



June 13, 2017

**VIA ELECTRONIC SUBMISSION**

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**

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Dear Sir or Madame,

On behalf of the American Civil Liberties Union (ACLU), we write to offer comments in response to the above-docketed notice (“Notice”) concerning the “Regulatory Reform Agenda” of the Department of Housing and Urban Development (HUD).

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. The ACLU advances equality through litigation and policy advocacy, including by challenging housing discrimination experienced by people of color; survivors of domestic violence and sexual assault; and lesbian, gay, bisexual, transgender, and queer (LGBTQ) people.

Since its passage in 1968, the ACLU has staunchly supported the Fair Housing Act (FHA)<sup>1</sup>, which we continue to believe must play a vital role in opening the doors of opportunity to all. We also have supported the housing protections of the Violence Against Women Act (VAWA), first enacted in 2005.<sup>2</sup> We write here in response to Question 3 of the Notice to emphasize that, in considering whether to repeal, replace, or modify any HUD regulation, HUD must continue to fulfill its obligations under the FHA and VAWA to move this country toward fulfilling its promise of equality. Recent executive orders do not supplant those obligations. Moreover, any analysis of the costs and benefits of regulations aimed at providing “for fair

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<sup>1</sup> 42 U.S.C. §§ 3601 – 3619.

<sup>2</sup> VAWA protections were amended in 2013, and are now codified at 42 U.S.C. § 14043e-11.

housing throughout the United States”<sup>3</sup> must take into account those benefits that are “difficult or impossible to quantify, including equity, human dignity, [and] fairness.”<sup>4</sup>

## **I. HUD’s Regulatory Reform Agenda Cannot Compromise Its Fair Housing Obligations.**

The Notice seeks public input on how HUD ought to implement the directives of two recent executive orders, Nos. 13777 and 13771, by identifying regulations that warrant repeal, replacement, or modification.<sup>5</sup> The ACLU reminds HUD that its statutory obligations under the FHA, VAWA, and the Administrative Procedure Act (APA) remain paramount. The Supreme Court has held that an agency may not make regulatory decisions based on “reasoning divorced from the statutory text.”<sup>6</sup> The recent executive orders do not alter that analysis. In fact, the text of each executive order makes explicit that it “shall be implemented consistent with applicable law.”<sup>7</sup>

Accordingly, any deregulatory action that HUD takes must not derogate from its FHA and VAWA duties. Congress has charged HUD with not only the “authority” but also the “responsibility” for administering the FHA.<sup>8</sup> The aim of that iconic civil rights legislation, passed in the wake of Dr. Martin Luther King, Jr.’s assassination, is to replace segregation and discrimination with “truly integrated and balanced living patterns.”<sup>9</sup> To that end, it bars governmental and private housing-related discrimination against members of protected classes<sup>10</sup> and gives HUD a central role in ending discrimination, requiring that HUD investigate complaints of housing discrimination brought by individuals and equipping HUD to initiate its own investigations.<sup>11</sup> Moreover, the FHA requires that HUD “affirmatively [] further” the FHA’s fair housing goals in all its “programs and activities.”<sup>12</sup> Likewise, HUD was charged with developing policies and procedures to implement VAWA’s housing protections and promote fair housing for survivors of domestic violence, sexual assault, dating violence, and stalking.<sup>13</sup>

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<sup>3</sup> 42 U.S.C. § 3601.

<sup>4</sup> Exec. Order No. 13563 § 1(c), 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>5</sup> Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017); Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017). It should be noted that E.O. 13771, by purporting to apply arbitrary cross-cutting and offsetting criteria for evaluating regulations that lack any legislative basis, raises clear and predictable conflicts with the Administrative Procedure Act and substantive statutory obligations of HUD and other agencies.

<sup>6</sup> *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007); see also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .”).

<sup>7</sup> 82 Fed. Reg. 12285, 12287; 82 Fed. Reg. 9339, 9340.

<sup>8</sup> 42 U.S.C. § 3608(a).

<sup>9</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)).

<sup>10</sup> 42 U.S.C. §§ 3604–3605.

<sup>11</sup> 42 U.S.C. § 3610(a).

<sup>12</sup> 42 U.S.C. § 3608(e)(5).

<sup>13</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 101, § 601 (2013).

