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Regulations Division
Office of General Counsel
451 7th Street SW, Room 10276
Department of Housing and Urban Development
Washington, DC 20410-0500
Submitted electronically through www.regulations.gov

Re: Docket No. FR-6030-N-01: “Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777”

Dear Regulations Division, Office of General Counsel, HUD:

The following comments are submitted on behalf of the National Housing Law Project (NHLP) and the Housing Justice Network (HJN) regarding the proposed rule published on Monday May 15, 2017, “Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777.”¹ NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for protected classes. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. In addition, NHLP hosts the national Housing Justice Network, a vast field network of over 1,000 community-level housing advocates and tenant leaders. HJN member organizations are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. Meaningful tenant involvement is fundamental to all supported and public housing decisions, and the following comments draw on NHLP and HJN’s extensive experience working for decades with advocates, residents, and Public Housing Authorities (PHAs).

INTRODUCTION

NHLP and HJN are concerned about the legality and impact of Executive Orders 13771 and 13777 and HUD’s subsequent Regulatory Burden Notice

Executive Order 13771 requires HUD to repeal two existing regulations for each new regulation it proposes so that there is no net cost due to the regulatory action in any year. The order does not direct an agency to take into consideration the benefit or impact of the regulation itself when making this

¹ Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22,344 (May 15, 2017) (hereinafter “Regulatory Burden Notice”).

determination. Executive Order 13777 provides guidance to agencies on complying with the administration's regulatory agenda, including implementing a task force that will evaluate existing regulations and make recommendations regarding repeal. HUD's Regulatory Burden Notice seeks to carry out these executive orders.

The Executive Orders will frustrate HUD's goal of providing safe and decent housing to low-income Americans. The orders overstep the Administration's authority and are not grounded in statutory law. Moreover, the Orders' mandates ignore the fact that every regulation goes through a notice and comment period prior to implementation, along with a rigorous regulatory impact analysis in which agencies are required to weigh the benefit and cost of proposed regulations.² For all of these reasons, HUD's Regulatory Burden Notice that implements Executive Orders 13771 and 13777 cannot be legally enforced.

In addition, Executive Orders 13771 and 13777, and the subsequent notice from HUD, may have a devastating impact on participants of the federal housing programs. Federal regulations provide important and often constitutionally and/or statutorily required protections for tenants. Aside from the legal barriers to implementing the Executive Orders, HUD has a moral obligation to preserve existing regulations that help low-income Americans obtain and maintain safe and stable housing.

In response to the Administration's regulatory reform agenda, HUD should implement regulations pursuant to HOTMA

Last year, Congress unanimously passed and President Obama signed into law the Housing Opportunity Through Modernization Act (HOTMA).³ HOTMA is the first major federal housing legislation in almost two decades. The bipartisan legislation addresses a number of changes to the federal housing programs that will increase the effectiveness of rental assistance, achieve cost savings, and ease administrative burdens for housing authorities and owners. HUD has already issued regulations to implement important sections of HOTMA that will achieve these goals. Instead of undergoing a wasteful process to evaluate and identify existing regulations that may be outdated, ineffective, or excessively burdensome, HUD should issue additional regulations pursuant to HOTMA that will streamline the programs and reduce administrative burdens on PHAs and subsidized owners.

HUD has also taken steps in recent years to streamline the federal housing programs and reduce administrative burdens. Pursuant to statutory revisions made by Congress to the U.S. Housing Act of 1937 in the 2014 Appropriations Act, HUD issued its "streamlining rule" in 2016 which made important policy changes to the federal housing programs.⁴ The final rule streamlined regulatory requirements pertaining to certain elements of federally assisted housing, reduced the administrative burdens on public housing agencies and aligned requirements across the programs. Thus, the process as outlined in HUD's Regulatory Burden Notice is duplicative of past efforts and is itself a waste of government resources.

HUD should include HUD-assisted and other tenants on the Regulatory Reform Task Force

² See Executive Orders 12291 (Reagan) and 13563 (Obama).

³ H.R. 3700, Pub. L. 114-201, 130 Stat. 782 (July 29, 2016).

⁴ Streamlining Administrative Regulations for Public Housing, Housing Choice Voucher, Multifamily Housing, and Community Planning and Development Programs; Final Rule, 81 Fed. Reg. 12,354 (Mar. 8, 2016).

