

## Affirmatively Furthering Fair Housing at HUD: A First Term Report Card

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### Part I: HUD Housing Programs<sup>1</sup>

During the first term of the Obama Administration, the U.S. Department of Housing and Urban Development has reaffirmed a broad commitment to fair housing. However, while fair housing enforcement at the agency has increased noticeably, the task of reforming HUD's own programs has been painstakingly slow. A flurry of positive activity inside the agency during the first term has not yet been reflected in final program regulations or guidance, even though some of this work has been underway for years. For this reason, our assessment of HUD's progress is mixed – but we are still hopeful that the agency's leadership will be able to expedite the completion of these needed reforms early in the second term.

This review focuses on HUD's "affirmatively furthering fair housing" (AFFH) mandate to promote racial integration<sup>2</sup> in nine broad program areas at HUD, plus the Low Income Housing Tax Credit, where HUD shares regulatory authority with the Treasury Department. Part II of this review (coming soon) will examine HUD's progress in enforcing the AFFH mandate among its grantees, including state and local governments and public housing agencies. We hope that this review provides a fair documentation of how far the Department has come, and how much remains to be done to reverse the legacy of segregation in federal housing programs.

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- 1 This review was prepared by PRRAC staff, including Philip Tegeler, Megan Haberle, and Ebony Gayles, with assistance from legal intern Sheela Ramesh. We have also drawn from program reviews prepared by researchers Martha Galvez and Sarah Oppenheimer, and from numerous coalition advocacy documents submitted to HUD between 2009-2013. See [www.prrac.org/projects/civilrightshousing.php](http://www.prrac.org/projects/civilrightshousing.php).
  - 2 The AFFH mandate stems from Section 3608 of the Fair Housing Act, which was included in the Act in 1968 to address the agency's legacy of segregation, and to add a legal obligation to promote housing integration in HUD programs. This obligation also applies to all HUD grantees. Of course, the Fair Housing Act also encompasses other aspects of housing discrimination, including discrimination on the basis of disability, gender, and religion. While these forms of discrimination are legally encompassed in the AFFH framework, they are not the central thrust of §3608, and will not be addressed in this review.

## 1. HUD's Strategic Plan

HUD's 2010-2015 strategic plan is a comprehensive document that further elucidates the agency's mission to "create strong, sustainable, inclusive communities and quality, affordable homes for all."<sup>3</sup> HUD pledges to "undertake this housing and community development mission with an eye toward ensuring choice and opportunity for all people pursuing the promise of a better life. We believe that strong communities are those where equality, inclusivity, and openness are cultivated and protected."<sup>4</sup> We applaud HUD's focus on equal and inclusive communities as a focal point of their strategic plan.

Other positive aspects of the strategic plan include:

- A focus on quality affordable rental homes, including the subgoal to "expand families' choices of affordable rental homes located in a broad range of communities."<sup>5</sup> HUD intends to address this goal by reforming "project-based subsidies to allow for resident mobility and promot[ing] better location outcomes in the housing voucher program"<sup>6</sup> as well as by creating "more mixed-income communities through regional planning, increased effectiveness of and compliance with the Analysis of Impediments (AI) to Fair Housing plans, and other strategies to affirmatively further fair housing through HUD programs."<sup>7</sup>
- A focus on "build[ing] inclusive and sustainable communities *free from discrimination*" (emphasis added).<sup>8</sup> HUD defines an inclusive community as one "in which all people—regardless of race, ethnicity, socioeconomic status, age, disability, or sexual orientation—have access to the same housing, transportation, health, education and employment opportunities."<sup>9</sup> Strategies to address this goal include "prevent[ing] discrimination through enforcement actions, compliance measures, public awareness campaigns, and education," "ensur[ing] the Department affirmatively furthers fair housing in all of its programs through both incentives and consequences for nonperformance," and "decreas[ing] the concentration of poverty and racial segregation in neighborhoods and communities through targeting of HUD resources."<sup>10</sup> HUD is also focusing on sustainable communities, with a goal of reducing "the share of household income spent on the combined costs of housing and transportation in communities that receive assistance from the Office of Sustainable Housing and Communities," and by "increas[ing] the proportion of HUD-assisted families in low-poverty and racially diverse communities."<sup>11</sup>

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3 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2010-2015 HUD STRATEGIC PLAN 4 (May 2010), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_4436.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf).

4 *Id.*

5 *Id.* at 11.

6 *Id.* at 21.

7 *Id.*

8 *Id.* at 31.

9 *Id.* at 36.

10 *Id.*

11 *Id.* at 60.

- A focus on housing as a “platform for improving quality of life.”<sup>12</sup> Measures of the success of this goal include “increas[ing] the number of HUD-assisted households with school-aged children who have access to schools scoring at or above the local average”; “improv[ing] the health of HUD-assisted residents”; and “increas[ing] the average income of HUD-assisted households.”<sup>13</sup>

## 2. New Focus on Fair Housing in HUD Competitive Grants

In a general Notice of Funding Availability (NOFA) published in June, 2010 (and reissued in subsequent fiscal years), HUD announced new fair housing requirements for grantees.<sup>14</sup> The General Section of the NOFA explains how applicants can receive full points for adhering to the “Affirmatively Furthering Fair Housing” policy priority, including “not only identify[ing] the specific activities to be undertaken to solve identified problems, but also identify[ing] the quantifiable outcomes that the grantee will measure in order to track the progress of these efforts.”<sup>15</sup> Grantees must detail their plans to achieve results in areas including:

- (1) Racial Segregation: Identify decreases in the concentration of racial segregation in housing developments, neighborhoods, or communities.
- (2) Vestiges of De Jure Segregation: Identify regional plans that result in more integrated living patterns and reduce or eliminate other effects of formerly de jure segregated public or assisted housing, in regions with a high segregation index.
- (3) Mixed-Income Communities of Opportunity: Identify increases in the number of HUD-assisted households in mixed-income low-poverty communities with access to employment and educational opportunities, transportation, and essential goods and services.



*The Strategic Plan’s emphasis on “inclusive and sustainable communities free from discrimination” and the plan’s explicit emphasis on “decreasing the concentration of poverty and racial segregation” have helped to move reform efforts forward inside the agency, and are often relied on by the Secretary and senior staff.*



*The treatment of fair housing as a coequal agency policy goal in the plan, rather than an overarching legal obligation, may help to perpetuate historical policy gridlock in the agency.*

<sup>12</sup> *Id.* at 24.

<sup>13</sup> *Id.* at 25.

<sup>14</sup> Notice of HUD’s Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD’s FY2010 NOFAs for Discretionary Programs, 75 Fed. Reg. 33323 (June 11, 2010), *available at* <http://edocket.access.gpo.gov/2010/pdf/2010-14004.pdf> (announcing the availability on HUD’s website of its FY2010 NOFA Policy Requirements and General Section to HUD’s FY2010 NOFAs for Discretionary Programs (June 4, 2010), *available at* <http://archives.hud.gov/funding/2010/gensec.pdf>).

<sup>15</sup> Notice of HUD’s Fiscal Year (FY) 2010 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD’s FY2010 NOFAs for Discretionary Programs (June 4, 2010) at 12, *available at* <http://archives.hud.gov/funding/2010/gensec.pdf>.

- (4) Concentration of Poverty: Identify increases in the number of HUD-assisted households living outside neighborhoods of concentrated poverty.<sup>16</sup>

Additionally, the notice requires that all applicants, regardless of whether they earn points for the “Affirmatively Furthering Fair Housing” policy priority, focus on overcoming impediments identified in the Analysis of Impediments to Fair Housing Choice and must address at least one of the following: “(1) help overcome any impediments to fair housing choice related to the



*Including fair housing obligations in competitive grant programs is one of the best ways to get the attention of HUD grantees.*



*The threshold requirements and bonus points in the general NOFA are based on the existing system of local AFFH planning, which HUD has recognized is in need of reform.*

assisted program or activity itself; (2) promote racially, ethnically, and socioeconomically diverse communities; or (3) promote housing-related opportunities that overcome the effects of past discrimination because of race, color, national origin, religion, sex, disability, and familial status.”<sup>17</sup>

Since 2010, HUD has published two more general NOFAs for Fiscal Years 2011<sup>18</sup> and 2012,<sup>19</sup> preserving the important language above. The 2012 General Section contains

additional illustrative examples beyond those in the 2011 and 2012 General Sections, regarding how the requirement to affirmatively further fair housing might be satisfied under different types of programs.<sup>20</sup>

### 3. The Affirmatively Furthering Fair Housing Regulation

Early in the first term, prompted by the settlement of the Westchester County “false claims” litigation (see discussion in “Part II” of this HUD report card, coming soon), the HUD Secretary announced the Department’s intention to replace the current fair housing planning and compliance process for HUD grantees (cities, towns, counties, and states receiving funding through programs such as CDBG and HOME) with a more data driven system. The stated goal was to clarify grantees’ obligations to “affirmatively furthering fair housing” more clearly than in the current “Analysis of Impediments to Fair Housing” system, and to update and codify some of the specific action recommendations set out in the “Fair Housing Planning Guide.”

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 22.

<sup>18</sup> Notice of HUD’s Fiscal Year (FY) 2011 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD’s FY2011 NOFAs for Discretionary Programs (Mar. 28, 2011), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=2011gensec.pdf>.

<sup>19</sup> Notice of HUD’s Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD’s FY2012 NOFAs for Discretionary Programs (Sept. 19, 2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=2012gensecNOFA.pdf>.

<sup>20</sup> *Id.* at 25-27.

Much of the first term was consumed with a public engagement process to build support for the proposed regulation among the wide range of stakeholders it would affect – not just state and local grantees but also fair housing advocates with a stake in the existing system, who would ultimately be needed to enforce the new requirements. The process was led initially by the Office of Fair Housing (FHEO), but was later taken on directly by the Deputy Secretary's and the Secretary's office, with support from FHEO and the Office of Policy Development & Research.

A proposed regulation was widely expected to be released in 2012, but, like many other anticipated regulations, the AFFH rule was put on hold until after the presidential election. The HUD regulatory agenda for 2013 now indicates that the proposed rule is expected to be released by April 2013.

Although civil rights advocates have not seen the text of the proposed regulation, there are encouraging hints in the new "Fair Housing Equity Assessment" process set out in the Sustainable Communities Initiative, which emphasizes racial integration and requires SCI grantees to take steps to address "racially concentrated areas of poverty."<sup>21</sup> On the other hand, there is concern among advocates that the new AFFH rule will be too single-mindedly focused on data and planning, and will not contain the kind of robust enforcement mechanisms that are necessary to force compliance among recalcitrant jurisdictions like Westchester.