The HUD regulations discussed below are vital to fulfilling HUD’s “statutory duty to promote fair housing.”<sup>14</sup> None is outdated, ineffective, or excessively burdensome. Although HUD exercises some discretion in carrying out this duty, that discretion “must be exercised within the framework of the national policy . . . in favor of fair housing.”<sup>15</sup> Should HUD seek to rescind or amend one of these existing regulations, the Supreme Court has held that it must “supply a reasoned analysis for the change” beyond that which would be required in the absence of the existing regulation,<sup>16</sup> and those reasons must be consistent with the goal of expanding opportunity embodied in the FHA.<sup>17</sup> Even if it seeks to alter subregulatory guidance, it must acknowledge the change and “provide a reasoned explanation.”<sup>18</sup> Without such an explanation, which must include reasons for “disregarding facts and circumstances that underlay or were engendered by the prior policy,” a court will declare the changed policy to be arbitrary, capricious, and unlawful under the APA.<sup>19</sup>

The regulations discussed below constitute legislative rules, issued pursuant to the APA notice-and-comment process. Any “new rules that work substantive changes in prior regulations” must similarly be enacted with notice and the opportunity for public comment.<sup>20</sup> That opportunity for input is particularly vital in the arena of fair housing, where advocates and impacted communities have fought for decades to make real the access to opportunity promised by the Fair Housing Act. Given the importance of fair housing to HUD and to this country, we ask that HUD also provide an opportunity for public comment should it opt to rescind or amend any sub-regulatory guidance affecting fair housing.

## **II. HUD Should Preserve the Affirmatively Furthering Fair Housing Rule.**

Courts have repeatedly held that the FHA mandate for HUD to “administer [its] programs and activities relating to housing and urban development in a manner affirmatively to further” fair housing “requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.”<sup>21</sup> To fulfill this affirmative duty to promote fair housing, HUD must “consider the effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area.”<sup>22</sup> The process that HUD utilized to accomplish this goal in 2015 was one the Government Accountability Office had found to be uneven, in particular as a

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<sup>14</sup> *Hills v. Gautreaux*, 425 U.S. 284, 302 (1976). Recognizing the centrality of its fair housing responsibilities to the agency, HUD describes its own mission as creating “strong, sustainable, inclusive communities and quality affordable homes for all.” U.S. Department of Housing and Urban Development, “Mission,” <https://portal.hud.gov/hudportal/HUD?src=/about/mission>; see also *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 447 (1st Cir. 2013) (quoting mission statement language).

<sup>15</sup> *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970).

<sup>16</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 30.

<sup>17</sup> *Massachusetts*, 549 U.S. at 532.

<sup>18</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

<sup>19</sup> *Id.* at 2125–26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

<sup>20</sup> *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 374 (D.C. Cir. 2003)

<sup>21</sup> *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 151, 154 (1st Cir. 1987) (Breyer, J.); see also *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973), *Shannon v. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).

<sup>22</sup> *N.A.A.C.P.*, 817 F.2d at 156 (alterations in original) (internal citations omitted).

result of “HUD’s limited regulatory requirements and oversight” for grantees.<sup>23</sup> In 2015, after years of consultation with stakeholders and experts as well as notice and comment, HUD issued its **Affirmatively Furthering Fair Housing (AFFH) Rule**.<sup>24</sup> The final rule effectively allows both HUD and its grantees to address barriers to fair housing, as the FHA requires, while simultaneously ensuring flexibility to address localized fair housing issues. HUD should preserve the AFFH rule and build upon it, continuing to provide grantees with technical assistance and other compliance help.

Moreover, the unquantifiable non-monetary benefits of the AFFH rule far outweigh the pecuniary costs of implementation, which in any event are not significantly higher than those imposed on grantees by the old, broken process.<sup>25</sup> By equipping HUD grantees around the nation with tools and data to identify barriers to fair housing, the rule will allow grantees to reduce disparities in access to housing and opportunities based on race, color, religion, sex, familial status, and disability. These changes produce concomitant and significant gains in equity, human dignity, and fairness—the very values which motivated Congress to pass the Fair Housing Act. The ACLU strongly supports the AFFH Rule and would oppose any effort to repeal, replace, or modify it in order to meet deregulatory goals—that is, based upon “reasoning divorced from [the FHA’s] text.”<sup>26</sup>

### **III. HUD Should Preserve the Disparate Impact Rule.**

As the Supreme Court recently affirmed, the Fair Housing Act prohibits not only intentional discrimination, but also those facially-neutral policies and practices that result in unjustified disparate impacts experienced by members of protected groups.<sup>27</sup> In 2013, previous to that decision, HUD issued its **Implementation of the Fair Housing Act’s Discriminatory Effects Standard** (Disparate Impact Rule)<sup>28</sup>, which created a uniform standard for evaluating claims of disparate impact discrimination in the face of variations among the tests that courts had applied. The Rule formally adopted the three-part burden shifting test that HUD and most federal courts already used.

Because the Disparate Impact Rule did not change the substantive law, HUD found at the time it was promulgated that it added “no additional costs to housing providers and others engaged in housing transactions.”<sup>29</sup> After the Supreme Court’s decision affirming the disparate impact standard, this finding is ironclad. Even in the absence of HUD’s rule, providers of housing and

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<sup>23</sup> U.S. Gov’t Accountability Off., GAO–10–905, “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” (Sept. 14, 2010), <http://www.gao.gov/new.items/d10905.pdf>.

