

Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs

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Accessing Opportunity: Recommendations for Marketing and Tenant Selection in LIHTC and Other Housing Programs

Table of Contents

EXECUTIVE SUMMARY

I. INTRODUCTION

II. AFFIRMATIVE MARKETING: CURRENT FRAMEWORK AND RECOMMENDATIONS

A. What is affirmative marketing and why is it needed?

B. Current AFHM Program Requirements in HUD Programs

- 1) AFHM Regulations
- 2) HUD's AFHM Handbook
- 3) Specific Problems with Current AFHM Handbook and Plan

C. Better Practices and New Directions

- 1) Lessons from the States
- 2) Lessons from the Field
- 3) New Directions: Recommendations for Affirmative Marketing

III. TENANT SELECTION: KEY ISSUES AND RECOMMENDATIONS

A. Tenant Selection within the LIHTC Program

- 1) Nondiscrimination Mandates
- 2) Scoring criteria

B. Considerations in Tenant Selection

- 1) Coordinating AFHM and Tenant Selection: Existing HUD Rules
- 2) Use of Preferences
- 3) Application and Waitlist Procedures
- 4) Screening Criteria

C. Recommendations for LIHTC Tenant Selection

- 1) Less-discriminatory alternatives for tenant screening
- 2) Application Process and Waitlist Management
- 3) Use of Preferences
- 4) Compliance

APPENDIX A: Summary of HUD regulations

APPENDIX B: Review of state "Qualified Allocation Plans" (QAPs)

APPENDIX C (forthcoming): Survey of State Regulations

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EXECUTIVE SUMMARY

Even where affordable housing is available in high-opportunity communities, it may not truly be accessible to low-income and minority tenants without well-designed outreach and admissions practices. Communities rich in social resources—such as good schools, environmental quality, and safe streets—frequently have a history of exclusion that can be forbidding to minority families who consider moving to them. This dynamic is reinforced by the simple difficulty of gaining meaningful information about rentals in areas where residents lack friends, family, or other community connections. Affirmative marketing programs—supported by nondiscriminatory tenant selection procedures—serve an important role in ensuring equal access to information, helping people overcome the legacies of exclusion, and promoting fair and open housing choice.

Robust, thoughtfully crafted marketing and tenant selection policy can help federal and state agencies (as well as individual developers) ensure that their resources foster diverse communities and counter the legacies of exclusion. In addition to being good policy, these responsibilities arise from the Fair Housing Act, which established the civil rights mandates of nondiscrimination and integration and includes a statutory directive that all federal housing programs “affirmatively further fair housing” (AFFH).¹ This directive requires that all agencies administering housing-related programs go beyond policing

¹ 42 U.S.C. §3608.

discrimination to ensure that federal housing resources actively advance integration and housing choice.²

The Department of Housing and Urban Development implements the AFFH requirement through its Affirmative Fair Housing Marketing (AFHM) guidance, along with other civil rights regulations applicable to its own programs. However, our largest low-income housing development program, the Low Income Housing Tax Credit, lacks any federal affirmative marketing guidelines, tenant selection rules, or other AFFH guidance to the state housing finance agencies (HFAs) that administer the program.

This report addresses both the need for AFHM and tenant selection guidance governing the LIHTC program; and the need for stronger, up-to-date AFHM and tenant selection guidance throughout all federal housing programs, including HUD programs. We describe the role that marketing and tenant selection should play in addressing informational and other disparities to *actually connect* residents to equal and open housing choice. We also identify specific ways in which commonly-used procedures and existing guidance tend to undermine this goal, despite the good intentions of many policymakers and developers: in particular, the lack of clear performance standards that can be used to effectively target technical assistance resources (as well as compliance reviews); the failure to consistently require region-wide outreach; the paucity of marketing content relevant to potential tenants; and tenant selection procedures that tend to disadvantage minority and non-local applicants.

Drawing upon the successful initiatives of individual states and developers, as well as an examination of existing housing program guidance, this report offers several layers of recommendations intended to help HUD, Treasury, state housing finance agencies, and developers or property managers all take meaningful steps toward fair, effective marketing and tenant selection.

With regard to marketing, we recommend that:

- Treasury apply HUD’s AFHM regulations, including the AFHM compliance regulation, to the LIHTC program, as part of its interpretation of the “general public use” requirement. This should include yearly submission of an AFHM Plan by each developer/manager to the state HFA and the agency responsible for AFHM oversight.
- On the level of sub-regulatory guidance, the LIHTC marketing program should track the substantive requirements contained in the HUD guidance (HUD’s AFHM Handbook and Plan) and also set a new AFHM standard where time and experience show the existing guidance to be ineffective or in need of updating. In addition to aiding these steps by Treasury, HUD should revise its own AFHM

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

guidance to provide more robust marketing standards applicable across its programs.

- Given its extensive fair housing expertise, HUD should coordinate with Treasury and the HFAs to develop AFHM oversight and technical assistance policies applicable to the LIHTC program (as governed by the improved guidance). Treasury, IRS, HUD, and the HFAs should also coordinate to designate an agency (or agencies) with primary responsibility for AFHM and tenant selection oversight in the LIHTC program. This should include a policy to avoid the duplication of oversight efforts where the development receives both HUD and LIHTC support; and in such cases, the stronger guidance should apply.
- Improvements and updates to the AFHM guidance include the following: consistently required region-wide marketing; clear standards on the use of demographic data to designate the “least likely to apply” marketing targets; clear performance standards employing demographic metrics; information-rich content for marketing materials; and widely-accessible listings of housing in high-opportunity/low-poverty areas.
- Through their LIHTC Qualified Allocation Plans, state housing finance agencies require a threshold level of marketing efforts for all developments; and incentivize commitment to a more complete “best practices” portfolio of personalized, highly engaged marketing efforts, particularly for developments in high-opportunity/low-poverty areas.
- State agencies facilitate the pooling of marketing resources, for example by coordinating listings of properties in high-opportunity/low-poverty areas for widespread distribution.
- As an initial step toward AFHM implementation, industry groups sign on to voluntary AFHM agreements (an option developed by HUD).

With regard to tenant selection, we recommend that:

- HUD and Treasury coordinate to issue detailed guidance on avoiding tenant selection procedures with discriminatory effects. We recommend that HUD develop this guidance and Treasury explicitly reinforce its application to the LIHTC program (as part of its interpretation of the “general public use” requirement); state agencies may also initiate state-level guidance to attach meaningful fair housing protections to their tax credit programs. Guidance should make clear that developers are required to avoid tenant selection practices that are discriminatory *or* that impair the affirmative marketing program’s pursuit of equal access to housing for all groups throughout a region. Guidance should 1) instruct developers and managers in specific practices to be avoided and 2) recommend effective, less discriminatory alternatives to common discriminatory practices.

- As with affirmative marketing oversight, Treasury, IRS, HUD, and the HFAs coordinate to designate an agency with primary responsibility for enforcing tenant selection fair housing requirements in the LIHTC program. Oversight procedures should entail the examination of applicant and tenant data, as well as the review of an annual AFHM Plan including a description of tenant selection procedures.
- State HFAs adopt QAP scoring criteria and incentives for policies that promote integration (such as preferences to families from high-poverty areas applying to developments in low-poverty areas).
- New guidance convey a strong presumption against the use of local residency preferences, which tend to undermine AFHM and fair housing goals.
- New guidance require improved waitlist management that avoids disadvantaging nonlocal and other residents who may have relative difficulty applying; for example, avoiding in-person application procedures, requiring the use of lotteries (rather than chronological preference) to select tenants, etc.
- Guidance require (or incentivize, by awarding QAP points to developers who commit to a “best practices” protocol developed by the agency) that developers avoid screening practices that disproportionately disadvantage minorities where less-discriminatory alternatives are available. For example, applicants with “thin file or no file” credit reports should be permitted to submit alternative financial information.

These recommendations, discussed in greater detail in our report, will help policymakers ensure that subsidized properties are marketed and occupied in a manner that generates diverse and open neighborhoods. When we invest resources in valuable housing programs such as LIHTC development, those programs should further the government’s existing civil rights obligations as well as shelter families in need. Strong AFHM and tenant selection guidance can help agencies leverage their housing investments toward both these ends.

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Accessing Opportunity: Recommendations for Marketing and Tenant Selection in LIHTC and Other Housing Programs

I. INTRODUCTION

Even as our nation grows increasingly diverse, racial differences continue to shape access to neighborhoods and the opportunities they offer.³ Racial steering and discrimination remain deeply felt, legitimate concerns,⁴ while communities rich in social resources—such as good schools, environmental quality, and safe streets—frequently have a history of exclusion that can be forbidding to minority families who consider moving to them. This dynamic is reinforced by the simple difficulty of gaining meaningful information about rentals in areas where residents lack friends, family, or other community connections. Because of these factors, even where affordable housing is available in high-opportunity communities, it can be a missed opportunity for integration if outreach and admissions practices fall short.

Federal and state agencies, as well as housing developers, can play an important role in fostering diverse communities, but doing so requires affirmative steps beyond ensuring that property managers refrain from discrimination. Marketing and tenant selection practices should be crafted as affirmative, equitable measures to diversify communities and avoid discriminatory impacts on qualified prospective tenants. These aspects of fair housing lack any federal-level guidance or oversight within the Low Income Housing Tax Credit (LIHTC) context, and often are overlooked even by well-intentioned developers. The following report addresses the need for improved guidance that requires robust affirmative marketing efforts and nondiscriminatory tenant selection practices, with recommendations for federal and state agencies.

The responsibilities of affirmative fair housing marketing and nondiscriminatory tenant selection arise from the Fair Housing Act, passed in 1968 to address the social harms of housing discrimination and segregated communities. The Act established the fair housing mandates of nondiscrimination and integration, and gave rise to regulations implementing those goals.⁵ This includes HUD’s Affirmative Fair Housing Marketing (AFHM) regulations,⁶ which implement the statutory mandate that federal housing programs

³ See, e.g., Margery Austin Turner, Susan J. Popkin, & Lynette Rawlings, *PUBLIC HOUSING AND THE LEGACY OF SEGREGATION*, The Urban Institute Press, 2009.

⁴ Housing discrimination is still quite common in the United States. See, e.g., Margery Austin Turner et al., Urban Inst., “Discrimination in Metropolitan Housing Markets” (2003), available at http://www.huduser.org/portal/publications/pdf/phase2_final.pdf (concluding that “significant discrimination against African American and Hispanic homeseekers still persists in both rental and sales markets of large metropolitan areas nationwide;” for example, whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time in tests).

⁵ Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*

⁶ See 24 C.F.R. § 200.600 *et seq.*

“affirmatively further fair housing.”⁷ AFHM requires participants in certain HUD programs to pursue an *affirmative* marketing policy: that is, those developers (and other program participants) must not only abide by nondiscrimination law, but must promote their properties and engage prospective occupants so as to actively advance fair housing goals.

While the Department of the Treasury does not yet have an AFHM regulation, its housing programs are subject to the same affirmative, integrative obligations that govern HUD programs and that are well established under housing law.⁸ In today’s housing market, these obligations—including AFHM—are particularly important within the LIHTC context, given the program’s significance in producing and rehabilitating affordable rental housing. Treasury should follow HUD’s example in mandating AFHM procedures, and more State Housing Finance Agencies should take the initiative to do so as well. Yet there is also a need for actors at every level, including HUD, to improve upon the existing policies. While the current HUD guidance articulates the need for affirmative marketing, it falls short in failing to set standards or issue clear directives on effective practices.⁹ Most problematically, while HUD’s AFHM program was designed to fill an important niche in fair housing policy—bridging gaps in information and exposure that otherwise impede meaningful access—it has largely been ignored since its inception. Despite the existing rules, developers have been able to show compliance with the law through advertising methods entailing minimal cost, effort, or creativity. Their actions hardly constitute “marketing” as it is known today, but rather provide little more than a minimal form of “notice” to a targeted community. These gestures lead to little change and little improvement in desegregation, and those “least likely to apply” remain exactly that.

The following report examines how AFHM guidance could better structure marketing policy and practices to be truly and effectively affirmative. Affirmative marketing programs should constitute true marketing efforts—developers should deploy strategies researched and targeted to the groups sought out, build customer relations, and ensure that they are communicating effectively. Such programs can be modeled on successful mobility programs and one-on-one counseling programs which have been valuable in other HUD contexts. To guide this process, we recommend that state and federal agencies create a framework that ensures that properties actually be “marketed” in a manner that generates diverse and open neighborhoods, by providing more substantive guidance and emphasizing outcomes.

Additionally, effective AFHM programs need to be accompanied by improved tenant selection practices. As with AFHM, this is an area where the LIHTC program currently lacks sufficient guidance. Developers are issued a bare prohibition on discrimination without direction in how best to avoid discriminatory impacts or how to further integration. As discussed below, clearer guidance on tenant selection practices can help

⁷ 42 U.S.C. §3608.

⁸ A fuller explanation why LIHTC is subject to the AFFH mandate can be found in civil rights groups’ Letter to Dr. Michael Stegman, U.S. Dep’t of the Treasury (May 15, 2012), http://www.prrac.org/pdf/Letter_to_Michael_Stegman_re_fair_housing_regs_5-15-12.pdf.

⁹ On the state level, a number of state housing finance agencies also require or incentivize some level of affirmative marketing as a component of the Qualified Allocation Plans (though the majority do not). See Appendix B.

landlords fully and consistently comply with fair housing laws. It is also needed in order for AFHM measures to succeed: outreach and marketing must be supported by an application process that similarly reflects fair housing goals.