It remains to be seen whether the rule will include rigorous and well-resourced accountability and enforcement measures. An effective AFFH rule would provide for audits and site visits, frequent evaluations of fair housing plans and progress, a specified process for receiving and investigating complaints, and increased enforcement.<sup>22</sup> Additionally, the rule should incentivize and assess concrete progress in increasing racial and economic integration within and across jurisdictions in metropolitan regions.<sup>23</sup>

A strong AFFH rule could become Secretary Donovan's most important legacy – it is crucial that it be released for notice and comment soon so that comments can be reviewed and the rule can be finalized early in the second term. This timing is important so that at least one round of local fair housing plans can be submitted and reviewed by HUD while the current administration is still in office.



*The proposed AFFH rule has received more extensive public input and engagement than any HUD regulation since the agency was founded.*



*Although the public engagement process has been positive, HUD has delayed the release for too long. It is important to release and finalize the rule so that implementation can begin before 2016.*

21 Though, as noted in the next section, this criteria needs to be strengthened.

22 See Letter to Sec. Donovan, re: Final thoughts on a new Affirmatively Furthering Fair Housing rule (Oct. 29, 2010), available at [http://www.prrac.org/pdf/AFFH\\_rule\\_final\\_pre-publication\\_comments\\_10-29-10.pdf](http://www.prrac.org/pdf/AFFH_rule_final_pre-publication_comments_10-29-10.pdf).

23 See Letter to HUD Asst. Sec. John Trasviña and HUD staff, re: Further comments on HUD's July 22nd "listening session" on Affirmatively Furthering Fair Housing (July 29, 2009), available at: <http://www.prrac.org/pdf/AffirmativelyFurtheringFairHousing7-29-09comments.pdf>.

#### 4. Sustainable Communities Initiative (SCI)

This innovative joint program among HUD, DOT and EPA is aimed at improving “regional planning efforts that integrate housing and transportation decisions, and increas[ing] state, regional, and local capacity to incorporate livability, sustainability, and social equity values into land use plans and zoning.”<sup>24</sup>

Some of the most positive requirements for the SCI regional plans include adopting a housing plan that provides for housing that “is affordable to all ranges of family income”<sup>25</sup> and that “[incorporates] equity and fair housing analysis into regional planning through the development of a regional analysis of impediments to fair housing choice.”<sup>26</sup> HUD also requires that all applicants provide “[m]easures of segregation and school poverty by participating community and by region” and the “[a]vailability of subsidized housing within 2 miles of the region’s five largest employment centers.”<sup>27</sup> Some of this language hearkens back to the original regional housing plans designed to implement the Fair Housing Act, which were eliminated in the 1970s.

In keeping with the General Section of HUD’s NOFAs, applicants are required to include a discussion of how the proposed plan will affirmatively further fair housing.<sup>28</sup> Applications that include specific activities and outcomes that address the requirement are rated higher in the evaluation process.<sup>29</sup> Encouraging mandatory outcome goals include: “reduced social and economic disparities for the low-income and communities of color within the target region”<sup>30</sup> and “increased proportion of low and very low-income households within a 30-minute transit commute of major employment centers in urban, suburban, and rural settings.”<sup>31</sup> Decreased segregation and poverty concentration is listed as a potential outcome goal,<sup>32</sup> but is not mandatory for establishing a Regional Plan for Sustainable Development.

The 2010 NOFA issued for the Sustainable Communities Regional Planning Grant Program announced \$100 million in funds available for the program.<sup>33</sup> The 2011 NOFA for the Sustainable Communities Regional Planning Grant Program announced \$70 million in available

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24 Notice of Funding Availability (NOFA) for HUD’s Fiscal year 2010 Sustainable Communities Regional Planning Grant Program (June 23, 2010) at 1, *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_35393.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35393.pdf).

25 *Id.* at 22.

26 *Id.* at 23.

27 *Id.* at 41.

28 *Id.* at 31-32.

29 *Id.* at 32.

30 *Id.* at 9.

31 *Id.* at 10.

32 *Id.* at 59.

33 *Id.* at 5.

funds for these grants and preserved the language above.<sup>34</sup> No 2012 NOFA was issued, as HUD has not yet received appropriations for the program for FY2012.<sup>35</sup> HUD has requested \$46 million for Regional Planning Grants in 2013,<sup>36</sup> but if the government continues to operate by “continuing resolution” through the end of the fiscal year, there may be no additional funds forthcoming this year.

Prior to the release of the initial Sustainable Communities NOFA, PRRAC and Building One America released a report by David Rusk (“Building Sustainable, *Inclusive* Communities”) suggesting the criteria that would be necessary for a successful regional planning program.<sup>37</sup> In that report, Rusk argued that regional planning “must be genuinely regional in scope, covering the jurisdictions that comprise a metropolitan or micropolitan area, or, at least those jurisdictions forming the urbanized area of such, including the principal city or cities and first suburbs.”<sup>38</sup> The 2010 NOFA largely met this goal,<sup>39</sup> and the 2011 NOFA expanded the definition and clarified that “[i]n no case shall a region consist of only a portion of a Metropolitan Statistical Area or a Micropolitan Statistical Area unless such region is defined by MPO boundaries...or State-designated planning boundaries...”<sup>40</sup>

After the initial program NOFA was released in 2010, David Rusk prepared a detailed review, comparing the Notice to ten principles described in his PRRAC-Building One America report. HUD received fairly positive assessments on most of the recommendations, though Rusk felt that the program did not have strong fair housing siting and housing mobility elements calculated to help low income families move to higher opportunity areas.<sup>41</sup>

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34 Notice of Funding Availability (NOFA) for HUD’s Fiscal year 2011 Sustainable Communities Regional Planning Grant Program (Sept. 6, 2011), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=2011scrpgfullappnofa.pdf>.

35 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2013 BUDGET B-3 (2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=CombBudget2013.pdf>.

36 *Id.*

37 DAVID RUSK, BUILDING SUSTAINABLE, *INCLUSIVE* COMMUNITIES: HOW AMERICA CAN PURSUE SMART GROWTH AND REUNITE OUR METROPOLITAN COMMUNITIES (May 2010), *available at* <http://www.prrac.org/pdf/SustainableInclusiveCommunities.pdf>.

38 *Id.* at 4.

39 The 2010 NOFA defined each region to be at least the area of the jurisdiction of a single MPO, the jurisdictions of two or more adjacent MPOs, a Metropolitan Statistical Area, a Micropolitan Statistical Area, a Metropolitan Division if the region is within a Combined Statistical Area with a population over 7,000,000, or a non-defined area entirely outside the boundaries of a Metropolitan Statistical Area, Micropolitan Statistical Area, or Metropolitan Division. Notice of Funding Availability (NOFA) for HUD’s Fiscal year 2010 Sustainable Communities Regional Planning Grant Program (June 23, 2010) at 16, *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_35393.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35393.pdf).

40 Notice of Funding Availability (NOFA) for HUD’s Fiscal year 2011 Sustainable Communities Regional Planning Grant Program (Sept. 6, 2011) at 17, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=2011scrpgfullappnofa.pdf>.

41 Rusk’s review of the 2010 NOFA is *available at* [http://prrac.org/pdf/BOA\\_SCI\\_NOFA\\_evaluation\\_7-10.pdf](http://prrac.org/pdf/BOA_SCI_NOFA_evaluation_7-10.pdf).





*A HUD regional planning program with a strong AFFH component has great potential to begin to undo patterns of segregation. The SCI program is probably the most innovative initiative of the agency's first term.*



*The SCI planning framework is thin on implementation, and it is unclear what kind of follow-through will be required in the regional plans. The program has also been hampered by a lack of full support from Congress.*

To assist SCI grantees in analyzing their region's fair housing challenges, HUD recently issued a "Fair Housing Equity Assessment" tool (FHEA) which provides participating regions with a wide array of demographic data to help them to map areas of opportunity and analyze levels of segregation. The FHEA is an excellent innovation, though it is still in need of refinement. For example, we have noted that its opportunity formula does not always lead to positive fair housing results, and may need to be adapted to local conditions, and we have also expressed concerns about the restrictive

definition of poverty concentration contained in the FHEA (40%!), which will allow some regions to avoid addressing the issue of racially concentrated areas of poverty in their communities.

The Sustainable Communities Initiative remains an exciting work in progress – and it is still at an early stage. The program's fair housing potential will depend largely on how HUD and the regional planning grantees implement the program in the field over the next several years. It is also crucial to demonstrate the program's success stories and mobilize support for the program in Congress so that it can continue to expand.

## **5. Section 8 Voucher Reform: Small Area FMRs, Portability, and Related Issues**

The Section 8 Housing Choice Voucher Program (HCV) has the potential to promote housing choice and expand integrated housing opportunities. HCV is our largest low income housing program, serving over 2 million families, and participants theoretically have the choice to rent any unit that meets Housing Quality Standards and is within allowable rents.<sup>42</sup> Unfortunately, a number of program's design features have the effect of steering low income families into lower opportunity areas.<sup>43</sup> HUD has recognized the program's limitations, and has been actively

42 The maximum rent levels that HCV families can access depend on the HUD-determined "Fair Market Rent" for the area, the locally set "payment standard" range above or below the FMR, and the family's ability to pay up to 40% of their income for rent, which can permit some families to rent units above the local payment standard.

43 A recent PRRAC study on housing and school location (looking at locational data from 2008) highlights the limitations of the program as currently structured – nationally, the average voucher family with children lives near an elementary school at the 26% percentile of school performance in its region, with an average of 74% of children receiving free and reduced price lunch (a standard measure of school poverty concentration). In comparison, the average renter family lives near an elementary school at the 37th percentile of school performance, and the average poor family (the vast majority of whom have no housing subsidy) lives near an elementary school at the 30th percentile of school performance in their region. In many older metro areas, the program performs at an even lower level. See Ingrid Gould Ellen and Keren Mertens Horn, *Do Federally Assisted Households Have Access to High Performing Public Schools?* (PRRAC, November 2012), available at [www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf](http://www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf).



engaged in an internal process of review, but by the close of the first term, there were only a few external signs of progress, and no final regulation changes. This is an area where the Administration can make major advances in the second term, to affirmatively promote fair housing opportunity for its clients.



