

The National Housing Trust Fund and Fair Housing: A Set of Policy Recommendations

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Introduction

PRRAC has previously raised the need for stronger civil rights guardrails in National Housing Trust Fund,² but our concerns take on new urgency in 2021, as the program has recently more than doubled in size,³ and is projected to expand even further in future years.⁴ This policy brief assesses current federal and state guidelines for the Housing Trust Fund in several key areas of fair housing policy, including site selection rules, local approval requirements, affirmative marketing, tenant selection, and data transparency, along with specific policy recommendations in each area. For reference, a fifty-state survey of National Housing Trust Fund policies is included in an appendix.

I. Overview and History of the National Housing Trust Fund

The National Housing Trust Fund (NHTF) was established in 2008 as part of the Housing and Economic Recovery Act of 2008.⁵ NHTF aims to increase and preserve the national supply of rental housing for extremely low-income (ELI) renter households⁶ and very low-income renter

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2 *The National Housing Trust Fund: Promoting Fair Housing in State Allocation Plans* (PRRAC, May 2016), https://www.prrac.org/pdf/Promoting_Fair_Housing_in_HTF_State_Allocation_Plans.pdf.

3 https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_053.

4 <https://nlihc.org/resource/78-members-congress-send-dear-colleague-letter-biden-administration-support-housed>.

5 National Housing Trust Fund, 12 U.S.C. § 4568 (2008).

6 Defined as households with incomes that are 30% or less than the median income in the household's area. 12 U.S.C. § 4568(f) (2008).

(VLI) households,⁷ including the homeless. It also aims to increase homeownership among these groups.⁸

At the federal level, the program is administered by the Department of Housing and Urban Development (HUD). Implementation, however, occurs at the state and local level. HUD distributes NHTF funds to the states, in accordance with an allocation formula that weighs state need and construction cost.⁹ States are responsible for distributing the money to state and sub-state level implementors who use NHTF funds to advance affordable housing through the construction, rehabilitation and improvement of affordable housing units. States have significant discretion with regard to how they will allocate NHTF funds, although the federal statute and associated regulations impose certain restrictions.¹⁰ For example, states can only allocate a maximum of 10% of funds towards increasing homeownership, while there is no restriction placed on the percent of funds allocated towards rental activity. If a state receives less than \$1 billion in a given year, it must allocate all funds towards ELI households (as opposed to VLI households).¹¹

Between 2016-2019, the program distributed almost \$1 billion to the states. Before 2016, NHTF did not make distributions. This delay was due to NHTF's unique financing mechanism. Along with the Capital Magnet Fund, the NHTF is funded through assessments on Freddie Mac and Fannie Mae.¹² These assessments were paused during the 2008 financial crisis and did not resume until 2014.¹³ The annual amounts allocated since 2016 are summarized in the table at right.¹⁴

NHTF Annual Amounts Allocated (2016 – 2021)

Year	Total Allocated ¹⁵
2021	\$711M
2020	\$326.4M
2019	\$247.7M
2018	\$266.8M
2017	\$219.2M
2016	\$173.6M

7 Defined as households with incomes that are 30-50% or less than the median income the household's area. 12 U.S.C. §4568 (f).

8 *Id.* §4568 (a).

9 *Id.* §4568 (c).

10 Federal regulations are found in the interim rule issued in 2015, at 24 C.F.R. § 93 and 24 C.F.R. §91.

11 24 C.F.R. §93.250.

12 *Id.* §93.1. See also *The Housing Trust Fund: Background and Issues*, Congressional Research Service (2016).

13 *The Housing Trust Fund: Background and Issues*, Congressional Research Service 1 (2016).

14 *HTF Allocations*, National Low Income Housing Coalition, <https://nlihc.org/explore-issues/projects-campaigns/national-housing-trust-fund/allocations>.

15 Under the Budget Control Act, these allocated amounts are reduced slightly each year as part of a ten year budget sequestration rule (which expires in 2022), intended to keep overall federal spending below a set spending cap. For example, the amount actually available to states in 2021 will be \$689.6 million, not \$711 million.

Since allocations began, there have been no major changes in regulation or implementation at the federal level. The interim rule that HUD issued in 2015 continues to govern NHTF and there are no outstanding requests for public comment.¹⁶ Although the Trump administration proposed eliminating funding for NHTF in several budget requests, Congress continued to authorize NHTF allocations using the funds raised through the assessments on Fannie Mae and Freddie Mac.¹⁷ There were several legislative proposals in the 116th Congress to increase funding for NHTF, but these did not gain traction.¹⁸

For additional details on federal regulations governing the National Housing Trust Fund, see the attached appendix.

II. History of Segregation in Federal Housing Programs

Federal government housing programs have a long history of furthering and enabling racial and economic segregation. Indeed, as described by Richard Rothstein in *The Color of Law*, “[t]he purposeful use of public housing by federal and local governments to herd African Americans into urban ghettos had as big an influence as any in the creation of our *de jure* system of segregation.”¹⁹ Until the 1960s, federal housing laws explicitly allowed the use of federal funds to build segregated housing projects, a point explicitly re-affirmed in the 1949 Housing Act.²⁰ For example, the Techwood neighborhood in Atlanta, one of the first projects of the New Deal Public Works Administration (PWA), intensified segregation by evicting African American families from their homes. The new Techwood neighborhood, constructed with federal funds, was open only to white tenants.²¹

Similarly, the “redlining” of majority African American communities, which began with the Federal Housing Act of 1934, resulted in explicit discrimination against minority communities. Redlining arose from the practice of assigning neighborhoods risk-levels for mortgages or

16 Housing Trust Fund 24 C.F.R. § 93.

17 See Kriston Capps, *The Cruellest Cut in Trump’s Housing Budget*, City Lab (May 2, 2017), <https://www.citylab.com/equity/2017/05/the-cruellest-cut-in-trumps-housing-budget/527730/>; Donna Kimura, *What’s Eliminated in Trump’s 2020 Budget Plan*, Affordable Housing Finance (March 22, 2019), https://www.housingfinance.com/policy-legislation/whats-eliminated-in-trumps-2020-budget-plan_o.

18 See American Housing and Economic Mobility Act of 2019, S. 787, 116th Cong. (2019) (proposing \$44.5 billion in federal appropriations for NHTF); Pathway to Stable and Affordable Housing for All Act, S.2946, 116th Cong. (2020) (proposing \$40 billion in appropriations for NHTF) (both bills were introduced but did not pass).

19 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 17 (2017).

20 *Id.* at 31.

21 *Id.* at 21.

housing loans.²² Predominantly minority neighborhoods were “redlined” as high-risk, raising the costs of homeownership. This discrimination resulted in white borrowers receiving 98% of loans insured by the Federal Housing Administration between 1934 and 1962.²³ Redlining was particularly harmful to middle class African Americans, who faced significantly greater levels of difficulty in becoming homeowners than similarly situated white families.²⁴

Motivated by persistent segregation, the assassination of Martin Luther King Jr., and urban riots across the United States, the 1968 Fair Housing Act (FHA) banned explicit discrimination in the sale, rental and financing of housing. The FHA also required federal housing agencies to take *affirmative* steps to promote integration when implementing federal housing programs, known as the affirmatively furthering fair housing (AFFH) requirement.²⁵ Unfortunately, the AFFH provision was under-enforced and did little to actually promote housing integration. Indeed, between 1972 and 2012, there are only two instances of HUD withholding money based on a community’s failure to comply with the FHA. In a pointed indictment of the federal government’s AFFH failure, the 2008 bipartisan National Commission on Fair Housing and Equal Opportunity concluded:

The current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed. HUD only requires that communities receiving federal funds “certify” to their funding agency fair housing. HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing.²⁶

Patterns in the implementation of federal housing programs illustrate how these programs often actively contribute to housing segregation despite the FHA’s mandate. Housing Choice Vouchers, which create a portable housing benefit and theoretically should promote housing mobility, are often concentrated in poor, low opportunity areas.²⁷ Similarly, the deference of

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- 22 Alexis C. Madrigal, *The Racist Housing Policy that Made Your Neighborhood*. The Atlantic (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>.
- 23 Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.
- 24 Rothstein, *supra* note 19 at 64.
- 25 The Fair Housing Act, 42 U.S.C. § 3608 (1968).
- 26 *The Future of Fair Housing*, The National Commission on Fair Housing and Equal Opportunity 44 (December 2008), https://www.prrac.org/projects/fair_housing_commission/The_Future_of_Fair_Housing.pdf. In 2015, the Obama administration finally released a meaningful AFFH Rule (which was subsequently suspended by the Trump administration in 2018).
- 27 Alicia Mazzara and Brian Knudsen, *Where Families With Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas* (Center on Budget and Policy Priorities and PRRAC, January 2019), https://prrac.org/pdf/where_families_use_vouchers_2019.pdf.

the federal Community Development Block Grant (CDBG) and the Home Investment Partnership (HOME) programs to local preferences has often allowed for ongoing segregation through discriminatory zoning practices and allocation criteria.²⁸ In addition, in some states developments funded by the Low Income Housing Tax Credit (LIHTC) have been concentrated in predominantly minority neighborhoods.²⁹ Patterns of segregation in LIHTC site selection were at issue in the 2015 Supreme Court case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc (ICP)*. In Dallas, over 90 percent of LIHTC units were located in census tracts with less than 50 percent white residents, perpetuating patterns of racial segregation in the city.³⁰

The failure of federal policies to address economic and racial segregation is evident from the persistent levels of segregation in America's cities. Between 1993-2012, New York City received around \$4 billion in block grants from the federal government for housing programs; yet, in 2012, the city was so segregated that 80 percent of African Americans would need to move to create an integrated city.³¹ Patterns of racial segregation often overlap with patterns of economic segregation.³² Today, young African Americans are ten times more likely to live in poor neighborhoods as young white Americans.³³

By perpetuating neighborhood segregation, federal housing policies contribute to disparate outcomes in health, education and income. Geography determines residents' access to schools, jobs, infrastructure, transit, public safety, and a clean environment. When federal housing resources are concentrated in low income, under-resourced neighborhoods, low income families and children receive an unequal share of public goods. For example, a recent study showed that the four major federal housing programs systemically place children in lower performing schools.³⁴ Conversely, childhood exposure

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28 *The Future of Fair Housing, supra*.

29 See, e.g., Phuong Tseng, Heather Bromfield, Samir Gambhir, & Stephen Menendian, *Opportunity, Race, and Low Income Housing Tax Credit Projects* (Haas Institute for a Fair and Inclusive Society, University of California, Berkeley, 2017); See also Jill Khadduri, Larry Buron, and Carissa Climaco, *Are States Using the Low Income Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (PRRAC and the National Fair Housing Alliance, 2007); Kirk McClure, Anne Williamson, Hye-Sung Han, "The LIHTC Program, Racially/Ethnically Concentrated Areas of Poverty, and High Opportunity Neighborhoods," 6 *Texas A&M Journal of Property Law* 89 (December 2020).

30 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. ___, 3 (2015).

31 Hannah-Jones, *supra* note 23.

32 Jessica Trounstein, *Race and Class Segregation and Local Public Policy*. 70 *Tax Law Review* 513, 524 (2016-2017).

33 Rothstein, *supra* note 19 at 185.

34 Ingrid Gould Ellen and Keren Horn, *Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance* (PRRAC, July 2018), <https://www.prrac.org/pdf/HousingLocationSchools2018.pdf>; See also Jennifer Jellison Holme, Erica

to a high opportunity neighborhood can have long term positive outcomes. In Raj Chetty's well known 2016 study, low income children who moved from high to low poverty neighborhoods had objectively improved outcomes as young adults, including an increased likelihood of

Childhood exposure to a high opportunity neighborhood can have long term positive outcomes...including an increased likelihood of college attendance, greater relationship stability, and higher incomes.

college attendance, greater relationship stability, and higher incomes.³⁵ Similarly, the test score gap between high and low-income students is lower in integrated metro areas, suggesting that integration supports more equitable access to schooling.³⁶

Fair Housing and Public Health

This policy brief is released in the middle of a national reckoning with four centuries of racial injustice and oppression as well as the global COVID-19 pandemic. It is clear that the virus has disproportionately impacted low-income and minority neighborhoods, neighborhoods that exist in their current form in large part as a result of government-sponsored segregation.³⁷ Residents of segregated neighborhoods are disproportionately in service jobs that cannot be conducted remotely and often must work in jobs that risk exposing them to COVID-19 in order to pay daily costs. Public health officials have explained that the death rate of African Americans from COVID-19 will be disproportionately high because low access to health care and high levels of environmentally-driven pre-existing conditions. In mapping the impact of the diseases, public health officials have seen spikes of COVID-19 in the same neighborhoods that have known concentrations of other poor health outcomes, such as lead poisoning and infant mortality.³⁸ Indeed, as one public health official said, "COVID is unmasking the deep disinvestment in our communities, the historical injustice and the impact of residential segregation."³⁹

Segregated housing has a history of driving disparate health outcomes. The pathways are multiple, but key mechanisms include the following: (1) environmental quality and sanitation tend to be lower in segregated communities, increasing the likelihood of environmental toxic exposures through the air, ground and water, additionally rates of lead-poisoning and asthma

Frankenberg, Joanna Sanchez, Kendra Taylor, Sarah De La Garza, Michelle Kennedy, "Subsidized Housing and School Segregation: Examining the Relationship Between Federally Subsidized Affordable Housing and Racial and Economic Isolation in Schools," Education Policy Analysis Archives (November 2020).

- 35 R. Chetty, N. Hendren, and L. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AMERICAN ECONOMIC REVIEW 855-902 (2016) (research uses neighborhood poverty as a proxy for opportunity).
- 36 Jonathan Rothwell, *Housing Costs, Zoning and Access to High-Scoring Schools*, Brookings 12-13 (April 2012), <https://www.brookings.edu/research/housing-costs-zoning-and-access-to-high-scoring-schools/>.
- 37 Akilah Johnson and Talia Buford, *Early Data Shows African Americans Have Contracted and Died of Coronavirus at an Alarming Rate*, ProPublica (April 2020), <https://www.propublica.org/article/early-data-shows-african-americans-have-contracted-and-died-of-coronavirus-at-an-alarming-rate>.
- 38 *Id.*
- 39 *Id.*

tend to be higher; (2) safety tends to be lower in segregated areas, causing not only direct harm but deterring social interaction and physical activity; (3) segregated neighborhoods tend to have lower access to full-service supermarkets, reducing residents' access to nutritious food and increasing the likelihood of obesity; (4) proximity to high quality and affordable health care tends to be lower in segregated neighborhoods.⁴⁰ Thus, integrating communities and helping more low-income families of color obtain affordable housing in high opportunity neighborhoods is critical from a public health perspective.

III. Fair Housing and the NHTF

Given the ongoing complicity of federal housing programs in perpetuating community segregation and patterns of inequality, there is a significant risk that NHTF might also contribute to housing segregation. Like many other federal programs, NHTF contains statutory and regulatory provisions that incorporate fair housing principles. The federal rules governing the NHTF require that funded programs comply with Title VI of the Civil Rights Act of 1964, the Fair Housing Act, and promote "greater choice of housing opportunities."⁴¹ Additionally, separate regulations require that all HUD programs affirmatively further fair housing.⁴² Yet, as the above history of federal housing programs suggests, these general mandates are often ineffective at ensuring that federal housing programs actually contribute to fair housing goals.

This section conducts a detailed examination of six dimensions of the National Housing Trust Fund: (1) Site Selection in High Opportunity Areas; (2) Local Approval and Opposition; (3) Affirmative Marketing; (4) Tenant Selection; (5) Deciding Between Construction, Rehabilitation, and Acquisition; (6) State Monitoring and Reporting. For each of these six issues, we describe their connection to fair housing/ civil rights, including insights from other federal housing programs; relevant existing laws, regulations, and policies at the federal and state level (based on research conducted in spring of 2020); and priority areas for future policy change.

While state initiatives are important, it is essential that NHTF shortcomings with regard to fair housing be addressed at the federal level. As our analysis demonstrates, there is significant room for additional fair housing protections at the federal level, while still giving states flexibility in tailoring the program for state-specific contexts. When possible and practical, federal fair

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40 See Robert Hahn, *Racial and Ethnic Residential Segregation as a Root Social Determinant of Public Health and Health Inequity: A Persistent Public Health Challenge in the United States*, Poverty & Race Research Action Council (June 2017), <https://prrac.org/racial-and-ethnic-residential-segregation-as-a-root-social-determinant-of-public-health-and-health-inequity-a-persistent-public-health-challenge-in-the-united-states-2/>; Brian Smedley and Philip Tegeler, *Affirmatively Furthering Fair Housing: A Platform for Public Health Advocates*, 106 Am. J. Public Health (June 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4880225/>.

41 24 C.F.R. § 93.150(a).

42 24 C.F.R. Subpart A §§ 5.150 - 5.167-5.180.

housing protections are preferable, as they do not depend on implementation by 50 different state actors and can be more permanent. However, in the absence of federal regulations, state policy can fill an important gap. For example, many states award NHTF funds through a competitive process using a points system. State agencies implementing these systems could incorporate the recommended fair housing principles into their selection criteria. Other fair housing recommendations could be addressed by state legislatures, making them mandatory in NHTF program administration.

1. Site Selection in High Opportunity Areas

A. Site Selection and Fair Housing

Site selection policies can have significant fair housing implications. If housing created or preserved by the NHTF is concentrated in low-income or racially-concentrated areas, it can

Site selection criteria should explicitly prioritize the creation of affordable housing in high opportunity areas.

perpetuate the segregation of low-income or minority communities. Because racial and socioeconomic segregation is often associated with fewer resources and lower opportunities, new affordable housing projects should be located in racially and socioeconomically diverse neighborhoods, those providing more resources.

As a result, site selection criteria should explicitly prioritize the creation of affordable housing in high opportunity areas (from which it has historically been excluded). High opportunity areas contain high-performing schools, health care, public amenities, transportation, jobs and low crime rates, crucial ingredients for thriving families.⁴³ By way of analogy, research on state-level preferences for high opportunity neighborhoods in the LIHTC program suggests that explicit guidelines can be successful in creating affordable housing in areas of high opportunity. A 2015 study demonstrated that states that incorporated siting standards that encouraged the location of LIHTC credits in high opportunity neighborhoods were successful in shifting more affordable housing to these neighborhoods.⁴⁴ The types of criteria that advanced this goal included explicit preference for sites in “high opportunity areas,” access to amenities, and the presence of meaningful community revitalization plans if the project were to be located in lower opportunity neighborhoods.⁴⁵

43 See R. Chetty *supra* 855-902 and Elizabeth Julian, *Making the Case for Housing Mobility: the CMTO Study in Seattle*, Poverty & Race Research Action Council (Sep. 6, 2019), <https://prrac.org/making-the-case-for-housing-mobility-the-cmto-study-in-seattle-by-elizabeth-julian-may-august-2019-pr-issue/>; *Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD’s Site & Neighborhood Standard as Applied to the Low Income Housing Tax Credit* (PRRAC, Kirwan Institute & Opportunity Agenda, October 2011).

44 Ingrid Ellen, Keren Horn, Yiwen Kuai, Roman Pazuniak, and Michael Williams, *Effect of QAP Incentives on the Location of LIHTC Properties*, U.S. Department of Housing and Urban Development Office of Policy Development and Research 14-16 (April 2015), https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf.

45 *Id.* at 7-11. See also Sarah Oppenheimer et al, *Building Opportunity II: Civil Rights Best Practices in the LIHTC Program* (PRRAC, July 2015), <https://www.prrac.org/pdf/BuildingOpportunityII.pdf>.

Targeting high opportunity neighborhoods does not mean that resources should not be directed towards disinvested, low-opportunity neighborhoods. However, in order to make a genuinely positive impact on neighborhood opportunity, these resources should be coordinated with other resources as part of a realistic neighborhood revitalization plan. For example, LIHTC treasury regulations give preference to projects in low-income qualified census tracts *only if* they are accompanied by a concerted community revitalization plan (CCRP).⁴⁶ Unfortunately, there have been significant shortcomings in the implementation of this requirement, with few states adopting a robust definition of CCRPs.⁴⁷

As described in a 2017 PRRAC brief, CCRPs should include identified development partners, a clear geography for revitalization, housing and non-housing developments, and meaningful/achievable goals.⁴⁸ Additionally, CCRPs should include safeguards against displacing existing residents and the preservation of affordable housing that serves existing community members.⁴⁹

B. Federal NHTF Site Selection Criteria

The federal regulations for the HTF program do not provide sufficiently precise guidelines for site selection, giving significant discretion to states. On a positive note, the NHTF regulation does encourage site selection outside of segregated neighborhoods. Specifically, the regulation attempts to limit the construction of new rental housing units in areas of concentrated minority population, following the standard established in HUD's project-based voucher (PBV) program.⁵⁰ This regulation reads:

(2) The site must not be located in an area of minority concentration, except as permitted under paragraph (e)(3) of this section, and must not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.⁵¹

Federal regulations governing the PBV program (and NHTF by extension) define an area of minority concentration as:

46 Low-Income Housing Credit 26 U.S.C. § 42(m)(1)(B)(ii)(III); *IRS Notice 2016-77*, <https://www.irs.gov/pub/irs-drop/n-16-77.pdf>

47 *See Fair housing comments on Treasury Department Notice 2016-77, regarding the "Concerted Community Revitalization Plan" requirement* (PRRAC and coalition partners, February 2017), https://prrac.org/pdf/Fair_housing_comments_on_LIHTC_CCRP_Notice_Feb_10_2017.pdf

48 *Assessment Criteria For "Concerted Community Revitalization Plans": A Recommended Framework* (PRRAC, March 2017), https://prrac.org/pdf/PRRAC_CCRP_recommendations_3_14_17.pdf

49 *Id.*

50 24 C.F.R. § 93.150(b) (requiring that new rental construction projects comply with the site selection requirements of Project-Based Voucher (PBV) Program 24 CFR § 983.57(e)(2)).

51 24 CFR § 983.57(e)(2).

7(i) the percentage of persons of a particular racial or ethnic minority within the area of the site is at least 20 percentage points higher than the percentage of that minority group in the housing market area as a whole or (ii) the total percentage of minority persons within the area of the site is at least 20 points higher than the total percentage of minorities in the housing market area.⁵²

The exceptions described in (e)(3) include:

- (i) Sufficient, comparable opportunities exist for housing for minority families in the income range to be served by the proposed project outside areas of minority concentration (see paragraph (e)(3)(iii), (iv), and (v) of this section for further guidance on this criterion); or
- (ii) The project is necessary to meet overriding housing needs that cannot be met in that housing market area (see paragraph (e) (3)(vi) of this section for further guidance on this criterion).

[(iii-vi) provide definitions and clarifications of the above two provisions]

In other words, NHTF funds cannot be used to build new rental units in areas of minority concentration unless either (a) sufficient housing opportunities, at similar levels of affordability, exist for minority families outside of the minority-concentrated neighborhood, i.e., there is a range of sources of affordable housing for minority families in diverse neighborhoods; or (b) the proposed-NHTF project is necessary for meeting an “overriding housing need” that cannot be met by a

Unfortunately, there is little empirical evidence on the impact of the “minority concentration” provisions on the location of PBV projects, making it difficult to predict what impact this provision will have on NHTF site selection.

project outside of the proposed site, e.g., the NHTF project is part of a neighborhood revitalization strategy in that area. This requirement should further fair housing goals by directing new housing construction outside of areas of minority concentration, which can often overlap with higher poverty/low opportunity areas, although the exceptions to the rule are quite broad. Unfortunately, there is little empirical evidence on the impact of the “minority concentration” provisions on the location of PBV projects, making it difficult to predict what impact this provision will have on NHTF site selection.

Importantly, the current federal regulation does not go so far as to impose any requirement or even encouragement for NHTF project sites to be located in neighborhoods of high opportunity or require the presence of CCRPs for construction in low-income neighborhoods.

52 U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Office of Housing, Notice H 2016-17, 25, (Nov. 10, 2016), https://www.hud.gov/sites/documents/16-17HSGN_16-17PIHN.PDF (in addition to defining areas of minority concentration, the regulation defines “area of the site” and “housing market area.”).

C. State NHTF Site Selection Criteria

There is a wide variety of criteria that states use for determining site selection. Some states achieve geographic diversity by allocating funds by regions, others by distributing funds to urban and rural communities, and others further this goal by prioritizing high opportunity areas.

Several states, including Massachusetts, New Jersey, Georgia, Connecticut, Texas and Delaware, prioritize high opportunity areas when evaluating projects for NHTF funds eligibility. For example, Massachusetts encourages the creation of units for ELI individuals and families in areas of opportunity, which it defines as “a neighborhood or community with a relatively low concentration of poverty” or a “neighborhood or community that offers access to jobs, health care, high performing school systems, higher education, retail and commercial enterprise, and public amenities.”⁵³ Similarly, New Jersey prioritizes high opportunity areas which are characterized by “low municipal poverty level, accessible public transportation within one mile, and low municipal labor force unemployment rate.”⁵⁴

Georgia tackles geographic diversity by awarding points to properties not in food deserts, defined as being more than 1 mile from a grocery store with meat, dairy and produce in an urban area and more than 10 miles in rural areas.⁵⁵ Georgia also awards points to properties near a traditional town square that is hub of commercial and community events or properties near community or recreational centers relevant to tenant populations. Minnesota considers each project’s proximity to certain community features that are priorities for Minnesota Housing, such as economic integration areas, workforce housing communities, rural and tribal areas, location efficiency (transit), access to higher performing schools, and community revitalization areas.⁵⁶

Connecticut gives preference to projects in higher opportunity areas as demonstrated through its official Opportunity Map,⁵⁷ while Texas awards NHTF applicants points based on an Opportunity Index that also rewards projects located in high opportunity areas.⁵⁸ Delaware encourages new development and preservation of affordable housing, especially affordable rental housing, in areas of opportunity, while targeting community development investments,

53 Massachusetts DRAFT 2019 Annual Action Plan, page 58 (2019).

54 New Jersey 2019 Annual Action Plan, page 47 (2019).

55 2017 State Of Georgia National Housing Trust Fund Allocation Plan, page 20 (2017).