<sup>24</sup> 80 Fed. Reg. 42271 (July 16, 2015) (to be codified at 24 C.F.R. 5, 91, 92, 570, 574, 576, & 903), <https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf>. The ACLU submitted comments during this process, which are available at: [https://www.aclu.org/sites/default/files/field\\_document/affh\\_comments\\_final\\_9-17-13.pdf](https://www.aclu.org/sites/default/files/field_document/affh_comments_final_9-17-13.pdf).

<sup>25</sup> See U.S. Dep’t of Housing & Urban Development, Affirmatively Furthering Fair Housing Final Rule: Regulatory Impact Analysis 9, Table 2, [https://www.huduser.gov/portal/sites/default/files/pdf/AFFH\\_Regulatory\\_Impact\\_Analysis\\_FinalRule.pdf](https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Regulatory_Impact_Analysis_FinalRule.pdf).

<sup>26</sup> *Massachusetts v. E.P.A.*, 549 U.S. at 532.

<sup>27</sup> *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>28</sup> 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500), <https://www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-03375.pdf>.

<sup>29</sup> *Id.* at 11460–61.

housing-related services would remain bound to avoid engaging in disparate impact discrimination. The rule provides necessary consistency and predictability for those entities. The ACLU strongly supports the Disparate Impact Rule and would oppose any effort to repeal, replace, or modify it in order to meet deregulatory goals—that is, based upon “reasoning divorced from [the FHA’s] text.”<sup>30</sup>

#### **IV. HUD Should Preserve the Harassment Rule.**

For decades, courts and HUD have recognized that the FHA prohibits harassment in housing based on race, color, religion, sex, national origin, disability, and familial status.<sup>31</sup> The **Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act** rule (Harassment Rule)<sup>32</sup> formalized the standard for assessing claims of harassment under the Fair Housing Act. The rule ensures that investigations and adjudications involving harassment in housing are treated uniformly.

As HUD observed at the time, the rule does not create any new forms of liability and thus adds no additional costs for housing providers, while benefiting all stakeholders by articulating clear standards and ensuring compliance with the FHA.<sup>33</sup> In doing so, the rule advances non-monetary aims as well, by supporting the rights of all to live in housing free of harassment. The ACLU strongly supports the Harassment Rule and would oppose any effort to repeal, replace, or modify it in order to meet deregulatory goals—that is, based upon “reasoning divorced from [the FHA’s] text.”<sup>34</sup>

#### **V. HUD Should Preserve the VAWA Rule.**

In 2005, Congress included housing protections in the Violence Against Women Act to ensure that victims of domestic violence, stalking, and dating violence do not experience housing discrimination based on the abuse they suffer.<sup>35</sup> In 2013, it expanded these protections to cover sexual assault survivors and more forms of federally-subsidized housing.<sup>36</sup> The law specifically required HUD to develop notices, plans, and other procedures to carry out VAWA’s protections, and HUD did so by issuing a final rule titled **Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs (VAWA Rule)**.<sup>37</sup> The rule prohibits denial or termination of housing based on the fact that an applicant or tenant has been a victim, and creates procedures to ensure survivors’ access to secure housing.

By providing clear regulations implementing statutory mandates, the regulation benefits victims of domestic violence and sexual assault and their communities by preventing housing discrimination that could lead to their homelessness and increased violence, which often results

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<sup>30</sup> *Massachusetts v. E.P.A.*, 549 U.S. at 532.

<sup>31</sup> See, e.g., *Shellhammer v. Lewallen*, 770 F.2d 167 (6<sup>th</sup> Cir. 1985); 54 Fed. Reg. 3285 (Jan. 23, 1989) (adopting 24 C.F.R. § 100.65(b)(5)).

<sup>32</sup> 81 Fed. Reg. 63,054 (Sept. 14, 2016).

<sup>33</sup> 81 Fed. Reg. at 63,055.

<sup>34</sup> *Massachusetts v. E.P.A.*, 549 U.S. at 532.

<sup>35</sup> Pub. L. No. 109-162, 119 Stat. 2959 (2006).

<sup>36</sup> Pub. L. No. 113-4, 127 Stat. 54 (2013).