HUD's Regulatory Burden Notice, pursuant to Executive Order 13777, requires agencies to set up a Regulatory Reform Task Force that will identify regulations appropriate for repeal, replacement, modification, and consistent with applicable law. Each Task Force:

“shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, *consumers*, non-governmental organizations, and trade associations.”⁵

“Consumers” in the housing context include all HUD-supported tenants, including public housing residents, Section 8 Housing Choice Voucher program participants, and residents of project-based Section 8 properties, among others. We urge HUD to invite tenants to participate in the Regulatory Reform Task Force including voucher and public housing residents and families who access HUD's homeless assistance grants. Tenants are most likely to experience the direct impacts of HUD's regulatory reform agenda and their input is essential in the evaluation process.

RECOMMENDATIONS

HUD should revise the following regulations because they are “outdated, unnecessary, or ineffective”

The HUD Regulatory Burden Notice specifically requests comments on regulations that are “outdated, unnecessary, or ineffective.”⁶ Regulations related to Section 3, the demolition/disposition of public housing, and portability are regulations that should be modified because they are ineffective and do not comply with Congressional intent.

Section 3 Regulations (24 C.F.R. Part 135): HUD's Section 3 regulations are outdated and ineffective and should be replaced by new regulations. Section 3 of the Housing and Urban Development Act of 1968, titled “Economic Opportunities for Low and Very Low Income Persons,” requires recipients of HUD housing and community development funding to provide “to the greatest extent feasible” job training, employment, and contracting opportunities for low and very low income residents and eligible businesses. Unfortunately, the potential of this program has largely been ignored throughout its history. Recipients of HUD funds routinely do not comply with the program and HUD does not enforce its mandates. The program is therefore unrecognized or underused by low and very low income workers and qualified businesses and their advocates.

HUD issued an interim rule to implement Section 3 in 1994. It was not until 2015 that HUD published a proposed rule to update and strengthen the Section 3 program.⁷ The proposed rule suggested meaningful changes to increase the program's effectiveness and better target its intended statutory beneficiaries. Specifically, the proposed rule makes the following changes to improve the Section 3 program:

⁵ Executive Order 13777 § 3(e) (*emphasis added*).

⁶ Regulatory Burden Notice at 22,345.

⁷ Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses Through Strengthened “Section 3” Requirements, 80 Fed. Reg. 16,520 (Mar. 27, 2015).

- Eliminates a loophole that allows businesses to qualify for a Section 3 contracting preference by paying their employees poverty wages.
- Ensures that sub-recipient and contractor selection procedures assess bidders' previous compliance and ability to retain Section 3 hires, comply with Section 3 requirements, and provide training opportunities, making it more likely that programs will comply.
- Makes collaboration with labor unions mandatory by requiring that agreements between recipients and labor unions provide employment, apprenticeship, training, contracting, and other opportunities for Section 3 residents.
- Eliminates a per-contract threshold that made it possible for contractors to receive a cumulative amount of Section 3 financial assistance in excess of the threshold, yet not have to comply with Section 3 requirements.
- Makes some Section 3 requirements easier to understand and implement.

We urge HUD to publish the final Section 3 rule because the interim regulations are outdated and ineffective. In fact, HUD's Office of Inspector General concluded in 2003 that HUD "did not have adequate controls in place to ensure it is meeting the intended purpose of Section 3."⁸ A final rule will help maximize economic opportunities for low income families.

Public Housing Demolition/Disposition Regulations (24 C.F.R. Part 970): Section 18 of the U.S. Housing Act of 1937,⁹ amended by QHWRA¹⁰ governs the demolition and disposition of public housing. The regulations related to demolition and disposition promulgated pursuant to the statute are outdated and ineffective. Last revised in 2006, the regulations set forth the application procedures and requirements for public housing agencies that wish to demolish or dispose of public housing properties.

HUD's current demolition-disposition policy has led to a dramatic reduction in the stock of public housing nationwide. The repeal of one-for-one replacement of public housing units, followed by years of Congressional underfunding, maintenance backlogs, and poor management, has led to a permanent loss of affordable housing for the nation's neediest families. Outdated HUD regulations contribute to the loss. The lack of resident consultation, the failure of HUD to enforce application requirements, and the apparent deficiencies of PHA relocation plans are flaws in the current regulations. PHAs also cite the regulation's lack of clarity as a barrier to complying with the rules. To address these concerns, HUD issued guidance to PHAs¹¹ and subsequently published a proposed rule¹² that:

- Includes more robust resident consultation requirements including what must be contained in a PHA's application for demolition and disposition as well as a mandate that consultation be accessible to all program participants.
- Improves resident relocation provisions including a requirement to offer housing mobility counseling to residents.¹³

⁸ HUD Office of Inspector General Report (June 2003).

⁹ 42 U.S.C. § 1437p (West 2014).

