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Via regulations.gov

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Office of the Assistant Secretary for Civil Rights
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20503

Re: Comments on “Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture,” 78 Fed. Reg. 78,788 (Dec. 27, 2013), Docket No. 0503-AA52

We write on behalf of undersigned civil rights, fair housing, low-income housing, and other advocacy organizations to comment upon the U.S. Department of Agriculture’s (USDA) proposed changes to its nondiscrimination regulation covering federally-conducted programs (Proposed Rule).¹ As our organizations work tirelessly to promote fair housing choice and equal opportunity for all, we are particularly encouraged by the proposed expansion of the regulation to include gender identity as a protected group. We agree with groups representing the Lesbian, Gay, Bisexual, and Transgender (LGBT) community in expressing the need for the proposed changes, and incorporate sentiments expressed by LGBT advocacy organizations in various parts of this letter. However, we write separately to focus on the impact that this Proposed Rule will have on the vital housing programs administered by USDA Rural Development (RD).

The Proposed Rule provides much-needed protections for transgender individuals in USDA’s federally-conducted programs, and we express our strong support for this much-needed change. Unfortunately, the draft regulation as written only applies to USDA’s *federally-conducted* programs and does not apply to many of its *federally-assisted* programs. In fact, discrimination on the basis of gender identity or sexual orientation is currently not prohibited in regulations governing USDA’s federally-assisted programs. Thus, we urge USDA to extend LGBT protections to **ALL** of its programs, including multi-family housing programs, in its final rule. Federally-assisted programs provide essential housing and related services to underserved rural populations. Making a more comprehensive change to USDA regulations is crucial, as discrimination against LGBT people remains widespread, and LGBT individuals and families are disproportionately likely to rely on programs aimed at low-income individuals. Furthermore, the U.S. Department of Housing and Urban Development (HUD) has recognized the need to offer LGBT protections in its housing programs, and in 2012, the agency finalized its regulation adding protections to all HUD-assisted and insured housing. USDA should follow HUD’s lead in furthering the cause of equal access for LGBT Americans.

¹ Notice of Proposed Rulemaking, “Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture,” 78 Fed. Reg. 78,788 (Dec. 27, 2013) (hereinafter “Proposed Rule”).

The Proposed Rule is a Starting Point for Providing Much-Needed Protections for Transgender Persons in USDA-Conducted Programs

We strongly support USDA’s move to include gender identity in its Proposed Rule. As we outline here, transgender individuals face discrimination in daily life, and in obtaining housing. According to recent studies, nearly 700,000 adults in the United States, or 0.3% of the adult U.S. population, are transgender.² The National Transgender Discrimination Survey—which is, to date, the largest nationwide survey of transgender individuals—found that transgender respondents live in every U.S. state, and are distributed across the nation similar to the general U.S. population.³ However, due to widespread bias and discrimination, transgender people today face disproportionate levels of poverty, homelessness, joblessness, and victimization.⁴ For example, transgender individuals may be turned away because they are deemed to dress “inappropriately” when presenting themselves in a manner consistent with their gender identity; deemed not to have appropriate identification when a document lists a former name or outdated gender designation different from the individual’s outward presentation; thrown out of offices for using public restrooms consistent with their gender identity; or subjected to inappropriate personal questions or other verbal or physical harassment. The National Transgender Discrimination Survey revealed that almost a third of respondents reported at least one incident of discrimination in a government office or program.⁵ Transgender individuals recounted being harassed (40% of respondents), asked to leave (15%), or in some cases, physically attacked (3%) after showing identification with the individual’s former name or gender.⁶ Transgender discrimination also manifests in housing: 10 percent of respondents reported being refused housing due to their gender identity or expression, and another 11 percent were evicted from their homes for the same reasons.⁷ These acts of discrimination often occur in states with large rural communities served by USDA programs and in the same states in which it is most difficult for transgender people to update state-issued identification. The survey also found that transgender persons of color, as well as lower-income transgender individuals were, as a general rule, less likely to change their state-issued identification.⁸

The Proposed Rule, together with appropriate training for USDA staff, will help ensure that discrimination does not hinder access to vital federally-conducted RD programs and activities. However, the Proposed Rule must go further by protecting transgender individuals in all USDA programs, especially its assisted housing programs. Having access to safe, decent, and affordable housing is a universal concern, but is an issue of particular importance to the LGBT community – as LGBT individuals and families continue to face housing discrimination. We therefore urge USDA to build upon the work it has done with this Proposed Rule to amend *all* nondiscrimination regulations covering the agency’s programs. As we discuss below, until gender identity protections are extended to all federally-assisted housing programs and activities –which are administered by state or municipal governments and private organizations—transgender individuals will not be guaranteed equal access to *all* of USDA’s housing programs.