*HUD is finally looking at the structural impediments to fair housing that are built into Section 8 voucher program design.*



*So far, only one relevant proposed regulation has been released, and other action has been delayed.*

## Fair Market Rents

The current system for setting Fair Market Rents (FMRs) has long been criticized for limiting voucher holders' ability to move into higher opportunity neighborhoods and for its tendency to steer families into higher poverty areas.<sup>44</sup> Early in the first term of the Obama Administration, partially in response to fair housing litigation in Dallas, HUD embarked on the design of new and more accurate system for setting FMRs by zip code ("Small Area FMRs"), which could expand families' access to housing in somewhat more expensive areas with higher quality schools, lower crime rates, and healthier living environments. The initially announced goal was to conduct a two year study followed by implementation of a national Small Area FMR system, but the study was repeatedly delayed (in part by reluctance of PHAs to participate without financial support from HUD).<sup>45</sup> HUD finally commenced a redesigned study in late 2012, which could potentially last until the end of fiscal year 2016.<sup>46</sup> HUD will need to expedite this delayed study, or issue proposed rules on Small Areas FMRs before the conclusion of the study, if it hopes to implement this crucial reform before the end of the second term.

In a positive, related development, HUD now routinely issues the Small Area FMR data in its October FMR release, and has indicated that PHAs may use the Small Area FMR data to set local area rents (though there is no incentive that they do so, and HUD has not yet set this out formally in a regulation).<sup>47</sup>

- 44 See, e.g., Florence Wagman Roisman, *End Residential Racial Segregation: Build Communities That Look Like America*, 2 HARV. L. & POL'Y REV. 1, 3 (2008) (arguing that HUD should increase FMRs for vouchers to be used in communities with "excellent resources and concomitantly high rents" to encourage integration); Barbara Sard, "How to Promote Housing Integration and Choice Through the Section 8 Voucher Program," Testimony before the National Commission on Fair Housing and Equal Opportunity, October 6, 2008, <http://www.cbpp.org/files/10-6-08hous-testimony.pdf> (citing metropolitan-wide FMRs that are too low to make units affordable in low-poverty areas); Margery Austin Turner, Susan Popkin, & Mary Cunningham, SECTION 8 MOBILITY & NEIGHBORHOOD HEALTH 31-33 (2000) (presenting concerns about FMR levels as barriers to integration and deconcentration of voucher holders, as well as Section 8 "submarkets"); Philip D. Tegeler, Michael L. Hanley, & Judith Liben, *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L. REV. 451, 477 (1995) (citing inadequate fair market rents as an impediment to the regional use of vouchers).
- 45 The delays in the Small Area FMR study are detailed in a letter to Secretary Donovan from fair housing advocates, re: Implementing the Small Area FMR Demonstration (April 8, 2011), available at [http://prprac.org/pdf/Civil\\_rights\\_Small\\_Area\\_FMR\\_delay-%204-8-11.pdf](http://prprac.org/pdf/Civil_rights_Small_Area_FMR_delay-%204-8-11.pdf).
- 46 In November 2012 HUD announced the PHAs randomly selected to participate in the SAFMR study. See 77 Fed. Reg. 69651 (November 20, 2012).
- 47 77 Fed. Reg. 61158 (October 5, 2012). HUD notes that "[t]he manner in which SAFMRs are calculated makes them ideal to be used as in the 'median rent method' section of the exception payment standard regulations found at 24 C.F.R. § 982.503(c)(2)(A)." 77 Fed. Reg. 61165. See also <http://www.huduser.org/portal/datasets/fmr.html>.

The proposal to set local FMRs at the zip code level in metropolitan areas is an important first step in improving voucher holders' access to a broader range of housing choices and can help facilitate residential integration and voluntary deconcentration of poverty. In addition, this policy will more accurately reflect local conditions and, over time, achieve more appropriate rent levels in many neighborhoods. We urge HUD to fully implement the Small Area FMR initiative in the tenant-based voucher program, with additional study on its application in the project-based setting.<sup>48</sup>

### **Section 8 Management Assessment**

The current PHA Section 8 assessment system (called SEMAP)<sup>49</sup> prioritizes quick "utilization" of vouchers and maximum use of voucher budget authority, which is sometimes misinterpreted by PHAs in the field as a reason to house families as quickly as possible, without regard to location issues. In contrast, SEMAP gives PHAs little or no credit or incentive for helping families move to less racially isolated, higher opportunity areas. The deconcentration "bonus" in SEMAP is only worth a few points, and is not even used by many PHAs. If families move across PHA borders to a lower poverty community, they are not counted at all. And because it is only a bonus, PHAs are not evaluated poorly by HUD if they have highly segregated and concentrated programs. Advocates have urged HUD to amend the SEMAP rule to provide much stronger incentives for PHAs to promote deconcentration (including across jurisdictional lines), and to reduce the emphasis on utilization rates, where delays in renting up are the result of efforts to assist households with mobility moves.<sup>50</sup> It is unclear why a new SEMAP rule was not issued in the first term, but it is listed on HUD's regulatory agenda for release early in the second term.<sup>51</sup>

### **Administrative Fee Reform**

The current "administrative fee" system that supports PHA voucher administration provides strong disincentives to PHAs to help families make opportunity moves. It takes more time to help a family move to an area where landlords are less likely to be familiar with the program, and there is no additional administrative fee for this extra effort. If a PHA is successful in helping the family move outside the jurisdiction, the PHA loses at least 4/5 of the administrative fee when the family moves (or may lose renewal funding for a portion of the value of the voucher if the receiving community "absorbs" the voucher and there is a delay in reissuing it). Instead of taking this issue on directly in the first term, HUD embarked on a multi-year Administrative Fee Study that seeks to break down the different aspects of PHA staff time spent on voucher administration. While this study has the potential to highlight the importance

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48 See advocates' comment letter, July 12, 2012, available at [http://prrac.org/pdf/fair\\_housing\\_comments\\_on\\_Small\\_Area\\_FMRs\\_7-12-10.pdf](http://prrac.org/pdf/fair_housing_comments_on_Small_Area_FMRs_7-12-10.pdf).

49 24 C.F.R. Part 98550.

50 For a more detailed analysis and recommendations on reforms to the SEMAP rule, see PRRAC's April 8, 2011 comments at <http://prrac.org/pdf/SEMAP-4-8-11.pdf>.

51 OFFICE OF INFORMATION AND REGULATORY AFFAIRS, AGENCY RULE LIST – 2012, available at <http://www.reginfo.gov>.

of administrative fee incentives for mobility-related tasks (and advocates have urged HUD to include these elements in the evaluation), it also appears that the existence of a pending study is being used as a reason not to undertake clearly needed reforms to the administrative fee system.

### ***Portability and related issues***

In the late 1980s, Congress amended the voucher program to allow voucher holders to move freely across PHA jurisdictional lines to rent apartments. The so-called “portability” rules that HUD developed in the early 1990s to respond to this statutory change in the voucher program have never worked smoothly, and continue to create obstacles for voucher families who want to move, and disincentives for PHA staff to help families move. Late in the first term, HUD issued a proposed rule and request for comments that suggested modest steps to streamline portability rules.<sup>52</sup> This proposed rule indicates definite progress but left a number of issues unresolved. And eight months have passed since the close of the comment period, without HUD submitting a final rule to OMB for clearance.

***Portability billing:*** The proposed rule takes an important first step to improve the system for family moves across jurisdictional lines, by mandating that “receiving” PHAs simply “absorb” the moving family into their own program if the receiving PHA is not at a high rate of utilization of its current budgeted vouchers. This approach is comparatively seamless from the voucher family’s point of view, reduces delay, eliminates cross-PHA billing, and returns the family’s original voucher to the sending PHA. Unfortunately, HUD does not impose this approach on all PHAs (if a receiving PHA has a high utilization rate (over 95%), it may continue to bill the sending PHA), but this will be an important step in the right direction if it is adopted in the final rule.

***Inconsistent screening rules:*** When a family is admitted to the voucher program, they are subject to tenant suitability “screening” that is to be conducted in accordance with the administrative plan by the admitting PHA.<sup>53</sup> PHAs are not authorized to “rescreen” tenants when they exercise their portability rights and move from one community to another, but some PHAs do rescreening, adding another barrier to entry for families seeking expanded housing

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52 See Letter to Regulations Division, Office of General Counsel, U.S. Department of Housing and Urban Development. Re: Public Housing and Section 8 Programs: Housing Choice Voucher Program: Streamlining the Portability Process, 77 F.R. 18731, (May 29, 2012), available at [http://prrac.org/pdf/portability\\_fairhousing\\_comments\\_5-29-12.pdf](http://prrac.org/pdf/portability_fairhousing_comments_5-29-12.pdf).

53 24 C.F.R. §982.307 (2012); see also 24 C.F.R. §982.553 (stating that PHAs are required to institute standards that prohibit the admission of sex offenders and people evicted from federally assisted housing for drug-related activities. The PHA can prohibit admission to a person that has been or currently is involved in “drug-related criminal activity; violent criminal activity; other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or other criminal activity which may threaten the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of the PHA.”

choices. Although rescreening appears to be illegal on its face,<sup>54</sup> the HUD proposed portability rule seeks input on whether rescreening should be allowed or prohibited.

**Discriminatory apartment listings:** As the HUD proposed rule points out, the lists of available units given out to Section 8 families may limit families' choices to higher poverty neighborhoods. As Stefanie DeLuca has eloquently described, these PHA lists are a direct contributor to residential segregation.<sup>55</sup> HUD's raising of this issue is positive, but the proposed rule proposes no specific fix to this problem.

**Search times:** Limits on search time for voucher holders make it harder for families looking in harder to rent areas. While HUD has improved its rules to eliminate any federally imposed time limit,<sup>56</sup> most agencies still impose strict limits and HUD has provided no guidance on the need to extend search periods to promote housing mobility.

**PHAs working together:** HUD's current PHA "consortia rule" provides few incentives for PHAs to work cooperatively to pool resources across jurisdictional lines to facilitate family moves within the same housing market.<sup>57</sup> HUD considered making changes to the rule in the first term, but did not take any action. The rule is now on the agency's regulatory agenda for May 2013.

**Tenant selection and waitlist management:** HUD still permits voucher application and waitlist procedures that have a foreseeable discriminatory effect in many jurisdictions, including first-come first-served waitlist policies, short application windows, in-person applications, etc. Even local residency preferences are permitted, as long as the PHA's tenant selection policies assert that the preference may not have a discriminatory purpose or effect.<sup>58</sup> Yet in practice,

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54 This issue was raised in comments submitted by both PRRAC and the Center on Budget and Policy Priorities. See PRRAC's comments at [http://prrac.org/pdf/portability\\_fairhousing\\_comments\\_5-29-12.pdf](http://prrac.org/pdf/portability_fairhousing_comments_5-29-12.pdf); see Center on Budget and Policy Priorities comments at <http://www.regulations.gov/#!documentDetail;D=HUD-2012-0027-0037>.