56 Minnesota’s National Housing Trust Fund Allocation Plan, page 6. (2017).

57 State of Connecticut DRAFT 2019-2020 Action Plan for Housing and Community Development, page 16 (2019).

58 National Housing Trust Fund State of Texas 2017 Allocation Plan, page 62 (2017).

particularly sustainable homeownership, in areas of concentration of low-income and/or minority households.⁵⁹

In a different vein, Washington D.C. encourages non-housing investments in poor neighborhoods to increase the opportunities they provide to residents. In the D.C. 2017-21 Consolidated Plan, the D.C. Department of Housing and Community Development includes a commitment to “nonhousing investments that increase the desirability of distressed neighborhoods through increasing community amenities, public investments, and economic opportunities.”⁶⁰ Recognizing that such improvements might increase housing costs, D.C. also includes provisions aimed at maintaining affordability through programs that allow tenants to purchase in those communities.⁶¹

Some states seek to make sure allocated funds are not concentrated in particular geographic areas. Some of these approaches include distributing funds to rural and urban communities, or by region. For example, Pennsylvania allocates 50% of NHTF resources to urban communities and 50% to suburban/rural communities.⁶² Similarly, California sets aside at least 20% of NHTF funds for projects located in rural areas.⁶³ Alabama uses NHTF funds to expand the overall rental housing supply located throughout the state in metropolitan and/or rural areas (or non-metropolitan areas),⁶⁴ while Alaska emphasizes funding for rural community needs, especially as they relate to low-and moderate-income (LMI) populations.⁶⁵ In Florida, program funding is proportionally distributed across Large, Medium and Small counties and within these groupings, they regularly use a “county award tally” to ensure that funding is further distributed across as many counties as possible.⁶⁶ Tennessee similarly breaks the state into three geographic divisions, East, Center and West, and awards funds to the highest scoring project in each geographic division.⁶⁷ New York distributes funds considering whether the project serves an area not awarded HTF funds before.⁶⁸

59 Delaware Draft 2019 Annual Action Plan, page 29 (2019).

60 Washington D.C. Consolidated Plan (2017-21), page 161, <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/FY2017-2021%20DHCD%20final%20Consolidated%20Plan.pdf>.

61 *Id.*

62 Pennsylvania 2018 Annual Action Plan, page 9 of Appendix F (2018).

63 California Draft 2019-20 Annual Action Plan, page 107 (2019).

64 Alabama Final 2020 AHFA HTF Allocation, page 3 (2020).

65 Alaska Final Annual Action Plan SFY 2020, page 39 (2020).

66 2017 National Housing Trust Fund Allocation Plan for Florida, page 8 (2017), <https://floridahousing.org/docs/default-source/programs/developers-multifamily-programs/competitive/final-proposed-2017-florida-nhtf-plan-document.pdf?sfvrsn=2>.

67 State of Tennessee fiscal Year 2019-20 Annual Action Plan for Housing And Community Development Programs, page 65 (2019).

68 New York Draft 2019 Annual Action Plan, page 82 (2019).

Besides allocating a portion of the funds to rural areas, California also gives points to projects based on “Need,” which includes consideration of the number of individuals experiencing homelessness in the geographic jurisdiction.⁶⁹ This approach may be ineffective in furthering fair housing as it could perpetuate segregation of low income communities. Other states such as Arizona⁷⁰ and Colorado⁷¹ prioritize projects that affirmatively further fair housing, but they do not provide specific guidelines on how to achieve this goal.

D. Recommendations for Policy Change

Policymakers should consider developing stronger, more specific site selection criteria that encourage the following: (1) racial and economic diversity in NHTF sites, while specifically avoiding areas of high poverty and racial segregation; (2) site location in areas of high opportunity, as measured by proximity to high-performing schools, overall neighborhood safety, and the presence of beneficial neighborhood assets like grocery stores or community centers, and accessible transit networks; and (3) a requirement for a meaningful CCRP if sites are located in lower-income neighborhoods. The NHTF regulation has made an important first step by limiting new rental construction in areas of “minority concentration,” and similar guardrails should be put in place for other site selection criteria. At the federal level, these criteria could be explicitly included in the project selection guidelines under 24 CFR §91.220.

In the absence of federal action, advocacy should focus on achieving stronger fair housing siting guidelines at the state level. Although several states, as discussed above, are prioritizing the distribution of NHTF to funds to projects in areas of high opportunity, most states have failed to incorporate fair housing principles into NHTF site selection criteria. States should uniformly prioritize areas of high opportunity for NHTF grants. Criteria based strictly on geography are insufficient.

***States should uniformly
prioritize areas of
high opportunity for
NHTF grants.***

To complement federal siting standards, other implementation details can be left to state’s discretion. For example, allowing states to define the methodology for identifying high opportunity areas would allow states to develop a definition that reflects the demographic, geographical, and economic situation of the state. Connecticut has developed one such approach, with a robust mapping of opportunity areas in the state in partnership with several community organizations.⁷²

69 California Draft, *supra* note 64.

70 Arizona 2018-2019 National Housing Trust Fund Annual Allocation Plan, page 2 (2018).

71 Colorado Draft Annual Action Plan 2019-2020, page 102 (2019).

72 *Introduction to Opportunity Mapping*, Open Communities Alliance, https://www.ctoca.org/introduction_to_opportunity_mapping.

Allowing states to define the methodology for identifying high opportunity areas would allow states to develop a definition that reflects the demographic, geographical, and economic situation of the state.

2. Local Approval and Opposition

A. Local Approval and Fair Housing

A requirement that local communities approve NHTF housing units prior to construction or rehabilitation can have a negative impact on fair housing objectives. As evidenced by other federal housing programs, such as LIHTC, affluent or high opportunity neighborhoods are more likely than lower opportunity neighborhoods to organize to block the construction of affordable housing.⁷³ Given the difficulty of obtaining local approval in more affluent areas, local approval criteria

can result in affordable housing units being concentrated in less affluent, and typically lower opportunity, neighborhoods.

B. Federal NHTF Provisions on Local Approval

The federal NHTF statute contains no prohibition on local or neighborhood approval or notification requirements. Prohibiting local approval requirements can facilitate fair housing goals by lowering the barriers to locating NHTF projects in high opportunity areas.

Unfortunately, without federal regulation, states may feel empowered to require or incent local approval as part of the state-level project selection criteria. By way of example, the federal LIHTC regulations do not yet prohibit local approval even though 2016 guidance issued by the Treasury Department clarified that states should not interpret LIHTC's local "notification and review" criteria as requiring or encouraging a local veto on proposed LIHTC projects,⁷⁴ and the Department explicitly cited fair housing principles in issuing this ruling.⁷⁵ Despite this requirement, many states continue to give localities a veto over proposed LIHTC projects.⁷⁶ States with stronger local approval requirements have a greater percentage of LIHTC units located in high poverty areas.⁷⁷ Advocates have called on the federal government to add a statutory prohibition on local vetoes to LIHTC developments to prevent state-level community approval requirements.⁷⁸

73 Ingrid Ellen, *supra* note 44 at 9-10.

74 I.R.S. Rev. Rul. 2016-29, 4-6, <https://www.irs.gov/pub/irs-drop/rr-16-29.pdf>.

75 *Id.* (Finding that local jurisdiction having "reasonable opportunity to comment" as laid out in Section 42(m)(1)(A)(ii) was misinterpreted by the allocating agency because its QAP provisions favored projects able to show affirmative local support and rejected those which lacked it and since approval was more likely in high minority communities it furthered residential segregation making it inconsistent with the Fair Housing Act).

76 Will Fischer, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*, Center on Budget and Policy Priorities (Aug. 28, 2018), <https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor-families>.

77 Ingrid Ellen, *supra* note 44 at 15-16.

78 Will Fischer, *supra* note 76.

C. State NHTF Provisions on Local Approval

States approach local approval criteria in various ways. Some states including Alabama, California, Colorado, Connecticut, Delaware, Kentucky, Louisiana, Massachusetts, North Carolina do not include any discussion of local approval in their state Allocation Plans, while others explicitly say the eligible project cannot require local approval to proceed.