² G. Gates, *How Many People Are Lesbian, Gay, Bisexual and Transgender?* (Williams Institute, Apr. 2011), <http://www2.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf>.

³ J.M. GRANT, L.A. MOTTET, J. TANIS, J. HARRISON, J.L. HERMAN, M. KEISLING, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, 21 (National Center for Transgender Equality & National Gay and Lesbian Task Force, 2011), available at http://www.endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

⁴ See generally GRANT ET AL., *INJUSTICE AT EVERY TURN*, especially 2-9 (Executive Summary).

⁵ GRANT ET AL., *INJUSTICE AT EVERY TURN*, 129-30.

⁶ GRANT ET AL., *INJUSTICE AT EVERY TURN*, 153.

⁷ GRANT ET AL., *INJUSTICE AT EVERY TURN*, 4.

⁸ GRANT ET AL., *INJUSTICE AT EVERY TURN*, 139.

USDA Must Amend its Regulations to Prohibit Gender Identity and Sexual Orientation Discrimination in All of its Programs

While we ardently support USDA's desire to eliminate gender identity discrimination in its federally-conducted programs, it is time for USDA to take the next step and include all of its federally assisted programs. The Proposed Rule prohibits discrimination based on gender identity only with respect to its federally-conducted programs,⁹ adding to the existing prohibition¹⁰ of discrimination in federally-conducted programs based on sexual orientation and other protected characteristics. However, agency regulations governing federally-assisted¹¹ programs do not prohibit discrimination on the basis of *either sexual orientation or gender identity*. Accordingly, USDA must change its current regulations to prohibit discrimination on the basis of both sexual orientation and gender identity in all of its federally-assisted programs. While there are numerous reasons why USDA should amend its regulations to reflect these overdue changes, we cite three: (1) the reach of USDA federally-assisted programs, including RD housing programs; (2) the importance of creating uniformity among USDA nondiscrimination regulations; and (3) the precedent of extending LGBT protections in federally-assisted housing programs by the U.S. Department of Housing and Urban Development (HUD).

Reach of USDA/RD programs

USDA's federally-assisted programs provide essential nutritional and housing assistance to individuals and families nationwide. It is our understanding that some of these programs fall under the definition of "federally-assisted" programs, including Section 514 Farm Labor Housing Loans, Section 515 Rental Housing Loans, Section 516 Farm Labor Housing Grants, Section 533 Housing Preservation Grants, Section 538 Guaranteed Rental Housing Loans, and Section 502 Guaranteed Loans.¹²¹³ These programs serve rural communities across the nation each year by helping them obtain decent, affordable housing; for example, in FY13 the Rental Housing Loan program provided 42 multifamily housing loans to rehabilitate housing for very low-, low-, and moderate-income households in 18 states; and in FY13, 39

⁹ See Proposed Rule at 78,788 (noting that the Proposed Rule only applies to federally-conducted, but not federally-assisted, programs).

¹⁰ See 7 C.F.R. § 15d.2(a) (existing regulation) (prohibiting discrimination on the basis of "race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability, or because all of [sic] part of an individual's income is derived from any public assistance program").

¹¹ See Proposed Rule at 78,788 at n.1 ("Federally assisted programs are programs and activities receiving financial assistance through a third party such as a State or municipal government, university, or organization. Federally conducted programs, which are those programs covered in this regulation, are programs and activities receiving assistance directly from USDA.")

¹² See e.g., "Appendix to Subpart A of Part 15 – List of Federal Financial Assistance From USDA," 7 C.F.R. Pt. 15, subpart A, Appendix (listing Section 514 Farm and Labor Housing Loans, Section 516 Farm Labor Housing Grants, and Section 515 Rural Rental Housing as comprising federal financial assistance by USDA, but stating this list is not exhaustive).

¹³ We have included Section 502 Guaranteed Loans on this list based on our reading of relevant USDA statutes, regulations, and the Proposed Rule. However, as we discuss below, the manner in which the Proposed Rule is written creates confusion about the exact scope of the proposed regulation.