¹⁰ Pub. L. No. 105-276, tit. V, § 531, 112 Stat. 2461, 2570 (1998).

¹¹ Demolition/Disposition of Public Housing and Associated Requirements for PHA Plans, Resident Consultation, Section 3, and Application Processing, HUD Notice PIH 2012-7 (Feb. 2, 2013).

¹² Public Housing Program: Demolition or Disposition of Public Housing Projects, and Conversion of Public Housing to Tenant-Based Assistance, 79 Fed. Reg. 62,249 (Oct. 16, 2014) (hereinafter Proposed Demo-Dispo Rule).

¹³ Proposed Demo-Dispo Rule at 62,275-62,276 (Proposed 24 C.F.R. Part 970, subpart A § 970.7(c)(7)(v)).

- Adds more robust civil rights certification requirements in the rule to help guarantee HUD’s goals: that demolition and disposition actions “do not serve to maintain or increase segregation based on race, ethnicity, or disability.”¹⁴
- Codifies HUD’s practice to allow demolitions in the case of emergency or major disaster without HUD approval.

HUD’s existing regulations related to the demolition and disposition of public housing are outdated and ineffective and contribute to the net loss of affordable housing units nationwide. HUD should publish a final rule to maximize the impact of its public housing program.

Enhanced Vouchers. Congress enacted Unified Enhanced Voucher authority to protect tenants residing in converted properties in 1999. For almost 20 years, HUD has failed to enact regulations implementing this authority, relying instead on occasional subregulatory guidance that does not adequately carry out the statute and protect tenants. In October of 2016, HUD finally proposed regulations to address this problem, which, among other things, failed to ensure that all affected income-eligible tenants received enhanced vouchers and failed to protect tenants' right to remain.¹⁵ A required lease addendum is essential to effectuate these long-standing protections, so that tenants, owners, PHAs and courts actually know that tenants actually have enhanced vouchers with special protections. To effectuate Congress' intent that tenants not be displaced by conversions, HUD should promptly issue a required lease addendum and regulations that reflect the comments of the National Housing Law Project, on behalf of the Housing Justice Network, the National Alliance of HUD Tenants, NLIHC, and several other national and local organizations working with enhanced voucher tenants and tenants facing conversions.

Portability (24 C.F.R. 982.353-982.355): The existing portability regulations are ineffective at promoting housing choice among voucher families. Mobility and portability are the key features of the voucher program. On August 20, 2015, HUD published a new portability rule.¹⁶ The rule revised the portability regulations for the Section 8 Housing Choice Voucher (HCV) program with the goal of streamlining the portability process for PHAs and reducing the burden on participating families. While the rule made important changes to the portability process, it fell short of removing significant barriers to housing choice and reducing administrative burdens on PHAs.

HUD should revise the portability rule to maximize family choice, increase the effectiveness of the voucher program, and reduce administrative burdens on PHAs. Suggested revisions include:

- Prohibiting receiving PHAs from re-screening program participants who are seeking to port their vouchers. HUD should adhere to the statute and implementing regulations, which prohibits receiving PHAs from conducting elective screening of current participants.¹⁷
- Requiring that information about porting be shared with families not only at the initial briefing, but at other times during the families’ participation in the voucher program, including after a request to port is submitted. Without this provision, the briefing requirements

Proposed Demo-Dispo Rule at 62,252.

¹⁵ 81 Fed. Reg. 74372 (Oct. 26, 2016).

¹⁶ Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50,564 (Aug. 20, 2015).

¹⁷ 42 U.S.C. § 1437f(o)(6)(B); 24 C.F.R. § 982.307(a)(1); 64 Fed. Reg. 49,656, 49,657 (Sept. 14, 1999); 64 Fed. Reg. 56,894 (Oct. 21, 1999).

on mobility are somewhat less effective, especially for long-time voucher holders that decide to move outside of their jurisdiction after years of program participation.

- Allowing a port where there may be loose ends from a prior tenancy but not at a level of severity that would call eligibility into question, promoting rapid rehousing and strengthening the credibility of the Section 8 program in the local housing community.
- Requiring that PHAs allow tenants to search for a new apartment without giving a definitive 30-day notice of intent to vacate.

As HUD analyzes regulations for modification, it should consider revising the portability rule to promote housing choice and mobility, the cornerstone of the voucher program.

HUD should preserve regulations that protect the rights of tenants

HUD's mission is to provide decent and safe housing for low-income Americans. In order to effectuate its mission, HUD promulgates regulations pursuant to federal statutory law. HUD cannot simply repeal a regulation even if it poses a cost or regulatory burden on the agency. We provide several examples below of regulations that protect the rights of tenants and are grounded in the law and therefore cannot be repealed by HUD simply as a result of the Administration's regulatory reform agenda.