Unfortunately, other states include some form of local approval criteria in which they encourage and often require applicants to provide proof of local support for the eligible project. For example, Alaska requires applicants for NHTF funding to show evidence demonstrating the need for the subject development in the geographic area in which it is proposed, which includes evidence of community support for the project as evidenced by at least two written letters of support from the local government, community council(s), and non-profit organizations located in the project area whose clients will likely benefit from the project.⁷⁹ In Arkansas, qualified applicants must provide a letter of support from the chief elected official or a majority of the members of the elected governing body of the jurisdiction where the affordable housing is to be located.⁸⁰ Similarly, Washington awards points to projects that show evidence of local priority and support from the jurisdiction in which the project is located.⁸¹ For instance, a project gets points if a letter of support from the local public body (i.e., city or county) with jurisdiction over the project's location is provided with the application and if the applicant demonstrates the project meets a currently defined local priority (e.g., consistent with the comprehensive plan, local resolution, ordinance, etc.). Colorado includes "confirmed local political support and expected planning and zoning approval within 90 days of State Housing Board approval" as two of the minimum application threshold criteria for project readiness to proceed.⁸²

Other states require local approval for the purposes of zoning only. For example, in Arizona, applicants must provide a letter from the unit of local government indicating whether the property is appropriately zoned for the intended use.⁸³ Similar, Georgia requires applicants to show evidence that the appropriate zoning is in place at the time of application submittal.⁸⁴ The letter from the authorized local government official must be included in the application and it must confirm that the development site conforms to the site development plan. Texas also requires applicants for funds to submit proof of zoning compliance in the form of a letter from appropriate government official.⁸⁵ Similarly, in Michigan, applicants are required to

79 Alaska Notice of Funding Availability The SFY 2020 Greater Opportunities For Affordable Living (GOAL) Program, page 10 (2019).

80 Arkansas National Housing Trust Fund Program, page 7 (2019).

81 Washington State 2017 National Housing Trust Fund Allocation Plan, page 13 (2017).

82 Colorado Draft Annual Action Plan 2019-2020, page 156 (2019).

83 Arizona 2018-2019 National Housing Trust Fund Annual Allocation Plan, page 9 (2018).

84 2017 State of Georgia National Housing Trust Fund Allocation Plan, page 15 (2017).

85 National Housing Trust Fund State of Texas 2017 Allocation Plan, page 53 (2017).

provide documentation from the appropriate local official on official letterhead identifying the address of the project, the property's current zoning designation and an explanation of whether or not the project is permitted under the zoning ordinance.⁸⁶

While, as mentioned above, requiring or encouraging local approval is generally detrimental to fair housing principles, at least one state uses the local approval process as a way to promote fair housing in the projects they select. For example, Virginia requires local government review of the site and neighborhood standards, but it does so to ensure the assisted projects are “located where possible in areas that decrease the overall concentration of poverty and minorities.”⁸⁷ The developer must demonstrate that the project is located on adequate and accessible sites with access to services and facilities, that they comply with fair housing laws, among other requirements.

D. Recommendations for Policy Change

Federal regulations do not mandate local approval or notification, and local approval or notification requirements are also relatively rare at the state level. Nonetheless, the existence of

The existence of local approval requirements in... states is a barrier to fair housing goals, as it empowers affluent communities to block affordable housing developments in high opportunity areas.

local approval requirements in these states is a barrier to fair housing goals, as it empowers affluent communities to block affordable housing developments in high opportunity areas. Ideally, federal regulations would explicitly block local approval rather than being silent on the issue.

States should also include flexibility for applicants facing community opposition. For example, stringent zoning regulations are often used as a pretext for blocking affordable housing in affluent housing, yet most states explicitly require applicants for NHTF funds demonstrate

compliance with local zoning regulations. Fair housing goals would be better advanced if state NHTF regulations allowed for flexibility in meeting local zoning requirements. Rather than requiring strict adherence to local zoning laws, states could accept a project that seeks variances or exceptions to local zoning regulations or one that reasonably pursued zoning approval but has been unsuccessful due to community opposition to affordable, low-income housing. In these latter cases, the state should help the applicant obtain the necessary approvals, or grant extensions on HTF funding while the applicant appeals a restrictive zoning ruling.

86 Addendum V Application Exhibit Checklist For Multi-Family Housing-Housing Trust Fund Gap Financing Program, page 5 (2019).

87 Virginia Affordable and Special Needs Housing – Consolidated Application Program Guidelines 2017-18, page 13 (2017).

3. Affirmative Marketing

A. Affirmative Marketing and Fair Housing

In the context of fair housing, affirmative marketing is a policy of intentionally designing advertising, marketing and tenant outreach activities to reach tenants from traditionally underserved communities.⁸⁸ One way to understand affirmative marketing strategies is that they “level the information playing field” about access to affordable housing.⁸⁹ Another framework views affirmative marketing as a necessary “nudge,” which encourages marginalized groups to seek-out housing in areas that they may have believed to be out-of-reach.⁹⁰ Empirical studies have found that affirmative marketing strategies are a significant contributor in creating mixed-income and mixed-race neighborhoods.⁹¹ Importantly, successful affirmative marketing strategies often require innovative thinking. Traditional advertising methods, such as “for rent” signs and newspaper ads are typically insufficient to attract low-income tenants.⁹²

B. Federal NHTF Provisions on Affirmative Marketing

NHTF regulations explicitly require owners of NHTF-financed projects to adopt affirmative marketing strategies.⁹³ In the NHTF regulation, affirmative marketing is defined as “actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability.”⁹⁴ The regulation states that affirmative marketing procedures must include the following:

- (i) Methods for informing the public, owners, and potential tenants about Federal fair housing laws and the grantee's affirmative marketing policy (e.g., the use of the Equal Housing Opportunity logotype or slogan in press releases and solicitations for owners, and written communication to fair housing and other groups);
- (ii) Requirements and practices the grantee and owner must adhere to in order to carry out the grantee's affirmative marketing procedures and requirements (e.g., use of

88 Megan Haberle, Ebony Gayles, and Philip Tegeler, *Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs*, Poverty & Race Research Action Council 9-13 (Dec. 2012), <https://www.prrac.org/pdf/affirmativemarketing.pdf>.

89 Mark W. Zimmerman, *Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, 41 DEPAUL L. REV. 1271, 1316 (1992).

90 Haberle, *supra* note 88 at 10-11.

91 *Id.* See also Diane L. Houk, Erica Blake, and Fred Freiberg, *Increasing Access to Low-Poverty Areas by Creating Mixed-Income Housing*, Fair Housing Justice Center (June 2007).

92 Haberle, *supra* note 88 at 12-13.

93 24 C.F.R. §93.350.

94 *Id.*

- commercial media, use of community contacts, use of the Equal Housing Opportunity logotype or slogan, and display of fair housing poster);
- (iii) Procedures to be used by the grantee and owners to inform and solicit applications from persons in the housing market area who are not likely to apply for the rental housing or homeownership assistance program without special outreach (e.g., through the use of community organizations, places of worship, employment centers, fair housing groups, or housing counseling agencies);
 - (iv) Records that will be kept describing actions taken by the grantee and owners to affirmatively market rental housing units and homeownership assistance program and records to assess the results of these actions; and
 - (v) A description of how the grantee will annually assess the success of affirmative marketing actions and what corrective actions will be taken where affirmative marketing requirements are not met.⁹⁵

Additionally, NHTF is regulated by HUD's affirmative marketing guidelines for HUD-administered programs.⁹⁶ These regulations apply to NHTF-financed developments with five or more units. HUD's affirmative marketing regulations are extensive, and a 2012 PRRAC Policy Brief contains fuller analysis of them.⁹⁷

C. State NHTF Provisions on Affirmative Marketing

States provide additional affirmative marketing guidance beyond the federal regulations to NHTF projects in two ways. First, some states include affirmative marketing specification in their NHTF allocation plans, either as a project requirement or as a selection criteria, as occurs in the allocation plans of Florida, Missouri, Georgia, and Texas. For example, Florida requires grantees to work with a Special Needs Household Referral Agency that will refer eligible homeless, at-risk homeless or special needs households for residency in the NHTF-financed units.⁹⁸ Missouri requires family developments proposed in opportunity areas to include an affirmative marketing plan that proactively reaches out to families currently living in census tracts where the poverty rate exceeds 40 percent.⁹⁹

The second, and more common, way that states address affirmative marketing is through non-NHTF-specific affirmative marketing policies that apply to housing programs administered by the state, including NHTF. For example, Connecticut has a statewide affirmative marketing

95 *Id.*

96 Affirmative Fair Housing Marketing Regulations 24 C.F.R. §200.600 (1972) and Compliance Procedures for Affirmative Fair Housing Marketing 24 C.F.R. §108 (1979). (Under 24 C.F.R. § 200.615, HUD's affirmative marketing guidelines apply to "applicants for participation in FHA subsidized and unsubsidized housing programs" for multifamily projects of five or more units.)

