarding Specific Assessment Tool Instructions

We offer the following recommendations regarding the specified Assessment Tool questions and/or accompanying instructions as outlined below.

General Instructions

- Introduction (page 1). The instructions should remind program participants that participation in a joint or regional collaboration does not relieve individual program participants of their obligations to conduct community participation in accordance with the AFFH Rule.⁶ This is a crucial point. Thus, the instructions should incorporate helpful language from the AFFH Rule, such as the language stating that collaborating program participants “must have a plan for community participation that complies with the requirements of §§ 5.150 through 5.180.”⁷ The AFFH Rule also 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*.”⁸ Importantly, the AFFH Rule states that community participation process must be sufficient for “each consolidated plan program participant collaborating in a joint AFH or regional AFH to certify that it is following its applicable citizen participation plan, and for each PHA, collaborating in a joint AFH or regional AFH, to satisfy the notice and comment requirements in 24 CFR part 903.”⁹
- Introduction (page 2). In discussing local data, 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.”¹⁰ Including this reminder in the instructions is important so as to remind program participant that the language “subject to a determination of

⁶ 24 C.F.R. § 5.156(d) (2016).

⁷ *Id.*

⁸ *Id.* (emphasis added).

⁹ *Id.*

¹⁰ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,306 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

statistical validity by HUD” is not intended to encourage program participants 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. Program participants should encourage members of the community and other stakeholders to submit local data as part of the community participation process.

- Introduction (page 3). The 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. The extensiveness of resources expended should depend on factors such as the size of the program participant, and the division of responsibilities in a joint or regional collaboration. Additionally, the instructions do not define “extensive” or provide an example of the types of resources HUD is referring to. 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.”¹¹ HUD should consider including an example to provide some clarity regarding the agency’s expectations regarding community participation. 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. Regardless of the language used, the instructions should also include a reminder that program participants are required to explain why any comments from the community participation process were not accepted by the program participant.¹²
- Introduction (page 3). Currently, the instructions state that “Program participants are permitted to include contributing factors that are not listed in Appendix C.”¹³ This statement could be read to mean that inclusion of contributing factors not otherwise included in the Assessment Tool is discretionary. However, the *AFFH 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.*”¹⁴ The instructions should, therefore, make clear that program participants 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.

II. Specific Responses to Comment Solicitation

Question 6: Inserts for Small CDBG Recipients and Qualified PHAs

¹¹ HUD, *Affirmatively Furthering Fair Housing Rule Guidebook*, 50 (Dec. 2015) [hereinafter “AFFH Rule Guidebook”].

¹² 24 C.F.R. § 5.154(d)(6) (2016).

¹³ Draft Local Government Assessment Tool Instructions, at 3.

¹⁴ *AFFH Rule Guidebook* at 108 (emphasis added).

HUD should substantially restructure the questions and accompanying instructions proposed for Small Program Participants and for Qualified PHAs. While we certainly understand HUD’s efforts to streamline this process for smaller program participants that have fewer resources, these questions run the risk of sending a message to QPHAs 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.”¹⁵ 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. The accompanying insert instructions simply direct small program participants and 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 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 and goals, remain in the main Assessment Tool responses.

Additionally, the insert instructions fail to direct either Qualified PHAs or Small Program Participants to review and consider the sections of the Assessment Tool outside of the Fair Housing Analysis section. Thus, these small program participants are not instructed to complete important questions, such as the Assessment of Past Goals, Actions, and Strategies, or the questions about the Community Participation Process. If HUD decides to ultimately retain the separate inserts in a substantially similar form, HUD should make sure to include instructions at the beginning of each of the respective inserts that cross references the remaining pieces of the analysis that are retained in the main Assessment Tool.

Qualified PHA Insert

The insert-specific instructions refer QPHAs to maps in the current AFFH Data and Mapping Tool; however, there is no way to discern the QPHA’s service area in these maps. (By contrast, the instructions make clear that a QPHA’s region is coextensive with the CBSA, unless the QPHA’s service area extends beyond the local government’s CBSA.) HUD has previously stated that the agency currently does not have the data necessary to outline all PHA service areas on the Data and Mapping Tool.¹⁶ However, if HUD retains this insert, and the data regarding PHA service areas are not available, the agency should include a question that requires the QPHA to describe its service area using geographic boundaries and other indicators commonly known within the community. This will help place the maps in the Data and Mapping Tool into proper context for anyone wishing to comment on the AFH.