Grievance procedures for public housing residents (24 C.F.R. 966.50-966.57): The federal regulations related to grievance procedures in public housing were promulgated to implement the requirements and spirit of the U.S Housing Act of 1937.¹⁸ The regulations afford public housing tenants the opportunity to dispute any public housing authority action or inaction involving the tenant's lease or housing authority regulations that adversely affect the tenant's rights, duties, welfare, or status. The right to a grievance procedure for tenants facing eviction from public housing has also been consistently upheld by the courts. *See, e.g., Thorpe v. Housing Authority of Durham*, 386 U.S. 670 (1967), *vacated and remanded*, 393 U.S. 268 (1969); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970). HUD could not repeal regulations pertaining to the right to a grievance procedure for public housing tenants because the right derives from due process protections afforded by the Constitution and is embedded into the fabric of federal housing law and policy. Furthermore, HUD studied this issue as part of the streamlining regulation, and determined that the bulk of the provisions were effective, but added some flexibility for PHAs.

The PHA Plan Process (24 C.F.R. Part 903): The regulations governing the PHA Plan process are critical to helping to ensure transparency and accountability by local decisionmakers and a means for the public to know and weigh in on important PHA policy decisions. HUD's regulations related to the PHA Plan process were promulgated in response to the Quality Housing and Work Responsibility Act (QHWRA).¹⁹ Congress enacted QHWRA to ensure accountability to U.S. taxpayers while balancing the need for PHA's to have the autonomy necessary to address local housing issues. QHWRA requires PHAs to prepare and submit to HUD a "PHA Plan" which includes an annual plan and a five year plan to report on the PHA's activities. The PHA Plan regulations contain almost identical language to the statute with regards to the requirement to complete the plan and its contents. Congress and HUD addressed the potential burden this requirement may have by exempting PHA's

¹⁸ 42 U.S.C. § 1437d(k).

¹⁹ 42 U.S.C.A. § 1437(a)(1)(C).

that are: 1) “high performing “; 2) Have less than 250 public housing units (and are not considered “troubled”; and 3) only administer tenant-based assistance and do not own or operate public housing.²⁰ HUD could not repeal regulations pertaining to PHA Plans because the requirements are embedded in statutory law and provide important tenant protections.

Lead Safe Housing Rule (24 C.F.R. Part 35): HUD finalized a rule amending 24 C.F.R. 35 in January 2017 designed to provide greater protection to children exposed to lead hazards. We urge HUD to maintain the critical improvements that HUD made to the Lead Safe Housing Rule. However, these updated regulations, alone, will not fully prevent children from being lead poisoned in federally assisted housing. In recognition of increasing reports of lead poisoning in federally assisted housing and lack of compliance with lead poisoning prevention laws, Congress included numerous directions to HUD in the recently passed Consolidated Appropriations Act of 2017, including improved lead hazard inspections; preference for UPCS inspections; updated lead hazard definitions based on health standards; removing the zero-bedroom dwelling unit exemption; identification of lead service lines; increased data collection, training, compliance, and oversight.

Congress has recognized that more is needed to protect children from lead poisoning, and has taken action accordingly. HUD can, and should, do the same. **At a minimum, HUD should conduct risk assessments in all of its inspection programs.** Under the current regulations, children in the Housing Choice Voucher program and project-based Section 8 buildings receiving less than \$5,000 per unit still must be lead poisoned and suffer permanent neurological damage before any interventions are triggered. To ensure that no families move into a unit with a lead hazard, it is critical that HUD require robust lead hazard evaluation in the form of risk assessment throughout its programs before a child occupies the unit. Any question regarding HUD’s authority to require risk inspections and the ineffectiveness of visual inspections was settled in the 2017 Consolidated Appropriations Act, where Congress expressly clarified and confirmed that HUD has the authority to provide more rigorous standards, stating, “HUD has the statutory authority necessary to require more stringent inspections when checking homes for lead paint. HUD’s current visual lead inspections have proven insufficient, and more rigorous standards, such as requiring risk assessments prior to a family moving into a home, should be implemented to ensure that children living in federally assisted housing are protected from lead poisoning.” H. Rep. No. 114-606, at 94 (2016). A continued reliance on visual assessments would not only ensure that lead hazard control occurs only after the child suffers permanent harm, it would also contravene the express will of Congress.

