

## The National Housing Trust Fund: Promoting Fair Housing in State Allocation Plans

The national Housing Trust Fund (HTF) is the newest federal low-income housing development program, and is particularly valuable for its focus on providing housing for extremely low-income families. Like the Low Income Housing Tax Credit (LIHTC), the HTF is allocated to state governments on a formula basis, and states are then responsible for allocating funds through a state allocation plan. And like the LIHTC and other federal housing programs, the HTF has the potential to perpetuate and even increase segregation and concentrated poverty if careful steps are not taken by state officials who implement the program. This policy brief will provide some guidelines for states and advocates to ensure that the HTF will fulfill the Fair Housing Act's goal that federal housing programs affirmatively further fair housing and expand housing choices for low-income families living in segregated, high-poverty neighborhoods.

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### ***AFFH and the HTF***

The HTF was established in 2008 as part of the Housing and Economic Recovery Act of 2008, and is initially funded in 2016 with allocations from Fannie Mae and Freddie Mac. These initial allocations are small (with most states receiving \$3 million in the first year),<sup>1</sup> but the program is expected to grow in future years. The HTF is designed to address the severe shortage of affordable housing for the lowest-income Americans. The HTF is a federal program with a dedicated fund not subject to the annual appropriations process and primarily designed to provide revenue to produce, preserve, rehabilitate, and operate rental housing for extremely low-income individuals.<sup>2</sup> Generally, the purposes of the HTF are to: (1) increase and preserve the national supply of rental housing for extremely low-income (ELI) households (households with incomes of 30% or less of area median) and very low-income (VLI) households

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1 See 81 Fed. Reg. 27165 (May 5, 2016).

2 12 U.S.C. §4568(c)(7) and §4568(c)(10)(A).

(households with incomes of 50% or less of area median), including homeless households; and (2) increase homeownership among ELI and VLI households.<sup>3</sup> On January 30, 2015, the Department of Housing and Urban Development (HUD) issued interim regulations to implement the HTF, which are modeled on federal HOME program regulations.<sup>4</sup> HUD subsequently published guidance to states to assist in the development of annual HTF Allocation Plans.<sup>5</sup>

Under the Fair Housing Act, the HTF must comply with the statutory directive that all federal housing programs affirmatively further fair housing (AFFH).<sup>6</sup> Specifically, the AFFH provision of the Fair Housing Act, 42 U.S.C. 3608(d), provides that: “All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes.” As a result, states that provide housing units through the HTF program must go beyond simply policing discriminatory activities to ensuring that their project actively advances housing integration and expanded housing choice.<sup>7</sup>

Last summer, HUD issued its final rule on Affirmatively Furthering Fair Housing, which requires jurisdictions to address levels of segregation, poverty concentration, disparities in access to opportunity across communities and neighborhoods, and disproportionate housing needs. The Assessment of Fair Housing (AFH) planning tool for state governments includes an analysis of the state’s implementation of the HTF. Every state will be required to go through the AFFH process sometime over the next six years, on a five-year cycle coinciding with the state’s Consolidated Plan (ConPlan) process. When this process takes place, states will be asked to “[d]escribe how the administration of CDBG, HOME, and the National Housing Trust Fund programs may affect patterns of segregation, R/ECAPs, disparities in access to opportunity and disproportionate housing needs.” In addition to the AFH review, the HTF program itself will require states to certify their compliance with the AFFH duty, as a condition of receiving HTF funds.<sup>8</sup>

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3 See [http://nlihc.org/sites/default/files/NHTF\\_FAQ\\_4-12-13.pdf](http://nlihc.org/sites/default/files/NHTF_FAQ_4-12-13.pdf).

4 80 Fed. Reg 5200 (January 30, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-01-30/pdf/2015-01642.pdf>.

5 HUD Notice CPD-16-07, “Guidance for HTF Grantees on Fiscal Year 2016 Housing Trust Fund (HTF) Allocation Plans,” April 26, 2016, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=16-07cpdn.pdf>.