When we invest resources in valuable housing programs such as LIHTC development, those programs should further the government’s existing civil rights obligations as well as shelter families in need. This is established law as well as good policy.¹⁰ Strong AFHM and tenant selection guidance can help agencies leverage their housing investments toward both these ends. It is time that federal and state agencies—as well as conscientious developers—turn their attention to making “affirmative marketing” more than just a catchphrase.

II. AFFIRMATIVE MARKETING: CURRENT FRAMEWORK AND RECOMMENDATIONS

A. What is affirmative marketing and why is it needed?

AFHM is a means of ensuring nondiscrimination and of affirmatively furthering fair housing,¹¹ an obligation the Fair Housing Act places upon HUD and other federal agencies to overcome the legacy of housing segregation and discrimination. The AFFH directive requires those responsible for federal housing programs to foster diverse communities and connect underrepresented groups to new residential options. This provision complements (but extends beyond) the Act’s antidiscrimination provisions in requiring that residential choice and integration be actively promoted.¹²

¹⁰ 42 U.S.C. §3608; as an agency administering housing and development programs, Treasury has “more than simply a duty to refrain from discrimination;” rather the Act requires that housing programs “assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases,” *NAACP v. HUD*, 817 F.2d 149, 155-57 (1st Cir. 1987).

¹¹ See U.S. Dept. of Housing and Urban Development, Handbook: Implementing Affirmative Fair Housing Marketing Requirements (8025.1)(hereinafter “Handbook”), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80251/index.cfm>, at 1-2,1-3. HUD’s primary AFHM regulation provides:

It is the policy of the Department to administer its FHA housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin. Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions. 24 C.F.R. § 200.610.

¹² The “AFFH” provision of the Fair Housing Act, 42 USC § 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.” See also, *e.g.*, *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987). The federal courts have confirmed that the AFFH obligation extends beyond HUD and is shared by all agencies with a role in housing and development. See, *e.g.*, *Jorman v. Veterans Admin.*, 579 F. Supp. 1407 (N.D.Ill.1984) (stating that 3608 places a “virtually identical fair housing duty” on the VA as on HUD); *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997) (applying § 3608(d) and caselaw developed under 3608(e)(5) to the OCC); *Albany Apartments Tenants Assoc. v. Veneman*, No. Civ. 01-1976, 2003 WL 1571576 at *10-11 (D. Minn. 2003) (applying AFFH claim to Dept. of Agriculture program); see also In

Along with other civil rights regulations, the AFHM program is an important means of implementing the AFFH goals. In a context of past discrimination and exclusion, disparities in exposure to and information about residential options tend to perpetuate segregated housing patterns. The AFHM program seeks to address those disparities, building upon other fair housing protections to *actually deliver* open housing choice regardless of protected characteristics. AFHM is needed to ensure equal access to information, help people overcome the legacies of exclusion, and promote fair and open housing choice.

Racial Blind Spots

Affirmative marketing is intended to foster diverse communities and to help families make informed choices they might otherwise find daunting. In a sense, affirmative marketing policy seeks to “‘level the informational playing field’ by encouraging the entry of underrepresented racial groups to a community and making special outreach efforts to these groups.”¹³ It has been shown that people from different racial groups are likely to have differing knowledge about neighborhoods within a metropolitan area.¹⁴ African Americans, whites and Latinos tend to have different “racial blind spots” – that is, communities they identify as those they “don’t know anything about,” which are generally neighborhoods that are inhabited primarily by other races.¹⁵ For example, surveyed African Americans in Chicago were familiar with few primarily white communities, especially those geographically distant.¹⁶ By closing these knowledge gaps, AFHM can help expand choice. In doing so, AFHM provides one means of addressing patterns that arise from discrimination and would otherwise be self-perpetuating.

Choice Architecture

Another approach to understanding affirmative marketing is through the lens of choice architecture, a concept developed by economists Richard Thaler and Cass Sunstein. The theory of choice architecture examines how context and presentation influence the choices people make, that is, “nudge” people to make one choice over another.¹⁷ Choice architecture draws upon theories of consumer economics applicable to residential decision-making just as to other choices. Numerous case studies show that people have a strong tendency to adhere to their current state, even when this is not the rational (from a market participant’s perspective) choice; this preference for the existing state shapes behavior, in part because it creates asymmetries in the valuation of options. This effect is

re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1, 10 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 861 A.2d 846 (N.J. 2004) (the state housing credit agency had a “duty to administer its housing and financing programs in a manner affirmatively to further the policies of Title VIII”).

¹³ Note, 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).

¹⁴ See Maria Krysan and Michael Bader, *Racial Blind Spots: Black-White-Latino Differences in Community Knowledge*, *Social Problems*, Vol. 56, Issue 4, pp. 677-701 (2009).

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 690.

¹⁷ Richard Thaler & Cass Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS*, Penguin Books (2009) at 85.

called “status quo bias,” describing the tendency of consumers to prefer the existing, default option (as in brand loyalty).¹⁸ Status quo bias is evident even in short-term experimental settings, as well as in a variety of contexts in the field.¹⁹ Especially because it combines with informational disparities such as the “racial blind spots” described above, it can also operate to perpetuate segregated patterns in housing choice.

Considering these tendencies, options that break with the status quo need to be marketed more vigorously and deliberately than might traditional or “default” options. In the case of AFHM, a simple advertisement in a newspaper is unlikely to be successful in expanding residents’ horizons beyond the status quo. Rather, information and outreach need to be deliberately structured to show people that there are convincing and appealing alternatives to their current situation.

Limits of Default Marketing Practices

Despite this need for extra marketing efforts to bridge residential divides, marketing tends to be deployed only to the extent necessary to fill vacancies and overlooked as an integrative strategy. Developers, juggling multiple priorities and lacking agency direction, need incentives to initiate affirmative marketing programs as well as recommendations for program design.

One survey of LIHTC developers, conducted by Abt Associates, revealed the tendency to use marketing on a minimalist scale and in ways unlikely to offer prospective tenants the chance to cross traditional neighborhood lines. The study found that:

[The] most popular mechanisms for marketing tax credit properties, according to property managers, are advertising in the newspaper and posting “for rent” signs on the front of the property—approximately 40 percent report using each of these methods. No other marketing method, including contacting the Section 8 office about openings, was reported by more than one-quarter of the managers. Given that over one-third of LIHTC tenants receive some form of Section 8 assistance ... and over three-fourths of the properties have at least one tenant on Section 8 assistance ... it is somewhat surprising that only 25 percent of the property managers contact the Section 8 office when they have vacancies. However, the lack of regular contact between most LIHTC managers and the local Section 8 office was reported by both site managers and Section 8 staff. It appears that at

¹⁸ See *id.* at 34-6. Behavioral economists also understand status quo bias as stemming in part from “loss aversion,” describing the tendency of consumers to weigh losses more heavily than gains, that is, to perceive the loss of giving an object up as greater than the value associated with acquiring it. Status quo bias also stems in part from “regret avoidance,” as studies have shown that individuals tend to anticipate and experience greater regret from consequences of new actions than from consequences of inactions. William Samuelson and Richard Zeckhauser, Status Quo Bias in Decision Making, *Journal of Risk and Uncertainty* (1988) at 38, available at <http://www.hks.harvard.edu/fs/rzeckhau/SQBDM.pdf>.

¹⁹ Studies have also shown that the effect of status quo bias can be stronger where choices are more complex or more difficult for consumers. For example, one experiment presented study participants with a variety of scenarios in which one option was presented as an existing default – e.g., the preferred composition of an investment portfolio – and found that preference for the default increased where the number of options increased. Daniel Kahneman; Jack L. Knetsch; Richard H. Thaler, Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, *The Journal of Economic Perspectives*, Vol. 5, No. 1. (Winter 1991) at 198 (citing Samuelson and Zeckhauser (1988)).

most of the LIHTC properties, the residents who receive Section 8 assistance found out about vacancies on their own.

...It should [also] be noted that 9 properties (just under one-fourth of the study properties) reported no formal marketing in the last two years. Seven of these nine properties were in the Boston area, reflecting a very tight housing market in Boston and the fact that managers do not need to advertise in order to fill vacancies.

While managers relied heavily on newspapers for advertising, residents reported word of mouth as the most common source for finding their LIHTC unit . . . Overall, 51 percent of the residents found their current home through family and friends. This is true for both nonprofit and for-profit properties. Residents identified newspapers and signage/walking by the property (the most common marketing methods reported by managers) as the next most frequent methods for learning of their new homes, though neither of these was reported by more than 15 percent of respondents. No other method for finding out about their new unit was reported by more than seven percent of the respondents.²⁰

Reliance on word-of-mouth, passers-by, or short newspaper ads (which indirectly rely on an applicant's external knowledge of an area's character) are unlikely to overcome disparities in comfort and familiarity with a development and its surrounding neighborhood. Yet many families in subsidized housing would welcome the opportunity to explore new residential options if given the chance. For example, in the Abt study of LIHTC developments, many residents expressed some level of dissatisfaction with their current neighborhoods: less than half (46 percent) of surveyed residents rated their LIHTC neighborhood as good or excellent, whereas 54 percent rated it as poor or fair; and among surveyed residents in project-based Section 8 units, nearly 80 percent rated their neighborhood as fair or poor overall.²¹ This indicates the need for better LIHTC siting practices going forward, but it also illustrates the likelihood that many individual residents would welcome outreach from alternative, higher-opportunity neighborhoods.

Successful Marketing

Experience shows that effective marketing is a key tactic for expanding choice and creating diverse communities. For example, a study conducted by the Fair Housing Justice Center on a number of successful affirmative marketing initiatives concluded that affirmative marketing was one significant contributor to the creation of diverse mixed-income communities.²² The study's final observations were that:

²⁰ Abt Assoc. Inc., *Assessment of the Economic and Social Characteristics of LIHTC Residents and Neighborhoods* (February 28, 2000) at 5-3, available at http://www.abtassociates.com/reports/Buron_00_Ec&SocialChars%20LIHTCResidents&Nbhd.PDF.

²¹ *Id.*, "Assessment" at 4-21.

²² See Diane L. Houk, Erica Blake, Fred Freiberg, *Increasing Access to Low-Poverty Areas by Creating Mixed-Income Housing*, June 2007 (Fair Housing Justice Center).

Affirmative marketing and rental criteria impact racial diversity at a housing site throughout the life of the development...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. 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. Also, the staging of the initial rent-up of both affordable and market-rate units can impact racial diversity as described more fully below.

Once initially rented, methods used to advertise future availabilities and re-rent apartments become critical tools for maintaining a low vacancy rate and supporting racial diversity. Mixed-income housing developers and managers in some low-poverty areas have found that attracting market-rate tenants over time is more challenging than attracting lower income tenants. These developers have successfully used private rental management companies with market-rate housing portfolios to market and re-rent apartments.²³

As one example, the FHJC report described marketing results in Carlsbad, California, a low-poverty city where an inclusionary zoning ordinance requires 15% of new housing construction to be affordable for those with incomes below 70% AMI.²⁴ In the case study, developers initiated a successful county-wide affirmative marketing plan that did not include residency preferences and emphasized outreach to different minority media sources and local employers to broaden the pool of applicants. The result of this effort was a racially diverse tenant population (47% White, 25% Hispanic, 13% Black, 7% Asian, and 8% Other) in a city that was more than 80% non-Hispanic White in 2000.²⁵

Need for Marketing

All the factors discussed above—the Fair Housing Act's directive that the legacies of exclusion be addressed through affirmative, integrative measures; the continuing racial disparities in information and access; and the documented tendency for default marketing practices to reinforce status quo bias among consumers—amply support the need for robust, truly affirmative marketing requirements in housing programs. This includes the race-conscious strategies needed for marketing efforts to successfully persuade those “least likely to apply” to do so.²⁶ As discussed in our recommendations, below, racial

²³ *Id.* at 66-7.

²⁴ *Id.* at 17.

²⁵ *Id.* at 18.

²⁶ See Philip Tegeler, The Future of Race Conscious Goals in National Housing Policy, in Margery Austin Turner, Susan J. Popkin, and Lynette Rawlings, eds., PUBLIC HOUSING AND THE LEGACY OF SEGREGATION (The Urban Institute Press, 2009), available at http://www.prrac.org/pdf/Tegeler_Urban_Institute_Chapter.pdf (discussed how race-conscious measures, such as affirmative marketing, that do not classify or treat individuals differently based on race are not

metrics should be used to target outreach and as one measure in assessing performance. Without disadvantaging or classifying individual tenants based on race, these techniques can help agencies ensure that our valuable housing resources are helping to build diverse and open communities.

B. Current AFHM Program Requirements in HUD Programs

While affirmative fair housing obligations apply to all federal housing programs, they are not yet codified in application to the LIHTC program. HUD's existing AFHM rules, applicable to other programs, can therefore serve as a helpful starting point in formulating LIHTC marketing policy. The following subsections provide an overview of basic regulatory requirements, relevant highlights from HUD's primary vehicle for AFHM guidance, its AFHM Handbook, and a brief critique of the HUD program.

While the HUD guidelines described below are instructive, they should be viewed as "first draft" marketing requirements that have been shown to lack teeth and need to be substantially sharpened for successful translation into LIHTC guidance. (Additionally, while properties with layered subsidies—for example, those receiving HOME funding or participating in Federal Housing Administration programs—are already subject to HUD's AFHM requirements, they need sturdier oversight with regard to these obligations.) The HUD guidance offers helpful recommendations for outreach and monitoring, but sets only a basic floor for marketing practices and compliance.