55 Stefanie DeLuca, Philip M.E. Garboden & Peter Rosenblatt, *Why Don't Vouchers Do a Better Job of Deconcentrating Poverty? Insights from Fieldwork with Poor Families*, 21 *POVERTY & RACE* 5, 1(2012).

56 24 C.F.R. § 982.303 (a).

57 24 C.F.R. § 943.

58 24 C.F.R. § 982.207 (providing that "[a]lthough a PHA is not prohibited from adopting a residency preference, the PHA may only adopt or implement residency preferences in accordance with non-discrimination and equal opportunity requirements listed at § 5.105(a) of this title...Any PHA residency preferences must be included in the statement of PHA policies that govern eligibility, selection and admission to the program, which is included in the PHA annual plan (or supporting documents) pursuant to part 903 of this title. Such policies must specify that use of a residency preference will not have the purpose or effect of delaying or otherwise denying admission to the program based on the race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family"); see also 24 C.F.R. § 5.105 (listing, inter alia, the Fair Housing Act (42 U.S.C. 3601-19) and implementing regulations at 24 CFR part 100 et seq.; Executive Order 11063, as amended by Executive Order 12259 (3 CFR, 1959-1963 Comp., p. 652 and 3 CFR, 1980 Comp., p. 307) (Equal Opportunity in Housing Programs) and implementing regulations at 24 CFR part 107; and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs)).

residency preferences frequently perpetuate segregation and result in discrimination that may not be identified at the PHA's initiative. HUD's recent guidance on tenant selection and waitlist management recognizes the potential impacts of application and waitlist procedures, but instead of mandating improvements, gives PHAs a menu of best practices to choose from.<sup>59</sup>

**Discrimination against voucher holders:** There is evidence that discrimination against voucher holders is widespread, and yet only a small number of jurisdictions have rules against voucher discrimination in place.<sup>60</sup>

HUD has taken the important step of requiring grantees, in the general guidelines for all funding notices, to comply with and certify their compliance with any local source of income discrimination laws.<sup>61</sup> HUD has also permitted grantees under the Fair Housing Initiatives Program to pursue work on source of income discrimination (in jurisdictions with such laws), where such discrimination also has a discriminatory impact.<sup>62</sup>

One important area of unfinished business in this area is the absence of an enforcement mechanism to implement federal source of income discrimination protections. Under federal law, discrimination against voucher holders is prohibited in the Low Income Housing Tax Credit program and in the HOME program, but HUD has not yet developed enforcement procedures to implement these requirements, or clarified what common practices with a likely discriminatory effect are prohibited.

## 6. Encouraging Housing Mobility Programs

As programs in Baltimore, Dallas, Chicago, and Westchester County have amply demonstrated, one-on-one housing mobility counseling is a cost-effective way of helping Housing Choice Voucher families access higher opportunity communities. During the first term, HUD has provided some leadership in supporting pilot housing mobility programs, but has been reluctant to commit to a broader initiative.

**Demonstration programs:** HUD deserves credit for finalizing the landmark settlement in the Thompson v. HUD housing desegregation case in Baltimore, supporting a major expansion of the successful Baltimore housing mobility program – a program which has been the flagship model for mobility programs around the country.

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59 Notice PIH 2012-34, "Waiting List Administration" (Aug. 13, 2012), *available at* <http://1.usa.gov/NUkh08>.

60 See Appendix B of PRRAC's recent housing mobility report for a full list of jurisdictions that ban "source of income discrimination": [www.prrac.org/pdf/Expanding\\_Choice\\_Appendix\\_B\\_Updated.pdf](http://www.prrac.org/pdf/Expanding_Choice_Appendix_B_Updated.pdf).

61 Notice of HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD's FY2012 NOFAs for Discretionary Programs, *available at* <http://archives.hud.gov/funding/2012/gensec.pdf>.

62 Notice of Funding Availability of HUD's Fiscal Year 2012 Fair Housing Initiatives Program, *available at* <http://archives.hud.gov/funding/2012/fhipnofa.pdf>.



*HUD is supporting housing mobility programs in Baltimore, Chicago and Philadelphia.*



*Why is HUD's support only limited to three cities?*

HUD has also recently announced support for pilot mobility programs in Chicago and Philadelphia, and HUD sought to include housing mobility support in the Rental Assistance Demonstration (see below), though Congress did not fund this aspect of the program.<sup>63</sup> Other than these efforts, HUD has

not included housing mobility counseling funds in its annual budget proposal, even though these programs have returned substantial benefits for families for relatively small investment in the cities they have been implemented.

***Housing mobility in routine voucher administration:*** Even without additional funding for housing mobility counseling, PHAs can do more to incorporate housing mobility into their routine administration of the voucher program. In fact, HUD's rules for the "Section 8 Administrative Plan" portion of the PHA plan require that during PHAs' briefings of the tenants they inform families living in a high-poverty census tract of the benefits of moving to an area with less poverty.<sup>64</sup>

During the first term, HUD has taken a few small steps toward the implementation of this provision. For example, in its proposed rule and solicitation of comments on the Section 8 portability rule (discussed above), HUD raises the possibility that apartment listings distributed to program participants should include a substantial number of apartments in high-opportunity, low-poverty areas.<sup>65</sup> It is unclear, however, if this concept will survive in the final rule.

In addition, HUD has encouraged (though not required) PHAs to advise voucher families about the quality of schools in neighborhoods and communities they are considering, linking families to a national web-based system for ranking schools.<sup>66</sup> We do not have any data on how many PHAs are now routinely using this system.

## **7. The Rental Assistance Demonstration (previously "Transforming Rental Assistance")**

The Rental Assistance Demonstration (RAD)<sup>67</sup> is a voluntary program through which public housing and other HUD-assisted properties may convert to long-term, project-based rental

63 U.S. Department of Housing and Urban Development, Investing in People and Places: FY 2011 Budget Request (2010), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_4220.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4220.pdf).

64 24 C.F.R. § 982.301(a)(3).

65 77 Fed. Reg. 18731(March 28, 2012).

66 For a copy of HUD's initial announcement, see [http://prrac.org/full\\_text.php?item\\_id=13236&newsletter\\_id=0&header=Current%20Projects](http://prrac.org/full_text.php?item_id=13236&newsletter_id=0&header=Current%20Projects).

67 Authorized by the Consolidated and Further Continuing Appropriations Act of 2012 (Public Law 112-55).

assistance. The demonstration aims to assess how effectively these conversions achieve certain goals, including access to private funding for improvement and preservation, as well as the extent to which residents have increased housing choice.<sup>68</sup>

We were pleased that HUD has kept its commitment to resident choice and mobility in the RAD program. The final notice stated that HUD “seeks to provide all residents of covered projects with viable choice-mobility options” and that its “goal is to provide 100 percent of residents in the demonstration offered a choice-mobility option within a reasonable time after conversion.”<sup>69</sup>

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*HUD maintained its commitment to the concept of “choice and mobility” in the final RAD program notice.*

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*However, these provisions of the program do not have strong fair housing guidance, and lack supports for families who wish to move.*

However, as we commented with regard to the draft RAD Notice, these choice and mobility elements need stronger incentives and guidelines to be effective in operation.<sup>70</sup> The final notice contains a number of problems:

**Voucher Cap and Project Cap:** While these caps permit (but do not require) PHAs to place an upward limit on the number of choice-mobility moves in a given year, or within a particular project, they failed to specify a minimum number of moves and did not require the provision of these moves within a reasonable time period. Nor are points awarded to PHAs that opt to commit a percentage of choice-mobility vouchers above the annual cap or above the project cap.

**“Good-cause exemption” from choice-mobility:** We commented that this exemption, which HUD may apply to 10% of all units in the demonstration, should be accompanied by limiting criteria – for example, it should not be allowed for family developments in high-poverty neighborhoods. However, HUD responded that “for administrative simplicity, and so as not to limit participation in the program, HUD is not modifying which PHAs or projects are eligible for an exemption.”

**Mobility incentives:** The current RAD guidance fails to encourage PHAs to include strong mobility and choice options in their plans. Without additional support, the choice option may not be a viable one for many residents, and HUD may lose the opportunity to evaluate the effectiveness of the choice option in the demonstration. We recommend that program

68 Rental Assistance Demonstration – Final Implementation, Notice PIH-2012-32 (July 26, 2012).

69 *Id.* at 44-45.

70 PRRAC April 23, 2012 Letter Re: Rental Assistance Demonstration: Partial Implementation and Request for Comments, 77 Fed.Reg. 14029 (March 8, 2012), Notice PIH-2012-18 (HA).



guidance be revised so that the “Ranking Factors” incentivize strong housing mobility efforts by giving substantial additional ranking points for efforts to enhance mobility. These efforts could include mobility counseling programs, landlord outreach and enhanced rents in high opportunity areas, evidence of cooperative agreements among PHAs to streamline or eliminate portability barriers, or financial assistance to remove barriers to relocation in higher opportunity communities.

During its implementation, the RAD program will need to be monitored to ensure that fair housing standards are met and to assess its impact on tenant mobility. Residents should be provided with procedures to enforce their mobility rights.

## **8. Choice Neighborhoods Initiative**

The Choice Neighborhoods Initiative was introduced in 2010 as HUD’s attempt to address the problem of “spatial concentration of poverty, [which] remains a serious and often unrecognized challenge to the ability of poor families and children to access opportunities and move up the economic ladder.”<sup>71</sup> The core goals of the program include:

1. Housing: Transform distressed public and assisted housing into energy efficient, mixed-income housing that is physically and financially viable over the long-term;
2. People: Support positive outcomes for families who live in the target development(s) and the surrounding neighborhood, particularly outcomes related to residents’ health, safety, employment, mobility, and education; and
3. Neighborhood: Transform neighborhoods of poverty into viable, mixed-income neighborhoods with access to well-functioning services, high quality public schools and education programs, high quality early learning programs and services, public assets, public transportation, and improved access to jobs.<sup>72</sup>

The Choice Neighborhoods Initiative was, in part, designed to overcome the flaws of the prior “HOPE VI” public housing redevelopment program, which had failed to provide one-for-one replacement of public housing units, failed to guarantee families the right to return to their original community, and failed to offer families who wished to move new housing choices outside of high poverty, segregated neighborhoods (both during the initial relocation and in the permanent replacement housing stage of the HOPE VI program).