Furthermore, 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

¹⁵ 24 C.F.R. § 5.156(a)(3) (2016).

¹⁶ Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies Solicitation of Comment—60-Day Notice Under Paperwork Reduction Act of 1995, 81 Fed. Reg. 15,549, 15,553 (Mar. 23, 2016).

protected class:”¹⁷ Educational Opportunities, Employment Opportunities, Transportation Opportunities, Low Poverty Exposure Opportunities, and Environmentally Healthy Neighborhood Opportunities. 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. Additionally, the instructions for Question 3 of the Qualified PHA Insert are unclear as to whether the Qualified PHA would also be instructed to review Table 12, which also includes all of the Opportunity Indices for the jurisdiction and region by race/ethnicity. While the instructions correctly acknowledge that HUD can still decide not to accept the AFH if “the QPHA analysis does not meet the standards for an acceptable AFH,”¹⁸ as noted above these questions seem to send a message to QPHAs that they are being held to a different standard of analysis.

The “Policies and Practices” section of the Publicly Supported Housing Section should also ask the QPHA to consider not only “Admissions preferences or housing designations,” but should 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).¹⁹ 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, providing interpretation assistance, and translation of vital documents).

Small Program Participant Insert

As noted above, certain questions in the Small Program Participant Insert attempt to combine a series of concepts and questions from the main Assessment Tool into a single question. Again, this sends the message that a different standard of analysis is required of Small Program Participants.

Question 7: Disparities in Access to Opportunity Section

The Assessment Tool should include questions in each subsection of the Disparities in Access to Opportunity section about other protected classes, not just those for which HUD is providing data. Doing so provides for a fuller analysis for each subsection, without requiring the program participant to revisit this topic in the “Additional Information” section. For example, if female survivors of domestic violence are facing disparities in access to employment because of the lack of housing options for survivors in certain areas of the jurisdiction or region that have access to jobs, this piece of information, based on local knowledge or local data, would likely not be included in the discussion of the Employment Opportunities subsection, given the current structure of the questions.

By waiting until the “Additional Information” section to ask about other protected classes, discussion of such disparities could ultimately be left out of the analysis. Furthermore, since local data and local knowledge are important not just for identifying “programs, policies, or funding

¹⁷ Draft Local Government Assessment Tool, at 12 (QPHA Insert).

¹⁸ Draft Local Government Assessment Tool Instructions, at 18.

¹⁹ 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).

mechanisms”²⁰ that affect disparities in access to the various opportunity indicators (proficient schools, employment, etc.), but also for identifying nature of the disparities themselves, the questions should reflect this. Given the limitations of the HUD data—such as the environmental opportunity index only measuring air toxins, for example—it is important for the fair housing analysis to include both the HUD data as well as local data and local knowledge in identifying the nature of the disparities in access to a particular opportunity indicator.

The questions in each subsection should ask participants to examine HUD data, local data, and local knowledge for all protected classes under the Fair Housing Act to discuss/describe (1) disparities in access to opportunity for the given opportunity indicator; (2) how disparities regarding that opportunity indicator “relate to residential living patterns in the jurisdiction and region”;²¹ and (3) “programs, policies, or funding mechanisms that affect disparities”²² in access to a particular opportunity indicator. Furthermore, each subsection should ask about “activities aimed at improving access to opportunities for areas that may lack such access, or in promoting access to opportunity”²³ for the given opportunity indicator. Each subsection should not only describe the disparities in opportunity access, but also those community assets and resources that exist to address such disparities. Alternatively, if such a structure is not feasible, then HUD should, at minimum, include questions about all FHA-protected classes under each subsection of the Disparities in Access to Opportunity section.

Question 8: Contributing Factors

Given the integral role of contributing factors in the AFH process, the list of possible contributing factors should strive to be as comprehensive as possible so that jurisdictions, collaborating PHAs, and community stakeholders can be prompted to consider a wide and diverse range of important areas relevant to a robust fair housing analysis. Accordingly, HUD should incorporate the following additions and improvements into its proposed contributing factor list for the next version of the Local Government Assessment Tool (and, as appropriate, the other assessment tools HUD is currently developing and refining).

