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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-5359-P-01, Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity. 76 F.R. 4194 (Jan. 24, 2011).

On behalf of the organizations listed below, the National Housing Law Project and members of the Housing Justice Network submit the following comments and recommendations regarding the Department of Housing and Urban Development's proposed rule entitled "Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity." The National Housing Law Project works with attorneys and advocates nationwide to advance housing justice for disadvantaged people. To that end, NHLP provides legal assistance, advocacy advice and housing expertise to legal services, private attorneys, low-income housing tenant and advocacy groups, housing providers, and policymakers. The Housing Justice Network is composed of legal services and housing advocates who work with public and assisted housing residents and low-income families and individuals seeking affordable housing nationwide.

We have reviewed the potential impact of this proposed rule, found in 76 F.R. 4194 (Jan. 24, 2011), and believe it is an important step in fighting discrimination against LGBTQ communities. We are pleased that HUD will change the definition of family to ensure that it is inclusive of same-sex couples and other LGBTQ families. HUD-assisted programs often provide one of the only viable options for the lowest income families to live in quality affordable housing. We also support the prohibition against using sexual orientation or gender identity as grounds for decision making in Federal Housing Administration (FHA) programs. The FHA mortgage loan program is a key provider of credit to low and moderate income homeowners and has played an especially large role in the market in recent years. Income verification and related underwriting is a core part of the mortgage qualification process and it is essential to provide equal access to LGBTQ applicants seeking affordable homeownership. The promulgation of these, and other proposed regulations moves us closer toward addressing the discrimination faced by numerous LGBTQ individuals and families throughout the country.

However, to adequately meet the goal of increasing access to housing in HUD programs for LGBTQ participants and applicants, we believe it is necessary to: (1) clarify the definition of "family"

so that it is consistent with other regulations, and ensure that public housing authorities may not alter it to exclude LGBTQ participants; (2) provide more nuance to the prohibition against inquiry; (3) develop a confidential data collection system; and (4) clarify the exception to the prohibition against inquiry for shared bathrooms and bedrooms to ensure that it does not permit discrimination against transgender people. In addition, we recommend that HUD (5) require HUD housing providers to affirmatively market to the LGBTQ community and (6) add an enforcement provision to these Rules, to ensure compliance. Our proposals for these changes are detailed below.

1. Consistent and Accurate Definition of Family

We support the intent expressed in the notice to expand the definition of family to specify that “families who are otherwise eligible for HUD programs may not be excluded because one or more members of the family may be an LGBT individual or have an LGBT relationship or perceived to be such an individual or in such relationship.” 76 F.R. 4194, at 4195. We suggest the following clarifications:

24 CFR § 5.403 (Definitions): The current term “group of persons residing together” should be clarified to mean two or more persons residing together, regardless of marital status, sexual orientation or gender identity. We support the addition of the term co-head to allow two people living together to be listed as co-heads of household.

24 CFR § 982.201: We suggest that, in addition to cross-referencing the definition of family in the new 24 CFR § 5.403, the rules add to 982.201(c) an explicit statement that Public Housing Authorities (PHAs) do not have discretion to define family groupings in such a way that excludes LGBTQ individuals or groups, and that PHAs’ discretion to define family is directly limited by the definitions of eligible families in 24 CFR § 5.403.

24 CFR § 891.305: (Section 811 Supportive Housing for Persons with Disabilities, Definition of “Disabled Household”): Under this section, “Disabled household means a household composed of: (1) One or more persons at least one of whom is an adult (18 years or older) who has a disability; (2) Two or more persons with disabilities living together, or one or more such persons living with another person who is determined by HUD, based upon a certification from an appropriate professional (e.g., a rehabilitation counselor, social worker, or licensed physician) to be important to their care or well being; or (3) The surviving member or members of any household described in paragraph (1) of this definition who were living in a unit assisted under this part, with the deceased member of the household at the time of his or her death.” The proposed rule will not change this definition. This definition may be plausibly read to exclude same-sex couples. We suggest that HUD add an additional cross-reference to the definition of family in the new 24 CFR § 5.403, with our recommended addition “regardless of marital status, sexual orientation, or gender identity.”

2. Prohibition Against Inquiry

Section II.B of the notice of the proposed rule describes how 24 CFR § 5.105 will be amended to include a new section prohibiting HUD-assisted housing providers from inquiring about the sexual orientation or gender identity of an applicant for or occupant of HUD-assisted housing. Prohibitions against inquiry will potentially expand opportunities for housing, especially for LGBTQ individuals and families living in areas with high instances of open and hostile discrimination. Permitting inquiries into a person’s sexual orientation or gender identity may dissuade people from seeking housing in the first place or expose them to discrimination if they disclose their sexual orientation or gender identity in response to such an inquiry. Prohibiting inquiries may encourage people who would otherwise hesitate to seek HUD-assisted housing, and may prevent discrimination.

