

June 14, 2017

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

Re: Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, Docket No. HUD-2017-0029, 82 Fed. Reg. 22344

Dear Madam/Sir:

On behalf National Fair Housing Alliance (NFHA), I am writing to urge the Department of Housing and Urban Development (HUD) to preserve and maintain several key regulations that are critical to ensuring fair housing for all in the United States, and to fulfilling a central part of HUD's mission. NFHA is the voice of fair housing. NFHA works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education, outreach, membership services, public policy initiatives, community development, advocacy and enforcement.

Our nation has a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics. This shared interest is also embedded in the mission of the Department of Housing and Urban Development. Passed in 1968 exactly seven days after the assassination of Dr. Martin Luther King, Jr., the federal Fair Housing Act prohibits discrimination in housing and housing related services on the basis of race, color, national origin, sex, familial status, religion, or if one has a disability. The Fair Housing Act makes it the policy of the United States to support the development and maintenance of diverse, inclusive, neighborhoods where every person has the community assets necessary to lead a fruitful, fulfilling life of opportunity. Fulfilling the promises of the Fair Housing Act for every person in the United States is a central component HUD's mission. The fair housing movement and NFHA shares this central mission, and we write to urge you to ensure that any regulatory or deregulatory efforts that HUD pursues not put at risk the department's critical obligation to achieve the goals of the Fair Housing Act.

Achieving truly fair and equitable housing in all neighborhoods is one of the greatest challenges that our nation faces. HUD has worked to issue helpful and important regulations that serve as tools for victims of housing discrimination, communities, fair housing practitioners, and the housing industry. In these comments, we share our strong support for HUD's fair housing regulations.



I. Appropriate Regulatory Review, Modification, and Rescission

It is important to point out that while the purpose of this request for information is to assist HUD in implementing Executive Order 13771 (EO 13771) – which directs agencies to eliminate two regulations for every one new regulation that is proposed - by reviewing which regulations should be reviewed, modified, or rescinded HUD is still subject to administrative and statutory requirements to which it must abide that supersede EO 13771.¹ Specifically, HUD and other agencies are required to engage in reasoned decision-making to interpret laws and determine how best to carry out the authority granted to them by Congress.² HUD has already engaged in extensive vetting of its regulatory proposals and drew reasonable determinations about the need for and design of its fair housing rules.

HUD's fair housing rules advance important statutory interests, provide important benefits that outweigh their costs, and respond to existing needs. EO 13771 does not allow for adequate consideration of the regulatory benefits or substantive statutory directives, resulting in an arbitrary assessment of existing rules. In its efforts to implement either EO 13777 or EO 13771, HUD must also abide by the Administrative Procedures Act and Congressional directives to implement the Fair Housing Act and other civil rights laws. Therefore, HUD must still provide regulation to advance the goals of the Fair Housing Act and its other statutory authorities.

II. The Costs of Housing Discrimination and Residential Segregation Warrant Strong Fair Housing Regulation

There is a strong national interest in ensuring that the Fair Housing Act is implemented to the greatest extent possible. Housing discrimination creates inefficiencies in housing and financial markets. Economists have studied the negative impacts of discrimination on free markets for more than 50 years. In 1957, University of Chicago economist and Nobel Prize winner Gary Becker published a groundbreaking work on the impact of discrimination on economic markets.³ In it, he provided the first systematic effort to use economic theory to analyze the effects of prejudice on the earnings, employment and occupations of minorities. Since then, many studies have built on his work.⁴

¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

² See *id.* at 43 (an agency must consider the factors Congress intended for it to consider and may not “rely on factors which Congress has not intended it to consider”).

³ See Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971).

⁴ See, e.g., David Rusk, *The “Segregation Tax”: The Cost of Racial Segregation to Black Homeowners*, (The Brookings Institution 2001), available at <http://www.brookings.edu/~media/research/files/reports/2001/10/metropolitanpolicy%20rusk/rusk.pdf> (finding that in the 100 largest metropolitan areas, black homeowners receive 18 percent less value for their homes than white homeowners); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* 98-103 (Russell Sage