We were pleased to see, in both the 2010 and 2012 Notices of Funding Availability, explicit references to CNI grantees’ obligation to Affirmatively Furthering Fair Housing (AFFH). In 2010,

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71 HUD’s Fiscal Year (FY) 2010 NOFA for the Choice Neighborhoods Initiative – Round 1 NOFA (Aug. 25, 2010) at 2, *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_9823.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9823.pdf).

72 *Id.*

Implementation Grant finalists could gain two points for proposals with substance and specificity in affirmatively furthering fair housing by at least two of the following means:

- (1) Increasing economic and racial and ethnic diversity within the neighborhood;
- (2) Providing existing residents with the choice to pursue housing choices in areas of greater racial, ethnic and income or diversity;
- (3) Ensuring that replacement housing is sited in a manner to enhance racial and ethnic diversity;
- (4) Ensuring that buildings and housing units are accessible and visitable by persons with disabilities.<sup>73</sup>

The 2012 Implementation Grant NOFA added a fifth possibility:

- (5) Demonstrating that the proposed Transformation Plan is consistent with the Analysis of Impediments for the jurisdiction in which the target neighborhood is located.<sup>74</sup>

Additionally, the 2012 Planning NOFA states that:

All activities under this NOFA shall be carried out in a manner that affirmatively furthers fair housing, as required by section 808(e)(5) of the Fair Housing Act, as amended (42 U.S.C. 3608(e)(5)). In lieu of an affirmatively furthering fair housing (AFFH) submission requirement, HUD has established specific AFFH requirements for successful applicants [including affirmative fair housing marketing].<sup>75</sup>

This inclusion of the AFFH obligation in the guidance is promising. However, more detailed requirements and a better-balanced incentive structure—ensuring that relocation and supportive services programming provides increased choice and integration, as well as stable neighborhoods—remain needed.

Early monitoring of the CNI program reveals that both HUD and the CNI grantees have so far tended to overlook housing mobility as an important complement to the program's neighborhood improvement aspects. In summer of 2012, the Poverty & Race Research Action Council commissioned an initial program review to examine CNI's mobility-related aspects: including HUD's and individual grantees' approach to tenant displacement and relocation, siting decisions for replacement housing, and the type of supportive services provided.<sup>76</sup> Our

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73 HUD's Fiscal Year (FY) 2010 NOFA for the Choice Neighborhoods Initiative – Round 2 NOFA (for Implementation Grant Finalists Only) (Mar. 22, 2011) at 44, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=cnround2nofa.pdf>.

74 HUD's Fiscal Year (FY) 2012 NOFA for the Choice Neighborhoods Initiative – Implementation Grants (Jan. 6, 2012) at 109, *available at* <http://portal.hud.gov/huddoc/fy12-implem-nofa.pdf>.

75 HUD's Fiscal Year (FY) 2012 NOFA for the Choice Neighborhoods Initiative- Planning Grants at 39, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=fy12cn-planninggrants.pdf>.

76 Martha Galvez, "An Early Assessment of Replacement Housing, Relocation Planning and Neighborhood Mobility Counseling in HUD's Choice Neighborhoods Initiative" (forthcoming from the Poverty & Race Research Action Council).

results point to a need for HUD to examine the program's AFFH performance, including whether its siting incentives and relocation practices tend to reinforce segregation in grantee communities.

Of primary concern was the finding that none of the five current CNI "implementation sites" will build replacement housing outside of their target neighborhood, and that only three of 13 surveyed "planning sites" currently had plans to build any portion of replacement units outside their target neighborhoods. This indicates a need for HUD to further investigate grantee activities and their fair housing impacts, and to reassess the priorities set by its CNI guidance. It is possible that the first group of CNI implementation sites may be in very desirable neighborhoods that are in the path of gentrification, and may have a vast majority of residents who wish to stay in the neighborhood, but HUD needs to recognize that this may not be true of all future grantees. It was certainly not true of most neighborhoods selected for the HOPE VI program.

On a positive note, the 2012 Implementation Grant NOFA offered a four-point incentive for higher-opportunity replacement siting outside the target neighborhood.<sup>77</sup> This was an improvement over the 2010 NOFA, in which those points could be attained by providing all replacement housing within the target neighborhood or by demonstrating that off-site replacement housing would meet a series of requirements to provide increased access to opportunity.<sup>78</sup> However, the incentive remains minor (four out of 204 points) compared to the overall number of available points offered by the NOFA. Additionally, the NOFA still does not provide an upper limit on reconstruction within the target neighborhood, despite the likelihood that such reconstruction would perpetuate segregation and conflict with HUD's and the grantees' AFFH duties. This presents the possibility that 100% of the units would be placed right back into some of our nation's most high poverty, segregated neighborhoods. As our research findings indicate, guidelines should incentivize more balanced redevelopment.<sup>79</sup>

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77 HUD's Fiscal Year (FY) 2012 NOFA for the Choice Neighborhoods Initiative – Implementation Grants (Jan. 6, 2012) at 82, *available at* <http://portal.hud.gov/huddoc/fy12-implem-nofa.pdf>. However, the 2012 NOFA softened the means by which applicants could demonstrate "access to opportunity." For example, 2010 applicants gained 4 points for replacement housing in areas with a poverty rate under 15%, and 2 points for replacement housing in areas with a poverty rate under 20%; 2012 applicants gained 4 points for replacement housing in areas with a poverty rate under 20% and where the "total percentage of minority persons is less than 20 percentage points higher than the total percentage of all minorities for the MSA as a whole," and could gain 2 points for replacement housing in areas with a poverty rate is less than 30 percent but "within the catchment area of a school with both reading and math scores better than the state averages in grades 4, 8, and any high school grade." Replacement housing outside the neighborhood in areas that have a poverty rate above 40 percent is not permitted.

78 *Id.* at 25.

79 See Letter from Philip Tegeler, Poverty & Race Research Action Council & John Powell, Kirwan Institute for the Study of Race and Ethnicity, to Carol Galante, Deputy Assistant Secretary for Multifamily Programs, Department of Housing and Urban Development (Jan. 14, 2011), *available at* [http://www.prrac.org/pdf/fair\\_](http://www.prrac.org/pdf/fair_)

PRRAC's examination of the CNI program also indicated that many grantees have not prioritized mobility counseling within their supportive services programming. HUD should examine this trend further, and strengthen CNI housing mobility counseling requirements and incentives in order to ensure that residents are equipped to make truly informed choices. Currently, the 2012 Implementation NOFA awards three points for applicants' "Relocation and Re-occupancy" strategies.<sup>80</sup> Although the NOFA makes encouraging references to choice and counseling, this section disappoints in several respects. The section's heavy emphasis on facilitating returns to the neighborhoods overlooks housing mobility as an important aspect of resident choice. Some level of mobility counseling should be required for all interested baseline residents, with the provision of more intensive services strongly incentivized.

Additionally, the NOFA's "Choice" outcome measure sets problematically low expectations for mobility programs. This outcome is assessed using two metrics: the number and share of residents who actually return to CNI sites compared to those who expressed an initial preference to return, and the share living in a "lower-poverty and higher-opportunity neighborhood than pre-transformation by household type."<sup>81</sup> Considering that CNI sites are selected based in part on extreme poverty rates and distress at baseline, moving to a lower poverty rate area (as opposed to a low-poverty or high-opportunity area) sets a very low bar. Furthermore, the metric measuring returns overlooks the likelihood that counseling and exposure to previously-unfamiliar neighborhoods may alter many residents' preferences following redevelopment (or that residents may re-evaluate their preferences if promised commercial and service improvements lag behind residential redevelopment).



*The Choice Neighborhoods Initiative is a major improvement over the HOPE VI public housing redevelopment program.*



*Unfortunately, like HOPE VI, Choice Neighborhoods does not require off-site replacement housing, and its housing mobility "requirements" are not yet being widely followed.*

housing\_comments\_on\_Choice\_Neighborhoods\_NOFA\_1-14-11.pdf. We also expressed these concerns when the CNI program was proposed, see Letter to Rep. Barney and Rep. Maxine Waters re Fair Housing and the Choice Neighborhoods Initiative (March 19, 2010), available at <http://www.prrac.org/pdf/choice-neighborhoods-3-19-2010.pdf> and Letter to Sec. Donovan re Choice Neighborhoods Initiative Draft Legislation (Nov. 24, 2009) available at <http://www.prrac.org/pdf/ChoiceNeighborhoodsInitiative.pdf>.

80 2012 Implementation NOFA at 95-96. Points are awarded "based on resident relocation and reoccupancy preferences (provide numbers and percentages) identified through [the applicant's] needs assessment, including the specific activities that have or will be undertaken to inform residents of the target public and/or assisted housing of their right to return" and in which the applicant must explain how it will "integrate comprehensive relocation and reoccupancy counseling and supports with [its] Supportive Services strategy so that residents of the target public and/or assisted housing receive the array of services they need to return to the revitalized housing or maintain stability in other housing of their choice." This section also specifies that regional mobility counseling be provided to accompany any tenant-based voucher program.

81 *Id.* at 96.

Future action on the CNI program is needed to ensure that the program furthers fair housing. This should include:

- Conducting more extensive inquiry as to why no current implementation sites, and few planning sites, intend to construct replacement units outside the target CNI neighborhoods. If this is due to CNI or other programmatic barriers, HUD should address those. For example, rather than requiring that an “application must include a justification of why it is necessary to locate [replacement] housing outside the target neighborhood and how doing so supports and enables the Transformation Plan,”<sup>82</sup> HUD should incentivize applicants to site replacement housing outside CNI neighborhoods. Where grantees do not provide at least a designated portion of replacement housing outside the target areas, they should be required to justify that decision. Additionally, higher standards for replacement housing neighborhoods would ensure that CNI applicants target high-opportunity areas.
- Tightening the nexus between AFFH requirements and programmatic activities. This could include assigning greater weight to the AFFH metrics (currently worth only two points) contained in the NOFA. HUD should also consider making some of these metrics (such as consistency with the Analysis of Impediments) mandatory, as well as requiring that more than two metrics be satisfied. As part of coordinated AFFH and CNI obligations, where CNI grantees identify impediments to mobility for CNI baseline residents or impediments to siting replacement housing outside the CNI neighborhood, these should be included in the jurisdictional AI.
- More explicit and meaningful attention to mobility counseling. HUD should consider requiring mobility counseling for all CNI baseline residents whose housing is redeveloped, not only those who express an initial preference to move beyond the neighborhood, so that all residents are able to make an informed choice. The NOFA should include specific expectations for counseling services and provide incentives for applicants to provide more individualized and intensive services. For example, sites should be required to recruit landlords or offer higher payment standards in high-opportunity areas, to offer voucher movers tours of high-quality schools and neighborhoods, and to have case managers accompany voucher holders when they visit units or meet with landlords.
- Ongoing technical and financial support for current and future CNI grantees to help them design, implement and monitor their mobility services. CNI presents an opportunity for HUD to test different approaches to mobility counseling services, in very different local market contexts. CNI grantee surveys on resident re-occupancy preferences could also serve as a “scoping” process that would help grantees to identify specific concerns about or barriers to mobility which could be addressed through counseling or otherwise.