6 42 U.S.C. §3608. The HTF statute is also subject to other federal civil rights laws that will not be covered in this policy brief, including nondiscrimination provisions of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1973, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, Section 3 of the Housing and Urban Development Act of 1968, the Uniform Relocation Act, and the lead-based paint regulations at 24 CFR part 35.

7 See also, for example, *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987).

8 See HUD Notice CPD-16-07, “Guidance for HTF Grantees on Fiscal Year 2016 Housing Trust Fund (HTF) Allocation Plans,” April 26, 2016.

## *Incorporating AFFH Principles into the State HTF Allocation Plan*

Unlike the HOME or Community Development Block Grant (CDBG) programs, HTF funding is not distributed directly to cities and counties. Under statute, each state must designate a state agency to receive and administer HTF funding.<sup>9</sup> Additionally, each state must prepare an annual HTF Allocation Plan that delineates how the state will distribute HTF resources based upon the housing needs identified in the state's ConPlan.<sup>10</sup> Under the interim rule, each state's HTF Allocation Plan must be included as a component of and integrated into the state's ConPlan.<sup>11</sup> Further, the HTF Allocation Plan must be made available to the public for comment and review.<sup>12</sup>

Under statute, each state HTF Allocation Plan must set forth requirements for selecting qualified applications from prospective recipients of HTF resources.<sup>13</sup> Specifically, the state HTF Allocation Plan must prioritize the allocation of funds based upon the following factors: (1) geographic diversity, as reflected in the ConPlan; (2) the extent to which rental units are affordable, especially for ELI households; (3) the length of time rental units will remain affordable; (4) the merit of a project, which is elucidated by HUD with several examples that include housing that serves people with special needs, housing accessible to transit or employment centers, and housing that includes green building and sustainable development features; (5) the ability of the applicant to obligate the funding and to carry out the project in a timely manner; and (6) the extent to which the project incorporates other funding sources.<sup>14</sup> The statute also requires that at least 90% of a state's HTF resources be used to produce, preserve, rehabilitate, or operate rental housing, while the remaining 10% is allocated toward homeownership activities.<sup>15</sup> Further, at least 75% of states' HTF resources that are allocated to rental housing must benefit ELI households or households with incomes below the federal poverty line.<sup>16</sup> The remaining 25% allocated to

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9 See National Low Income Housing Coalition (NLIHC), "How Can I Influence Where the Money Goes?" (A NHTF Policy Brief) available at [http://nlihc.org/sites/default/files/04\\_NHTF\\_Influence-the-Money\\_0615.pdf](http://nlihc.org/sites/default/files/04_NHTF_Influence-the-Money_0615.pdf); 12 U.S.C. §1338(c)(2) statute; 24 CFR §93.101(a).

10 *Id.*; 12 U.S.C. §4568(c)(5)(A); 24 CFR §93.2, §93.100(b), and §93.101(b), and ConPlan regs at 24 CFR §91.220(l)(5) and §91.320(k)(5).

11 *Id.*; 12 U.S.C. §4568

12 *Id.*; 12 U.S.C. §4568(c)(5)(B).

13 *Id.*; 12 U.S.C. §4568(c)(5)(C).

14 *Id.*; 12 U.S.C. §4568(c)(6) and §4568(g)(2)(D); ConPlan regulations at 24 CFR §91.220(l)(5) and §91.320(k)(5).

15 See National Low Income Housing Coalition (NLIHC) "Focused on Extremely Low Income Renters" (A NHTF Policy Brief), available at [http://nlihc.org/sites/default/files/03\\_NHTF\\_Focus-on-ELI-Renters\\_0615.pdf](http://nlihc.org/sites/default/files/03_NHTF_Focus-on-ELI-Renters_0615.pdf); 12 U.S.C. §4568(c)(7) and §4568(c)(10)(A).

16 *Id.*; 12 U.S.C. §4568(c)(7)(A).

rental housing must benefit VLI households.<sup>17</sup> All funding designated toward homeownership activities must benefit households with incomes less than 50% of the area median income.