The adverse financial consequences of segregation and discrimination have also been well documented.⁵ Hyper-segregation of Black people and Latinos in urban areas has led to inferior access to public services, education, jobs and transportation, all of which have a negative economic impact.⁶ Doug Massey and Nancy Denton, in *American Apartheid: Segregation and the Making of the Underclass*, observed that “barriers to spatial mobility are barriers to social mobility, and where one lives determines a variety of salient factors that affect individual well-being: the quality of schooling, the value of housing, exposure to crime, the quality of public services, and the character of children’s peers.”⁷ Segregation also contributes to wealth inequality, since, for example, American familial wealth is closely tied to home values and homes located in neighborhoods with high concentrations of nonwhites tend to be undervalued.⁸ Discrimination also imposes significant costs on minority households when they search for properties to purchase, “whether or not [they] actually encountered discrimination.”⁹

Open markets, free from discrimination, are critical to the prosperity of the housing markets and the adverse consequences of segregation have long plagued the United States. HUD’s fair housing rules are crucial to reducing housing discrimination and undoing the persistent disparities that result from residential segregation.

Foundation 1997) (estimating the annual cost of discrimination in the mid-1990s housing market at \$2.0 billion for Blacks and \$1.2 billion for Hispanics).

⁵ See, e.g., Alan Berube & Bruce Katz, *Katrina’s Window: Confronting Concentrated Poverty Across America* (The Brookings Institution 2005), available at http://www.brookings.edu/~media/research/files/report_s/2005/10/poverty%20berube/20051012_concentratedpoverty.pdf (discussing the relationship between segregation and concentrated poverty); Thomas M. Shapiro, *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality* 105-25 (Oxford University Press 2005) (discussing how segregation and discriminatory financing contribute to wealth inequality).

⁶ See Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 148-85 (1993).

⁷ *Id.* at 150.

⁸ See generally Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth, White Wealth* 12-35 (Taylor & Francis 2006). In the aftermath of the foreclosure crisis, communities of color have experienced a disproportionate loss of wealth. Between 2005 and 2009, median wealth adjusted for inflation fell by 66 percent among Latino households and 53 percent among African-American households, compared with 16 percent among white households. Rakesh Kochhar et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics* 1 (Pew Research Ctr. 2011) available at http://www.pewsocialtrends.org/files/2011/07/SDT-wealthreport_7-26-11_FINAL.pdf.

⁹ John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 *J. Urb. Econ.* 339, 340 (1997).

III. Implementation of the Fair Housing Act is Central to HUD's Mission

Carrying out the Fair Housing Act is at the center of HUD's mission and its fair housing regulations are critical to the implementation of that mission. With the passage of the Fair Housing Act, and its subsequent amendments, HUD was charged by Congress with the "authority and responsibility"¹⁰ to implement the nation's signature fair housing law, "to provide, within constitutional limitations, for fair housing throughout the United States."¹¹

HUD has put forth important regulations that assist victims of prohibited discrimination, both intentional and disparate impact discrimination,¹² and that help to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies [of the legislation]."¹³ The latter refers to the section in the Fair Housing Act from which HUD's Affirmatively Furthering Fair Housing (AFFH) rule derives. Central to HUD's responsibilities is also to ensure that its own programs affirmatively further fair housing and those administered by local and state governments, and public housing authorities, and that discrimination does not occur in HUD-assisted housing. HUD's fair housing rules assist housing providers and mortgage lenders in understanding their responsibilities under the law, how to avoid costly, time-consuming legal action, and how to defend against legal challenges to alleged discriminatory behavior or policies.

IV. HUD Fair Housing Regulations

HUD's fair housing regulations reflect a careful assessment and commitment to its statutory responsibilities under the Fair Housing Act. Through the required and appropriate public comment periods and stakeholder engagements, HUD has carefully considered the costs, public benefits, regulatory burdens, and its own obligations to effectively implement the Fair Housing Act. We strongly urge HUD to preserve each of the regulations described below, and to continue to enforce them vigorously.

Affirmatively Furthering Fair Housing Rule

HUD has a statutory mandate under Sec. 808(d) of the federal Fair Housing Act to administer its programs in a manner that affirmatively furthers fair housing. This provision was built into the Fair Housing Act from the beginning (1968) and has been upheld by federal courts on numerous

¹⁰ 42 U.S.C. § 3608(a).

¹¹ 42 U.S.C. § 3601.

¹² See, e.g., 42 U.S.C. § 3604; *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015)(affirming that the disparate impact is cognizable under the Fair Housing Act).

¹³ 42 § 3608(e)(5)

occasions. Given that mandate, if HUD fails to provide its grantees with clear guidance about how to fulfill their AFFH obligation, it leaves them exposed to greater litigation risk.