Victims of Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Harassment

First, we applaud HUD’s inclusion of a contributing factor that recognizes the barriers to fair housing choice faced by victims of domestic violence and harassment. In order to build upon this very positive development, HUD should make the following changes to this contributing factor.

First, the contributing factor, as proposed, is entitled “Lack of housing support for victims of sexual harassment, including victims of domestic violence.” However, this phrasing conflates two distinct concepts that should be considered separately. Domestic violence, as well as other crimes, should be represented in a distinct contributing factor from sexual and other forms of harassment. While both sexual harassment and domestic violence implicate discrimination on the basis of sex, domestic violence is not generally considered to be a subcategory of sexual harassment. For example, the Violence Against Women Reauthorization Act of 2013 defines “domestic violence” as including “felony or misdemeanor crimes of violence” committed by an individual with whom the victim has

²⁰ Draft Local Government Assessment Tool, at 4-5.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 5.

some sort of relationship.²⁴ Conversely, “harassment” including sexual harassment, is a distinct legal concept that includes two theories with individual elements: (1) quid pro quo harassment and (2) hostile environment harassment.²⁵ While the relationship between domestic violence and fair housing derives from the fact that an overwhelming majority of domestic violence victims are women,²⁶ as HUD has made clear in recent rulemaking, quid pro quo or hostile environment harassment due to one’s membership in *any* FHA-protected class gives rise to FHA liability.²⁷

Given these differences, HUD should create two separate contributing factors, the first being “Displacement of and lack of housing support for victims of domestic violence, dating violence, sexual assault, and stalking.” We add dating violence, sexual assault, and stalking due to the VAWA 2013 protections from housing discrimination afforded to victims of dating violence, sexual assault, and stalking who live in federally-assisted housing. We propose that this contributing factor be provided with the following description:

Displacement of and lack of housing support for victims of domestic violence, dating violence, sexual assault, and stalking.

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

²⁴ 42 U.S.C.A. § 13925(a)(8) (West 2016). Specifically, VAWA 2013 defines “domestic violence” as including “felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.” *Id.*

²⁵ See generally *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

²⁶ 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*, 4 (Sept. 13, 2016).

²⁷ 24 C.F.R. § 100.600(a) (2016) (noting that “[q]uid pro quo and hostile environment harassment because of race, color, religion, sex, familial status, national origin or handicap may violate” the Fair Housing Act.); see also 81 Fed. Reg. at 63,054 (“This final rule amends HUD’s fair housing regulations to formalize standards for use in investigations and adjudications involving allegations of harassment on the basis of race, color, religion, national origin, sex, familial status, or disability.”).

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.

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 Location and Occupancy.

For the second contributing factor, we propose the following, “Displacement of and lack of housing support for victims of harassment based on membership in a protected class.” The language for this contributing factor description should incorporate language from HUD’s recent final Harassment Rule.²⁸

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

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.²⁹ 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.”³⁰ “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.³¹ 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.”³² 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 Location and Occupancy.

²⁸ See generally 24 C.F.R. § 100.600(a) (2016).

²⁹ *Id.* § 100.600(a)(1).

³⁰ *Id.*

³¹ *Id.* § 100.600(a)(2).

³² *Id.*

Adverse Housing Decisions and Policies Based on Criminal History

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.”³³ 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 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 warrant an individual contributing factor for consideration by local governments, other program participants, and the public. Second, the present reference to “criminal records policies” is included within a contributing factor that is describing such policies in publicly supported housing. However, the problem of barriers to obtaining safe, decent, and affordable housing for persons with criminal records extends beyond publicly supported housing. The Assessment Tool should facilitate a discussion of the role of criminal history policies more broadly to include both publicly supported housing and the private housing market. Therefore, we propose the following contributing factor and description:

Adverse Housing Decisions and Policies Based on Criminal History

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

³³ 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).

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 denying admission, terminating assistance, or evicting tenants.”³⁴ 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 notice also references 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 factors lists in the Segregation, R/ECAP, Disparities in Access to Opportunity, Disproportionate Housing Needs, Publicly Supported Housing Location and Occupancy, and Disability and Access sections.