**The factors listed in the interim rule are all governed by the overarching affirmatively furthering fair housing mandate. When selecting projects and designing ranking criteria among eligible projects, states must also adhere to these fair housing mandates.** For example, a proposal that undermines fair housing goals should not necessarily be eligible for state funding, even if it satisfies one of the other allocation factors in the HTF rule.

## INCLUDING AFFH in the HTF State Allocation Plan

### *Site Selection*

Under statute, each state HTF Allocation Plan must prioritize geographic diversity. In the context of AFFH, geographic diversity means a cross-section of communities, **including** higher-income areas of opportunity and non-racially concentrated communities and neighborhoods. HUD's April 26 guidance on HTF state allocation plans is explicit about this obligation, noting that “[t]he State’s geographic distribution priorities must be consistent with the State’s certification that it will affirmatively further fair housing...” Thus, each state plan should clarify how geographic diversity is to be achieved within the context of AFFH, and also incorporate a strategy for racial/ethnic deconcentration by prioritizing areas that currently have few affordable units.

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***Allocation plans that simply re-allocate NHTF units based on existing poverty population in each city or town are likely to violate the Fair Housing Act, where patterns of poverty concentration parallel patterns of racial concentration. These types of allocation plans are essentially using historical patterns of segregation as the basis to justify a policy of continuing segregation.***

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The state HTF Allocation Plan will play a critical role in ensuring that ELI and VLI households have equal access to fair and affordable housing opportunities in non-segregated communities. Allocation plans that simply re-allocate HTF units based on existing poverty population in each city or town are likely to violate the Fair Housing Act, where patterns of poverty concentration parallel patterns of racial concentration. In other words, these types of allocation plans are essentially using historical patterns of segregation as the basis to justify a policy of continuing segregation. For this reason, we strongly advise against state allocation plans that automatically re-allocate funds to HUD entitlement jurisdictions, which are by definition areas that already have significant populations of poor families. States should make their own policy choices for HTF allocation, including providing funds to appropriate housing developments in entitlement jurisdictions, consistent with the Fair Housing Act, rather than simply

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17 Id.; [http://nlihc.org/sites/default/files/03\\_NHTF\\_Focus-on-ELI-Renters\\_0615.pdf](http://nlihc.org/sites/default/files/03_NHTF_Focus-on-ELI-Renters_0615.pdf); 12 U.S.C. §4568(c)(7).

following HUD's existing funding structures, which can have the effect of limiting choice and perpetuating segregation.

State HTF plans should take account of the needs of low-income families with children for safe neighborhoods with high-performing schools. High-opportunity neighborhoods provide critical resources for families, such as jobs, health care, high-performing school systems, retail and commercial enterprises, and public amenities. To advance fair and affordable housing, state HTF Allocation Plans should incorporate siting standards related to: (1) racial and/or economic concentration/deconcentration; (2) proximity to high-quality schools, positive or negative neighborhood assets, and accessible transit networks; and (3) for developments in lower income neighborhoods, the presence of meaningful community revitalization plans.<sup>18</sup> Based on HUD-sponsored research on state LIHTC Qualified Allocation Plans (QAPs), these types of fair-housing-based threshold requirements or point systems actually have the effect of providing more LIHTC housing in high-opportunity communities.<sup>19</sup>

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States can rely on model definitions of "opportunity areas" included in many state QAPs for the LIHTC. For example, in the 2014 Massachusetts QAP for the LIHTC, "opportunity area" is defined: "as part of a neighborhood or community with a relatively low concentration of poverty (poverty rates <15%) that also offers access to opportunities such as jobs, health care, high-performing school systems, higher education, retail and commercial enterprise, and public amenities."<sup>20</sup> Similarly, the 2013 Pennsylvania QAP awarded points in its scoring rubric "to developments in areas that demonstrate the following relative to the immediate market area: low poverty rates, limited affordable housing options (both subsidized and non), limited affordable housing production in the past 20 years, close proximity to employment, strong housing markets and high owner-occupied markets."<sup>21</sup> Other states have also included deconcentration provisions in their QAPs for the LIHTC, such as awarding points for developments located in high-income census tracts and/or in nonqualified census tracts, or creating an actual set-aside for developments located in suburban areas. For example, the New Jersey 2013 QAP included a 60% pool of tax credits available for suburban (and rural) locations.<sup>22</sup>

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18 See *Building Opportunity II: A Fair Housing Assessment of State Low Income Housing Tax Credit Plans* (PRRAC, May 2015), available at [www.prrac.org/pdf/BuildingOpportunityII.pdf](http://www.prrac.org/pdf/BuildingOpportunityII.pdf).