97 Haberle, *supra* note 88.

98 Florida Allocation Plan, *supra* note 67.

99 Missouri 2019 National Housing Trust Fund Allocation Plan, 19 (2019).

plan.¹⁰⁰ The plan provides a precise definition of “least likely to apply” as those who do not live in the development area because of “racial or ethnic patterns, perceived community attitudes, price or other factors and need additional outreach to inform them of their opportunity to live in the development.”¹⁰¹ It also requires reporting on fair housing marketing efforts at least three times prior to occupancy and annually thereafter. If Connecticut deems a developer’s affirmative marketing strategies to be inadequate, it can require additional outreach, potentially causing a delay in occupancy.¹⁰²

Similarly, New Jersey has independent regulations on affirmative marketing that apply to NHTF, among other programs.¹⁰³ The New Jersey regulations include a definition of “least likely to apply,” which takes a regional approach, not limiting potential tenants to those in the immediately surrounding neighborhoods.¹⁰⁴ This is designed to attract people from all majority and minority groups that are potentially eligible and in addition requires three broadcasting methods, newspaper, radio and one medium selected by the developer like flyers or advertising with community groups serving low-income populations.¹⁰⁵

Washington D.C. requires community-based partners, including NHTF grantees, to participate in affirmative marketing training at least once per year.¹⁰⁶ The training is intended to educate grantees on discriminatory practices and to build capacities that lead to more equitable service delivery.

Other states with affirmative marketing policies for state-administered housing programs include, but are not limited to, Indiana, Massachusetts, Michigan, Minnesota, and New York.

D. Recommendations for Policy Change

At the federal level, NHTF-specific regulations and HUD affirmative marketing guidelines provide a solid basis for successful affirmative marketing strategies. It is also encouraging that many states have adopted their own affirmative marketing policies to govern state housing programs. However, greater specificity is needed to ensure that affirmative marketing strategies reach those most in need of affordable housing, who are often the most difficult to reach through traditional marketing strategies. Policymakers should consider modifying federal

100 *Affirmative Furthering Fair Housing: A Guide for Housing Providers*, Connecticut Fair Housing Center (2013) <https://www.ctfairhousing.org/wp-content/uploads/CFHC-AffirmFurthGuideProviders.pdf>.

101 *Id.* at 24.

102 *Id.* at 11-12.

103 Uniform Housing Affordability Controls N.J.A.C. 5:80-26.1 et seq. (2004), https://www.state.nj.us/dca/divisions/lps/hss/admin_files/uhac/uhac.pdf.

104 *Id.* at 19.

105 *Id.* at 20-21.

106 Washington D.C. Consolidated Plan *supra* note 61 at 211.

and state affirmative marketing regulations to reflect research on the most effective affirmative marketing strategies for reaching historically marginalized groups.

Policymakers should consider modifying federal and state affirmative marketing regulations to reflect research on the most effective affirmative marketing strategies for reaching historically marginalized groups.

First, the federal regulation should mandate certain affirmative marketing practices that positively contribute to diversity across multiple contexts. These include mandating that marketing be open for an extended period of time (e.g., six months) before a lease is signed; giving developers sufficient time to identify applicants in the “least likely to apply” category; and requiring that all affordable units be placed on a central website, giving prospective tenants a one-stop-shop for identifying affordable housing units.¹⁰⁷ Some states, such as Massachusetts, already include these requirements, and these

practices should be explicitly incorporated in federal affirmative marketing requirements.

Second, greater specificity should be provided in defining those tenants “least likely to apply,” and how to conduct targeted outreach. The absence of a definition of “least likely to apply” at the federal level gives states too much flexibility. For example, if an analysis of those who are least likely to who apply is limited to the immediate neighborhood of the project, it will fail to target the true “least likely to apply” who likely live in segregated neighborhoods. Building on this, marketing of fair housing opportunities should be conducted regionally, rather than locally, to ensure that it reaches families living in segregated areas.

Finally, affirmative marketing strategies must include community engagement provisions. Community-driven engagement is a demonstrated mechanism of increasing the applicant pool.¹⁰⁸ These practices would include: (1) addressing residents’ concerns through specific information; (2) sponsored community visits to discuss the housing program; (3) the engagement of local groups; (4) recruiting applicants from public housing authority waitlists; and (5) coordination among developers in the same area so that they jointly reach out to those “least likely to apply,” giving potential tenants a streamlined source of information about affordable housing.¹⁰⁹ States could require that developers provide evidence of pursuing each of these four community engagement strategies as a program requirement.

4. Tenant Selection

A. Tenant Selection and Fair Housing

Tenant selection is closely related to affirmative marketing. Tenant selection procedures can inadvertently reinforce patterns of segregation and discrimination. For example, screening

107 Haberle, *supra* note 88 at 20-21.

108 *Id.* at 25-27.

109 *Id.* at 25-27.

mechanisms, such as reliance on FICO scores and criminal background scores, can have a disparate impact on traditionally disadvantaged groups, resulting in affordable housing not going to those most in-need.¹¹⁰ Similarly, local residency preferences too often reinforce patterns of racial segregation since many neighborhoods are racially homogenous.¹¹¹ Tenant selection policies should be designed to include those most in-need of affordable housing, and practices known to disadvantage certain racial or socioeconomic groups should be prohibited.

B. Federal NHTF Provisions on Tenant Selection

The NHTF regulation contains specific prescriptions for tenant selection for rental housing, although no analogous requirements are provided for homebuyers. First, landlords must comply with the affirmative marketing requirements of the grantee (i.e., the state/ state implementing agency). Second, the landlord must adopt and follow written tenant selection criteria under §93.303 (d) that include the following:

- (1) Limiting housing to income-eligible families
- (2) Selection criteria reasonably related to the tenant's ability to perform the obligations of the lease (i.e., to pay the rent, not to damage the housing; not to interfere with the rights and quiet enjoyment of other tenants)
- (3) Limit eligibility or give preference to a particular segment of the population *only if* this is done with written agreement of the grantee. This might include preferences for individuals with disabilities, the homeless, veterans, etc. (There are several limitations to this allowance, listed in §93.303 (d) (3)(i)-(ii))
- (4) Cannot exclude tenants on the basis of holding Section 8 vouchers (under 24 CFR §982) or being HOME rental assistance participants (under 24 CFR§92).
- (5) Provide for the selection of tenants from a written waiting list in chronological order, insofar as this is possible
- (6) Give prompt written notification to any rejected applicant of the grounds for rejection
- (7) Comply with the Violence Against Women Act (VAWA), as detailed in §93.356.

Once again, the NHTF requirements are a good first step towards fair tenant selection procedures, but lessons from other federal housing programs suggest that stronger guardrails are needed to ensure that selection procedures do not result in discriminatory patterns of tenant selection.

110 *Id.* at 10.

111 Houk, *supra* note 91.

First, while it is fair to allow landlords to assess a tenant's ability to fulfill lease obligations, the regulation gives too much flexibility for landlords to adopt screening mechanisms that have a demonstrated discriminatory effect. As noted above, FICO scores tend to disproportionately disadvantage certain groups while not being strong predictors of future rent payments. Indeed, HUD has issued guidance recommending the use of alternative credit assessments, such as non-traditional credit reports, which rely on payment histories for rent utilities and other specified items.¹¹² Criminal background is another commonly used screening tactic that can have a discriminatory impact without necessarily being indicative of future tenant behavior. HUD has similarly issued guidance on using criminal history in tenant selection and cautions such information should be used in limited manners to ensure Fair Housing Act compliance.¹¹³ As the NHTF regulation is currently written, it risks landlords defaulting to screening procedures that will have a discriminatory impact.

Second, NHTF does not provide any guidance on residency preferences. In the implementation of other federal housing programs, owners have often given preference to applicants from the existing community or neighborhood.¹¹⁴ Because of patterns of segregation, local residency preferences have the potential to disproportionately exclude on the basis of race. Disallowing local residency preferences would allow those "least likely to apply" to have increased access to affordable housing in higher opportunity communities. Local residency requirements likely violate *existing* NHTF requirements, which prohibit landlords from imposing selection criteria that are not related to lease obligations. However, given the use of local residency as a screening mechanism in other affordable housing programs, local residency preferences should be explicitly banned in NHTF-funded developments.

Finally, the NHTF regulation does not require affirmative notification procedures for notifying tenants on the waitlist. Given that the most disadvantaged tenants might be the most difficult to reach (e.g., in homeless shelters or without reliable access to Internet), landlords should be required to employ multiple means of notifying tenants on a waitlist and to provide several days for a response before moving on to another tenant. Similarly, the NHTF regulation recommends a chronological waitlist, but a better practice would be a lottery-based waitlist.¹¹⁵ The first prospective tenants to file applications are often the most advantaged and tend to be local residents. A randomized waitlist ensures that those who applied later, often the "least likely to apply," are given sufficiently opportunity to benefit from the housing.

112 Haberle, *supra* note 88 at 40.

113 *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*. U.S. Department of Housing and Urban Development (Apr. 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

114 Haberle, *supra* note 88 at 38.

115 *Id.* at 39.

C. State NHTF Provisions on Tenant Selection

Most states do not address these fair housing issues in their NHTF allocation plans. Consistent with the fair housing principles described above, a few states, such as Florida, Georgia, and Ohio, discourage the use of potentially discriminatory tenant screening mechanisms, such as FICO scores or criminal background. Our review of state allocation plans did not reveal any states that regulated or provided recommendations for waitlist policies, such as local residency preferences, or giving applicants sufficient time to respond to openings.