As discussed in our recommendations, we urge policymakers at all agencies to assess the current program's weaknesses and address them in improved guidance. Additionally, demographic data collection and monitoring, which is required by law²⁷ but has been much delayed, is crucial to the process of setting program goals and measuring outcomes. State housing finance agencies, Treasury, and HUD should respond to the AFFH directive by implementing a more assertive, more effective marketing program.

1) AFHM Regulations

HUD's AFHM regulations implement the Fair Housing Act's requirement that HUD (and other federal agencies) affirmatively further fair housing, 42 U.S.C. §3608, that is, the agency's obligation to go beyond policing discrimination and ensure that federal housing resources advance integration and housing choice. The most detailed AFHM regulations, 24 C.F.R. §200.600 *et seq.*, were promulgated by HUD in 1972 to govern Federal Housing Administration programs, but have also been incorporated by reference into a number of other HUD programs. An additional set of HUD programs contain less detailed, program-specific marketing regulations (for instance, many do not require an AFHM Plan). A list of the federal AFHM regulations across various housing programs is included as Appendix A.

subject to strict scrutiny and are analogous to the integrative techniques cited approvingly in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007)).

²⁷ Housing and Economic Recovery Act of 2008, § 2835(d) (codified at 42 U.S.C. § 1437z-8 (2010)), amending the United States Housing Act of 1937 to require that, at least annually, State Housing Finance Agencies provide to HUD and HUD make publicly available data regarding the race, ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments for households residing in all properties receiving Low-Income Housing Tax Credits.

The AFHM marketing regulations in 24 C.F.R. § 200.600 *et seq.* (applicable to Federal Housing Administration and, by reference, other programs, and providing for the submission of an AFHM Plan) and 24 C.F.R. § 108 (governing compliance) are HUD's most comprehensive and most widely applicable marketing regulations. HUD's AFHM regulation provides that:

It is the policy of the Department to administer its FHA [and certain other] housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin. Each applicant for participation in FHA subsidized and unsubsidized housing programs shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions.²⁸

HUD's AFHM regulation further requires that each applicant "carry out an affirmative program to attract buyers or tenants . . . [which] shall typically involve publicizing to minority persons the availability of housing opportunities . . . through the type of media customarily utilized by the applicant, including minority publications or other minority outlets."²⁹ Program applicants subject to this rule must also submit AFHM Plans to fulfill their marketing requirements.³⁰

Compliance with the duty to affirmatively market is governed by 24 C.F.R. § 108, which applies to "all applicants for participation in subsidized and unsubsidized housing programs administered by the Department of Housing and Urban Development and to all other persons subject to Affirmative Fair Housing Marketing requirements in Department programs."³¹ The purpose of the regulation "is to establish procedures for determining whether or not an applicant's actions are in compliance with its approved Affirmative Fair Housing Marketing plan." Compliance procedures include:

- Pre-occupancy review of marketing plan: developers must notify the HUD monitoring office at least 90 days before marketing activities begin; the office must review the marketing plan and may hold a pre-occupancy conference.
- Ongoing monitoring: the HUD office reviews sale/rental reports; other documentation of plan implementation; and provides technical assistance.
- Compliance meetings: first level of compliance review, triggered where the program applicant fails to comply with AFHM procedures, or where "it appears that the goals of the AFHM plan may not be achieved, or that the implementation of the Plan should be modified." The applicant must provide data including copies of advertising materials and other evidence of outreach; descriptions of training programs; sign-ins from potential tenants who were shown the building; copies of applications and waiting lists of prospective renters; and copies of the selection and screening criteria. The HUD office's examination of this material and

²⁸ 24 C.F.R. § 200.610 ("Policy").

²⁹ 24 C.F.R. § 200.620.

³⁰ 24 C.F.R. § 200.625.

³¹ 24 C.F.R. § 108.1(b).

meeting with the applicant produces a determination of either compliance or “possible noncompliance” – which leads to a “comprehensive compliance review” and potentially a referral to HUD’s Fair Housing and Equal Opportunity Office.

- Complaints: in addition to the monitoring process, reviews may be triggered by complaints. Individuals and private and public entities may file complaints with HUD alleging violations of the AFHM regulations or an approved AFHM plan.
- Compliance reviews: this examination includes the “[a]pplicant’s sales and rental practices, including practices in soliciting buyers and tenants, determining eligibility, selecting and rejecting buyers and renters, and in concluding sales and rental transactions,” and requires the HUD office to examine data submitted by the applicant, including that relating to the race of buyers or renters.³²
- Compliance report and sanctions: the compliance review yields a compliance report detailing specific areas where AFHM activities have failed to comply with HUD’s requirements. Potentially, this may lead to sanctions such as denial of further participation in HUD programs.

2) HUD’s AFHM Handbook

The primary source of AFHM sub-regulatory guidance is HUD’s AFHM Handbook (last updated in 1993), which is a centralized resource for participants in programs subject to AFHM and for FHEO staff.³³ In addition, applicants to many covered programs must submit an AFHM Plan as directed in forms supplied by HUD.³⁴ (This form is also required as by a number of state housing finance agencies as part of the tax credit application process; see Appendix B.) The marketing plan forms contain helpful demographic analysis and reporting components, but would benefit from further improvements.

The AFHM Handbook provides that affirmative marketing is to target those “least likely to know about and apply for the housing in question” in the absence of outreach.³⁵ The Handbook provides guidance on determining what demographic group is “least likely to apply:” in addition to the racial and ethnic composition of the residential area, applicants are instructed to consider factors such as exclusionary zoning, advertising, or site selection policies that may have resulted in discrimination; language barriers; and income eligibility requirements.³⁶ The AFHM Plan form provides a worksheet to be used to determine which demographic group is least likely to apply for housing, based on whether there is “a significant under-representation of any demographic group in the project and/or on its waiting list relative to the surrounding housing market area.”

³² 24 C.F.R. § 108.40.

³³ U.S. Dept. of Housing and Urban Development, Handbook: Implementing Affirmative Fair Housing Marketing Requirements (8025.1)(hereinafter “Handbook”), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80251/index.cfm>. HUD also addresses marketing requirements on a less detailed scale in its Occupancy Handbook, available at http://www.novoco.com/low_income_housing/resource_files/hud_data/43503c2HSGH.pdf.

³⁴ See AFHM Plan for Multifamily Housing (HUD form), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14902.pdf.

³⁵ *Id.*, Handbook at 4-1.

³⁶ *Id.* at 2-8.

With regard to marketing efforts, the Handbook requires a “good faith effort” to reach those identified as the “least likely to apply.”³⁷ Examples of a good faith effort include:

1. Advertising in print and electronic media that are used and viewed or listened to by those identified as least likely to apply;
2. Marketing housing to specific community, religious or other organizations frequented by those least likely to apply;
3. Developing a brochure or handout that describes facilities to be used by buyers or renters, e.g., transportation services, schools, hospitals, facilities, industry, recreation facilities. The brochure should also describe how the proposed project will be accessible to physically handicapped persons and describe any reasonable accommodations made to persons with disabilities; and
4. Insuring that the sales/management staff has read and understood the Fair Housing Act, and the purposes and objectives of the AFHM Plan.³⁸

For rental properties, applicants must make provisions for advertising following the initial rent-up period, including an agreement with HUD regarding periodic plan modification.³⁹

As noted above, applicants within certain programs subject to AFHM requirements are required by regulation to submit an AFHM Plan to HUD, using HUD-provided forms. Plan requirements are detailed in Chapter 2 of the AFHM Handbook. The general components of each Plan, as identified by the Handbook, include:

- Targeting (identification of the group(s) least likely to apply);
- Outreach (program design including special measures to attract those “least likely”);
- Indicators (statement of metrics used to measure success);⁴⁰ and
- Staff Training (description of capacity for fair housing and other staff training).

With regard to outcome, the Handbook currently states that:

Applicants are encouraged to formulate their own methods of measuring the effectiveness of the Plan and FHEO staff shall review the appropriateness of such methods. Such measures might include a survey questionnaire or other method of gathering information ... The reviewer shall assess the appropriateness of such indicators by using knowledge of the operation of the market and of how people

³⁷ *Id.* at 1-7(A).

³⁸ *Id.*

³⁹ *Id.* at 2-10.

⁴⁰ With regard to Indicators, the Handbook currently states that: “Indicators such as the anticipated racial/ethnic composition of the tenant population or applicant pool are not to be used as indicators of effectiveness of an AFHM Plan under any circumstances. The applicant is encouraged to use indicators based on good faith efforts, including the number of referrals by community organizations; the number of visits to the site or walk-ins due to outreach or advertising; or the representation of persons identified as least likely to apply as part of the potential buyer or renter group in comparison to the percentage of that group within the housing market area.” 2-15.

hear about housing opportunities. The reviewer must conclude that the indicators are realistic and measurable.⁴¹

As discussed further below, stronger guidance is needed to address each component of AFHM planning, in particular with regard to outcome metrics and performance standards.

3) Specific Problems with Current AFHM Handbook and Plan

Identification of Market Area

The current Handbook and Plan give the applicant wide discretion in designating the “market area” for each property, stating that this is the area from which an applicant can “reasonably expect to draw a substantial number of its tenants.”⁴² This market area is then used to determine who is “least likely to apply” (through a comparison between tenant composition and market area composition), as well as whether the use of residency preferences is likely to be discriminatory. This approach is problematic because it does not require applicants (or the reviewing office) to acknowledge and address regional patterns of segregation. Rather, the applicant may designate whatever local area they deem appropriate as their “market area,” excusing themselves from outreach to neighboring areas and throughout the region. Yet metropolitan areas can be a racial patchwork in which neighborhood quality differs dramatically among communities, often due to zoning, racial steering, and other exclusionary practices. The promotion of fair housing is a region-wide responsibility.⁴³ This is a legal mandate that has been strengthened by the federal courts since the Handbook’s 1993 revision.⁴⁴ AFHM guidance that permits the program participant broad flexibility to identify its market area falls short of meeting HUD’s responsibilities in this regard.

Need for outreach to include information-based content

The Handbook highlights general marketing approaches: print media, such as brochures and advertisements in minority media outlets, and community outreach. However, the Handbook does not require or recommend strategies tailored to address the gaps in knowledge that may result from decades of residential exclusion—such as the presentation of clear comparative data on school quality, services, or other neighborhood

⁴¹ Handbook 3-10

⁴² HUD instructs that an “Expanded Market Area” should be used “if the immediate housing market area is not demographically diverse enough to draw applicants considered least likely to apply for housing in this Project,” see Tip Sheet, available at <http://www.hud.gov/local/shared/working/r10/mf/afhmptipsheet.pdf>; however, this is largely left as a discretionary determination. The instructions provide that “If a housing market area is not demographically diverse in terms of race, color, national origin, religion, sex, disability, or familial status, an expanded housing market area may be used. An expanded housing market area is a larger geographic area that may provide additional diversity.” AFHM Plan at 6. Note that the regional “market area” appropriate for marketing outreach may be different from the area assessed in the developer’s “market study.”

⁴³ See *Thompson v. HUD*, 348 F.Supp.2d 398, 408 (D.Md. 2005) (requiring agency to consider regional, not merely local, approaches to AFFH and integration); see also Florence Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333 (2007).

⁴⁴ *Id.*

features. While the Handbook suggests that brochures “may include a range of information that influences decisions regarding housing choice” such as the location of schools, transportation, hospitals, etc.,⁴⁵ it does not *require* that any such information be provided.

Lack of performance standards

Elements of the Handbook –such as the requirement that the participant submit marketing material for examination—provide a helpful framework for AFHM program assessment. However, while the Handbook provides detail with respect to monitoring and compliance *procedures*, it does not provide meaningful performance *standards* to trigger compliance reviews or targeted technical assistance. Rather, program applicants set their own indicators of success, which they describe to HUD in submitting their Plans. While some evaluations of demographic data are required (for example, with regard to demographics of prospective tenants who inquire about the building, as well as annual occupancy reports),⁴⁶ AFHM procedures do not provide clear guidance on how this data should be analyzed or used—for example, whether or when demographic data should trigger the compliance review process described in the AFHM regulations (required when “it appears” to the HUD office that “the plan may not accomplish its intended objective,” 24 C.F.R. § 108). Furthermore, the current Handbook states that demographic indicators should not be used by applicants to assess the success of their AFHM programs—rather, indicators are to be based on the extent of the applicant’s “good faith efforts.” While the extent and type of marketing efforts will be the ultimate measures of compliance, demographic data showing that “least likely” tenants remain underrepresented should lead to first-level AFHM reviews. This indicates to HUD where a deeper look into an applicant’s procedures is needed to determine whether more representative tenant composition could be pursued through better marketing.

C. Better Practices and New Directions

1) Lessons from the States

Some states have adopted their own AFHM regulations in addition to the HUD regulations. Although the LIHTC “General Public Use Rule” technically incorporates a wide range of HUD regulations by reference (including AFHM), this has never been communicated by Treasury or the IRS to property owners. In lieu of such federal guidance, states can require LIHTC properties to implement the state’s AFHM regulations or guidance (as Massachusetts does, for properties in the federal LIHTC program as well as those in the state’s low income housing tax credit program).⁴⁷

⁴⁵ Handbook at 2-10.

⁴⁶ Handbook 4-8 (referring to Form HUD-949, Civil Rights Tenant Characteristics/Occupancy Report, Insured Unsubsidized Housing Programs); 5-6 (indicators); 6-14 (compliance).

⁴⁷ In Massachusetts, “...all privately assisted housing or housing for inclusion on the Subsidized Housing Inventory shall have an Affirmative Fair Housing marketing Plan.” Eligible subsidy programs for Subsidized Housing Inventory includes Massachusetts Low Income Housing Tax Credits and Federal Low Income Housing Tax Credits. See Massachusetts Housing and Economic Development, Measuring Towards Local Goals (2008), available at www.mass.gov/hed/docs/dhcd/legal/shi.doc.

We have reviewed three states—Massachusetts, New Jersey, and Connecticut—that have enacted their own AFHM regulations. The state AFHM Plans discussed below all contain successful features that can be helpful in formulating improved state- and federal-level guidance. These three states have successfully developed requirements that target those least likely to apply. Their plans also have controls in place to ensure developers’ compliance.

Massachusetts

The Massachusetts Affirmative Marketing Guidelines, which recognize that “Massachusetts has a compelling interest in creating fair and open access to affordable housing,”⁴⁸ provide substantive requirements for marketing strategies. The Massachusetts marketing guidelines call for marketing to begin a full six months prior to a new-ownership development being made available for rental.⁴⁹ This requirement allows developers ample time to develop a waiting list inclusive of aspiring tenants otherwise “least likely to apply.” The guidelines also require that newspaper ads run at least twice over a sixty day period, and that advertisements in mainstream sources be comparable across regional, local, and minority news sources.⁵⁰ Having uniform print advertisement ensures that all populations and cities are equally targeted. Also, print advertisements can better reach those without home internet access. Massachusetts requires affordable units to be placed on certain public government-run registries, in order to increase access to those who have need.⁵¹ By requiring that all affordable and/or accessible units are listed on the same website potential tenants, housing agencies, local housing authorities and other non-profit agencies are all able to access information on available affordable units and this information is available to people throughout the state and is not limited to a jurisdiction.

Another requirement Massachusetts has that expands potential tenants’ access to the affordable units is that applications for affordable units must be available at public locations, including at least one that has some night hours.⁵² This requirement expands the audience learning of the affordable housing and is another way to target those least likely to apply. Massachusetts also requires administrators to conduct informational meetings to educate applicants about the application process and about the housing development.⁵³ While attendance is not mandatory, these meetings can introduce applicants to the process and answer whatever questions they may have.⁵⁴ Meetings are held either on a weekend or during the evening in order to reach many potential residents. Holding the meetings when most working people would be able to attend ensures that those people are able to apply.

⁴⁸ Massachusetts Department of Housing and Community Development, Affirmative Fair Housing Marketing Plan Guidelines, at 2, *available at* <http://www.mass.gov/Ehed/docs/dhcd/hd/fair/afhmp.pdf>.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 4-5.

⁵¹ *Id.* at 4. Massachusetts is not the only government to require this measure; the local Westchester government requires similar outreach. *See* Westchester County Fair and Affordable Housing Implementation Plan, Appendix G-1.

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ *Id.*

Massachusetts' AFHM Plan regulation contains key provisions that if adopted by other states or agencies could improve the LIHTC program. In particular, requiring an extended time for marketing ensures that developers spend sufficient time marketing their property to those least likely to apply and allows more time for interested parties to sign up on the waiting list. Requiring a centralized listing of all affordable properties (for example, on a website) is a simple change that would make LIHTC properties more accessible to those least likely to apply.

Connecticut

Connecticut's regulations provide for data collection and clear enforcement procedures. To promote racial and economic integration the Connecticut regulation requires that 20% of all units funded in whole or in part by the Connecticut Department of Housing be marketed to those who are least likely to apply.⁵⁵ "Least likely to apply" is defined in the Connecticut Fair Housing Regulations as:

Those persons who, in the main, do not live in the area of the development because of racial or ethnic patterns, perceived community attitudes, price or other factors, and thus need additional outreach to inform them of their opportunity to live in the development. With regards to race, in predominantly white areas, these shall be minority groups; in predominantly minority areas, these shall be white groups.⁵⁶

The definition used by Connecticut expands "least likely to apply" beyond race by including price and "other factors." The use of price in addition to race to determine those least likely to apply allows Connecticut to have a racially and economically diverse applicant pool. The HUD Handbook and Form 935.2A do not specifically identify the affordability of the neighborhood as an identifying factor of those least likely to apply. HUD identifies transportation, insufficient information on housing, and language barriers as some reasons why someone may not apply.⁵⁷

Enforcement of the "least likely to apply" outreach requirement is a focus of Connecticut's plan. The regulations state:

[I]f the affirmative action office finds at any stage that there are insufficient "least likely to apply" candidates due to a lack of good faith affirmative fair marketing efforts, then the affirmative action office shall reserve the right to require additional outreach until such time as a sufficient effort has been expended or a sufficient number of applicants are available. Such additional outreach may delay the occupancy of units."⁵⁸

The above requirement ensures that the developer's marketing is attracting tenants from groups that are in need of affordable units. In addition to the state reviewing plans,

⁵⁵ Connecticut Fair Housing Regulations, §8-33ee-2(a).

⁵⁶ Connecticut Fair Housing Regulations, §8-33ee-1(6).

⁵⁷ HUD, *Affirmative Fair Housing Marketing Plan*, form HUD-935.2A (May, 2010).

⁵⁸ Connecticut Fair Housing Regulations, §8-33ee-2(a).

Connecticut requires that plans be available for public inspection at the sales or rental office of the developer.⁵⁹

Projects in Connecticut are required to prepare and submit a quarterly list of projects that the state distributes to a list of interested organizations and individuals. Maintaining a list of properties is an effective way to reach those least likely to apply. Additionally, Connecticut enforces its fair marketing regulations by refusing to allow managers to open waiting lists or market without an affirmative marketing plan in place.⁶⁰ Pursuant to Connecticut affirmative fair housing marketing regulations, data reporting is required at three points prior to occupancy and annually thereafter.⁶¹ The three point reporting requirement allows state officials to ensure that marketing is actually reaching those least likely to apply.

New Jersey

New Jersey's affirmative marketing plan is described in the regulations as a "regional marketing strategy."⁶² Framing the marketing plan as a regional plan makes developers aware that their marketing must target an entire region, and not just a city or neighborhood around the new development. New Jersey's regulations provide that:

The affirmative marketing plan is a regional marketing strategy designed to attract buyers and/or renters of all majority and minority groups, regardless of race, creed, color, national origin, ancestry, marital or familial status, gender, affectional or sexual orientation, disability, age or number of children to housing units which are being marketed by a developer or sponsor of affordable housing. The affirmative marketing plan is also intended to target those potentially eligible persons who are least likely to apply for affordable units in that region. It is a continuing program that directs all marketing activities toward the COAH Housing Region in which the municipality is located and covers the period of deed restriction.⁶³

New Jersey requires that affirmative marketing plans be implemented by a designated administrative agent.⁶⁴ This agent must be approved by the New Jersey Council on Affordable Housing (COAH) and is required to attend a COAH-approved affirmative marketing training program. The assignment of responsibility to an administrative agent helps ensure that marketing is paid due attention by an individual with relevant experience and training, who is knowledgeable about effective strategies for reaching low-income individuals, and who is professionally invested in successful marketing. In addition, the agent is responsible for counseling services that complement tenant outreach: New Jersey code provides that in implementing the affirmative marketing plan, administrative agents must "designate an experienced staff person [or contract with an experienced agency] approved by COAH to provide counseling services to low and

⁵⁹ *Id.* at §8-37ee-4.

⁶⁰ Interview with Erin Kemple, Sept. 27, 2010.

⁶¹ Connecticut Fair Housing Regulations, § 8-33ee-7(e).

⁶² N.J. Admin. Code § 5:80-26.15 (a).

⁶³ *Id.*

⁶⁴ N.J. Admin. Code § 5:80-26.15 (b).

moderate income applicants on subjects such as budgeting, credit issues, mortgage qualification, rental lease requirements, and landlord/tenant law.”⁶⁵

New Jersey requires the administrative agent to publish one advertisement in a newspaper that is circulated in the housing region and broadcast one advertisement on the radio.⁶⁶ The administrative agent must select a third marketing strategy in addition to the newspaper and broadcasting ads. This additional strategy may include distributing flyers to employers throughout the housing region, advertising to groups least likely to be reached by radio or TV ads, or identifying specific community organizations that will solicit moderate- and low-income applicants.⁶⁷

The New Jersey plan, like the Massachusetts plan, requires a longer period of advertisement than the 90 days required by HUD. New Jersey requires advertisement to begin at least four months before occupancy is expected to begin in the marketed units.⁶⁸

Overview

The three state AFHM regulatory schemes detailed above contain some best practices that should be included in current HUD regulation and future Treasury regulations. These best practices include:

- Requiring the marketing of properties 4-6 months prior to occupancy
- Requiring all affordable units to be listed on the same website
- Requiring applications for affordable units be available at public locations including at least one that has night hours
- Requiring that “least likely to apply” be clearly defined. This determination should require a statistical identification of underrepresented racial groups, with the additional consideration of other factors (such as residence in a high-poverty area)
- Require that the marketing of properties is done regionally rather than locally

We recommend the implementation of these key best practices into the current HUD regulation and future Treasury regulation, as well as by states. This will help ensure that marketing reaches those least likely to apply and that racial and economic integration is being promoted by developers.

States with Marketing Requirements and Incentives in Qualified Allocation Plans

We recommend that Treasury work with HUD to develop robust federal-level requirements for AFHM throughout the LIHTC program. However, state agencies can and should take action to promote AFHM programs through their own authority without waiting for federal guidance to be developed. For example, Qualified Allocation Plan scoring protocols can serve as an initial, state-level step toward widespread AFHM implementation. (Qualified Allocation Plans, or QAPs, are the documents describing the

⁶⁵ N.J. Admin. Code § 5:80-26.15(d).

⁶⁶ N.J. Admin. Code § 5:80-26.15 (f).

⁶⁷ *Id.*

⁶⁸ N.J. Admin. Code § 5:80(g).

threshold criteria and competitive rubric through which each state allots its tax credits.) QAPs should require affirmative marketing as a qualifying threshold when awarding tax credits, and can also provide scoring incentives for developers (particularly those in low-poverty areas) willing to sign on to more intensive marketing programs.

In addition to the states profiled in detail above, a number of state HFAs currently require or incentivize the use of affirmative marketing techniques for LIHTC developments through the threshold or scoring components of their qualified allocation plans (QAPs). A full survey of state LIHTC QAP provisions on affirmative marketing (and tenant selection) is included with this report as Appendix B.

As detailed in the appendix, the QAP marketing provisions may require the submission of a marketing plan, or simply a general commitment to exert targeted marketing efforts (for example, to accompany special-needs housing set-asides). A relatively small number of states issue substantive marketing requirements. While any recognition of marketing's role is a helpful step, substantive guidance and oversight is needed in order for marketing to effectively yield diverse, integrated tenant populations.⁶⁹ As discussed below, we recommend that all state HFAs implement generally applicable, mandatory marketing programs that hold developers accountable for their commitments and provide substantive directives.

Scoring systems may also reward onsite services—such as child care—that can be used to attract tenants concerned about moving to an unknown community. Information about these services should be systematically included as part of targeted marketing outreach.

2) Lessons from the Field

Policymakers can develop core “best practice” for marketing by examining strategies that developers have found effective in reaching those “least likely to apply.” These lessons from the field can inform AFHM trainings, an updated Handbook, and other technical assistance.

A helpful starting point in this research is an AFHM resource developed by New York University School of Law's Furman Center for Real Estate and Urban Policy.⁷⁰ This report, which provides key lessons for effective affirmative marketing, was produced at the request of a Court Monitor overseeing a landmark settlement agreement that requires Westchester County (in New York) to fulfill its obligation to affirmatively further fair housing, in part by paying \$51.6 million to develop affordable housing principally in

⁶⁹ For example, while most states require that developers engage in some level of outreach to public housing or voucher waitlists, there is wide variation in the level of effort required. In addition, waitlist outreach may have little integrative effect where developers are not required to pursue marketing beyond their immediate jurisdictions, if the waitlist composition reflects that of the local area. *See* Philip D. Tegeler et. al., *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 Harv. C.R.-C.L. L. Rev. 451, 474 (1995).

⁷⁰ John Infranca, Furman Center for Real Estate & Urban Policy, *An Overview of Affirmative Marketing and Implications for the Westchester Fair Housing Settlement* (2011)(hereinafter “Furman Report”), http://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf.

predominantly white municipalities.⁷¹ The Furman Center’s project entailed a review of academic literature, analyses of various affirmative marketing programs, and a roundtable convention to solicit feedback from a number of organizations and individuals with relevant experience.

The report revealed findings along four dimensions which provide insight as to what constitutes “Successful Practices” in affirmative marketing.⁷² First the report found that an affirmative marketing plan should seek to identify and address the concerns of prospective residents. Second, the plan should incorporate a mechanism, such as organized visits or tours, for prospective residents to gain personal exposure to the resources available in the new community. Third, local groups should be engaged at the onset of this process. Fourth, marketing efforts should be coordinated to avoid duplication and maximize efficiency.