19 See *Effect of QAP Incentives on the Location of LIHTC Properties* (U.S. Department of Housing and Urban Development, April 2015), available at [www.huduser.org/portal/publications/pdf/QAP\\_incentive\\_mdrt.pdf](http://www.huduser.org/portal/publications/pdf/QAP_incentive_mdrt.pdf)

20 MA QAP 2014, pg. 37.

21 PA QAP 2013, pg. 27.

22 See *Building Opportunity II* (2015), pg. 10.

Taking further insights from the LIHTC program, the 2013 North Carolina QAP for the LIHTC specified, as a general requirement, that “Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site’s census tract with the community overall) though exceptions may be granted for economically distressed areas which have community revitalization plans with public funds committed to support the effort.”<sup>23</sup> Similarly, in various state QAPs for the LIHTC – including in Alabama, Ohio, North Carolina, and South Dakota – strong point scores/requirements are incorporated to encourage developments to be located away from detrimental land uses.<sup>24</sup>

Finally, states should strive for geographic balance not just in the overall distribution of HTF units, but especially in the distribution of larger units for families with young children. Traditionally, it has been easier to site affordable housing for elderly residents in exclusionary white towns – however, this practice does little to affirmatively further fair housing, and can lead to a racially divided HTF system within a state.

### *Avoiding Local Opposition to HTF Developments*

The HTF includes no requirement for local approval of HTF developments. Indeed, there are not even any provisions in the HTF statute for the notification of local officials. **The practice of local approval has been shown to be detrimental to the siting of LIHTC family developments in high-opportunity communities and neighborhoods,**<sup>25</sup> and the requirement of local contribution and approval for LIHTC developments has prompted a HUD fair housing complaint in at least one state.<sup>26</sup> For these reasons, state HTF allocation plans should avoid local approval requirements (or point incentives for local approval or contribution).

### *Affirmative Marketing*

To promote fair housing for all low-income households, especially those families who have historically experienced the greatest discrimination, the **HTF allocation plan should ensure not only that affordable housing is available in high-opportunity communities, but also that these developments are accessible to families in low-income and underserved communities** through affirmative marketing strategies.<sup>27</sup> In other words, it is not enough to simply provide low-cost housing for families who already live in a lower-poverty community. Affirmative marketing strategies seek to “level the information playing field by

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23 NC QAP 2013, pg. 23.

24 See *Building Opportunity II* (2015), pg. 10.

25 See *Effect of QAP Incentives on the Location of LIHTC Properties*, *Supra*.

26 *Baltimore Regional Housing Campaign v. State of Maryland and Raymond A. Skinner, Secretary of the Department of Housing and Community Development of the State of Maryland* (HUD Complaint, August 2011)

27 The HTF Interim Rule sets out requirements for affirmative marketing at 24 CFR §§93.350(b), 93.404(c)(2)(vii)

encouraging the entry of underrepresented racial groups to a community and making special outreach efforts to these groups.”<sup>28</sup>

In LIHTC state QAPs, affirmative marketing provisions are frequently mandated. Likewise, affirmative marketing should be included in any HTF allocation plan as a fundamental project characteristic, and states should undertake responsibility for reviewing these plans and monitoring their implementation. Such affirmative fair housing marketing plans should include market studies from the applicant, and also explain how the prospective HTF project intends to affirmatively further fair housing and attract underserved populations to the project.<sup>29</sup>