Many state allocation plans include tenant selection protocols that allow or instruct landlords to give preferences to certain groups, as allowed under §93.303. Groups commonly given preference as tenants under state allocation plans include veterans,¹¹⁶ the homeless¹¹⁷, and those with disabilities.¹¹⁸ These group preferences might provide states with important means to further state public policy goals or help particularly disadvantaged groups through the NHTF. However, supporting these groups, in the absence of other policies, does not necessarily further fair housing. These group preferences should be combined with tenant selection procedures that address fair housing concerns, such as the avoidance of discriminatory screening mechanisms and waitlist procedures discussed above. Tenant selection policies that give group preferences but do not incorporate fair housing principles may result in housing that serves the most advantaged members of these groups, rather than those most in-need of housing. Combining fair housing regulations with group preferences would ensure that NHTF funds are going to projects that serve most disadvantaged and contribute to the growth of more integrated and thriving communities.

D. Recommendations for Policy Change

Policymakers should consider providing for stronger regulations and guidance related to screening procedures, residency preferences, and waitlist policies. Given that few states have tenant selection policies in place, federal action is particularly necessary to fill this gap and states cannot be counted on to implement tenant selection policies consistent with fair housing.

Specifically, federal requirements should be revised to advise against the use of screening mechanisms with demonstrated discriminatory effects, such as FICO scores and criminal

116 See e.g., *NHTF Allocation Plans for Alabama, Arkansas, California, Georgia, Michigan, Missouri, New Jersey, New Mexico, Texas, Washington*.

117 See e.g., *NHTF Allocation Plans for Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Indiana, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, Texas, Washington*.

118 See e.g., *NHTF Allocation Plans for Alabama, Alaska, Arkansas, California, Colorado, Georgia, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, Texas, Washington*.

Landlords should be encouraged to use screening mechanisms that are more inclusionary, such as accepting non-traditional credit scores, acknowledging some ELI households will have no credit history, and allow the presentation of mitigating circumstances for eviction history as well as criminal records.

background checks without the accompanying considerations of mitigating circumstances. Instead, landlords should be encouraged to use screening mechanisms that are more inclusionary, such as accepting non-traditional credit scores, acknowledging some ELI households will have no credit history, and allow the presentation of mitigating circumstances for eviction history as well as criminal records. Encouragingly, some states, such as Ohio, have adopted these policies, and advocacy should focus on spreading such best practices.

Second, federal rules or state requirements should prohibit preferences for local residency. Third, federal and state tenant selection requirements should include stronger waitlist notification procedures to ensure that disadvantaged tenants are reached and given sufficient time to respond. At the federal level, waitlist guidelines should also be changed to recommend a randomized lottery for the waitlist rather than chronological order.

5. Deciding Between Construction, Rehabilitation, and Acquisition

A. Fair Housing Implications

NHTF is available for both construction and rehabilitation of housing. New construction contributes to the goal of increasing the country's overall housing stock, yet new construction in areas of high poverty is likely to perpetuate patterns of segregation. We recommend that projects in areas of high poverty should focus on acquisition or rehabilitation, rather than new construction. To the extent there are necessary exceptions to this rule, new construction in high poverty areas should be allowed only if accompanied by meaningful CCRPs (as discussed in the site selection section). Projects in areas of opportunity can include construction, rehabilitation, or acquisition.

B. Federal Provisions

Federal regulations do not provide guidance on the allocation of funds between construction, rehabilitation or acquisition as long as the projects meet other NHTF requirements.¹¹⁹

Few federal programs provide analogies for resolving the question of construction versus rehabilitation. For example, the HOME program similarly does not provide guidance on how to allocated projects between construction, rehabilitation or acquisition. Instead, this balancing is determined at the state or local level.

C. State Provisions

While NHTF funds are available for both new construction and rehabilitation of housing, states have discretion on whether to use their funds for either or both of those purposes. Some states including Delaware, Pennsylvania, Georgia, Indiana, and Tennessee follow recommendations consistent with fair housing principles by requiring new construction projects to be located in low poverty areas, and dedicating rehabilitation projects to areas with high poverty concentration. For example, in Delaware, new construction and preservation of affordable housing are prioritized and encouraged on high opportunity areas, which they define as areas that offer economic opportunity, high performing schools, and supportive infrastructure, while containing little or no affordable housing.¹²⁰ In general, the plan establishes that new construction and rehabilitation of affordable rental housing is incentivized in Areas of Opportunity, neutral in Stable areas, and discouraged in distressed areas with high concentration of subsidized rental housing.¹²¹

In Tennessee, for new construction projects, the Recipient must provide documentation to determine that proposed sites for new construction meet the requirements in 24 CFR 93.150 which places limiting conditions on building in areas of “minority concentration” and “racially mixed” areas.¹²²

In Georgia, NHTF funds are used to invest in both improving neighborhoods that already serve low-income residents and providing new housing options in historically less affordable communities that provide residents access to a broad array of jobs, services, and amenities.¹²³

Other states use NHTF funds for both new construction and rehabilitation purposes but do not specify which areas these different types of projects prioritize. These states include Arizona, Colorado, Connecticut, Kentucky, Louisiana, New Jersey, Michigan, North Carolina. As discussed above, Arizona and Colorado claim to distribute funds in ways that affirmatively further fair housing, while Connecticut, North Carolina, and Louisiana prioritize areas of high opportunity. Thus, despite the fact that these states do not specify which areas these different types of projects prioritize, they have adopted site selection criteria consistent with fair housing.

Some states use NHTF funds for new construction but do not specify which areas will be prioritized. For example, in Alaska, only new construction proposals are eligible to receive NHTF grants and no acquisition and/or rehabilitation proposals may apply for NHTF awards.¹²⁴

120 Delaware 2019 Annual Action Plan *supra* note 60 at 53.

121 *Id.* at 81.

122 State of Tennessee 20 Annual Action Plan *supra* note 68 at 26.

123 2017 State of Georgia National Housing Trust Fund Allocation Plan, page 20 (2017).

124 Alaska Notice of Funding Availability *supra* note 81 at 4.

Similarly, in Arkansas, eligible activities are new construction of rental housing projects, single family homes, and multifamily residential rental units but not rehabilitation of existing projects.¹²⁵ Florida requires NHTF funds to be used for new construction only and no funds can be used for rehabilitation.¹²⁶ None of these three states prioritizes high opportunity areas in their site selection criteria.

Other states prioritize rehabilitation of existing housing, which likely concentrates HTF resources in higher poverty neighborhoods. For example, Pennsylvania does not use NHTF funds for new construction, instead, the state gives preference to projects/programs that assist with the rehabilitation of blighted, abandoned or otherwise at risk housing and the reuse of vacant land where housing was once located.¹²⁷ Indiana goes further, requiring applicants to link the rehabilitation and/or new construction project to the revitalization of existing neighborhoods, preferably through a comprehensive approach.¹²⁸

D. Recommendations for Policy Change

For projects in areas of high poverty, NHTF funds should be directed towards preservation and rehabilitation of existing housing rather than creating new housing in these areas.

Federal or state program requirements should include guidelines for allocating funds among construction, rehabilitation and acquisition projects. For projects in areas of high poverty, NHTF funds should be directed towards preservation and rehabilitation of existing housing rather than creating new housing in these areas. Although many state plans express some preference between construction and rehabilitation, few express a clear preference for new construction in high opportunity areas and rehabilitation in low opportunity areas. More clear criteria to this effect would better advance fair housing goals.

6. Monitoring and Reporting

A. Monitoring and Reporting and Fair Housing

Monitoring and reporting are key to ensuring that NHTF programs comply with fair housing obligations. Without monitoring, there is no way to determine whether provisions meant to further fair housing objectives are producing their intended results. Moreover, transparent reporting is the first step towards accountability mechanisms that enforce fair housing provisions that already exist. Crucially, monitoring and reporting should cover metrics related to

125 Arkansas National Housing Trust Fund Program *supra* note 82 at 4.

126 2017 National Housing Trust Fund Allocation Plan for Florida *supra* note 67 at 8.

127 2019 Pennsylvania Housing Affordability and Rehabilitation Enhancement Fund-Final, page 2 (2019).

128 State of Indiana 2019 Annual Action Plan for Housing and Community Development, July 1, 2010–June 30, 2020, page 227 (2020).

fair housing goals, such as the demographics of tenants and neighborhoods, in order to hold NHTF projects accountable for meeting fair housing objectives.