However, the utility of a prohibition on inquiry may be limited for many LGBTQ people. The prohibition against inquiring about sexual orientation or gender identity protects only those who choose to and are able to hide their sexual orientation or gender identity and who are only identifiable as LGBTQ if they disclose their identity. For many people in LGBTQ communities, this is not possible. Transgender and gender-nonconforming people may be identified as transgender without inquiry. This is particularly true for low-income transgender people who cannot access legal processes that make it possible for them to change their identity documents to reflect their gender identity or cannot afford expensive medical and cosmetic procedures to transition their genders. Moreover, people who are gender-nonconforming may be perceived as gay or lesbian without any inquiry into their sexual orientation. Finally, same-sex couples and families with two heads of household of the same gender are easily perceptible as gay without any inquiry. Much of the discrimination that occurs against LGBTQ people occurs not because a person answered an inquiry about their sexual orientation or gender identity, but because of assumptions about a person's gender identity or sexual orientation. Because of the limited protections offered by prohibiting inquiry alone, we propose adding language to more clearly address the purpose of the prohibition – to prevent discrimination against LGBTQ persons.

We suggest that the prohibition be strengthened by stating that no information about a person's sexual orientation or gender identity can be used to make decisions related to the tenancy (*e.g.* admissions, occupancy, evictions, and housing quality). For example, one can use the parallel language described in Section C. in the notice of the proposed rules, relating to FHA programs. After stating that inquiry is prohibited, add: "Any decision related to any aspect of the tenancy of an individual or family must be made without regard to one's actual or perceived sexual orientation or gender identity." This would ensure that a housing provider cannot use information about a person's perceived or actual sexual orientation or gender identity, however obtained, to deny a tenancy, harass a tenant, evict a tenant, or terminate a voucher. We believe such language would significantly strengthen the protections provided by these regulations.

3. Data Collection

The prohibition against inquiry into a person's sexual orientation or gender identity has raised the question of whether and how data could be collected to identify and document occurrences of anti-LGBTQ housing discrimination. As HUD acknowledged when it launched the first national study of LGBTQ discrimination, data about housing access and discrimination is vital in demonstrating the extent of the problem, identifying when seemingly neutral policies are having a disparate impact on a community, and attracting resources to combat these problems. *See* Obama Administration To Ensure Inclusion of the LGBTQ Community in HUD Programs, HUD 09-206. Moreover, such data is crucial for demonstrating the need for affirmative outreach and then assessing whether these efforts are having a positive effect on the ability of LGBTQ people to access HUD-assisted housing. However, as discussed, inquiries into a person's sexual orientation or gender identity may provide fuel for discrimination and harassment or discourage LGBTQ applicants from accessing HUD programs. We strongly support creating and using a data collection system that will both provide accurate information that will aid in identifying and combating discrimination, and also protect the privacy of tenants and housing program participants who do not feel safe disclosing their sexual orientation or gender identity.

4. Exception for Gender-Segregated Facilities

We echo and support the concerns raised by the National Center for Lesbian Rights and other LGBTQ organizations, that the exemption from the prohibition against inquiries for situations

involving shared sleeping areas and bathrooms is not sufficiently clear. This could lead to discrimination against transgender people because the regulation could be read to require applicants or occupants to disclose the sex they were given at birth, rather than their gender identity. Although such a reading is inconsistent with HUD's July 2010 statement regarding its interpretation of the Fair Housing Act as prohibiting discrimination on the basis of gender identity, we recommend that the regulation be amended to clarify this point, that a person need only disclose the gender with which they identify, and they may not be asked to provide proof of that identity.

5. Affirmative Marketing to LGBTQ Populations

We request that in addition to redefining family to include LGBTQ individuals and prohibiting discrimination on the basis of gender identity and sexual orientation, HUD require that HUD-assisted housing providers affirmatively market to the LGBTQ population through community centers, and other outreach groups. We also request that forms HUD-935.2(a) or (b), be amended for this purpose to include categories for gender identity and sexual orientation as target groups, and that such forms be developed for all HUD-assisted programs.

Although there is little data related to discrimination faced by LGBTQ people in housing, existing data show that LGBTQ people face high rates of discrimination. As noted in the introduction to the proposed rule, the Michigan Fair Housing Center found that over a quarter of its testers faced housing discrimination on the basis of sexual orientation. Report on "Sexual Orientation and Housing Discrimination in Michigan" January 2007 at http://www.fhcmichigan.org/images/Arcus_web1.pdf. Transgender people are also extremely vulnerable to housing discrimination—in a 2011 study by the National Center for Transgender Equality and National Gay and Lesbian Task Force (NGLTF), 19% of respondents reported being refused an apartment or home and 11% reported being evicted. LGBTQ identity is also a major factor in homelessness. In the same study, one in five respondents experienced homelessness because of their gender identity or expression. And between 20 and 40 percent of homeless youth are LGBTQ, according to the 2007 study, "Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness" by NGLTF. HUD acknowledges in the notice of its proposed rule that LGBTQ individuals have been repeatedly turned away from housing because of their actual or perceived sexual orientation or gender identity. Over time, this discrimination may have discouraged LGBTQ individuals and families in this community from applying for HUD housing programs. Because the goal of these proposed rules is to provide LGBTQ individuals and families with equal access to these programs, we believe part of that effort involves affirmative marketing to LGBTQ communities.