Lack of Source of Income Protection/Source of Income Discrimination

We applaud HUD for including “Lack of Source of Income Protection” as a possible contributing factor. To ensure that program participants are evaluating the impact of the lack of source of income protections to include possible fair housing barriers to those families receiving tenant-based rental subsidies, we offer the following edits (additions are underlined; deletions are represented by a strikethrough):

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 ~~discrimination~~ may significantly limit fair housing choice for individuals with certain protected characteristics. Legislation to eliminate ~~of~~ source

³⁴ 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).

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 note that “Lack of source of income protection” is not included in any of the possible contributing factor lists in the Assessment Tool. We propose that HUD add “Lack of source of income protection” into all sections of the fair housing analysis: Segregation, Racially/Ethnically Concentrated Areas of Poverty, Disproportionate Housing Needs, Disparities in Access to Opportunity, Publicly Supported Housing Location and Occupancy, Disability and Access, and Fair Housing Enforcement, Outreach Capacity, and Resources.

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

Source of income discrimination

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.

Lack of Meaningful Language Access for Individuals with Limited English Proficiency

We also recommend that HUD include a new contributing factor, “Lack of Meaningful Language Access for Individuals with Limited English Proficiency.” We propose the following contributing factor and description:

Lack of Meaningful Language Access for Individuals with Limited English Proficiency

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, or who speaks English “less than very well.” Public housing authorities (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. 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. 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. Therefore, private housing providers who discriminate against prospective or existing tenants who are LEP on the basis of national origin may violate the Fair Housing Act.

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 Location and Occupancy sections.

Community Opposition

We recommend including language describing the “lack of political will” that results from successful community opposition in the description accompanying the “Community Opposition” contributing factor.

III. Comments Regarding Disability and Access³⁵

- Data issues. HUD’s data on the accessibility needs of local jurisdictions is lacking. We encourage HUD to work closely with the U.S. Census Bureau to add questions to the American Community Survey around the accessibility needs of persons with disabilities. Reliable data is needed on the need for wheelchair accessible housing as well as housing that is accessible to persons with visual and hearing disabilities. This data should be broken down by income and renter status. In addition, it would be helpful to obtain data on whether accessibility issues in local infrastructure and amenities (e.g., inaccessible sidewalks and intersections, in accessible government offices and buildings, libraries, public transportation, etc.) pose barriers to persons with disabilities. Better data is also needed about whether persons with disabilities live in segregated environments, such as group homes for persons with disabilities, special needs housing, assisted living, or other congregate housing. It has been our experience that many persons with disabilities are forced to choose housing in segregated environments because the housing they require (wheelchair accessible housing, supportive housing, etc.) is not available in integrated housing developments. In addition, many persons with disabilities cannot find housing outside of R/ECAPs due to their inability to find safe, decent and affordable housing in areas of opportunity. In light of the poor data around the needs of persons with disabilities, we suggest that HUD encourage local jurisdictions to share information about waiting list demographics and specifically solicit information about applicants’ needs for accessibility (physical and sensory) in its waiting list applications. This information should be compiled and used in determining the needs of the jurisdiction to create more accessible housing, offer a reasonable modifications fund, or otherwise offer low-cost loans for accessibility modifications.
- Assessment Tool, page 2: In the discussion of “segregation levels,” include reference to disability. In “contributing factors” on pp.2-3, add “lack of accessibility” and “lack of public transportation.” We recommend that “segregated setting” be defined to include housing that is exclusively for persons with disabilities or other special needs housing. The term is not currently defined in the tool. Our perspective is that it should not refer solely to race, national origin or economic level.

³⁵ The comments for this section were drafted by Disability Rights Maryland. Please contact Luciene Parsley, Managing Attorney, Disability Rights Maryland, LucieneP@disabilityrightsmd.org.