For many years, local officials sought greater clarity and guidance from HUD about what they should be doing to affirmatively further fair housing. HUD's previous approach to implementing the AFFH mandate – through the requirement that grantees periodically develop an Analysis of Impediments to Fair Housing Choice – was neither well-structured nor well-administered, as the U.S. Government Accountability Office (GAO) pointed out in its 2010 report on this subject.¹⁴ The new approach addresses many of the criticisms that GAO highlighted, and provides HUD grantees with more structure, clearer guidance, and needed resources for identifying and addressing fair housing problems in their communities.

The rule was developed with considerable public input. Before developing the rule, HUD conducted a listening tour across the country, in large and small communities, to get input from local officials and other stakeholders about their ideas and concerns. During the public notice and comment period, more than 1,000 public comments were submitted to HUD through the Regulations.gov website.¹⁵ The Assessment Tools for entitlement jurisdictions and public housing authorities that accompany the rule each went through a two-part comment process, as required under the Paperwork Reduction Act. HUD was also careful to ensure that strong local control mechanisms were set in place with the AFFH rule. The AFFH regulation provides for robust community input, which means that the plans developed reflect local priorities and respond to each community's unique circumstances.

HUD is providing its grantees with training, technical support, and a substantial amount of very valuable data about their communities, along with a powerful data and mapping tool to aid in understanding and analyzing the data. These are highly valuable resources, especially for smaller communities with limited data analysis and mapping capacity. This tool and the accompanying data are also available to the public, which is another important benefit of the rule.

We should note that, in addition to cities, counties and states, the regulation also applies to public housing authorities (PHAs). As HUD grantees, PHAs are obligated to affirmatively further fair housing, and have been so obligated since 1968. Despite this, few PHAs have taken steps to fulfill this obligation. As a result, residents of public and other subsidized housing have not had the full benefit of their rights under the Fair Housing Act, and have often found their housing choices limited to neighborhoods that are highly segregated and which have significant concentrations of poverty. In many cases, these residents have not had access to the same range

¹⁴ “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans,” GAO-10-905, Sept. 14, 2010, available at <http://www.gao.gov/products/GAO-10-905>; see also AFFH Rule preamble at 80 Fed. Reg. 42,275.

¹⁵ See <https://www.regulations.gov/document?D=HUD-2013-0066-0001>.

of opportunities as their counterparts in neighborhoods with less poverty and less segregation. Having PHAs undertake a fair housing planning process that facilitates their analysis of the extent to which the residents they serve are connected to the full range of opportunities they need, and which leads to the development of strategies to better connect those residents to opportunity, can only work to the benefit of the residents, the PHAs themselves, and the broader community.

HUD is still finalizing the modifications to the data and mapping tool to extract data for PHA service areas and PHAs are not yet required to comply with the new rule, and with only a few exceptions have no practical experience with its requirements. The few exceptions are PHAs that have chosen to collaborate with their local jurisdictions on an Assessment of Fair Housing (AFH). These include the Housing Authority of New Orleans and the Philadelphia Housing Authority, both of which were in the first round of submitters under the new rule. The Housing Authority of Los Angeles is currently working with the City of Los Angeles on a collaborative AFH. All of these partnerships demonstrate an important component of the design of the AFFH rule, with which some PHA commenters may not yet be familiar. That is the option for PHAs to partner with other PHAs, with their local jurisdictions, with their states, or with some combination of the three to conduct their fair housing assessments. Such collaborations allow some of the administrative and technical aspects of the process to be shared, reducing the resources that any single member of the collaborative must allocate to the process. They also enable PHAs to get the benefit of the experience, ideas and strategic recommendations of their partners, and to identify opportunities to work with other grantees to accomplish common goals identified through the AFH process. Thus, once the AFFH rule is fully implemented, and PHAs begin to participate in conducting AFHSs, they will likely find that the benefits far outweigh any costs.

The fair housing plans developed under this rule will help jurisdictions and PHAs use their federal housing and community development resources more strategically, thereby strengthening social and cultural ties and boosting economic prosperity. For all of these reasons, we believe it is critical for HUD to preserve the Affirmatively Furthering Fair Housing regulation, continue to support its grantees in complying with the rule, and finalize the remaining rule components that are needed for its full implementation.