Address Residents’ Concerns through Specific Information

The Furman Center’s report noted that social scientific evidence suggests that relocating households make their decisions primarily on the basis of information concerning the new community’s specific resources, rather than a more general interest in “social mobility” or “high opportunity” areas.⁷³ Accordingly, decisions were predominantly based on concrete information pertaining to the availability of specific resources in the new community. In particular, one study revealed that access to shopping, transportation, quality schools, and an over overall safe environment were among the most prevalent of preferences for relocating households.⁷⁴ Residents also had strong concerns about the quality and affordability of the housing units themselves.⁷⁵ In light of this information, the report stressed that marketing materials: “...should address how prospective

⁷¹ Stipulation and Order of Settlement and Dismissal, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, No. 06-2860 (S.D.N.Y. Aug. 10, 2009) at ¶¶ 2, 5, 9. Plaintiffs in the lawsuit, alleged that although the county had certified that it would “affirmatively further fair housing” in order to receive HUD funding, it had not met this AFFH obligation because it utterly failed to consider impediments to fair housing choice along the lines of race and further failed to identify and take appropriate actions to overcome these impediments (so that the certification violated the federal False Claims Act, 31 U.S.C. § 3729 *et. seq.*).

⁷² Furman Report at 7 (noting that the literature on this subject and the experiences shared by roundtable participants suggested key lessons that may not guarantee success, but are likely to strengthen efforts to develop a successful affirmative marketing plan that affirmatively furthers fair housing).

⁷³ The Furman Center’s report relied on various case studies conducted in the context of HUD’s Hope VI Program. The Hope VI program entailed a plan developed by HUD whose central purpose was to rebuild the most physically impoverished public housing developments across the country. In order to facilitate this extensive work, current residents are moved to other buildings within their development, relocated to public housing elsewhere or provided with housing assistance vouchers. The program thus provided a ripe opportunity to glean insights into the decision making process families employed when determining whether to move to another public housing unit or a private residential unit. *See e.g.* Susan Clampet-Lundquist, *HOPE VI Relocation: Moving to New Neighborhoods and Building New Ties*, 15 Housing Policy Debate 415 (2004).

⁷⁴ Another case study conducted in the context of HUD’s Hope VI program was used to identify these factors. Robin Smith, with Arthur Naparstek, Susan Popkin, Lesley Bartlett, Lisa Bates, Jessica Cigna, Russell Crane & Elisa Vinson, The Urban Institute Metropolitan Housing and Communities Policy Center, *Housing Choice for HOPE VI Relocates* (2002) (conducting study on the operation of the Hope VI program in four cities to reveal that relocating households sought neighborhoods that were safe, had good schools, were convenient for shopping and transportation).

⁷⁵ *Id.* at 19.

households will manage the challenges of daily life, in addition to focusing on the longer-term advantages of improved schools or economic opportunities.”⁷⁶

Sponsor Community Visits

Building on these insights, the Furman Center’s report goes on to acknowledge how critical it is for an affirmative marketing plan to incorporate opportunities to visit the new community.⁷⁷ As an illustration of a successful use of this tactic, the report pointed to the Housing Mobility Voucher Program in the Baltimore metropolitan area, which was developed to enable low-income families to relocate to “Opportunity Neighborhoods” (meaning diverse neighborhoods with a relatively low concentration of poverty and government-assisted housing). The Baltimore program provides two different tours to prospective residents.⁷⁸

At the onset, individuals seeking housing in the community are taken on a two-hour bus tour into suburban areas. During the tour, guides point out the location of resources including transportation, shopping, housing, healthcare, and schools.⁷⁹ Later a housing search assistant meets with program participants who are ready to obtain housing. This assistant, who is a former participant in the program, is then able to answer any specific questions prospective residents may have.⁸⁰ The Furman’s Center report found that these respective tours might provide a useful model for the development of other strategies to help prospective residents determine if the new community will meet their needs.⁸¹

Engage Local Groups

In order to facilitate the identification of these various resources through visits, the Furman Center’s report also stressed the need for engaging current residents of the communities as early as possible.⁸² By establishing a structure to mobilize current residents, an affirmative marketing plan could utilize these individuals to assist in addressing the prospective concerns of residents while simultaneously fostering relationships that could prove instrumental to easing the transition of relocating households. Boston’s Pine Street Inn (PSI) was singled out as a successful illustration of this tactic. Back in 1993, when PSI was preparing to open a ten-unit housing site, they provided tours, made presentations, and went door-to-door in target neighborhoods to provide information and answer questions.⁸³

In addition, faith groups were identified as a segment of the community which could play a pivotal role in this process. These groups could not only disseminate information, but

⁷⁶ Furman Report at 11.

⁷⁷ Furman Report at 21.

⁷⁸The program originated as a partial settlement to the litigation in the public housing desegregation case of *Thompson v. HUD*,

⁷⁹ Furman Report at 22.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Furman Report at 24.

⁸³ *Id.* at 25. See also Michael Allen, *Why Not in Our Back Yard?*, PLANNING COMMISSIONERS JOURNAL, No. 45, at 1-2 (Winter 2002).

could also serve as a welcoming community for newly relocated households.⁸⁴ Similarly, organizations that already facilitate community dialogue on relevant topics can provide ripe opportunities for partnerships that could be leveraged to reach out to prospective residents.⁸⁵

Alliances with the local business community were also found to be worthwhile for marketing purposes particularly at workplaces with a diverse group of employees who work in the community, but cannot afford to live in it.⁸⁶ The Furman Center's report also noted that housing developments could be designed to incorporate community resources, such as a library or recreation center, as a strategy to reach community members.⁸⁷

Efforts to engage local community members in an affirmative marketing campaign were found to carry an additional benefit in addressing prospective residents are also concerned about the potential for hostile or discriminatory treatment.⁸⁸ Current residents of the community can be a resource in addressing these concerns by relaying their personal experiences and assisting in fostering a welcoming environment.⁸⁹

Coordinate Marketing

The Furman Center also recommends that, to the extent possible, developers should pool their resources to share the cost of developing an effective affirmative marketing campaign. Combining resources: "...could enable more robust marketing- including billboards and widespread radio advertising in multiple languages- all directed towards a common web or telephone resource."⁹⁰ Although a centralized website could prove to be quite useful, especially if it includes a wide range of information from details about the units to available resources in the community; however, the report cautioned that word-of-mouth advertising and personalized hands-on assistance are irreplaceable.⁹¹

Other recommendations

To supplement the Furman findings, the Poverty & Race Research Action Council and the Connecticut Fair Housing Center conducted a small number of interviews with

⁸⁴ Furman Report at 25.

⁸⁵ *Id.*

⁸⁶ *Id.* at 21.

⁸⁷ *Id.* at 26.

⁸⁸ "The literature on housing choice voucher programs indicates that both actual and perceived discrimination can play a key role in an individual's decision of whether to move to an unfamiliar neighborhood..." *Id.* at 16.

In offering supporting evidence of this phenomenon, the report, in part, pointed to the results of qualitative studies orchestrated in the context of Section 8 programs which found that participants restricted their search to African American neighborhoods because they assumed they would not be welcome in predominantly white communities. Susan J. Popkin & Mary K. Cunningham, Urban Institute, *CHAC Section 8 Program: Barriers to Successful Leasing Up* 23(1999).

⁸⁹ Furman Report at 18 ("An affirmative marketing plan can seek to address these concerns through an aggressive public relations campaign that involves minority residents currently living in the community who are willing to share their own experiences with prospective residents and that identifies steps the community will take to further diversity and integration").

⁹⁰ *Id.* at 27.

⁹¹ *Id.* at 28.

housing practitioners who identified additional marketing techniques they have found to be successful.⁹² Their recommendations include:

- Marketing that includes mailings, local transportation advertising (including buses as well as trains), local newsletters and circulars, radio ads, flyers or pamphlets at daycare, senior, and recreation centers, and flyers on local grocery store boards and other venues. Advertising in multiple languages where needed.
- Materials that describe the location and nearby venues, such as parks, schools, rec center, restaurants, bus routes, amenities within walking distance, shopping, etc. Materials should include information regarding after-school care or clubs for children, various school qualities, such as after-school programs, ESL, tutoring, etc.
- Regular training for staff on how to complete the AFHMP and on fair housing marketing and tenant selection.
- Outreach through neighborhood events. Property managers can attend events in other localities to distribute marketing materials, and hold events at the property which are advertised to community groups and in other neighborhoods.

3) New Directions: Recommendations for Affirmative Marketing

We encourage policymakers to explore state, local, and individual marketing initiatives, including those discussed above, for successful practices that can be rendered into guidance. Our recommendations for new directions in affirmative marketing include the following:

Apply HUD's primary AFHM regulations to the tax credit program

We recommend that HUD and Treasury coordinate their affirmative fair housing responsibilities and extend AFHM requirements throughout the LIHTC program. This is authorized by the Fair Housing Act, 42 U.S.C. § 3608(d), and would be consistent with Treasury's "general public use" rule applying fair housing regulations to the tax credit program. Although Treasury could issue its own freshly-drafted AFHM regulations, implementation of marketing requirements would be best achieved through reference to HUD's existing AFHM regulations. This would provide for improved coordination among federal housing programs, particularly where there are layered subsidies.⁹³ This

⁹² These interviews were conducted with: Betsy Crum of the Connecticut Housing Coalition; Frank Piazza of Piazza & Associates in New Jersey; Melanie Kibble and Deborah Clemmons-Miller of Mercy Housing in Colorado; Nancy Rase of the Housing Partnership Network in Maryland; Diane Eddings of Common Wealth Development in Wisconsin; and Peter O'Connor and Deborah DelGrande of Fair Share Housing Development in New Jersey.

⁹³ This includes Federal Housing Administration programs, which are subject to HUD's AFHM regulation and may be increasingly coupled with the tax credit program. See Jerry Ascierio, "FHA Aligns with Tax Credits," Affordable Housing Finance (describing how Mortgagee Letter 2008-19 streamlined requirements for LIHTC developments using FHA Secs. 221(d)(4), 220, and 231 programs), available at <http://www.housingfinance.com/news/fha-aligns-with-tax-housing.htm>.

level of coordination with HUD is also appropriate given HUD’s statutorily designated leadership role in AFFH.

Current LIHTC regulations require that developments be available “for general public use,” meaning that “the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX).”⁹⁴ This “public use” regulation also expressly indicates that HUD Handbook 4350.3 (“or its successor”) should be used as a reference. However, marketing—along with a number of other civil rights requirements included in the HUD Handbook—has yet to be imported to the tax credit program. We recommend that Treasury explicitly include affirmative marketing as a component of the “general public use” requirement. As with other I.R.S. rule violations, failure to comply with marketing requirements should result in the recapture of tax credits.

Specifically, Treasury should adopt the policy:

[of administering its] housing programs affirmatively, as to achieve a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, handicap, familial status or national origin. Each applicant for participation in [the LIHTC program] shall pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining their eligibility, and in concluding sales and rental transactions. 24 C.F.R. § 200.610.

Treasury should also adopt the compliance procedures set forth in HUD regulations, which provide pre-occupancy conferences with the monitoring office to determine whether the approved plan requires modification; monitoring; and review of applicants’ sales and rental reports.⁹⁵

We recommend that Treasury make clear that the HUD’s substantive marketing requirements, including those in 24 C.F.R. § 200.600 *et seq.* and 24 C.F.R. § 108, apply to LIHTC.

However, the LIHTC guidance should depart from the existing guidance (that is, the AFHM Plan and other sub-regulatory materials) where time and experience have shown it to be ineffective or in need of updating (see the following subsection, regarding “Plans”). The LIHTC marketing program should set a new industry standard. This can be accomplished by Treasury issuing an additional layer of guidance while incorporating the majority of the Handbook’s and Plan’s requirements. In addition to aiding these steps by Treasury, HUD should revise its own guidance to provide a more robust program.

Treasury, HUD, and the state housing finance agencies should coordinate to designate primary responsibility for AFHM compliance oversight, as expanded to the LIHTC

⁹⁴ 26 C.F.R. § 1.42-9.

⁹⁵ 24 C.F.R. § 108.

context.⁹⁶ I.R.S. audit technique guides should address marketing compliance oversight, along with other aspects of the general public use rule and the general marketing requirements for LIHTC units.⁹⁷

Improve the guidance accompanying the AFHM Regulation: AFHM Plans

We recommend that SHFAs require developers to submit annual AFHM plans, as well as annual certifications of their marketing efforts. The agencies should engage in regular reviews and audits of these plans. When applying, prospective tenants should be asked to indicate how they heard of the development so that future iterations of the Plan can be tailored responsively.

We recommend that AFHM plans in general follow the HUD design, with its four corners: Targeting, Outreach, Indicators, and Staff, as well as worksheets that require demographic comparisons. However, for the plan to effectively further fair housing, it will need significant adjustments. These include:

- *Market area.* Designation of the “market area” is currently at the applicant’s discretion, and the ability to limit marketing to local areas (such as Census tracts) defeats the program’s intent in reaching those “least likely to apply.” Marketing should occur on a region-wide scale if it is to be successfully integrative and overcome the problem of racial blind spots. The “market area” should encompass the metropolitan statistical area or the regional planning area.⁹⁸
- *Targeting.* HUD’s Plan provides a worksheet for identifying the group “least likely to apply,” and HUD’s Handbook offers helpful recommendations for determining what demographic group is “least likely to apply,” including the racial and ethnic composition of the residential area, as well as factors such as exclusionary zoning, advertising, or site selection policies that may have resulted in discrimination; language barriers; and income eligibility requirements.⁹⁹ However, applicants need greater clarity on how to use statistical comparison to determine which groups are underrepresented or likely to be underrepresented without additional outreach. To identify those “least likely to apply,” developers seeking to fill market new properties should compare the demographic composition of the Census tract in which the development is located with that of eligible families in the *regional* market area. For existing developments, the composition of applicants and the tenant composition of low-income units should be compared to the *regional* demographics of income-eligible individuals. (HUD

⁹⁶ In addition, HUD occupies a statutory role as the coordinator of all agencies’ AFFH responsibilities and is charged with several key responsibilities under the LIHTC statute, namely that of designating certain areas for tax basis boosts, 26 U.S.C. § 42(d)(5)(B).

⁹⁷ See I.R.S. Form 8823 (requiring state credit agencies to report general public use violations).

⁹⁸ See Connecticut Fair Housing Regulations, § 8-33ee, providing that “Recipients’ plans shall provide for the dissemination of information at a minimum in (a) the largest city located in the nearest Primary Metropolitan Statistical Area or Areas or Metropolitan Statistical Area or Areas, (b) the regional planning area, and (c) any other areas which are likely to contain high minority populations and where public transportation or public highways and/or job availability make it likely that minorities might wish to move where the development is located.”

⁹⁹ *Id.* at 2-8.

should provide developers with this regional information.) If certain groups are underrepresented by either of these measures, they should be targeted for marketing efforts (or more-enhanced efforts, in the case of existing developments). For example, in a highly segregated metro area, families with children living in high poverty neighborhoods would be a recommended marketing target group for developments in high opportunity communities.

- *Indicators.* Clear performance standards are needed in order to indicate where marketing efforts are achieving their aims, or whether changes to an AFHM plan should be made. Current guidance does not measure or incentivize progress toward the AFHM aim of integrated, open housing and does not ensure that technical assistance resources are well aimed. The metrics identified in the Handbook, such as the number of referrals by community organizations and the number of visits to the site or walk-ins due to outreach or advertising, fail to show whether they actually have reached the targeted “least likely to apply” group(s) unless they are accompanied by demographic data.

As with the targeting process, demographic comparisons should be required in setting indicators to measure AFHM effectiveness. Developers should be required to compare the tenant composition of low-income units within the development, as well as that of applicants, to the regional demographics of income-eligible individuals.¹⁰⁰ Significant demographic disparities should trigger oversight by compliance staff, who should examine marketing procedures for their sufficiency and may provide recommendations for changes or enhancements. Demographic comparison will not itself result in any penalties, but simply triggers a review of whether sufficient marketing efforts have been exerted. However, if the review indicates that the disparities are attributable to a failure to affirmatively market, then additional outreach efforts should be required. This may delay unit occupancy until the applicant pool is sufficiently diverse.¹⁰¹

Guidance should clearly indicate the level of statistical disparity that will trigger review.¹⁰² Furthermore, if there is a significant difference in composition between the applicant pool and the residents, tenant selection procedures (see Section III,

¹⁰⁰ For example, the City of Oakland’s affirmative marketing program requires: “The owner and managing agent shall annually assess the success of affirmative marketing actions for each project. If the demographic data of the applicants and residents vary significantly from the jurisdiction’s population data for the target income group, advertising efforts and outreach should be targeted to underrepresented groups in an attempt to balance the applicants and residents with the demographics of the jurisdiction....Where the characteristics of applicants are significantly different from the make-up of the City/Agency’s population (i.e., in cases where specific groups are over-represented or underrepresented), the City/Agency will examine in more detail the owner’s actions to determine if a violation of the requirements has occurred.” City of Oakland Community and Economic Development Agency Affirmative Fair Marketing Procedures at 7-8 (July 2010), *available at* <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/procedure/oak025582.pdf>.

¹⁰¹ See Connecticut Fair Housing Regulations, §8-33ee-2(a).

¹⁰² Policymakers should determine an appropriate “trigger” in consultation with social scientists and practitioners, including fair housing attorneys. A similar framework is used in employment discrimination actions, where the EEOC uses the rule that evidence of an adverse impact exists when the selection rate for any race, sex, or ethnic group is less than four-fifths of the rate for the group with the highest rate. See 29 C.F.R. § 1607.4(D). A different number may be appropriate in this context.

infra) should be reviewed for potential fair housing violations and conflicts with the AFHM Plan.

- *Staff.* Where feasible, developers should have dedicated marketing staff identified as a component of their AFHM plans. In addition, developers should be encouraged to install community liaisons and service coordinators among their tenants.¹⁰³ For example, developers might consider rent abatements for designated “welcome” residents who meet with prospective tenants, ease misgivings about moving to a new area, and provide information about services. As staff capacity will depend on the scale of the developer, some aspects of AFHM staffing should be constructed as an incentive program rather than a requirement. However, regular staff training in AFHM, as well sufficient staff time to implement the Plan, should be mandatory.

Personalize and simplify access to information

As discussed above, personalized community outreach is a key strategy in effective marketing. In addition, developers should be encouraged to employ more intensive strategies, such as offering neighborhood tours to applicants from outside the locality.

We also recommend that marketing resources be pooled: for example, developments in high-opportunity neighborhoods could form marketing consortia to reach out to low-opportunity neighborhoods. Housing agencies could also compile a list of LIHTC developments in throughout the state, and make this information publicly available through a variety of sources.¹⁰⁴ Listings should include profiles of the developments that highlight key neighborhood features, including indicators of neighborhood quality such as poverty rates. This list should be made available on the internet, at organizations such as public libraries, and through entities likely to connect with a wide range of prospective applicants, including public housing agencies and housing counselors. The list should be accompanied by referrals to certified counselors who can guide prospective residents to high-opportunity areas and provide them with the information to make informed moves; it should also provide a concise statement of nondiscrimination requirements applicable to LIHTC properties (including the prohibition against voucher discrimination). This could also be accomplished on a regional level, for example through the HUD field office.

Require strategic, information-rich content

Marketing programs should mirror successful housing mobility counseling programs by offering an array of clearly presented, specific information likely to be of concern to prospective residents. Default marketing techniques—which may only provide notice that housing is available, as through short newspaper ads—indirectly rely on an applicant’s comfort with and external knowledge of an area’s character, so are insufficient to

¹⁰³ For example, the California QAP awards points to developments with a Service Coordinator whose “[r]esponsibilities must include, but are not limited to: (a) providing tenants with information about available services in the community, (b) assisting tenants to access services through referral and advocacy, and (c) organizing community-building and/or other enrichment activities for tenants.”

¹⁰⁴ See Connecticut Fair Housing Regulations, § 8-33ee-7(e).

overcome residential disparities and reach those “least likely to apply.” Marketing materials should include information addressing the specific concerns of residents (as discussed in the section on the Furman Center’s recommendations, above). In addition, we recommend that guidance discourage the use of terminology that is likely to deter applicants (such as “luxury housing”) and require affirmative language likely to encourage applicants such as “rent assistance welcome.”

Choice architecture is informative in crafting an effective approach to affirmative marketing. For example, Thaler and Sunstein illustrate the role that choice architecture can play with regard to improving school choices.¹⁰⁵ One experiment in Charlotte demonstrated that parents can make better school choices with better and simpler information that had been offered previously. As Thaler and Sunstein explain:

Charlotte gave parents the option to apply for admission at multiple public schools besides their default school. Low-income parents tended to put less weight than high-income parents on school quality, as measured by test scores, and rarely tried to enroll in higher-performing schools. A random sample of parents was selected to receive an abbreviated “fact sheet” about the schools. . . Printed on each sheet was a complete listing of average test scores and acceptance rates, from highest to lowest, at schools available to a given child.

The experimenters wanted to find out whether parents, and especially low-income parents, would choose better schools. They did. Much better ones. The parents who received the fact sheets made decisions implying that the weight they assigned to school quality (as measured by test scores) had doubled. The schools they had selected had, on average, 70 percent higher test scores than the scores at their neighborhood schools. This had the effect of making their choices similar to those of families whose incomes were \$65,000 a year higher.¹⁰⁶

This simple strategy of offering clear comparative information can be implemented in the housing sector as well. Thaler and Sunstein advocate a method of choice that is essentially one of providing straightforward data to those facing decisions.¹⁰⁷ Their primary point is applicable to the housing system: “It is not enough to make lots of choices available and then hope [people] choose wisely. [Those attempting to influence decision making] need to put [people] in a position to think through their choices, and to exercise their freedom rather than to rely on the default option.”¹⁰⁸

Voluntary Affirmative Marketing Agreements

AFHM programs should be mandatory because they arise from the AFFH statutory directive attaching to federal housing programs as well as because they are sound policy

¹⁰⁵ Nudge at 203.

¹⁰⁶ *Id.* at 204.

¹⁰⁷ *Id.* at 95-96. The Nudge authors call this strategy RECAP: Record, Evaluate, Compare Alternative Prices.

¹⁰⁸ *Id.* at 208.

in helping our nation to build integrated neighborhoods. Yet even while new guidance is pending, developers and agency staff can take steps toward negotiating Voluntary Affirmative Marketing Agreements between local industry associations and HUD-certified housing counseling agencies. These could include some of the steps described above, as well as in HUD's Handbook, to help further fair housing and conduct targeted outreach. These agreements are discussed at more length in the AFHM Handbook.¹⁰⁹ State QAPs could award points to developers who signing onto voluntary affirmative marketing agreements with HUD (or require developers to do so as threshold criteria).

III. TENANT SELECTION: KEY ISSUES AND RECOMMENDATIONS

For affirmative marketing programs to succeed, they need to be supported by tenant selection procedures that similarly are geared toward diverse, nondiscriminatory outcomes. These procedures—such as tenant qualifications, preferences, and waitlist management practices—influence resident demographics in any development. Marketing and selection are two sides of the same coin, and the best marketing program in the world will be undermined if tenant selection isn't granted equal care and oversight. The following section recommends guidance that coordinates fair housing obligations with respect to tenant selection and affirmative marketing, while offering specific suggestions for effective, nondiscriminatory selection practices.

While developers should be well aware of fair housing law prohibiting discrimination in pre-occupancy procedures including tenant selection, they would benefit from more detailed guidance on avoiding procedures with discriminatory effects. Developers may be unaware that tenant selection practices, including some in common use, can have a disparate impact or perpetuate segregation and could be replaced by equally effective, less discriminatory procedures. They may also be hesitant to implement new procedures until these alternatives are recommended by an authoritative source such as an agency. In addition to providing general guidance explaining that disparate impact discrimination violates the Fair Housing Act, federal and state agencies can ensure (with greater efficiency and consistency) that less discrimination occurs by instructing developers and managers in specific practices to be avoided as well as those that are both effective and legal. We recommend that guidance address practices including tenant screening criteria, waitlist management, and the use of preferences, as discussed below.

Directives on avoiding disparate impact discrimination are fundamental to tenant selection guidance, but agencies must also ensure that tenant selection procedures contribute to—rather than undermine—their affirmative fair housing obligations. This includes the AFHM program. Tenant selection policies are a necessary complement to affirmative marketing policies, and agencies should monitor and disincentivize practices that conflict with their AFFH directive. At the same time, practices that further fair housing and integration, in keeping with civil rights law and sound social policy, should be encouraged.

¹⁰⁹ U.S. Dept. of Housing and Urban Development, Handbook: Voluntary Affirmative Marketing Agreements, available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80211/index.cfm>.

To these ends, HUD program rules already require a basic degree of coordination between affirmative marketing and tenant selection policies. HUD’s AFHM regulation 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.”¹¹⁰ HUD also makes its approval of residency preferences contingent on a determination that the preference is “deemed consistent with the objectives of the AFHM Regulations and the AFHM Plan.”¹¹¹ Yet the rules otherwise provide little direction as to how AFHM considerations should shape determinations of tenant eligibility. As discussed in our recommendations below, tenant selection guidance for all programs (including new guidance for LIHTC) needs to more consistently conform to AFHM goals.

A. Tenant Selection within the LIHTC Program

Tenant selection within the LIHTC program largely has been the individual developer’s purview, but two existing aspects of the program—its federal nondiscrimination requirements, and the QAP threshold and scoring mechanisms—should be more fully developed to reflect fair housing mandates. This guidance should be consistent with HUD rules but improve on them, as well as reflect best practices developed by fair housing practitioners. As with marketing programs, in cases where HUD rules currently apply, the compatible but stronger new rules should govern.

1) Nondiscrimination Mandates

As noted above, the LIHTC regulations require that developments must be available “for general public use,” meaning that “the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 C.F.R. subtitle A and chapters I through XX).”¹¹² This “public use” regulation also indicates that the HUD Handbook 4350.3 (“or its successor”) should be used as a reference. The LIHTC statute also prohibits refusals to lease to Section 8 certificate or voucher holders.¹¹³ In addition to the incorporation of HUD’s rules into the I.R.S. regulations, the Fair Housing Act (including both its discriminatory treatment and discriminatory effects components) applies directly to LIHTC developers as well as federal and state actors.

Landlords are also required to report on tenant demographics, data which SHFAs provide to HUD for collection and analysis.¹¹⁴ Landlords must certify data for all subsidized household residents.¹¹⁵ In addition to complying with this data requirement regarding

¹¹⁰ 24 C.F.R. § 200.610 (“Policy”).

¹¹¹ AFHM Handbook at 2-16, 2-17.

¹¹² 26 C.F.R. § 1.42-9.

¹¹³ 26 U.S.C. § 42(h)(6)(B)(iv).

¹¹⁴ State agencies administering LIHTCs must furnish HUD, not less than annually, information concerning the race, ethnicity, family composition, age, income, use of Section 8 or similar rental assistance, disability status, and monthly rental payments of households residing in each tax credit property, through standards developed by HUD. 42 U.S.C. § 1437z-8.