B. Federal Provisions on Monitoring and Reporting

Currently, very few reporting mechanisms exist at the federal level for tracking the impact of NHTF funds. The key performance tracking mechanism is the Consolidated Annual Performance and Evaluation Report (CAPER) that each state submits to HUD documenting its progress in carrying out its consolidated plan.¹²⁹ These performance reports apply to all programs covered in a state's consolidated action plan and must cover the state's progress in meeting affordable housing objectives, reducing homelessness, and any other outcomes mentioned in the consolidated plans. Additionally, for NHTF in particular, the performance reports must cover the NHTF "program's accomplishments, and the extent to which the jurisdiction complied with its approved [N]HTF allocation plan and the requirements of 24 CFR §93."¹³⁰ These reporting requirements focus on core NHTF metrics, such as whether the funding was used for eligible activities and whether the property remained affordable and met program standards.¹³¹ The federal regulatory guidelines do not explicitly require reporting on tenant demographics. In practice, most state CAPERs include reporting on the ethnicity of tenants and their income-level (e.g., extremely low income, very low income, or low income).¹³² In practice, CAPERs do not include information on the age or household size of tenants or on the characteristics of the neighborhoods of NHTF projects.

Additionally, until reinstatement and eventual implementation of an appropriate AFFH regulation, states may not be pursuing the kind of deep fair housing assessment necessary to evaluate their HTF grants. The 2015 federal rule required states and municipalities to conduct an assessment of their federally-funded housing programs' compliance with federal fair housing obligations. The AFFH rule was suspended in 2018, and is expected to be reinstated in some form later this year.¹³³

It is concerning that federal guidelines do not require reporting on key fair housing metrics, such as tenant's family status, race and ethnicity, the location of projects, and key opportunity indicators of project neighborhoods. As the history of fair housing illustrates, enforcement of the Fair Housing Act requires accurate and transparent data reporting.

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129 24 C.F.R. §91.520.

130 24 C.F.R. §91.520 (h).

131 24 C.F.R. §93.452.

132 See *CPD Consolidated Plans, Annual Action Plans, and CAPERs*. HUD, <https://www.hudexchange.info/programs/consolidated-plan/con-plans-aaps-capers/>.

133 See "Trump gutted Obama-era housing discrimination rules. Biden's bringing them back." *Washington Post*, April 13, 2021, <https://www.washingtonpost.com/us-policy/2021/04/13/hud-biden-fair-housing-rules/>.

C. State Provisions on Monitoring and Reporting

As a general trend, states are largely failing to include demographic reporting and monitoring mechanisms in their NHTF Allocation Plans. Several states do not include reporting at all in their plans including Arizona, Connecticut, Florida, Hawaii, Illinois, Kentucky, Louisiana, Michigan, Missouri, New York, Ohio, and Washington. Other states adopt better fair housing practices by explicitly collecting data on demographics such as Pennsylvania, Minnesota, and New Mexico, or on the fair housing impact of the projects – in Alabama, Arkansas, and Colorado. Other states discuss reporting requirements in their plans but do not include any reference to demographics or fair housing.

States with explicit reference to demographic reporting in their plans include Minnesota, where owners are asked to provide demographic data in their required annual certifications for Minnesota Housing research, although this information cannot be required as a condition of occupancy.¹³⁴ Similarly, in New Mexico, evaluation of NHTF project performance include specific indicators such as racial and ethnic status of families assisted, number of households served by income-level, and whether recipients have special needs.¹³⁵ In Pennsylvania, where HTF projects receive Tax Credits, they must abide by the Housing and Economic Recovery Act (HERA) of 2008 which requires each state Credit allocating agency to provide HUD with information on the race and ethnicity of households residing in each property receiving Housing Credits.¹³⁶

Other states, while not explicitly mentioning demographic reporting, require states to monitor and report on the fair housing impact of the NHTF eligible projects. For example, Alabama¹³⁷ and Arkansas¹³⁸ have a monitoring requirement where the staff of their respective housing agencies monitor each HTF project on-site at least once prior to the completion of the project and periodically through the entire HTF Affordability Period. The agencies review for compliance with eligibility requirements, affirmative outreach, tenant protections and selection, and fair housing. Monitoring determinations range from “acceptable” to “finding” with appropriate corrective measures imposed. Similarly, Colorado requires applicants to have compliance plans to ensure that federal and state regulations and reporting requirements will be met, including Fair Housing and Civil Rights.¹³⁹

134 Minnesota's National Housing Trust Fund Allocation Plan 2017-2021 Consolidated Plan, page 40-41 (2017).

135 2019 New Mexico Annual Action Plan, page 3 (2019).

136 Pennsylvania 2018 Annual Action Plan *supra* note 63 at 23.

137 Alabama 2020 AHFA National Housing Trust Fund Allocation Plan, page 10 (2020).

138 Arkansas Development Finance Authority National Housing Trust Fund 2016 Allocation Plan, page 11 (2016).

139 Colorado Draft Annual Action Plan *supra* note 72 at 156.

D. Recommendations for Policy Change

Federal regulations should require monitoring and reporting specifically related to fair housing. These could be part of a revived Assessment of Fair Housing for state housing agencies, as begun in 2015. It should also be included specifically in the NHTF regulation. In the absence of federal monitoring, states should establish their own monitoring procedures. The most important monitoring procedures are: demographics of tenants (including race/ethnicity, income, age, and family size) and the location of funded projects (including racial demographics and poverty rate in the neighborhood). Ideally, reporting would also cover neighborhood opportunity indicators, such as school quality, crime, and proximity to jobs.

IV. Conclusion

The NHTF presents an opportunity to help address the United States' affordable housing crisis on a major scale, building, rehabilitating, and acquiring affordable housing units that will provide security and improved opportunity for low-income families. In order to fulfill the goals of expanded housing opportunities and choice for low income families, federal, state and local actors must ensure that NHTF projects comply with fair housing principles, including locating a substantial portion of funded projects in diverse areas of high opportunity and marketing those units to families least likely to have access to similar housing opportunities.

Based on our review of the federal regulation and state allocation plans, the NHTF has made positive initial strides in adhering to fair housing principles. For example, the limits on selecting sites in areas of minority concentration should encourage the development of housing in higher opportunity areas. The absence of local approval requirements makes it less likely that affluent communities will successfully organize against new housing projects. The presence of NHTF-specific affirmative marketing requirements embeds proactive outreach into the core of the NHTF.

Nonetheless, troubling gaps remain in the NHTF regulations. High opportunity neighborhoods are not prioritized in federal site selection criteria, increasing the likelihood that NHTF developments will perpetuate segregation. States too frequently allow local opposition or strict zoning requirements to block the construction of NHTF affordable housing projects. Affirmative marketing and tenant selection policies need to go further in proactively reaching out to those least likely to apply and ensuring that they are given sufficient opportunity to receive housing, after applying. New construction should be more explicitly prioritized, except in areas of low opportunity. Finally, monitoring and reporting should be robust so that we can

In order to fulfill the goals of expanded housing opportunities and choice for low income families, federal, state and local actors must ensure that NHTF projects comply with fair housing principles.

better understand the impact of the NHTF on housing opportunities for low-income families of color, and what changes are needed to better advance fair housing goals.

Addressing these issues, preferably at the federal level, but also potentially at the state level, are important steps in ensuring that the NHTF fulfills its potential to advance integrated, high-opportunity, and affordable housing in the United States.

Appendix: 50-state table of NHTF state policies

prrac.org/pdf/50-state-nhtf-survey.xlsx

Related PRRAC reports

- ***What Can HUD Do to Expand Public and Community Ownership of Rental Housing?*** (April 2021)
- ***Housing Choice Voucher Reform: A Primer for 2021 and Beyond*** (August 2020)
- ***Where Families With Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas*** (CBPP-PRRAC, January 2019)
- ***Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance*** (July 2018)
- ***The National Housing Trust Fund: Promoting Fair Housing in State Allocation Plans*** (May 2016)
- ***Building Opportunity II: Civil Rights Best Practices in the LIHTC Program*** (July 2015)



About the Poverty & Race Research Action Council (PRRAC): Connecting Research to Advocacy

The **Poverty & Race Research Action Council (PRRAC)** is a civil rights law and policy organization based in Washington, D.C. Our mission is to promote research-based advocacy strategies to address structural inequality and disrupt the systems that disadvantage low-income people of color. PRRAC was founded in 1989-1990, through an initiative of major civil rights, civil liberties, and anti-poverty groups seeking to connect advocates with social scientists working at the intersection of race and poverty.

Our current work focuses on housing and education, with a focus on developing actionable policies to overcome the mechanisms that continue to reproduce historical patterns of racial and economic segregation. In addition to federal-level law and policy research and advocacy, we provide technical assistance and support for local partners working on innovative, inclusive policies. We believe in strong coalition and partnership models, and our work is informed by attorneys, educators, organizers, and public health and housing professionals on the front lines of racial justice advocacy. PRRAC is also a founding member of the National Coalition on School Diversity (NCSD), and helps to staff the coalition's organizing, advocacy, and outreach.

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