Discriminatory Effects Rule (Disparate Impact)

The Fair Housing Act prohibits both intentional and facially neutral but unjustified policies or practices that have a disparate impact on access to housing choice. HUD's final Disparate Impact Rule¹⁶ was intended to provide a unified framework to be used in proving liability. And

¹⁶ 78 Fed. Reg. 11460 (Feb. 15, 2013).

as recently as 2015, the Supreme Court affirmed the continued viability and importance of disparate impact claims under the Fair Housing Act¹⁷ and reinforced the existing jurisprudence that HUD considered when drafting its regulation.¹⁸ For decades, HUD has also applied the disparate impact standard in its administrative enforcement of the Fair Housing Act.¹⁹ The rule provides clarity and consistency under a single standard of liability for housing industry professionals when faced with disparate impact claims and gives the public a greater understanding of their rights.

The discriminatory effects standard has consistently been interpreted to cover, and is necessary to address, a range of both land use and other practices.²⁰ We strongly urge HUD to refrain from rescinding or making any modifications to HUD's Disparate Impact rule.

Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act²¹ (Harassment Rule)

HUD's Harassment Rule formalizes standards to be used in investigations and adjudications involving allegations of harassment based on the Fair Housing Act's protected classes. The final Harassment Rule is rooted in HUD's authority to interpret and administer the Fair Housing Act.²² In particular, Sections 3604(b) and 3617 of the Act expressly protect an individual's right to be free from discrimination with respect to her housing and the use and enjoyment of her housing.²³ Yet discriminatory harassment in housing continues across the nation. In 2016 alone, private nonprofit fair housing organizations reported a total of 640 complaints of discriminatory harassment, up from 591 in 2015 and 379 in 2014.²⁴ HUD's Harassment Rule is and will remain critically important to helping housing providers understand and abide by their obligations under the law and assist tenants in identifying illegal behavior, and we urge HUD to refrain from rescinding or making any modifications to the rule.

¹⁷ *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

¹⁸ *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460, 11461-63 (Feb. 15, 2013).

¹⁹ See discussion at 78 Fed. Reg. 11461-63.

²⁰ See, e.g., *Inclusive Communities.*, 135 S. Ct. 2507. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), aff'd in part per curiam, 488 U.S. 15 (1988)(zoning ordinance confining multifamily housing to a narrow urban renewal area); *Smith v. Town of Clarkton, N.C.*, 682 F. 2d 1055, 1065-66 (4th Cir. 1982)(town's withdrawal from a multi-municipality housing authority effectively blocking construction of public housing units); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526 (N.D. Tex. 2000)(exclusionary zoning).

²¹ 81 Fed. Reg. 63054 (Sept. 14, 2016).

²² See 80 Fed. Reg. 63720, 63721 (Oct. 21, 2015) (citing 42 U.S.C. § 3608(a)).

²³ See 42 U.S.C. §§ 3604(b) and 3617.

²⁴ "The Case for Fair Housing: 2017 Housing Trends Report." National Fair Housing Alliance, n.d. Web. Page 82.

Violence Against Women Reauthorization of 2013: Implementation in HUD Housing Programs²⁵ (VAWA Rule)

HUD's VAWA rule are critical to ensuring that victims of acts prohibited by VAWA can live in their homes free from fear of violence and reduce the destabilizing impact that results. HUD's VAWA Rule implements statutory changes made in the 2013 reauthorization of the Violence Against Women Act, improving access to safe housing for survivors of domestic violence, dating violence, sexual assault, and stalking. The rule prohibits decisions to terminate housing assistance or initiate eviction that are made on the basis of a tenant's status as a survivor of domestic violence, dating violence, stalking, or sexual assault.

HUD's rule expands protections of VAWA to applicants and tenants beyond those in HUD's public housing and Section 8 programs. The rule also strengthens the confidentiality rights of victims HUD-covered programs, and helps to minimize the likelihood that covered persons under VAWA will lose their housing by setting forth emergency transfer mechanisms for victims of violence. We urge HUD to refrain from rescinding or making any modifications to the rule.

Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity²⁶

HUD's Equal Access Rule clarifies that discrimination on the basis of someone's actual or perceived sexual orientation, gender identity, and gender expression that is based on gender nonconformity is prohibited in HUD programs, including HUD-assisted or -insured housing. Housing providers regularly refuse to rent to LGBTQ people because they believe that person acts differently from their notion of how a person of a particular sex should act. In 2016, private nonprofit fair housing centers reported 150 complaints based on sexual orientation, and 44 complaints based on gender identity.²⁷ We urge HUD to refrain from rescinding or making any modifications to this rule.

Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs²⁸

This rule clarifies the application of the Equal Access Rule to the treatment of transgender and gender nonconforming people in temporary, emergency shelters and other buildings and facilities used for shelter that have shared sleeping or bathing facilities. LGBTQ people, and especially

²⁵ 81 Fed. Reg. 80724 (Nov. 16, 2016).

²⁶ 77 Fed. Reg. 5661 (Feb. 2, 2012).

²⁷ "The Case for Fair Housing: 2017 Housing Trends Report." National Fair Housing Alliance, n.d. Web. Page 79.

²⁸ 81 Fed. Reg. 64763 (Sept. 21, 2016).

transgender and gender nonconforming people, are significantly more likely to experience homelessness and housing instability than the general population. In fact, 40% of young people experiencing homelessness identify as LGBTQ or gender nonconforming.²⁹ Given the disproportionately high rate of need, it is critical for shelter providers to understand their legal obligations in serving transgender and gender nonconforming people. This rule “benefit[s] clients...by assuring that all clients receive equal access and will benefit the CPD-funded facilities by making compliance with HUD's equal access requirements easier.”³⁰ Given these benefits, we strongly urge HUD to preserve the rule and to enforce it vigorously.

Federal Housing Administration (FHA)

We also want to express our strong support for HUD’s current foreclosure alternatives program for FHA-insured loans. These alternatives enable HUD to avoid unnecessary payment of insurance claims and thus protect the mortgage insurance fund (Fund) and communities. Taxpayers are harmed by payment of unnecessary claims and neighborhoods benefit significantly from fewer foreclosures that destabilize them. The FHA insurance program facilitates the funding for approximately half of all home purchases made by African American and Latino households. Under the National Housing Act, Congress made clear that HUD’s administration of the Fund must promote sustainable homeownership and protect the financial solvency of the Fund. HUD’s continued long-term commitment to mandatory loss mitigation, as spelled out in its regulations, is essential to the ability of the agency to meet both goals.

In addition, we strongly support the preservation and strengthening of crucial FHA loss mitigation regulations as well as recommend modifications to specific regulations and program policies. We offer the following recommendations for HUD to avoid costs associated with unnecessary claims and to stabilize homeownership and communities.

- HUD’s decades-long, modest loss mitigation procedural requirements should be preserved because they avoid unnecessary payment of insurance claims by ensuring that lenders evaluate all borrowers for all foreclosure prevention options. 24 CFR §203.501; 24 CFR §203.357; 24 CFR §203.370; 24 CFR §203.414; 24 CFR §203.512; 24 CFR §203.471; 24 CFR §203.614; 24 CFR §203.616.

²⁹ "Serving Our Youth: Findings from a National Survey of Services Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless or At The Risk of Becoming Homeless." Williams Institute , n.d. Web. Page 4.

³⁰ *Id.*

- HUD's significantly improved menu of FHA loss mitigation foreclosure alternatives should be maintained because it promotes payment relief for FHA's unique borrower profile while limiting unnecessary insurance claims. 24 CFR §203.616; Mortgagee Letter 2016-14, see section HUD's Loss Mitigation Option Priority Waterfall.
- To ensure that HUD does not pay unnecessary claims, HUD should revise its program for selling loans through the Distressed Asset Stabilization Program (DASP) by requiring pre-auction notice to borrowers and by enhancing its pre-claim screening. The current procedure to provide post-sale notice to homeowners frustrates the goals of the loss mitigation regulations referenced above.
- In order to reduce claims to the Fund, HUD should amend the regulation that requires HUD to pay claims even in cases of lender's non-compliance with loss mitigation regulations. 24 CFR §203.500.
- HUD must preserve its reverse mortgage rules protecting surviving spouses and ensure loss mitigation options are available and enforced for borrowers who fall behind on property taxes and homeowner's insurance. 24 CFR §206.55; Mortgagee Letter 2015-11; Mortgagee Letter 2016-07.

Thank you for the opportunity to comment. Please feel free to reach out to Jorge Andres Soto, NFHA's Director of Public Policy, at JSoto@nationalfairhousing.org or at 202-898-1611 should you have any questions.

Sincerely,



Shanna L. Smith
President and CEO