- Assessment Tool, page 6: In the discussion of “Disproportionate Housing Needs,” include disability. In Question 3, “contributing factors,” include “lack of accessibility” and “lack of availability of funding for reasonable modifications.”
- Assessment Tool, page 8: C.(b)(iv), add specific reference to disability, as many RAD buildings are in mixed population buildings and disproportionately impact on persons with disabilities.
- Assessment Tool, page 8: C(3), add to the “Contributing Factors”: lack of accessibility in private units funded by tenant-based Section 8; lack of funds for modifications that could address the lack of accessibility; lack of local funds to create accessible housing, and lack of the use of local funds to create segregated housing.” In 3. Add “Lack of investment in accessibility.”
- Assessment Tool, page 9: In the discussion of disability, HUD should include prompts aimed at assessing jurisdictions’ compliance with the Olmstead integration mandate. Wherever possible, jurisdictions should be encouraged to promote housing that is integrated and in the least restrictive type of housing appropriate to an individual’s disability-related needs. In D.3, we suggest adding, “To what degree do people with disabilities have meaningful access to integrated housing opportunities that are not solely in special needs housing, group homes, assisted living, and other congregate housing options? For persons with disabilities who require supportive housing, are they able to choose to receive the supports they need in housing of their choice? Are supportive housing options available within integrated housing developments?”
- Assessment Tool, page 10, ()(7) Add: “Lack of resources for individuals returning from jails and prisons, nursing homes, state hospitals, institutions” as a contributing factor.
- Assessment Tool, page 10(7): We recommend that HUD specifically ask jurisdictions to report on the loss of housing for persons with disabilities, particularly where developments have adopted tenancy preferences for senior citizens to the exclusion of persons with disabilities. Jurisdictions should evaluate the impact of the loss of housing for persons with disabilities in these situations and plan for how to mitigate the harm.
- Assessment Tool, page 10(7): Add contributing factor “Lack of assistance to locate accessible housing.”
- Assessment Tool, page 10-11(7): Add bullet points 1) Lack of building code requirements for rehabilitation that mandate that developments undergoing substantial rehabilitation to come into compliance with the accessibility requirements of the FHA (which only applies to new construction), 2) lack of capacity to mandate compliance with UFAS for developments that are federally subsidized and other units developed or funded by the locality, and 3) lack of state or local laws that would require that developments that receive local or state funding comply with the requirements of UFAS (which applies only to federally subsidized developments) as a way of addressing the unmet need for accessible units

IV. Additional Miscellaneous Comments

- **Technical Corrections.**
 - Instructions, page 6. The first full paragraph of the instructions should refer to Question 1(c), whereas the following paragraph (second full paragraph on the page) should refer to Question 1(b). Additionally, the fourth full paragraph on the page should also refer to Question 1(b).
 - Instructions, page 7. In the first full paragraph, the referenced question, Question 1(f), does not exist in the most recent draft.

- Instructions, page 7. The last sentence should also refer program participants to Map 4 (LEP dot density map).
- **Concentrations of Wealth.** A focus on measures of poverty and segregation, rather than accumulations of wealth or opportunity, does not tell the whole story of certain communities across the country. HUD should explore the possibility of including more questions that would prompt a discussion within communities and regions that may have considerable concentrations of wealth, but low instances of integration --such that these communities can devise goals that would expand fair housing choice for members of protected classes.
- **Low-Income Housing Tax Credit Data.** We urge 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 jurisdiction or region. We do support differentiating between 4 percent and 9 percent tax credits in the AFFH Data and Mapping Tool.
- **Data regarding Evictions.** In future iterations of the AFFH Data and Mapping Tool, HUD should explore ways to incorporate data regarding evictions and subsidy terminations into the HUD-provided data. This will allow program participants and members of the community to be able to evaluate the extent to which members of protected classes are experiencing evictions and subsidy terminations.
- **“Transforming R/ECAPs.”** At several instances, the Assessment Tool instructions use the phrase “transforming R/ECAPs by addressing the combined effects of segregation and poverty”³⁶ 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 into the community. This change is reflected in the above discussion regarding our proposed changes to questions currently included in the “Additional Information” subsections within the Analysis portion of the Tool.
- **References to the Rental Assistance Demonstration.** In several places, the Assessment Tool instructions state that housing converted through the Rental Assistance Demonstration (RAD) program “may be analyzed as part of Housing Choice Vouchers.”³⁷ However, housing converted through RAD can either consist of Housing Choice Vouchers or project-based rental assistance. We recommend updating the instructions accordingly.
- **Disparities in Infrastructure.** The Assessment Tool should also include questions requiring jurisdictions to conduct an analysis of unequal services and existing disparities in infrastructure.

Thank you for your consideration of these comments. If you have any questions, please contact NHLP Staff Attorney Renee Williams, rwilliams@nhlp.org.

Sincerely,

/s/

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³⁶ See e.g., Draft Assessment Tool Instructions, at 8.

³⁷ See e.g., Draft Assessment Tool Instructions, at 13.

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