¹¹⁵ Docket No. FR-5298-N-02 (March 3, 2012), <http://www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4386.pdf>.

residents, SHFAs should require data on *applicants* in order to determine whether tenant selection and affirmative marketing are effective and successfully integrative.¹¹⁶ This project-level data should also be made publicly available. Data on the applicant pool is important to show whom marketing has reached (in other words, whether it has been successfully “affirmative” in yielding applicants representative of region-wide demographics) and whether tenant selection procedures draw equitably from the applicant group.

Even applied only to resident tenants, however, the current data reporting component constitutes an important enforcement mechanism for civil rights compliance. Specifically, the data will allow HUD and fair housing practitioners to assess the integrative success of LIHTC siting and other practices (such as marketing and tenant selection), and to determine whether aspects of the program’s administration either perpetuate segregation or affirmatively further fair housing.¹¹⁷ Analysis of the data is currently overdue and it should be made available without further delay.

2) QAP Threshold and Scoring Criteria

As noted above, we recommend that agencies more actively instruct developers in avoiding tenant selection practices that are discriminatory or that conflict with the affirmative marketing program’s goal of equalizing access to housing for all groups throughout a region. In addition, agencies can employ their QAP criteria to incentivize sound tenant selection practices that promote integration and equal access to high-quality neighborhoods.

The LIHTC statute requires that QAP selection criteria include project location, housing needs characteristics, project characteristics, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership.¹¹⁸ Federal guidelines do not specify how this criteria should be weighted. Furthermore, the list of criteria is not exhaustive, and agencies may include additional factors to reflect state priorities.

As noted in our recommendations, agencies should consider using their scoring protocol to address specific housing needs that accompany racial and socioeconomic disparities within the state. For example, agencies might award points for tenant selection preferences on the basis of applicants’ residency in low-performing school districts, low environmental quality, or other features that are significantly better in the receiving

¹¹⁶ HUD has previously stated that it is without statutory authority to itself require data on LIHTC tenant applicants (in addition to residents) in order to assess affirmative marketing compliance. Docket No. FR–5298–N–02 at 9611 (March 3, 2012), <http://www.gpo.gov/fdsys/pkg/FR-2010-03-03/pdf/2010-4386.pdf>. We urge HUD to reconsider this stance in light of data’s crucial role in assessing fair housing, including AFFH, compliance. Although Congress has not specifically required HUD to collect LIHTC applicant data as it has resident data, HUD and Treasury should agree to impose broader data requirements as authorized by their statutory AFFH mandate. AFFH is a duty shared among federal agencies, but in which HUD has a statutorily imposed leadership role. 42 U.S.C. § 3608. HUD requires data on applicants in its own programs. See 24 C.F.R. § 121.2.

¹¹⁷ 42 U.S.C. § 3604(a), prohibiting discrimination and the perpetuation of segregation; 42 U.S.C. § 3608, requiring that federal housing programs affirmatively further fair housing. See also generally *Shannon v HUD*, 436 F.2d 809 (3rd Cir. 1970).

¹¹⁸ 26 U.S.C. § 42(m)(1)(C).

neighborhood. Agencies should also consider awarding points to developers who give preference to applicants from public housing or Section 8 waitlists—as does Washington, D.C., for example. *See* Appendix B. Agencies might also award points for developers who sign on to a state-designed tenant screening program based on best practices.

Rewards for tenant selection practices should be accompanied by monitoring (at lease-up and annually) to ensure that landlords' commitments are fulfilled.

B. Considerations in Tenant Selection

1) Coordinating AFHM and Tenant Selection: Existing HUD Rules

HUD's AFHM regulation 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"¹¹⁹ (emphasis added). Despite this directive, current guidance provides little detail on how tenant selection should be coordinated with AFHM goals. As discussed in the following subsection, an exception is HUD's oversight of residency preferences, the use of which must be "deemed consistent with the objectives of the AFHM Regulations and the AFHM Plan."¹²⁰

A number of HUD programs do have rules generally addressing resident selection procedures. For example, many programmatic regulations require owners to develop a Tenant Selection Plan, and give basic instructions on waitlist procedures.¹²¹

HUD provides additional guidance on tenant selection and waitlist management in its Handbook for Subsidized Multifamily Housing.¹²² (A section of this Handbook also addresses some AFHM requirements.)¹²³ This Handbook summarizes how landlords should apply screening criteria and preference systems in accordance with HUD regulations, including landlords' option to employ residency preferences and working family preferences.

2) Use of Preferences

Landlords sometimes give preference to certain categories of applicant, such as existing residents of the community where the development is located. The use of such preferences is discriminatory where it has an unjustified, disproportionate effect on the basis of race or another protected characteristic. Their use is particularly suspect in relatively homogenous communities. For example, residency preferences for a development in a predominantly white community will tend to exclude minorities

¹¹⁹ 24 C.F.R. § 200.610 ("Policy").

¹²⁰ AFHM Handbook at 2-16, 2-17.

¹²¹ *See, e.g.*, 24 C.F.R. § 5.655 (Section 8 Project-Based Assistance); 24 C.F.R. § 92.253 (HOME Investment Partnership); 24 C.F.R. § 982.202 (Section 8 Tenant-Based Assistance).

¹²² U.S. Dept. of Housing and Urban Development, Handbook for Subsidized Multifamily Housing, Ch. 4, *available at*

http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsg/4350.

¹²³ *Id.*, Section 2.

seeking to move from other communities.¹²⁴ In general, residency preferences should be avoided because of their tendency to perpetuate racial segregation among neighborhoods and to disadvantage those “least likely to apply” for many developments. Preferences should be reserved for exceptional circumstances, such as preventing displacement when gentrifying neighborhoods are redeveloped *and* the preference system is not shown to impair integration.¹²⁵

Nondiscrimination regulations prohibit the use of preference systems that are discriminatory or that have the purpose or the effect of denying admission to the program on the basis of race, color, or national origin.¹²⁶ Additionally, HUD’s tenant selection rules generally require coordination with affirmative marketing requirements when residency preferences are imposed. The AFHM Handbook provides that applicants must gain approval from their HUD field offices to implement residency preferences:

The regulations of a number of HUD-assisted housing programs explicitly prohibit provisions which mandate that all the tenants of funded projects be residents of the community in which the project is located. Residency preferences are permitted by regulation for a number of HUD-assisted programs, including the Section 8 New Construction and Substantial Rehabilitation programs, the Section 202 Housing for the Elderly Program, the Housing Development Grant Program, and other HUD-assisted programs, *as long as the preference is deemed consistent with the objectives of the AFHM Regulations and the AFHM Plan*. Where used, residency preferences must operate in such a manner that housing opportunities will not be denied to any particular group, especially to those groups identified as least likely to apply. (Emphasis added).¹²⁷

The use of residency preferences should be 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.¹²⁸ Because of residency preferences’ tendency to impair the ability of those “least likely to apply” to be selected as tenants, and the likelihood that a preference will have a discriminatory effect, we recommend that agencies strongly discourage their use.

3) Application and Waitlist Procedures

¹²⁴ 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).

¹²⁵ Cf. Raso v. Lago, 958 F. Supp. 686 (D. Mass. 1997).

¹²⁶ See 24 C.F.R. § 982.207(b)(1)(i) & (iii); 24 C.F.R. § 5.105(a)(1).

¹²⁷ Handbook at 2-16, 2-17.

¹²⁸ As noted in Section II, HUD program applicants submitting a residency preference for HUD’s nondiscrimination review complete a worksheet (as part of the AFHM Plan) showing how the “percentage of the population in the residency preference area conforms to that of the occupancy of the project, waiting list, census tract, and housing market area.” AFHM Plan –Multifamily Housing, Worksheet 2. This review procedure is insufficient to assess whether the preference has a discriminatory effect beyond the immediate area, since applicants are currently able to designate their own market area and the use of an extended market area is not mandatory.

HUD has recently provided helpful guidance regarding waitlist procedures for public housing and vouchers.¹²⁹ The release of this guidance was particularly welcome in light of the unfair, chaotic results of waitlist “rushes” documented at some PHAs in past years.¹³⁰ Specific aspects of the waitlist guidance include:

- Notice and outreach. Notice of waitlist opening must be provided to the public through various means of outreach. PHAs should consider sending notifications to public social service offices, homeless shelters, domestic violence shelters, human services agencies and organizations working with people who have limited English proficiency. Notice must include sufficient detail about the time and place to apply, as well as any limitations on who may apply and any local preferences for the waitlist. Notice must be easily understood and reach people with disabilities and those with limited English proficiency. The guidance warns that a waiting list that is not representative of various demographics may indicate the need to expand or modify outreach procedures.
- Expanded time and means of application. The notice encourages multiple intake sites, accepting application by mail or electronically, and an extended period of time for accepting applications. In the past, offering only a single application location or a one-day application period has resulted in safety issues. It is also important to note that overly limited application windows may tend to disadvantage those “least likely to apply” for the housing.
- Waitlist selection and preferences. The Notice provides that PHAs may employ random choice techniques (ie, lotteries) to select applicants to be placed on the waitlist. With regard to the selection of potential residents from the waitlist, existing regulations offer two methods for selection among applicants with the same preference and qualifications: selecting based on the date and time an application is received, or selecting by lottery or another random choice technique. The Notice encourages the use of a lottery (rather than selection based on receipt date), noting that ordering a waiting list by the date and time the application is received may have an adverse effect on people with disabilities, for example.

Such guidance may help address the problems documented at many PHAs in which those prospective tenants already “less likely to apply” are further disadvantaged by difficult application procedures. For example, nonlocal residents have frequently encountered greater hurdles in applying for housing. In the PHA context, this has included practices such as the use of local preferences, limited openings to the waitlist so that nonlocal residents are unlikely to hear of and apply for openings in time, uneven application of eligibility standards to local and nonlocal residents, and arbitrary application rules (such

¹²⁹ Notice PIH 2012-34, “Waiting List Administration” (Aug. 13, 2012), *available at* <http://1.usa.gov/NUkh08>. This guidance updates that available in HUD’s Multifamily Occupancy Handbook. While the guidance provides helpful recommendations, it is unfortunately not mandatory for PHAs.

¹³⁰ MLRI Letter to Sara Pratt, Deputy Assistant Secretary – Enforcement Programs, Re: Need for HUD Guidance on Application Procedures in HUD Assisted Housing (April 10, 2012)(on file with PRRAC).

as refusals to accept forms by mail or photocopied forms, or refusing to provide information over the phone).¹³¹

4) Screening Criteria

Tenant eligibility and screening criteria are another area where agencies should direct developers and property managers away from practices likely to result in discrimination. Both housing agencies and private landlords employ tenant screening criteria in order to limit financial and other risks, examining criteria such as credit history, criminal background checks, drug testing, housekeeping or home visits, and the prospective resident's employment or self-sufficiency record.¹³² Although the screening process is used to protect fellow tenants, landlords, and the community, it can be better designed to be effective while avoiding discriminatory effects. There is a need for agencies to recommend and monitor screening practices because specific practices may be unnecessarily restrictive in ways that disparately impact minority applicants.¹³³ Eligibility criteria can be problematic because as landlords screen tenants, they may rely on indicators that disproportionately disadvantage some groups but are not the best means of predicting behavior. Alternative screening methods that are accurate but less discriminatory are often available. For example, reliance on conventional credit (FICO) scores as a screening method tends to disadvantage minority applicants, who frequently have less access to mainstream credit sources and other ways to build good credit, are more likely to have damaged credit that does not necessarily reflect on future likelihood to pay rent (for example, due to foreclosures or past medical debts), and may simply be unaware of simple steps they can take to raise their credit scores. HUD has recognized this problem and provides for use of alternative credit appraisals in its mortgage programs. For example, the Federal Housing Administration instructs mortgage lenders to evaluate borrowers with thin or no traditional credit files through Non Traditional Credit Reports, which rely on payment histories for rent, utilities, and other specified items.¹³⁴ A number of other organizations and companies have also developed alternative

¹³¹ See Barbara Sard, The Massachusetts Experience with Targeted Tenant-Based Rental Assistance for the Homeless: Lessons on Housing Disfavored Policy for Socially Groups, 1 Geo. J. on Fighting Poverty 192-92 (1994).

¹³² 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 Geo. J. on Poverty L. & Pol'y 117, 161 (2009).

¹³³ For example, it has been found that “[i]nitial studies of site-based criteria at various Chicago redevelopments reveal that some TSPs are draconian or at least may include criteria that will be very difficult for public housing residents to meet. Some TSPs give property managers the ability to reject families that have declared bankruptcies more than two years prior to applying. Other sites preclude a resident from returning if they have any debt delinquency greater than \$1,000 dollars. 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.” Lisa T. Alexander, Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment, 16 Geo. J. on Poverty L. & Pol'y 117, 162-63 (2009)(internal cites omitted).