Affirmative marketing provisions from state QAPs provide some helpful examples; for example, the 2014 Georgia QAP states, “At a minimum, Marketing Plans must include: outreach efforts to service providers, homeless shelter, or local disability advocacy organizations in the country where project is located; strategy to affirmatively market to persons with disabilities and the homeless; strategy to establish/maintain relationships between management agent and community service providers; referral/screening process that will be used to refer tenants to the projects, the screening criteria to be used, and reasonable accommodations made to facilitate admittance of persons with disabilities and homeless persons; marketing of properties to underserved populations 2-4 months prior to occupancy; applications for affordable units shall be made available in public locations including at least one with night hours.”<sup>30</sup>

In Massachusetts, the QAP for the LIHTC program is explicit about specific racial/ethnic groups that should be targeted through affirmative marketing strategies. The Massachusetts 2014 QAP for the LIHTC program states: “All [applicants] should include a detailed plan detailing how they intend to market and attract underserved populations to the project, indicating persons with disabilities and minority households.”<sup>31</sup> The Massachusetts QAP further states: “DHCD requires that developers establish affirmative action goals for the percentage of minority participation in each project. Applications must include marketing plans to reach the identified minority groups that are least likely to apply for the housing project being provided.”<sup>32</sup>

Researchers have noted that marketing plans must incorporate innovative strategies to reach the most underserved populations. Relying on word-of-mouth or newspaper ads is unlikely to

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28 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).

29 Megan Haberle, Ebony Gayles, and Philip Tegeler, *Accessing Opportunity: Recommendations for Marketing and Tenant Selection in LIHTC and Other Housing Programs* (PRRAC, December 2012)

30 Georgia 2014 QAP, pg. 41, available at [http://www.prrac.org/pdf/BO2AppendixB/georgia\\_2014.pdf](http://www.prrac.org/pdf/BO2AppendixB/georgia_2014.pdf)

31 MA QAP 2014, pg. 34, [http://www.prrac.org/pdf/BO2AppendixB/massachusetts\\_2014.pdf](http://www.prrac.org/pdf/BO2AppendixB/massachusetts_2014.pdf)

32 Id. pg. 50.

overcome existing stigmas and increase the familiarity of underserved populations with high-opportunity neighborhoods.<sup>33</sup>

In order to maximize the long-term benefits of integrative moves for families and children, agencies allocating HTF funds can award points for tenant selection preferences on the basis of applicants' residency in low-performing school districts and high-poverty, segregated communities with low environmental quality and other characteristics that are improved in the receiving community.<sup>34</sup> These families potentially have the most to gain from a move to a high opportunity community.

According to a study conducted by the Fair Housing Justice Center on a number of successful affirmative marketing initiatives, "The affirmative marketing plan and rental criteria utilized by a developer for the initial rent-up of a mixed income housing site in a low-poverty area, as well as during the on-going management of the site, directly impacts whether the site is racially diverse. If a site's initial marketing plan includes a wide variety of media outlets and targets a broad geographic area, it is more likely that a racially diverse tenant applicant pool will be created."<sup>35</sup>

## *Tenant Selection*

In conjunction with affirmative marketing programs, nondiscriminatory tenant selection procedures are critical to ensuring equal access for low-income and underserved households, which will help ameliorate the legacy of exclusion that plague many low-income individuals who benefit from government-funded housing programs. Researchers have demonstrated that different racial and economic groups often have access to different knowledge about housing opportunities within a metropolitan area, often due to tenant selection policies that create racial blind spots.<sup>36</sup> Certain tenant selection procedures – such as tenant qualifications and screening criteria, the use of preferences, and waitlist management practices – can directly influence resident demographics in a development.<sup>37</sup>

HUD program rules already require coordination between affirmative marketing and tenant selection policies, as noted in HUD's Affirmative Fair Housing Marketing (AFHM) regulation, which requires that program participants "shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions."<sup>38</sup>

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33 *Accessing Opportunity*, pg. 12.

34 *Accessing Opportunity*, pg. 36.