HUD should continue to advance equal access to housing free from discrimination, and maintain those regulations that already do so

HUD must ensure that its regulations continue to protect those persons who have been historically denied fair and equal access to housing opportunities. HUD’s regulations concerning fair housing and equal access are an integral part of ensuring that racial and ethnic minorities, families with children, persons with disabilities, survivors of domestic and sexual violence, LGBT individuals and families, among others, are not denied access to safe, decent, and affordable housing due to discrimination.

We also remind HUD of its own statutory obligation to affirmatively further fair housing, such that the agency is required to administer its programs and activities in a way that affirmatively

²⁰ 24 C.F.R. Part 903.11.

further the aims of Fair Housing Act itself.²¹ Furthermore, we note that the Act includes a provision requiring all executive departments and agencies to administer their programs and activities related to housing and urban development in a manner that also affirmatively furthers fair housing.²² To the extent HUD is consulted by other agencies who are evaluating their own regulations concerning housing-related activities, we ask that HUD work with these agencies to ensure that the aims of the Fair Housing Act are promoted and affirmed across the federal government.

We highlight the following regulations as examples of those recent regulations that are integral to protecting and advancing the civil rights of those who unfortunately are still denied equal housing opportunities. However, note that this is not an exhaustive list; we simply include these regulations to illustrate the various contexts in which fair housing and equal access regulations remain crucial in the advancement of HUD's broader mission. However, other longstanding regulations related to ensuring equal access and nondiscrimination in housing, including within HUD programs, should remain in place as well.

The Duty to Affirmatively Furthering Fair Housing (AFFH). The Fair Housing Act of 1968 (FHA) includes in its text an obligation that HUD shall administer its “programs and activities relating to housing and urban development in a manner affirmatively to further” the Fair Housing Act.²³ In addition to this statutory obligation in the text of the 1968 Act, HUD programmatic statutes also include a requirement that program participants certify that they will affirmatively further fair housing.²⁴ Despite being subject to these statutory obligations, jurisdictions receiving funds from HUD through programs such as the Community Development Block Grant (CDBG) program or the HOME Investment Partnerships program, in addition to public housing agencies (PHAs), previously lacked a clear framework to evaluate the extent to which they were affirmatively furthering fair housing choice in their programs and activities. A 2010 Government Accountability Office report documented the deficiencies under the former analysis of impediments framework, citing among other issues, the lack of a structured process and an absence of consistent HUD oversight.²⁵ Thus, the AFFH rule,²⁶ finalized by HUD in 2015, is a necessary regulation that provides a structured framework for HUD program participants to analyze the fair housing issues impacting communities of color, families with children, persons with disabilities, and other persons protected by the FHA.

Both within the AFFH rule itself, as well as in its subsequent implementation, HUD has been cognizant of and responsive to the needs of grantees – including those who have fewer resources and capacity. In doing so, HUD has thoughtfully weighed the statutory requirement for its grantees to

²¹ 42 U.S.C.A. § 3608(e)(5).

²² *Id.* § 3608(d) (“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 to further such purposes.”).

²³ 42 U.S.C.A. § 3608(e)(5).

²⁴ *See e.g.*, 42 U.S.C.A. § 5304(b)(2) (states and local governments receiving CDBG funds must certify that they will affirmatively further fair housing); 42 U.S.C.A. § 5306(d)(7)(B) (local governments that receive CDBG funds from states must certify that they will affirmatively further fair housing); 42 U.S.C.A. § 1437c-1(d)(16) (affirmatively furthering fair housing certification requirement for public housing agencies).

²⁵ *See generally* Government Accountability Office, GAO-10-905, “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” (Sept. 2010).

²⁶ Affirmatively Furthering Fair Housing; Final Rule, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. Parts 5, 91, 92, 570, 574, 576, and 903) [hereinafter “AFFH rule”].

affirmatively further fair housing, the need for HUD to give grantees sufficient guidance and structure to comply with this obligation, and the realities of limited resources. For example, the AFFH rule currently allows for HUD program participants that are required to complete an Assessment of Fair Housing (AFH) to engage in joint or regional collaborations,²⁷ which HUD indicated in its AFFH rule preamble that the agency expected would not only improve fair housing planning but that collaborating grantees may be able to reduce costs through shared resources.²⁸ In fact, the text of the AFFH regulation itself encourages program participants to “collaborate to conduct and submit a single AFH” for the “purposes of sharing resources and addressing fair housing issues from a broader perspective.”²⁹ HUD is also providing an AFFH Data and Mapping Tool³⁰ for HUD grantees to use in completing their analyses – while still requiring grantees to also engage members of their local communities so that the analysis and resulting goals are reflective and responsive to local circumstances. Furthermore, HUD provided small grantees more time to complete the AFH, including entitlement jurisdictions receiving \$500,000 or less in CDBG funds in FY 2015, and qualified PHAs.³¹ In addition, in its recently finalized versions of the Local Government Assessment Tool and the Public Housing Agency Assessment Tool, HUD included optional inserts that local governments with smaller CDBG grants and small PHAs (specifically, these entities that are collaborating with local governments and PHAs using the main Assessment Tools) could utilize to streamline their fair housing analysis portion of the Assessment.³² HUD has also indicated that it will be creating a separate Assessment Tool for qualified PHAs.³³ In sum, HUD has taken measures both within the rule itself, and in subsequent guidance documents, to ensure that grantees of varying sizes and capacities can still engage in a meaningful fair housing analysis. This approach lessens the likelihood of assessments that fail to meaningfully evaluate fair housing issues in communities – a result that would be an inefficient use of program participant resources.