¹³⁴ U.S. Dept. of Housing and Urban Development, Handbook: Mortgage Credit Analysis for Mortgage Insurance (4155.1), 1-C-9 et seq. (Chapter 5), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4155.1/41551HSGH.pdf>.

credit scoring systems using data shown to have reliable predictive value.¹³⁵ Consumer advocates note that alternative scores have potential to expand access to credit (and related resources, such as housing) for low-income and minority individuals, though these should be used with care to avoid negative impacts.¹³⁶

Mistakes in screening—and the inability of applicants to dispute and correct errors—are another problematic issue in tenant selection. The use of both credit scores and criminal background scores can be problematic in application because there of frequent errors by reporting services.¹³⁷ These problems are compounded by landlords’ use of third-party tenant screening services, who compile and score background information but have little incentive to correct mistakes.¹³⁸ This use of scores to summarily reject tenants is problematic because tenants frequently are unable to dispute negative information. Where landlords do rely on credit scores and other background information, this process should be transparent for tenants. Where possible, tenants should be given time to dispute and correct errors with credit reporting and other services and re-submit their applications. (Federal law requires consumer reporting agencies to investigate and correct disputed errors.¹³⁹)

Landlords should be cautioned about the use of litigation and eviction records. A prospective tenant’s involvement in a court proceeding with a past landlord does not indicate fault on the part of the tenant: rather, the tenant may have been seeking repairs or otherwise seeking to exercise legal rights in good faith.¹⁴⁰ Additionally, many tenant screening services disqualify tenants on the basis of any involvement in eviction proceedings—even where the tenant prevailed or the action was dismissed.¹⁴¹ These are practices that disproportionately impact minority applicants.¹⁴² Rejection on the basis of involvement in legal action should not be regarded as a legitimate business justification

¹³⁵ See Federal Reserve Bank of Boston, New England Community Developments *available at* <http://www.bos.frb.org/commdev/necd/2005/q3/credit.pdf>; Credit Builders’ Alliance, Alternative Credit: Highlighted Articles and Research, <http://www.creditbuildersalliance.org/toolkit-hot-topics/alternative-credit.html>.

¹³⁶ *Id.*, Fed. Res. Bank of Boston; *see also* National Consumer Law Center, Using Nontraditional Credit Information: Boon or Bane? (June 2009), http://www.nclc.org/images/pdf/credit_reports/credit_reports_boon_bane.pdf. Because of these caveats, we recommend that alternative credit reports be an *option* offered to applying tenants.

¹³⁷ Eric Dunn, Marina Grabchuk, Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State, 9 Seattle J. for Soc. Just. 319, 328 (2010), listing common errors arising in background checks due to misattributions between people with similar names or birthdays, criminal identity theft, reports containing expunged records, clerical errors, and other issues.

¹³⁸ *Id.* at 334-35.

¹³⁹ 15 U.S.C. § 1681(i) (1998).

¹⁴⁰ “Tenant screening agencies in the Twin Cities: An overview of tenant screening practices and their impact on renters,” HousingLink, Prepared for the Minnesota Housing Finance Agency and the Fair Housing Implementation Council (2004), at 12, http://www.housinglink.org/Files/Tenant_Screening.pdf.

¹⁴¹ Merf Ehman, Columbia Legal Services (commissioned by PRRAC), “Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies” (Jan. 2011) at 13, *available at* <http://nhlp.org/files/PRRAC%20Disparate%20Impact%201-2011.pdf>.

¹⁴² *Id.*, citing Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem, 14 Housing Pol’y Debate, 461, 467-68 (2003), noting, for example, that in studies conducted in New York City, Philadelphia, and Oakland, people of color made up over 70% of tenants involved in unlawful detainer actions.

for this practice. Instead, landlords should examine the tenant’s actual conduct to determine whether there is a basis for rejecting the application.

Landlords should also be more careful in the use of criminal records to screen tenants. Automatic exclusions based on criminal records can have a disproportionate effect on minority households while disqualifying tenants who can show they are committed to behaving responsibly despite distant or minor offenses committed in their past.¹⁴³

Landlords can protect their property and other tenants without resorting to overly broad exclusions. Extensive examination of similar issues in the employment context shows that successful screening does not need to rely on automatic or overbroad exclusions, and that these potentially discriminatory practices can be avoided.¹⁴⁴

C. Recommendations for LIHTC Tenant Selection

We recommend that agencies provide guidance regarding appropriate tenant selection practices that avoid unnecessarily and disproportionately burdening minorities, and that support the tenant outreach components of the AFHM program. This should be addressed at both the state and federal levels. We recommend that HUD and Treasury issue clear guidance for SHFAs and LIHTC participants with regard to tenant selection procedures such as the use of screening criteria, preferences (particularly residency preferences), and waitlists. State agencies should issue mandatory fair housing guidance on these points as well. In addition, state agencies can use their QAPs to prohibit discriminatory practices and to incentivize tenant selection practices that promote integration—for example, by awarding points to developments in high-opportunity neighborhoods that give preferences to prospective tenants applying from high-poverty neighborhoods.

Our specific recommendations are as follows.

1) Less-discriminatory alternatives for tenant screening

We recommend that HUD, as the agency responsible for fair housing enforcement, issue new guidance for federal housing programs (including LIHTC, through explicit incorporation into the General Public Use rule) to address common screening criteria including criminal records and credit scores. The guidance should explain that because automatic, overbroad exclusions based on these criteria are statistically likely to have a disparate impact, these practices will be presumed to have a discriminatory effect. HUD should employ this presumption in its fair housing monitoring activities. Guidance should recommend specific, less-discriminatory alternatives to automatic exclusions for landlords to effectively assess financial and behavioral suitability. While costs associated with transitioning to the less-discriminatory screening system are unlikely to be substantial, HUD should explain that any such costs will not serve as a “business justification” for practices found to be discriminatory.

¹⁴³ For a fuller analysis of how use of criminal records results in a disparate impact on minority applicants, *see id.*, “Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies” at 12.

¹⁴⁴ *See* Rebecca Oyama, Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act, 15 Mich. J. Race & L. 181 (2009).

We also recommend that individual state agencies take the initiative to address problems in tenant screening. Agencies should issue their own robust fair housing guidance making clear that practices with a discriminatory impact will be penalized. Additionally, state agencies should draw up model screening protocols, which they should require or incentivize landlords to adhere to. For example, QAP scoring criteria could be awarded to landlords who agree to use the “best practices” protocol or who use an outside screening agency that does so. (We also recommend that states certify responsible third-party screeners.) State agencies should also consider establishing a centralized application database which would allow tenants to submit single applications that multiple landlords could reference. This would decrease screening fees and increase accuracy, as tenants would be able to dispute any screening errors at a single source.

Credit scores

With regard to their content, screening guidance or protocols should be sure to address the use of credit scores. Prospective tenants should not be rejected because they have a thin credit file or no credit file.¹⁴⁵ Rather, if an applicant’s FICO score is low, he or she should have the option of submitted an alternative credit report calculated by an agency-approved reporting source.

Whatever the type of payment or credit history used, tenants should not be scored adversely because of payments missed due to good-faith disputes (for example, withholding rent because of a past landlord’s failure to make repairs). Whether they are being screened by an individual landlord or by an agency-certified screener, tenants should be given the opportunity to explain or correct flaws in their credit histories. Where possible (as in new developments), landlords should process applications sufficiently in advance that tenants are able to dispute or provide additional information explaining any negative results. Landlords should notify tenants of specific reasons for rejection. This notice should be accompanied by referral to a counseling service that can aid credit repair.

Criminal records

With regard to the use of criminal records, best practices for landlords to follow (as recommended by the National Housing Law Project) include:¹⁴⁶

- In the housing application, provide space for the tenant to explain past convictions and mitigating information, including why the tenant is suitable. The application should provide notice of screening practices and standards and clearly explain that the tenant may still be considered despite a criminal record.
- Grant waivers of admissions standards where the conviction can be attributed to a disability, or is related to domestic violence perpetrated against the applicant.

¹⁴⁵ See Connecticut Fair Housing Regulation, Sec. 8-37ee-304 (Selection process).

¹⁴⁶ National Housing Law Project, “Best Practices for Landlords: Screening Applicants for a Criminal Record,” available at <http://nhlp.org/node/1518>

- Consider how long again the offense occurred and whether the offense is relevant to the safety of other residents or the property
- Consider other mitigating factors, such as age at the time of the offense and evidence of rehabilitation, such as employment, training and education, or letters of support.
- Records other than adult conviction records (for example, arrest records) should not be considered.

2) Application Process and Waitlist Management

Agencies should instruct landlords to ensure that the application process does not disadvantage nonlocal, disabled, or other residents who need relatively more time or additional avenues to submit applications. Required procedures should incorporate the HUD guidance to PHAs described above.¹⁴⁷ Specifically, this entails advance, widely accessible notice procedures; broadly available applications that can be submitted in multiple ways over an extended application period; and the use of lotteries rather than chronological waitlist administration.

We also concur with recommendations of the Center on Budget & Policy Priorities, Mass. Law Reform Institute and other groups on the use of consolidated regional waitlists for federally assisted housing programs: this approach would ease the application burden for tenants and facilitate their access to properties throughout a housing market area. Prospective tenants would submit a single application to the waitlist, which multiple landlords would draw upon to select tenants for their properties.

3) Use of Preferences

Local Residency

All agencies should make clear that tenant selection preferences by LIHTC landlords are not permissible unless HUD determines that they will not have a discriminatory impact, including where they perpetuate segregation, and will not undermine AFHM objectives. This guidance should cover the use of any preference, and should specifically address the use of local residency preferences.

Requests to use residency preferences should be submitted with the AFHM Plan. As with HUD's current Plan, developers should be required to submit a worksheet with comparative data. However, unlike for the current Plan, the determination whether the preference is discriminatory should not primarily be based on comparison of the racial composition within the preference's geographic scope to that of the Census tract or developer-defined market area. The worksheet should also require (not simply offer as an option) comparison to the full metropolitan area, as well as to the Census tract, development, and waitlist. In addition, the assessment should use disaggregated data showing the relative impact on each racial group. For example, a residency preference

¹⁴⁷ Notice PIH 2012-34, "Waiting List Administration" (Aug. 13, 2012), *available at* <http://I.usa.gov/NUkh08>.

that has the effect of excluding Latino applicants from either a primarily white neighborhood or a primarily black neighborhood should not be approved.

In most cases, a residency preference will found appropriate only where the composition of the neighborhood and the development reflects that of the region. There should be a strong presumption against the use of residency preferences, with HUD re-assessing approval at regular periods to ensure that the preference remains appropriate and legal given changing demographics.

Where state agencies require local approval for LIHTC development, this requirement should be waived where local approval would be contingent on a residency preference. (However, we strongly recommend that HFAs not require or incentivize local approval in their QAPs, as this tends to inhibit development in many areas where affordable housing is needed but politically unpopular. Rather, HFAs can require developers to engage in community *outreach* and notification consistent with the LIHTC statute, which does not require that developers obtain local approval.)

QAP requirements and incentives

As noted above, state agencies should use QAP scoring criteria to serve the AFFH goals of integration and equal access to opportunity. Agencies should assess specific housing needs reflecting racial and socioeconomic disparities within their states and devise their scoring rubrics accordingly. This could include significant points for developments in high-opportunity areas that will employ tenant preferences on the basis of applicants' residency in neighborhoods with high poverty rates, or other significant features such as poor environmental quality.¹⁴⁸ The points awarded should be sufficiently significant to serve as a meaningful incentive program.

We also recommend that points be awarded for tenant preferences targeting voucher holders and public housing authority waiting lists. These preferences should extend throughout the region in order to ensure they do not replicate any racial disparities between the immediate jurisdiction and the region.

4) Compliance

Data

As discussed above, data collection and analysis of application pool and tenant demographics is essential to ensuring nondiscrimination. HUD should ensure that the demographic data on LIHTC residents, required by statute, promptly be made publicly available. In addition, HUD, Treasury, and the SHFAs should take steps to require data

¹⁴⁸While not a direct model, Connecticut's tenant selection rule is an instructive precedent; landlords may use a lottery system or assign tenants points based on factors such as residence in substandard housing. See CT Fair Housing Reg. at Sec. 8-37ee-305 (Selection methodology).

on applicants (as well as residents) in order to determine whether tenant selection and affirmative marketing outreach are aligned and effective in furthering fair housing.¹⁴⁹

Plan and Monitoring

We recommend that agencies require developers to develop a written tenant selection plan for annual review. The plan should, at a minimum, cover aspects of tenant selection including procedures for accepting applications; screening criteria; and wait list administration.¹⁵⁰ This process can be streamlined if SHFAs develop a “best practices” model tenant selection plan to offer developers, who must either commit to that plan or provide justifications for departures from it.

Developers should provide annual certifications regarding adherence to their plans, as well as compliance with civil rights laws. We recommend that, in cooperation with HUD, state agencies engage in ongoing monitoring efforts to ensure that Plans are adhered to and that the tenant selection process is nondiscriminatory. This includes monitoring whether the application process discourages or discriminates against Section 8 voucher holders.

As noted above, reliable demographic data is crucial to effective compliance procedures and would enable agencies to use monitoring resources in an efficient, targeted fashion. Significant disparities between the composition of the applicant pool and that of admitted residents should trigger a review of selection procedures. These targeted reviews will be most effective if supplemented by random audits for fair housing compliance at developments throughout the state.

APPENDICES

APPENDIX A: SUMMARY OF HUD REGULATIONS

APPENDIX B: REVIEW OF STATE “QUALIFIED ALLOCATION PLANS” (QAPs)

APPENDIX C (forthcoming): SURVEY OF STATE REGULATIONS

Available at: www.prrac.org/projects/affirmativemarketing.php

¹⁴⁹ States and cities can initiative this while awaiting federal guidance. *See* City of Oakland Affirmative Fair Marketing Procedures (July 2010) at 7, requiring that “Owners shall keep up-to-date records for each project regarding the characteristics of persons applying for vacant units, persons selected to occupy units and residents of the project (including race, ethnicity, presence of children under the age of 18 in the household, requests for reasonable accommodation for a disability, income, and household size), and records about tenant selection or rejection.”

¹⁵⁰ *See* Ct Fair Housing Reg. at Sec. 8-37ee-304 (Selection process).