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82 2012 Implementation NOFA at 13.

## 9. The Moving to Work Program

The MTW program allows HUD to waive provisions of the U.S. Housing Act of 1937 and various HUD regulations at the request of selected Public Housing Agencies (PHAs or “agencies”) in pursuit of the program’s statutory goals, one of which is to “increase housing choices for low-income families.”<sup>83</sup> Additionally, MTW agencies are granted substantial flexibility in how they may apply their funds, with the potential to interchangeably allocate funds from different sources.

Encouragingly, the Obama Administration has included explicit requirements for Affirmatively Furthering Fair Housing in the MTW selection and certification process. The 2009 MTW NOFA required that:

Prior to the execution of the MTW Agreement, and in support of its civil rights certification under Section 5A of the U.S. Housing Act of 1937 and the affirmatively furthering fair housing certification in the MTW Work Plan, a successful applicant will provide a narrative statement of how it will affirmatively further fair housing in its MTW program that:

- (1) Identifies any impediments to fair housing choice within the HCV or public housing programs that would be covered under an MTW Agreement between the PHA and HUD, as well as relevant impediments identified in the applicable jurisdictions’ Analysis of Impediments (AI) to Fair Housing Choice in the PHA’s service area;
- (2) Addresses these impediments in a reasonable fashion in view of the resources available under the programs to be covered under the MTW Agreement by specifying activities and policies to overcome these impediments;
- (3) Describes coordination efforts to overcome impediments to fair housing choice with the jurisdictions that prepare the Consolidated Plan and Analysis of Impediments; and
- (4) Describes how the PHA will maintain records of the activities, policies, and coordination of efforts to overcome impediments to fair housing choice, and their impact.<sup>84</sup>

The 2010 and 2012 NOFAs reinforced these requirements and further stated that:

... the proposed activities must address at least one of the following objectives: (1) help overcome any impediments to fair housing choice related to the assisted program or activity itself; (2) promote racially, ethnically, and socioeconomically diverse communities; or (3) promote housing-related opportunities that overcome the effects of past discrimination because of race, color, national origin, religion, sex, disability, and familial status... HUD encourages applications from PHAs that participate in regional fair housing strategies to overcome patterns of segregated housing, including

83 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 §204(a) (April 1996).

84 Request for Applications under the Moving to Work Demonstration Program, NOTICE PIH 2009-29, Aug. 19, 2009, available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_9017.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_9017.pdf), at 9.

the effects of formerly de jure segregated public or assisted housing, and to facilitate more integrated living patterns.<sup>85</sup>

In addition, HUD has clarified the civil rights obligations of MTW agencies in guidance specifically addressing fair housing and other protections.<sup>86</sup>

However, the MTW program also has some serious weaknesses, in particular with regard to its “housing choices” goal. This goal needs definitional content, which should reflect the AFFH and other fair housing directives. As the GAO has noted, it is problematic that “HUD has not clearly defined what the language in some of these [MTW statutory] purposes means, such as ‘increasing housing choices for low-income families.’”<sup>87</sup> This definitional vacuum leaves the “housing choices” goal void of measurable criteria, impairing HUD’s ability to assess programmatic outcomes and to ensure that the program operates in accordance with Congressional intent. Given the resulting confusion among PHAs, it is incumbent on HUD to furnish content for the “housing choices” goal that 1) promotes choice-oriented initiatives by PHAs with measurable outcomes; and 2) aligns such initiatives with fair housing requirements, including the responsibility to affirmatively further fair housing.

HUD took a positive step in this direction in the 2012 MTW NOFA, which presented applicants with an explicit *choice-mobility* option in the form of a demonstration program. In the context of this demonstration, the NOFA defined an “increase in housing choice” as “providing more types and locations for assisted housing in areas where affordable housing may not be many, and may entail geographic mobility programs that result in residents moving to more racially or economically diverse neighborhoods.”<sup>88</sup> This has yielded promising initiatives from two 2012 grantees: the Housing Authority of Columbus, Georgia plans to conduct a mobility study

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- 85 Request for Applications under the Moving to Work Demonstration Program, NOTICE PIH 2010-29 (HA), July 30, 2010, *available at* <http://www.hud.gov/offices/pih/publications/notices/10/pih2010-29.pdf>, at 11-12 (also noting that “for example, for programs that focus on rehabilitation or new construction of housing, activities that affirmatively further fair housing include those that: (1) ensure that housing is sited in a manner to enhance racial or ethnic diversity; (2) ensure that housing units are affordable to persons of low, very low-and moderate income; (3) to the extent permitted by program requirements, ensure that buildings and housing units are accessible and visitable by people with disabilities; (4) to the extent permitted by program and relocation assistance requirements, ensure that any existing residents relocated to facilitate construction are afforded preference or first right of refusal for the new units; and (5) ensure that the units are placed in an area of opportunity, which includes factors such as access to employment centers, effective schools, health care facilities, social services, and public transportation.”)
- 86 PIH Notice 2011-31 (June 13, 2011), “Guidance on non-discrimination and equal opportunity requirements for PHAs,” *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=compliance-guidance.pdf>.
- 87 HUD’s Moving to Work Demonstration: Opportunities Exist to Improve Information and Monitoring, GAO-12-490 (April 2012) at 26, *available at* <http://gao.gov/assets/600/590226.pdf>.
- 88 PIH Notice 2012-16 (Feb. 27, 2012) at 5 (“Housing Choice Mobility Demonstration – To further the third statutory objective of the MTW demonstration, increasing housing choice, applicants will design and test an activity that uses MTW flexibility to increase housing choices for residents through mobility programs...The study may encompass public housing, vouchers, or both and may be a subset. The study does not need to encompass the PHA’s entire public housing and/or HCV portfolio, but if a subset of the portfolio is used, HUD requires that the PHA establish statistically valid treatment and control groups that will enable a rigorous evaluation of the activity’s outcomes.”).



introducing voucher families into higher-opportunity neighborhoods, and the Housing Authority of Reno, Nevada, will acquire foreclosed homes in high-opportunity neighborhoods for voucher holders' use.<sup>89</sup>

However, more widely applicable and clearly delivered guidance on the "choice" aspect of the program remains needed. PRRAC's initial review of the program in January 2011, based on HUD's August 2010 report to Congress, suggested that MTW had largely failed to deliver on the "housing choices" goal: "For most of the other PHAs reviewed in the study, MTW was not reported to have expanded resident choices, and in some cases appeared to have contributed to the redevelopment of public and assisted housing in the same neighborhoods where it was previously located."<sup>90</sup> We also noted that the standard MTW agreement could be construed to permit waiver of key civil rights siting standards.<sup>91</sup> A more detailed review by the Center on Budget and Policy Priorities in September 2011 observed that the trend of transferring funds out of PHA voucher programs had the effect of decreasing housing choices in the program, and found that HUD had approved waivers of Section 8 portability rules for several MTW PHAs.<sup>92</sup>

In summer 2012, PRRAC commissioned a review of MTW sites that revealed substantial variation in MTW agencies' understanding of "housing choice" and residential mobility.<sup>93</sup> In some cases, agencies were able to identify mobility efforts, which included: efforts to increase residents' knowledge of area neighborhoods through counseling programs; efforts to increase residents' purchasing power in and presumed access to certain neighborhoods by increasing small area payment standards; expanding unit availability into new or underrepresented

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- 89 See HUD Press Release, "Four Agencies Selected for Elite Program to Improve Federal Rental Assistance Programs," Dec. 18, 2012, *available at* [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2012/HUDNo.12-194](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-194).
- 90 PRRAC Policy Brief: "Report to Congress: The Moving to Work Demonstration Fails to Increase Housing Choice for Low Income Families" (January 2011), *available at* [http://prrac.org/pdf/MTW\\_Policy\\_Brief\\_January\\_2011.pdf](http://prrac.org/pdf/MTW_Policy_Brief_January_2011.pdf).
- 91 The MTW legislation does not authorize the waiver of civil rights requirements (including the site and neighborhood standards), and in its 2012 MTW Notice, HUD states clearly that "[p]articipation in the MTW demonstration brings no flexibilities related to fair housing or civil rights requirements. See PIH Notice 2011-31," and "[p]articipation in MTW does not bring any opportunity flexibility [sic] on regulations outside the 1937 Act. The continued applicability of fair housing and civil rights requirements on PHAs participating in the MTW demonstration is explained at length in PIH Notice 2011-31." HUD Notice PIH-2012-16, "Request for Applications under the Moving to Work Demonstration Program for Fiscal Year 2011," February 27, 2012. However, HUD Notice PIH 2011-31 at 13 includes explicit "Flexibilities in implementing site and neighborhood standards under MTW" and the Standard MTW Agreement, Attachment D, also contemplates such waivers; see [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/mtw/mtwsa](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/mtwsa).
- 92 Will Fischer, Center on Budget and Policy Priorities, "Expansion of HUD's 'Moving-To-Work' Demonstration is Not Justified: Other Approaches Would Promote Demonstration's Goals More Effectively" (Sept. 27, 2011), *available at* <http://www.cbpp.org/Files/9-27-11/hous.pdf>.
- 93 Sarah Oppenheimer, Megan Haberle, and Philip Tegeler, "Increasing Housing Choices: Can the MTW Program Evolve to Achieve its Statutory Mandate?" (forthcoming from the Poverty & Race Research Action Council).

neighborhoods, as by building relationships with local landlords; and initiatives that specifically incentivized moving to new neighborhoods. These are helpful strategies with the potential to further fair housing, and HUD should research and promote them further as part of MTW and other programs.

On the other hand, many agencies appeared confused as to what mobility programs entail, and used “mobility” as a catch-all concept encompassing any efforts aiming to strengthen tenants’ individual capacity, regardless of the fair housing impact for example, job skills training, access to mental health supports, etc. While it is possible that these strategies will indirectly “increase choice” for some tenants, they are not mobility programs and should not substitute for them in advancing the particular statutory goal of increasing choice.<sup>94</sup> Other agencies identified as “mobility” programs efforts that were unrelated to mobility and

solidified existing segregated residential patterns: for example, strategies of redevelopment in high-poverty neighborhoods, which they said were intended to give PHA participants more viable options to stay in their current neighborhoods.