<sup>37</sup> 81 Fed. Reg. 80,724 (2016).

when victims are unable to report violence for fear of losing their housing. HUD noted the costs of the rule are “not significant” and the rule makes important contributions, including promoting the awareness of statutory rights and minimizing the loss of survivors’ housing.<sup>38</sup> Domestic violence is a primary cause of homelessness for women and children, and the rule effectively implements Congress’ response to this societal problem. The ACLU strongly supports the VAWA Rule and would oppose any effort to repeal, replace, or modify it in order to meet deregulatory goals—that is, based upon “reasoning divorced from [VAWA’s] text.”<sup>39</sup>

## **VI. HUD Should Preserve Rules of Importance to the LGBTQ Community.**

The ACLU strongly supports the rule entitled “**Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity**” (2012 Equal Access Rule)<sup>40</sup>, and would oppose any effort to repeal, replace, or modify it. The Equal Access Rule ensures that HUD-funded or HUD-insured housing is open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. The rule is clear that it “does not impose any new costs, or modify existing costs, applicable to HUD grantees.”<sup>41</sup> The rule has the benefit of ensuring that HUD’s core programs are open to LGBTQ people, in line with existing law.

The need for these nondiscrimination protections are well-supported, including by HUD’s own studies. A first-of-its-kind HUD study in 2013 looked at discrimination against same-sex couples in the online rental housing market. The study found that same-sex couples receive less favorable treatment than heterosexual couples. In fact, gay and lesbian couples were found to receive significantly fewer responses to email inquiries about advertised units.<sup>42</sup> The study found adverse treatment of same-sex couples in all of the 50 metropolitan markets where tests were conducted.

The ACLU also strongly supports the related rule entitled “**Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs—Regardless of Sexual Orientation or Gender Identity.**”<sup>43</sup> This rule applied the same equal access provisions from the 2012 Equal Access Rule to HUD’s Native American and Native Hawaiian programs. In doing so, the rule provides clarity and consistency across HUD’s programs without any new costs.<sup>44</sup>

Additionally, the ACLU strongly supports the 2016 rule entitled “**Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs**”

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<sup>38</sup> 81 Fed. Reg. at 80,797.

<sup>39</sup> *Massachusetts v. E.P.A.*, 549 U.S. at 532.

<sup>40</sup> Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5661 (Feb. 3, 2012) (to be codified at 24 C.F.R. 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982), <https://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2343.pdf>.

<sup>41</sup> *Id.* at 5673.

<sup>42</sup> U.S. Dept. of Housing and Urban Development, Office of Policy Development and Research, “An Estimate of Housing Discrimination Against Same-Sex Couples” (June 2013), [https://www.huduser.gov/portal/publications/pdf/Hsg\\_Disc\\_against\\_SameSexCpls\\_v3.pdf](https://www.huduser.gov/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf).

<sup>43</sup> Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs—Regardless of Sexual Orientation or Gender Identity, 81 Fed. Reg. 80989 (Nov. 17, 2016) (to be codified at C.F.R. pts. 5, 1000, 1003, 1005, 1006, and 1007), <https://www.federalregister.gov/documents/2016/11/17/2016-27196/equal-access-to-housing-in-huds-native-american-and-native-hawaiian-programs-regardless-of-sexual>.

<sup>44</sup> *Id.* at 80992.

(Gender Identity Rule)<sup>45</sup>, and would oppose any effort to repeal, replace, or modify it. The Gender Identity Rule clarified how the earlier 2012 Equal Access Rule applies 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. The rule is clear that it “will not have a significant economic impact on a substantial number of small entities.”<sup>46</sup> Its clarification “will benefit clients accessing CPD-funded programs, including those with temporary, emergency shelters and other buildings and facilities, 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.”<sup>47</sup>

The need for this rule could not be stronger. According to the findings of the landmark 2015 Transgender Survey, 30% of respondents have experienced homelessness at some point in their lives.<sup>48</sup> More than a quarter (26%) of respondents who experienced homelessness in the past year avoided staying in a shelter because they feared being mistreated as a transgender person.<sup>49</sup> Those who did stay in a shelter reported staggering levels of mistreatment. Seven out of ten respondents who stayed in a shelter in the past year reported some form of mistreatment, including being harassed, sexually or physically assaulted, or getting kicked out because of being transgender.<sup>50</sup>

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In conclusion, the ACLU staunchly supports HUD’s extant fair housing regulations and reminds HUD that a deregulatory agenda does not alter its statutory obligations under the FHA and VAWA. Please contact Rachel Goodman at 212.549.2663 or [rgoodman@aclu.org](mailto:rgoodman@aclu.org) with any questions. Thank you for this opportunity to comment.

Sincerely,



Faiz Shakir  
National Political Director



Rachel Goodman  
Staff Attorney  
ACLU Racial Justice Program

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<sup>45</sup> Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64763 (Sept. 21, 2016) (to be codified at C.F.R. pt. 5), <https://www.federalregister.gov/documents/2016/09/21/2016-22589/equal-access-in-accordance-with-an-individuals-gender-identity-in-community-planning-and-development>.

<sup>46</sup> *Id.* at 64781.

<sup>47</sup> *Id.*

<sup>48</sup> Nat’l Cen. for Transgender Equality, 2015 U.S. Transgender Survey 3 (2015), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.*