Despite the guidance and resources HUD has provided regarding the AFFH rule, there is still unfamiliarity with and misconceptions about what the AFFH rule requires program participants to do;

²⁷ 24 C.F.R. § 5.156.

²⁸ In the preamble to the AFFH rule, HUD states:

The reason that HUD strongly encourages collaboration by program participants (whether regionally collaborating program participants or joint participants) *is that HUD expects that jurisdictions working together will more effectively affirmatively further fair housing, and may be able to reduce costs by sharing resources.* HUD already strongly encourages collaboration by program participants (whether regionally collaborating participants or joint participants) because HUD expects that the very fact that jurisdictions are working together will lead them to more effectively affirmatively further fair housing.

80 Fed. Reg. at 42,328 (emphasis added).

²⁹ 24 C.F.R. § 5.156(a).

³⁰ <https://egis.hud.gov/affht/>.

³¹ 24 C.F.R. § 5.160(a); Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants That Receive a Community Development Block Grant of \$500,000 or Less, 81 Fed. Reg. 73,129 (Oct. 24, 2016).

³² See Assessment of Fair Housing Tool for Local Governments, Section V.F (Jan. 2017) (1,250 Unit or Fewer PHA Insert); *see id.*, Section V.G (\$500,000 or Less Local Government Insert); Assessment of Fair Housing Tool for Public Housing Agencies, Section V.F (Jan. 2017) (1,250 Unit or Fewer PHA Insert) (Jan. 2017).

³³ Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document, 82 Fed. Reg. 4373, 4374 (Jan. 13, 2017) (“HUD has also committed to developing a fourth Assessment Tool specifically for use by QPHAs who choose to conduct and submit an individual AFH or that collaborate with other QPHAs to conduct and submit a joint AFH.”).

this may lead those unfamiliar with the AFH framework to label the rule an intrusive step by the federal government. In fact, the framework required by the AFFH rule—with its emphasis on strong community participation and input, the use of local data and knowledge to supplement HUD-provided data, and locally-determined goals, metrics, and milestones—instead facilitates important community-based discussions of fair housing issues, challenges, and potential solutions. Importantly, in response to the concern that the AFFH rule impedes local zoning decisions, the rule’s preamble states:

HUD agrees that determinations about the goals, priorities, strategies, and actions that a community will take to affirmatively further fair housing should be made at the local level. This rule does not impose any land use decisions or zoning laws on any local government. Rather, the rule requires HUD program participants to perform an assessment of land use decisions and zoning to evaluate their possible impact on fair housing choice. This assessment must be consistent with fair housing and civil rights requirements, which do apply nondiscrimination requirements to the land use and zoning process. However, this rule does not change those existing requirements under fair housing and civil rights law. Instead, the purpose of this assessment is to enable HUD program participants to better fulfill their existing legal obligation to affirmatively further fair housing, in accordance with the Fair Housing Act and other civil rights laws.³⁴

The AFFH rule is designed to assist program participants in fulfilling their existing AFFH obligations in accordance with local needs and input. It is not intended to take local authority away from local jurisdictions.

Another misconception is that the AFFH rule is requiring HUD program participants to solve problems that are impossible for them to solve. For example, a PHA may express concerns about having to analyze disparities in access to opportunity in areas such as education or access to transit. However, at its core, the Assessment of Fair Housing process requires program participants to perform an analysis so that they may come to a better understanding of how their policies and practices shape fair housing choice, and identifying appropriate goals. Such analysis may also result in collaborations with those entities (such as a local jurisdiction) that may actually be able to address disparities in access to opportunities such as those existing in education or jobs.³⁵ HUD has an important role in facilitating program participants’ understanding of the AFFH rule and the statutory AFFH obligation so that program participants may better make connections between their own policies and practices, and how those policies may be contributing to fair housing issues such as disparities in access to opportunity, segregation, or disproportionate housing needs.