Such marketing would be consistent with current HUD regulations and practices. HUD requires that PHAs to take affirmative steps to create equal housing opportunities in accordance with the Fair Housing Act, *see* 24 CFR §§ 903.2 and 903.7, and its stated interpretation of the Fair Housing Act, *see* HUD Issues Guidance on LGBTQ Housing Discrimination Complaints, HUD 10-139. One of the ways PHAs comply with this affirmative obligation is through affirmative marketing to underrepresented populations. HUD also requires jurisdictions participating in programs like HOME to affirmatively market these services to populations "least likely to apply for the housing, in order to make them aware of available affordable housing opportunities." *See* Affirmative Marketing, Housing and Urban Development, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/crosscutting/equalaccess/marketing.cfm>.

Forms such as the HUD Affirmative Marketing Plans, forms 935.2 (a) and 935.2(b), exist and could provide an easily adjusted template. As one step, these forms can be amended to include a target category of people who identify as or are perceived to be LGBTQ. Other examples of affirmative marketing activities include collaborating with local LGBTQ centers to reach out to their members and participants, advertising in LGBTQ media, and developing comprehensive outreach goals. Including such a requirement is vital to expanding access to HUD programs.

6. Enforcement Provisions

As drafted in 76 F.R. 4194, the proposed rule is silent about how HUD will enforce these provisions. Prohibiting housing providers from discriminating on these bases does not sufficiently protect LGBTQ participants and applicants if the rules do not provide recourse for when they inevitably encounter violations of these regulations. While we understand that HUD program offices may use existing authority to enforce these proposed rules, a number of practical barriers would make it difficult. For example, many housing advocates would not know who to contact when a problem arises. Additionally, HUD program offices have not frequently used the breadth of its enforcement authority against housing providers. Thus, we propose that rules clearly provide for enforcement provisions to be used against housing providers who violate these regulations.

The rules should explicitly state that HUD may sanction, suspend, debar, or seek civil penalties against HUD-assisted housing providers who violate these regulations by refusing to provide qualified individuals and families with safe, clean affordable housing because of their gender identity or sexual orientation. HUD already has the authority to do this. We believe an explicit statement would both have a deterrent effect on housing providers and it would signal the importance of equal access to HUD programs for LGBTQ individuals and families.

HUD's Fair Housing Enforcement Office should clarify its role in relation to the program offices with regard to enforcement of the rule and it should provide training on the implementation of the rule. Further, the rule should also require that HUD designate a coordinator for handling all complaints based on a person's sexual orientation or gender identity. Such a coordinator could direct complaints to the appropriate persons in the program offices. Relatedly, HUD should create a complaint system by which people can submit information about discrimination. For example, HUD could use a form similar to the existing Form 903 that people may use to file Fair Housing Act complaints (of course, some instances of discrimination based on gender identity or sexual orientation will fall under the FHA's purview). The agency could designate a telephone number for complaints based on violations of the proposed rule. Creating a centralized intake system would have the benefit facilitating reports of discrimination as well as providing more information about the occurrence of discrimination in HUD programs. Practical mechanisms for enforcement will allow LGBTQ families and advocates to fully utilize these changes to access housing.

7. Other HUD Actions

Finally, we urge HUD to work with Rural Development, under the United State Department of Agriculture, and the Low Income Housing Tax Credit program, under the Internal Revenue Service, to create analogous rules for those housing programs. These are both large programs serving large populations, including some of the areas with high rates of discrimination.

Thank you for considering these comments, and for your continued efforts to improve equal housing opportunities for LGBTQ communities. If you would like to discuss these comments further, please do not hesitate to contact Navneet Grewal, Staff Attorney at the National Housing Law Project, at ngrewal@nhlp.org or 415.546.7000 ext. 3102.

Sincerely,

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Asian Pacific American Legal Center (Los Angeles, CA)

Bay Area Legal Aid (Oakland, CA)

Bet Tzedek Legal Services (Los Angeles, CA)

California Rural Legal Assistance

Central Minnesota Legal Services

Housing Rights Committee of San Francisco

Housing Law Clinic, Michigan State University School of Law

Judge David L. Bazelon Center for Mental Health Law

Law Foundation of Silicon Valley

Legal Aid Foundation of Los Angeles

Legal Services of Northern California

Dorinda Wider, Legal Aid Society of Minneapolis/Mid-Minnesota Legal Assistance

National Alliance to End Homelessness

National Consumer Law Center (on behalf of our low income clients)

National Fair Housing Alliance

National Low Income Housing Coalition

New Hampshire Legal Assistance

Ohio Poverty Law Center

Oregon Law Center

OutFront Minnesota

Texas RioGrande Legal Aid, Inc.

Virginia Legal Aid Society, Inc.

Western Center on Law and Poverty (California)