*Excellent new funding notice in 2012 clarifying the original statutory goals of the program.*



*How will HUD address the fair housing deficiencies of some of the older MTW agencies?*

While redevelopment and self-sufficiency

initiatives may help many tenants and offer a valuable complement to mobility efforts, the inability to distinguish among these strategies prevents accurate program evaluations, and is likely to create an imbalanced portfolio of initiatives that fails to promote residential choice. Furthermore, “housing choice” should be interpreted in light of HUD’s and the PHAs’ AFFH obligations, which require that the agencies address segregative and exclusionary patterns.

As we recommend in our forthcoming report, HUD should take steps to further fair housing in the MTW program in the following ways:

- **Clarify what it means to “increase housing choices.”** Clarity about what it means to “increase housing choices” is a prerequisite to HUD’s evaluation of the MTW demonstration with regard to this statutory goal, and is needed to guide agencies toward implementing policies that advance it. Our study illustrates that there may be a significant degree of confusion and inconsistency among PHAs on this point. As GAO has also recommended, HUD should more fully define its expectations about what it means to “increase housing

94 Characterizing self-sufficiency strategies as mobility- or choice-related conflates the statutory goal of housing choice with the second MTW goal of self-sufficiency and work programs; the legislation explicitly sets apart housing choice as a distinct and equally important aim.

choice,” and HUD and PHAs should assess program outcomes accordingly.<sup>95</sup> In addressing this statutory goal, HUD’s MTW guidance should emphasize mobility strategies, and make clear that policies characterized as “increasing housing choice” should not simply reinforce existing, segregative options, but instead should “affirmatively further fair housing.”

- **Identify and replicate successful practices.** Accurate MTW program assessments are needed to help HUD and agencies identify successful practices that advance housing choice. HUD guidance should emphasize mobility outcomes as an important feature of such assessments. This requires that agencies more rigorously and consistently track and analyze data on mobility. Practices that are shown to be successful in expanding choice can then be lifted up as “best practices,” serve as models for other PHAs, and be fostered by targeted support from HUD.
- **Incentivize housing mobility programs.** This study indicated that many PHAs did not prioritize mobility initiatives, and struggled to identify funding they could devote to mobility efforts. To the extent possible, HUD should address these barriers by providing increased funding for mobility efforts and should examine ways to incentivize such efforts. PHAs should also assess their priorities and ensure that other initiatives are balanced by strong mobility programming.
- **Adhere to civil rights requirements.** While further research will be needed as to the extent to which site and neighborhood standards are being waived, any waivers of this civil rights regulation are troubling. HUD should revise its guidance to make clear that MTW participation does not authorize site and neighborhood standard waivers. These standards embody fair housing requirements and are needed to counter longstanding patterns of segregation.
- **Provide mobility training to PHA staff and mobility counseling to residents.** Agencies that cited “participant resistance” as a bar to mobility efforts are likely unaware of the success of, and demand for, mobility programs in other jurisdictions; or of the richly documented educational, health, and other benefits of such programs. Anecdotes of resistance lead PHAs to overlook the many families who do want to move. Additionally, some of this perceived resistance may reflect a lack of information or past struggles that can in fact be addressed through quality housing mobility strategies, including counseling and fair housing enforcement. HUD should convey (and agencies should seek out) information regarding housing mobility successes and benefits so that PHAs are able to make fully informed programming decisions.

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95 See Housing Justice Network (co-signed by PRRAC) Letter to Collette Pollard, HUD Departmental Reports Management Officer (July 15, 2011) at 10-11, available at [http://www.prrac.org/pdf/MTW\\_comments\\_7-15-11\\_HJN.pdf](http://www.prrac.org/pdf/MTW_comments_7-15-11_HJN.pdf) (regarding the need for increased data collection to demonstrate whether the “housing choice” goal is met, in keeping with the AFFH obligation).

## 10. The Low-Income Housing Tax Credit Program (LIHTC)

### ***Missed Opportunities for Interagency Cooperation: Need for Guidance Implementing Civil Rights Laws***

The Low Income Housing Tax Credit program is the largest federal low income housing development program, with 1,539,619 units placed in service between 1995 and 2009.<sup>96</sup> Yet this program still lacks any civil rights guidance beyond an echo of Title VIII's basic nondiscrimination provision (in the Treasury Department's requirement that LIHTC properties be available for "use by the general public"<sup>97</sup>). This vacuum continues despite advocates' repeated urging that HUD and Treasury formulate regulations and guidance to implement Title VIII's AFFH mandate, as well as Title VI of the 1964 Civil Rights Act (prohibiting discrimination in federally-funded programs) and other civil rights laws.<sup>98</sup> These rules are needed to provide guidance to the state housing finance agencies (HFAs) that administer the program, and to provide applicants to the program with equal access to program benefits, and access to non-segregated communities and high performing schools.

Primary responsibility for developing civil rights guidance for the LIHTC program lies with the Treasury Department, which administers the program. Working within the existing legal frameworks for interagency cooperation,<sup>99</sup> HUD (as well as the Department of Justice) should urge Treasury to issue AFFH rules for the LIHTC program without further delay. Specifically, these Treasury rules should ensure that LIHTC residents and applicants have at a minimum the protections that HUD residents and applicants have – particularly in the areas of site selection, affirmative marketing, tenant selection, design and accessibility standards, source of income discrimination protections, and other program incentives to promote racial integration.<sup>100</sup> They

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96 See HUD Office of Policy Development & Research, New Low Income Housing Tax Credit Data Available, Table 2, at <http://www.huduser.org/portal/datasets/lihtc/topical9509.pdf>.

97 The rule requires that "the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX)," 26 C.F.R. § 1.42-9.

98 See, e.g., Letter to Michael Barr, U.S. Dept. of the Treasury, re Title VI, Section 504, and Title VIII Regulations and Guidance at the Dept. of the Treasury (Oct. 26, 2010), available at [http://www.prrac.org/pdf/civil\\_rights\\_letter\\_to\\_Michael\\_Barr\\_10-26-10.pdf](http://www.prrac.org/pdf/civil_rights_letter_to_Michael_Barr_10-26-10.pdf); Letter to Assistant Attorney General Thomas Perez, DOJ Civil Rights Division (Aug. 9, 2010), available at [http://www.prrac.org/pdf/LIHTC\\_letter\\_to\\_AAG\\_Perez\\_8-9-10.pdf](http://www.prrac.org/pdf/LIHTC_letter_to_AAG_Perez_8-9-10.pdf); Letter to Michael Stegman, U.S. Dept. of the Treasury (May 15, 2012), available at [http://www.prrac.org/pdf/Letter\\_to\\_Michael\\_Stegman\\_re\\_fair\\_housing\\_regs\\_5-15-12.pdf](http://www.prrac.org/pdf/Letter_to_Michael_Stegman_re_fair_housing_regs_5-15-12.pdf);

99 Including the "compliance harmonization" process initiated by the Office of Management & Budget during President Obama's first term to conform housing development rules across programs, and a "memorandum of understanding" (MOU) group established during the Clinton Administration to address fair housing issues in the LIHTC program and comprised of representatives of DOJ, HUD, and Treasury.

100 The Fair Housing Act explicitly extends AFFH obligations to all federal agencies involved in housing- and development-related programs, as does Executive Order 12892, 59 Fed. Reg. 2939 (Jan. 17, 1994), which clarifies the statutory duties placed on Treasury. The Act also requires that HUD take a leadership and coordinating role among agencies in implementing §3608. The "primary authority" for AFFH is vested in HUD, and Executive Order 12892 requires each agency head administering housing programs to "cooperat[e] with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act." §2-201, 202; see also 42 U.S.C. § 3608(d).

should further assist state HFAs in interpreting the LIHTC statute's selection priorities and preference criteria for state Qualified Allocation Plans, which lack content in the Code of Federal Regulations<sup>101</sup>—including defining the “concerted community revitalization plans” that grant projects in “qualified census tracts” preferred status.<sup>102</sup>

Another missed opportunity for AFFH coordination has been in the HUD “consolidated planning” process for state and local recipients of HUD funds. A basic framework for this coordination is already codified: HUD's ConPlan rules require local jurisdictions to address the use of LIHTC as a “federal resource,”<sup>103</sup> and require state jurisdictions to state how CPD funds will be coordinated with LIHTC.<sup>104</sup> Future guidance should require states to use the ConPlan, and the housing needs identified there, to inform their QAP criteria. Both the ConPlan and QAP should reflect strong AFFH standards, with an emphasis on performance.<sup>105</sup>

In addition, HUD (as well as DOJ<sup>106</sup>) should take active steps in urging Treasury to issue regulations or other guidance implementing Title VI: this is an important and appropriate role given HUD's sphere of extensive expertise in enforcing civil rights laws, including Title VI, in the context of housing programs. A landmark piece of civil rights legislation still neglected by the Treasury Department after almost 50 years, Title VI was passed to ensure that the government would fully divest itself of discrimination—and do so consistently across the initiatives and programs it supports.<sup>107</sup> As we have stated in correspondence to Treasury, this includes all forms of financial assistance, including assistance such as the tax credit program.<sup>108</sup> Title VI rules would ensure that the LIHTC program offers the same substantive and procedural civil

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101 26 U.S.C. § 42(m)(1); 26 C.F.R. § 1.42-17(a)(1) and (2).

102 26 U.S.C. § 42(m)(1)(B)(ii)(III).

103 24 C.F.R. § 91.220(c).

104 24 C.F.R. §§ 91.315(m) and 91.320(j).

105 The QAP and ConPlan should also be responsive to the requirements of HUD's forthcoming AFFH rule, discussed above.

106 See Exec. Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980), assigning to DOJ the leadership role among federal agencies for Title VI, Title IX and Section 504 implementation.

107 Title VI's broad applicability across programs and activities receiving federal assistance was designed to “insure the uniformity and permanence of the nondiscrimination policy,” 110 Cong. Rec. 6544 (Statement of Sen. Humphrey); see also 110 Cong. Rec. 2468 (1964) “Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs.” As with Title VIII, Title VI was in part a correction to past government sponsorship of discrimination.