Repealing the AFFH rule, or substantially reducing program participants’ obligations under the rule would, fundamentally, be a disservice to program participants, as they would once again lack the structure of the AFH process while still retaining programmatic statutory obligations to AFFH noted above. More importantly, eliminating or significantly scaling back this obligation at a time when communities across the country are engaging in important and meaningful conversations through the Assessment of Fair Housing process about fair housing choice and access to opportunity

³⁴ 80 Fed. Reg. at 42,309.

³⁵ *See also* discussion in AFFH rule preamble, 80 Fed. Reg. at 42,286.

would also be inconsistent with the agency’s statutory duty to affirmatively further fair housing in its programs and activities.

Discriminatory Effects. In 2013, HUD issued its final rule³⁶ regarding discriminatory effects theory under the Fair Housing Act. The U.S. Supreme Court affirmed that disparate impact claims are cognizable under the FHA its recent *Inclusive Communities Project* decision -- with Justice Kennedy noting that recognition of disparate impact “is consistent with the FHA’s central purpose.”³⁷ Because policies and practices need not have a discriminatory intent to have a devastating effect on members of protected classes, the discriminatory effects framework is essential to ensuring equal access to housing opportunities for all. The Discriminatory Effects Rule serves the important role of formalizing the standard by which discriminatory effects claims are analyzed.³⁸ Importantly, the current Discriminatory Effects Rule provides defendants or respondents the opportunity to demonstrate that a challenged practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant,” such that the rule only imposes liability for unjustified practices with a discriminatory effect – assuming the plaintiff cannot show a less discriminatory alternative.³⁹ The regulation sets out a single standard to be consistently evaluated by HUD as well as by the courts.⁴⁰ The regulation standardizes the discriminatory effects analysis to address variations that had developed in how to analyze discriminatory effects claims.⁴¹ The preamble also notes that the rule adds “no additional costs to housing providers and others engaged in housing transactions.”⁴² HUD should not upset this uniformity by taking steps to weaken its existing discriminatory effects regulations at 24 C.F.R. § 100.500.

Equal Access Rule and Subsequent Amendments. In 2012, HUD issued its regulation regarding equal access to HUD housing programs regardless of gender identity, marital status, or sexual orientation.⁴³ HUD subsequently amended the Equal Access Rule twice in 2016.⁴⁴ These protections are critical for ensuring access to HUD programs for members of the LGBT community. Members of the LGBT community still experience high rates of housing discrimination.⁴⁵ Ensuring that HUD’s programs are accessible to persons regardless of their sexual orientation, gender identity, or marital status is fundamentally tied to HUD’s mission. The 2016 rule regarding equal access to HUD’s

³⁶ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

³⁷ 135 S. Ct. 2507, 2521, 576 U.S. ____ (2015).

³⁸ Discriminatory effects liability includes both disparate impact as well as perpetuation of segregation claims.

³⁹ 24 C.F.R. § 100.500(c)(2).

⁴⁰ 78 Fed. Reg. at 11,460 (“This rule formally establishes a three-part burden-shifting test currently used by HUD and most federal courts, thereby providing greater clarity and predictability for all parties engaged in housing transactions as to how the discriminatory effects standard applies.”).

⁴¹ 78 Fed. Reg. at 11,462-63.

⁴² *Id.* at 11,460.

⁴³ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012).

⁴⁴ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sept. 21, 2016); Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs—Regardless of Sexual Orientation or Gender Identity, 81 Fed. Reg. 80,989 (Nov. 17, 2016).

⁴⁵ *See, e.g.*, preamble to CPD Gender Identity Rule, 81 Fed. Reg. at 64,765 (describing recent study where testing was conducted to evaluate the ability of transgender women to access shelters); Equal Rights Center, “Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples” (2014); HUD, An Estimate of Housing Discrimination Against Same-Sex Couples, 20 (June 2013) (“From June through October 2011, same-sex couples experienced significant levels of adverse treatment relative to comparable heterosexual couples when they responded to electronically advertised rental housing in metropolitan rental housing markets nationwide.”).

Community Planning & Development (CPD) programs is a crucial amendment to the Equal Access Rule. HUD determined that the CPD rule was necessary, because, upon review, the regulations then in place “did not adequately address the significant barriers faced by transgender and gender nonconforming persons when accessing temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities.”⁴⁶ Furthermore, HUD found “that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations.”⁴⁷ Accordingly, the CPD amendments to the Equal Access Rule provides for nondiscrimination in accessing life-saving emergency shelter, including for those individuals and families who are escaping domestic or sexual violence. Additionally, in 2016, HUD also extended the Equal Access Rule’s protections to its Native American and Native Hawaiian programs. We support the maintenance of these important protections in HUD housing programs, and would oppose any softening or weakening of protections for LGBT persons who apply for or participate in HUD programs.