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

36 See Maria Krysan and Michael Bader, "Racial Blind Spots: Black-White-Latino Differences in Community Knowledge," *Social Problems*, Vol. 56, Issue 4: 677–701 (2009).

37 *Accessing Opportunity*, pg. 34.

38 24 C.F.R. § 200.610 ("Policy").

The most well-known examples of a discriminatory tenant selection policy is the local residency preference. As the Fair Housing Justice Center notes, “Since many neighborhoods are racially homogenous, especially low-poverty ones, the use of localized rental marketing techniques and criteria, such as residency preferences, limit access for prospective tenants.”<sup>39</sup> For example, strict residency preferences in predominantly white communities tend to perpetuate racial segregation by excluding minorities seeking to move from other communities.<sup>40</sup> Residency preferences should be avoided because they unfairly harm those least likely to apply to development in high-opportunity neighborhoods. The use of residency preference should be made impermissible except “where it can be shown (1) not to have a discriminatory effect and (2) not to conflict with AFHM (or other fair housing) objectives.”<sup>41</sup>

State HTF allocation plans should also be mindful of discriminatory application or waitlist management procedures. Best practices can be gleaned from the guidance provided by HUD regarding waitlist procedures for public housing and vouchers.<sup>42</sup> Some recommendations included in the waitlist guidance include: providing adequate notice of waitlist openings and affirmative outreach to a broad range of communities, especially underserved communities that are least likely to apply to developments in high-opportunity neighborhoods due to a lack of awareness; expanding time for accepting applications and offering more diverse platforms for submitting applications (for example, not *requiring* people to go to a physical place to subscribe to the waiting list, accommodating persons with disabilities, etc); eliminating uneven eligibility standards for local and nonlocal residents, and other arbitrary rules that harm underserved communities; and avoiding discriminatory waitlist selection procedures, such as using local preferences, selecting applicants by lottery or selecting by the date and time of the application.<sup>43</sup>

The screening criteria used by HTF grantees to select applicants are another area where proper guidance through the state HTF allocation plan can help prevent discrimination. It is customary for housing agencies and private landlords to utilize tenant screening criteria to limit financial risk and assess other potential risks, such as criminal history, history of drug use, and employment history.<sup>44</sup> However, many screening practices can have a discriminatory impact on

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39 Diane Houk et al, *supra*

40 See Keaton Norquist, “Local Preferences in Affordable Housing: Special Treatment for Those Who Live or Work in A Municipality?” 36 B.C. *Envtl. Aff. L. Rev.* 207, 224 (2009).

41 *Accessing Opportunity*, pg. 38.

42 Notice PIH 2012-34, “Waiting List Administration,” (August 13, 2012): <http://1.usa.gov/NUkh08>. This guidance updates that available in HUD’s Multifamily Occupancy Handbook.

43 *Accessing Opportunity*, pg. 39.

44 See, e.g., description of Chicago Housing Authority Practices in Lisa T. Alexander, “Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment,” 16 *Georgetown Journal on Poverty Law and Policy* 117: 161 (2009).

minority applicants.<sup>45</sup> For example, a reliance on conventional credit (FICO) scores as a screening method can disadvantage minority applicants, who may have limited access to mainstream credit-building resources. Additionally, the use of credit scores and criminal background scores can harm minority applicants because of frequent errors by reporting services and the inability of applicants to dispute mistaken records.<sup>46</sup> Some landlords reject applicants based on prior involvement in legal actions, which should not be viewed as a legitimate business justification for tenant screening.<sup>47</sup> Also, some landlords automatically exclude applicants based on criminal records, which has a disproportionate impact on minority households with family members who committed minor offenses or offenses unrelated to their tenancy or distant in time.<sup>48</sup> HUD's new guidance on the discriminatory impacts of indiscriminate criminal background screening<sup>49</sup> has reinforced this message: **state HTF allocation plans should not perpetuate automatic or overbroad exclusions in the tenant selection process.**