108 See Letter to Michael Stegman, U.S. Dept. of the Treasury (June 29, 2012), available at [http://www.prrac.org/pdf/Title\\_VI\\_and\\_LIHTC\\_6-29-12.pdf](http://www.prrac.org/pdf/Title_VI_and_LIHTC_6-29-12.pdf); see also HUD's Title VI regulations, defining “federal financial assistance” to “include... (1) Grants, loans, and advances of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. The term Federal financial assistance does not include a contract of insurance or guaranty.” 24 C.F.R. § 1.2(e) (emphasis added).

rights protections as do other government-supported housing programs. In particular, HUD should convey to Treasury the importance of prohibiting disparate impact discrimination.

Similarly, it is important that HUD support the full implementation of other civil rights laws applicable to the tax credit program, including Section 504 of the Rehabilitation Act of 1973, Title IX, the Age Discrimination Act, and the Americans with Disabilities Act (ADA).

### ***Civil Rights Reporting Requirements***

The Housing and Economic Recovery Act of 2008 amended the United States Housing Act of 1937 to require that, at least annually, State Housing Finance Agencies provide to HUD and HUD make publicly available data regarding the race, ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments for households residing in all properties receiving Low-Income Housing Tax Credits.<sup>109</sup> This was a valuable step in addressing some of our concerns with the LIHTC program.<sup>110</sup> The data will allow HUD and fair housing practitioners to assess the integrative success of LIHTC siting and other practices (such as affirmative marketing), and to determine whether aspects of the program's administration either perpetuate segregation or affirmatively further fair housing.

The statute contains no express timeline as to when the data collection and release must commence, but does authorize appropriations for the cost of such activities for fiscal years 2009-2013.<sup>111</sup> In 2010, HUD issued a notice of specific requirements for the data collection by state agencies, which stated that Congress had not appropriated any funds for FY 2009.<sup>112</sup> It appears that no funds have been appropriated for this purpose in the following years either.<sup>113</sup> In 2010 and 2011, HUD collected data regarding fiscal years 2009 and 2010, respectively.<sup>114</sup> It is now almost five years after this data collection requirement was imposed by Congress,

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109 Housing and Economic Recovery Act of 2008, § 2835(d) (codified as amended at 42 U.S.C. § 1437z-8 (2010)).

110 See Comments on LIHTC Tenant Data Collection and Data Collection Methodology (May 5, 2009), *available at* [http://www.prrac.org/pdf/LIHTC\\_data\\_collection\\_comment\\_letter\\_5-5-09.pdf](http://www.prrac.org/pdf/LIHTC_data_collection_comment_letter_5-5-09.pdf); see also Poverty and Race Research Action Council & Lawyers Committee for Civil Rights, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* (Dec. 2004), *available at* [www.prrac.org/pdf/crmandates.pdf](http://www.prrac.org/pdf/crmandates.pdf).

111 42 U.S.C. § 1437z-8(d) (2010).

112 Low-Income Housing Tax Credit (LIHTC) Tenant Data Collection: Responses to Advance Solicitation of Comment on Data Collection Methodology, 75 Fed. Reg. 9609 (Mar. 3, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4386.pdf>.

113 See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117 (2009); Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10 (2011); Consolidated and Further Continuing Appropriation Act of 2012, Pub. L. No. 112-55 (2011).

114 See Low-Income Housing Tax Credit (LIHTC) Tenant Data Collection: Responses to Advance Solicitation of Comment on Data Collection Methodology, 75 Fed. Reg. 9609 (Mar. 3, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4386.pdf>; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD LIHTC TENANT DATA COLLECTION FORM (May 2010), *available at* <http://www.hud.gov/offices/adm/hudclips/forms/files/52697.pdf>; Update on HUD's LIHTC Tenant-Level Data Collection (Mar. 17, 2010) (TRACS Quarterly Meeting presentation), *available at* <http://www.hud.gov/offices/hsg/mfh/trx/meet/2010lihtcdatacollection.pdf>.

compliance among state HFAs appears to be incomplete, and no data has yet been made available to the public.

In addition to this lack of tenant-level data, there continue to be gaps in the project-level data already collected by HUD and made available through the LIHTC Database. The information in this database is submitted voluntarily by state housing finance agencies (HFAs), but these submissions are incomplete, with many projects unreported or missing data on key characteristics such as location type.<sup>115</sup>

### ***Qualified Census Tracts, Difficult to Develop, and Designated High-Cost Areas***

Tax credits awarded through the LIHTC program can have a higher value for developers and investors who build in specified areas. The tax code provides that developments in designated “difficult development areas” (DDAs) or designated “Qualified Census Tracts” (QCTs) are eligible for a basis boost: the eligible basis used to calculate available tax credits (derived from development costs) can be increased up to 130% in those areas, incentivizing development there.

The tax code requires HUD to designate QCTs and DDAs and defines them as follows:

The term “qualified census tract” means any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent. . . . 26 U.S.C.A. § 42(d)(5)(B)(ii).

The term “difficult development areas” means any area designated by the Secretary of Housing and Urban Development as an area which has high construction, land, and utility costs relative to area median gross income. 26 U.S.C.A. § 42(d)(5)(B)(iii).

The procedures the Secretary uses to designate these areas should—but currently do not—reflect HUD’s other statutory directives, in particular its AFFH obligation. Currently, HUD bases its designation of these areas on formulas that fail to incorporate fair housing considerations. Absent fair housing standards to ensure better distribution, QCT designations rely only on the high-poverty/high-minority concentration thresholds set by the statute,<sup>116</sup> enhancing the

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115 Low-Income Housing Tax Credits: Agencies Implemented Changes Enacted in 2008, but Project Data Collection Could Be Improved, GAO-13-66 (Dec. 6), <http://www.gao.gov/products/GAO-13-66>.

116 77 Fed. Reg. 23735 (April 20, 2012).



financial incentives to develop in low-opportunity neighborhoods. DDA designations are calculated using the ratio of area-wide Fair Market Rents (FMRs) to the area-wide LIHTC income-based rent limit (derived from the area median income); the 20% of metropolitan and nonmetropolitan areas with the highest ratios, as ranked nationally, are listed as DDAs.<sup>117</sup> HUD has considered changing the DDA process to use small-area FMRs rather than metropolitan-area-wide FMRs,<sup>118</sup> but stated that it will not implement this change until 2014.<sup>119</sup> The move to small-area FMRs is encouraging, because it would allow these “basis boosts” to be more

widely distributed among metropolitan areas and states, and would better balance distribution within metro areas to reach high-opportunity neighborhoods.



*For the first time, the Treasury Department has invited input on the agency's civil rights and fair housing obligations for the LIHTC program.*



*Nothing has happened yet. The Treasury Department has not issued draft Title VIII regulations or guidance, and it remains one of the only federal agencies that has not adopted regulations to implement Title VI of the Civil Rights Act of 1964. HUD has not yet incorporated AFFH requirements into its own LIHTC responsibilities, and has not yet released LIHTC project demographic data required by Congress in 2008.*

The use of small-area FMRs would be a considerable improvement in the designation process. In addition, however, clear fair housing standards should be applied to basis boost designations and allocations. HUD should work with Treasury to develop standards requiring housing finance agencies to award a significant portion of basis boosts to developments in high-opportunity or revitalizing neighborhoods, particularly with regard to new construction. HUD should also

urge Treasury to provide guidance to state housing finance agencies ensuring that their discretionary designation of “buildings in high cost areas” eligible for tax basis boosts will direct credits to high opportunity census tracts.<sup>120</sup>

117 See 76 Fed. Reg. 66744 (Oct. 27, 2011).

118 *Id.*

119 See 77 Fed. Reg. 59629 (Sept. 28, 2012).

120 26 U.S.C. § 42(d)(5)(B)(v).

## **12. Conclusion**

HUD's new regulatory efforts, while not without their problems and shortfalls, demonstrate an encouraging trend within the administration to focus on equality, inclusion and the statutory duty to Affirmatively Further Fair Housing. It can only be hoped that these programs are administered in a way which directly addresses HUD's mission to "create strong, sustainable, inclusive communities, and quality, affordable homes for all."<sup>121</sup> For more information on PRRAC's work on the issues raised in this program review, visit our website at [www.prrac.org/projects/civilrightshousing.php](http://www.prrac.org/projects/civilrightshousing.php).

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121 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2010-2015 HUD STRATEGIC PLAN 4 (May 2010), *available at* [http://portal.hud.gov/portal/page/portal/HUD/program\\_offices/cfo/stratplan/HUD%20Strategic%20Plan%20060810.pdf](http://portal.hud.gov/portal/page/portal/HUD/program_offices/cfo/stratplan/HUD%20Strategic%20Plan%20060810.pdf).

## Authorized budget amounts in key federal housing programs

PROGRAM	STAT CITE	CFR CITE	NOFA CITES	2011 BUDGET FINAL <sup>122</sup>	2012 BUDGET REQUEST <sup>123</sup>	2012 BUDGET FINAL <sup>124</sup>	2013 BUDGET REQUEST <sup>125</sup>
Fair Housing & Equal Opportunity	FHA, 42 USC §§ 3601-3619	24 CFR § 100	N/A	\$72M	\$72M	\$71M	\$68M
Fair Housing Initiatives Program	HCDA, 42 USC § 3616	24 CFR § 125	Docket No. FR-5600-N-08 <sup>126</sup>	\$42M <sup>127</sup>	\$42.5M	(within FHEO budget)	\$41M
Fair Housing Assistance Program	FHA, 42 USC § 3601	24 CFR § 115	N/A (non-competitive)	\$29M <sup>128</sup>	\$29.5M	(within FHEO budget)	\$25M
Sustainable Communities Regional Planning Grants	DHUDAA, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3084 (2009)		Docket No. FR-5500-N-30FA <sup>129</sup>	\$70M	\$100M	\$0	\$46M
Choice Neighborhoods Initiative	USHA, 42 USC § 1437v	24 CFR §§ 84-85	Docket No. 5600-N-10129 & Docket No. FR-5600-N-19130	\$65M	\$250M	\$120M	\$150M
Transforming Rental Assistance/ Rental Assistance Demonstration	CFCAA, 2012, Pub. L. No. 112-55 (2011)		Docket No. FR-5600-N-28131	\$0	\$200M	\$0	\$0

122 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2013 BUDGET (2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=CombBudget2013.pdf>.

123 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2012 BUDGET SUMMARY (Feb. 2011), *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=2012BudgetFinal\\_03\\_07\\_Web.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=2012BudgetFinal_03_07_Web.pdf).

124 U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FY 2013 BUDGET (2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=CombBudget2013.pdf>.

125 *Id.*

126 Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2012 Fair Housing Initiatives Program (FHIP) (Feb. 15, 2012), *available at* <http://archives.hud.gov/funding/2012/fhipnofa.pdf>.

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