VAWA 2013 Implementation. The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) includes additional critical housing protections for victims of domestic violence, dating violence, sexual assault, and stalking.⁴⁸ For example, some of the key housing protections in VAWA 2013 include the expansion of existing housing protections to additional HUD housing programs; the extension of protections to sexual assault victims; requiring HUD (among other federal agencies) to develop a model emergency transfer plan to be used by PHAs, owners, and managers; and requiring that victims receive a HUD-created notification of VAWA housing rights at three critical junctures for tenants of and applicants for covered HUD programs: (1) denial, (2) admission (3) notification of eviction/subsidy termination.⁴⁹ The HUD VAWA 2013 rule issued in 2016 builds upon and is consistent with the statute’s requirements. The rule and its conforming amendments are essential for successful implementation of the statute by PHAs, owners, and managers – and more fully characterize the life-saving protections outlined within the VAWA 2013 statute. Without regulations in place regarding VAWA 2013, certain provisions of the statute could not be implemented as HUD has determined they are not self-executing,⁵⁰ forcing domestic violence survivors to choose between their housing and their safety. HUD notes that the primary costs (i.e., paperwork costs) are “not significant” given HUD’s role in creating documents such as the notice of VAWA rights and the certification form – as well as HUD’s assurance of providing translated versions of the notice.⁵¹ We urge HUD to maintain regulations that implement VAWA 2013.

Harassment. HUD should preserve its final 2016 regulation regarding harassment and Fair Housing Act liability. Harassment in housing is a serious and pervasive issue that threatens the housing security of members of protected classes across the country. In its regulation, HUD builds upon the legal framework developed through sexual harassment caselaw in the Title VII context, as well as

⁴⁶ 81 Fed. Reg. at 64,764.

⁴⁷ *Id.*

⁴⁸ *See generally* 42 U.S.C.A. § 14043e-11.

⁴⁹ *Id.*

⁵⁰ *See generally* The Violence Against Women Reauthorization Act of 2013: Overview of Applicability to HUD Programs; Notice, 78 Fed. Reg. 47,717 (Aug. 6, 2013).

⁵¹ Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs; Final Rule, 81 Fed. Reg. 80,724, 80,797 (Nov. 16, 2016).

harassment cases brought pursuant to the federal Fair Housing Act. Importantly, as the rule preamble rightly acknowledges, harassment in one’s home constitutes an acute violation of one’s personal security.⁵² As past court cases and HUD discrimination charges have illustrated, members of protected classes – including low-income tenants who are members of protected classes -- are often the targets for unlawful harassment. For instance, in 2014, HUD filed a discrimination charge alleging that a property manager perpetrated sexual harassment against female tenants – who were also Section 8 Housing Choice Voucher participants—with the property manager threatening tenants’ housing subsidies should they refuse to acquiesce to sexual demands.⁵³ As the rule also recognizes, all protected classes under the FHA are also subject to unlawful harassing conduct. The rule is necessary because it clearly lays out the standards for evaluating claims of both quid pro quo and hostile environment harassment under the Fair Housing Act. Furthermore, the rule also formalizes the standards for direct and vicarious liability under the FHA generally. The preamble notes that the rule “does not create any new forms of liability under the Fair Housing Act and thus adds no additional costs for housing providers and others engaged in housing transactions.”⁵⁴ We would oppose efforts to weaken or rescind this regulation.

Thank you for your consideration of our comments and recommendations. We look forward to working with HUD and are happy to further discuss our suggestions. Please contact Deborah Thrope (dthrope@nhlp.org) or Renee Williams (rwilliams@nhlp.org) should you wish to talk with NHLP and/or HJN members to clarify our position on these important issues.

Sincerely,

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⁵² 81 Fed. Reg. at 63,055 (“One’s home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one’s home can be far more intrusive, violative and threatening than harassment in the more public environment of one’s work place.”).

⁵³ Press Release, “West Virginia and Tennessee Landlords Charged with Sexual Harassment After Female Renters Coerced to Comply or Lose Home,” HUD No. 14-126 (Oct. 8, 2014), available at: http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2014/HUDNo_14-126 (referencing West Virginia discrimination charge).

⁵⁴ 81 Fed. Reg. at 63,055.

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