### *Minimizing the Segregative Impact of Federally Mandated Allocation Guidelines*

Two of the six priority funding factors in the interim HTF rule parallel provisions of the HOME program, which have helped foster segregation in the HOME rental housing programs. These factors are “the ability of the applicant to obligate the funding and to carry out the project in a timely manner” and “the extent to which the project incorporates other funding sources.”<sup>50</sup>

It is important to recognize the role that these two factors have sometimes played in favoring projects that increase racial segregation and poverty concentration in neighborhoods that are already segregated. For example, **the existence of local funding support from other low-income housing funding sources, and the easy availability of a site for development, are often closely correlated with very low-opportunity, segregated neighborhoods.** While it may be appropriate to fund such projects in a rapidly gentrifying poor neighborhood, or in the

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45 For example, researchers have noted that at various Chicago housing developments, “At some sites, any debt over 90 days past due could prevent an applicant from meeting the screening requirements. Some tenant plans look at criminal history indefinitely with regards to certain crimes. Some tenant plans are silent as to whether a conviction or merely an arrest is required to reject applicants.” See Lisa T. Alexander, “Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment,” 16 *Georgetown Journal on Poverty Law & Policy* 117: 162–63 (2009) (internal cites omitted).

46 Eric Dunn and Marina Grabchuk, “Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State,” 9 *Seattle Journal for Social Justice* 319: 328 (2010), listing common errors in background checks due to mistakes arising from similar names or birth dates, criminal identity theft, reports containing expunged records, clerical errors, and other issues.

47 *Accessing Opportunity*, pg. 41.

48 Merf Ehman, Columbia Legal Services, “Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies” (January 2011), <http://nhlp.org/files/PRRAC%20Disparate%20Impact%201-2011.pdf>

49 “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” (HUD, April 4, 2016), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf).

50 12 U.S.C. §4568(c)(6) and §4568(g)(2)(D); ConPlan regs at 24 U.S.C. §91.220(l)(5) and §91.320(k)(5).

context of a bona fide community revitalization plan, the preference in the allocation criteria is not a license to violate the Fair Housing Act – rather it means that, among otherwise eligible projects, the existing of other funding sources and the ability to carry out the project in a timely fashion will give the project an advantage in the competition for funds.

A number of QAPs in the LIHTC program favor developments in Qualified Census Tracts if they contribute to a “concerted community revitalization plan,” avoiding the placement of more low-income units in high-poverty areas with no other neighborhood investment strategy in place. For example, Pennsylvania requires that tax credits in the LIHTC program be used to support a “broader community revitalization program which has the capability of changing fundamentally the character of a neighborhood, enhancing the lives and amenities available to residents of the community...focused on implementing a mixed income strategy, and/or which seeks to counteract the pattern through which some metropolitan areas are being segregated by income or race.”<sup>51</sup>

### ***Preservation, Acquisition, and New Construction: Achieving an Appropriate Balance***

The HTF was intended to *increase* the supply of housing affordable to extremely low income families, so there should be an emphasis in most state plans favoring new construction. However, the preservation and acquisition of existing housing are also appropriate uses of HTF funds, as long as allocation policies do not drive segregation. Here are some suggested general principles:

- New construction should be focused on developments in lower-poverty areas of opportunity; investments in higher-poverty areas should focus on the preservation and rehabilitation of existing housing.
- Acquisition of existing housing (or portions of existing rental housing) for conversion to deed-restricted low-income housing should be limited to lower-poverty, higher-opportunity areas.
- Preservation of low-income housing should prioritize, but not be limited to, the preservation of assisted housing resources in lower-poverty, higher-opportunity areas.
- Funds allocated to housing preservation should not represent a disproportionate share of state HTF allocations; most funds should be allocated to new construction or new housing acquisition in lower-poverty areas of opportunity.

### ***Other Incentives to Promote Racial Integration***

State HTF Allocation Plans should also require detailed demographic reporting to permit the state to assess whether the program is being used in a manner to further geographic diversity and residential integration over time, and whether any internal segregation is developing among the HTF developments within a given metropolitan area.

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51 PA QAP 2013, pg. 7; see *Building Opportunity II* (2015), pg. 17.

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