Guaranteed Rental Housing Loans were made to finance rural rental housing for low and moderate income people in 14 states.¹⁴

Importance of uniformity

That said, it is unclear from the text of the Proposed Rule exactly which USDA programs are covered by the proposed changes to the regulation. Extending LGBT nondiscrimination protections to *both* federally-conducted and federally-assisted programs would harmonize USDA regulations and eliminate confusion regarding what protections govern which programs. Having different standards for federally-conducted and federally-assisted programs serves only to create uncertainty among USDA staff, funding recipients, and the general public about the applicability of these important nondiscrimination protections. In updating both the federally-conducted and federally-assisted program regulations, USDA will send a clear, unequivocal message that *none* of its programs will discriminate against LGBT persons. Such an extension would also solidify the impact of the changes in the current Proposed Rule.

Should USDA choose to not include federally-assisted programs in its final rule, it will be of critical importance--particularly for the safety of transgender people seeking access to USDA programs—that the Department conduct widespread public education that explicitly lays out which programs have nondiscrimination protections for transgender individuals. Additionally, we would also urge USDA to comprehensively list the programs covered in the final rule. However, we strongly urge USDA to err on the side of consistency and broader access by holistically prohibiting discrimination in all of its programs.

Prior HUD leadership on this issue

Furthermore, HUD has previously extended its LGBT protections to its federally-assisted and insured programs; USDA should follow HUD's leadership on this issue. The Proposed Rule cites HUD's 2012 changes to that agency's regulations prohibiting discrimination against LGBT individuals in HUD programs.¹⁵ These HUD nondiscrimination protections, known as the Equal Access Rule, apply to HUD-assisted and -insured housing.¹⁶ Among HUD's recent changes was an update to 24 C.F.R. § 5.105(a)(2)(i) that included sexual orientation and gender identity (along with marital status) as protected categories assured equal access to HUD -assisted and -insured housing.¹⁷ Furthermore, HUD had previously noted the connection between gender identity/expression or sexual orientation

¹⁴ See Housing Assistance Council, "USDA Rural Development Housing Obligations: Fiscal Year 2013 Year-End Report" at Summary 1, and MFH 1, 7 (2013), *available at* ruralhome.org/storage/documents/rd_obligations/fy2013/yearend/usdard-fy13-ye-obligations-combined.pdf.

¹⁵ See Proposed Rule at 78,791 (discussing the 2012 HUD rule).

¹⁶ See HUD, Final Rule, "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity," 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) ("As the Nation's housing agency, it is important not only that HUD ensure that its own programs do not involve arbitrary discrimination against any individual or family otherwise eligible for HUD-assisted or -insured housing, but that its policies and programs serve as models for equal housing opportunity.").

¹⁷ The section reads: "(2) Equal access to HUD-assisted or insured housing. (i) Eligibility for HUD- assisted or insured housing. A determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status." 24 C.F.R. § 5.105(a)(2); *see also* 77 Fed. Reg. at 5674.

discrimination and existing protected classes under the federal Fair Housing Act (sex, etc.).¹⁸ Federally-assisted housing providers participating in RD housing programs have similar Fair Housing Act obligations. Accordingly, we urge USDA to amend the agency's regulations governing all of its programs as a further demonstration of its commitment to addressing discrimination against LGBT persons and families.

We thank you for your time and your consideration of these comments. Please contact Jorge Andres Soto at the National Fair Housing Alliance at jsoto@nationalfairhousing.org or 202-898-1661, or Renee Williams at the National Housing Law Project, rwilliams@nhlp.org, or (415) 546-7000, ext. 3121.

Sincerely,

Brancart & Brancart

California Rural Legal Assistance, Inc.

The Fair Housing Council of the San Fernando Valley

Fair Housing Law Project, Law Foundation of Silicon Valley

Housing and Economic Rights Advocates

The Leadership Conference on Civil and Human Rights

The Legal Aid Society

NAACP

NC Justice Center

National Center for Lesbian Rights

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

National Fair Housing Alliance

National Gay and Lesbian Task Force

National Housing Law Project

National Low Income Housing Coalition

National Rural Housing Coalition

National Urban League

Texas RioGrande Legal Aid, Inc.

Western Center on Law and Poverty

¹⁸ See generally, John Trasviña, Former Assistant Secretary for Fair Housing and Equal Opportunity, Memo to HUD FHEO Regional Directors, "Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression."