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RE: Notice of Submission of Proposed Information Collection to OMB; Fair Housing Initiatives Program Grant Application Testing Training, Docket No. FR-5482-N-02

To Whom It May Concern:

The National Fair Housing Alliance submits the following comments in response to Notice of Submission of Proposed Information Collection to OMB; Fair Housing Initiatives Program Grant Application Testing Training (Docket No. FR-5482-N-02). Founded in 1988, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., NFHA, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

NFHA supports HUD's intent to provide enhanced capacity building and technical assistance (training) related to testing for fair housing enforcement purposes for FHIP recipients. NFHA is concerned, however, with some of the language utilized by HUD in Docket No. FR-5482-N-02. NFHA provides these comments to assist HUD to effectively outline what training related to fair housing testing for enforcement purposes should encompass.

HUD has been involved in setting methodologies for *research* testing for several decades. While HUD does review testing developed and conducted by private fair housing organizations for *enforcement purposes* in its complaint process, HUD itself has not been involved in developing and implementing testing methodologies for enforcement purposes. HUD's expressed intent, in Docket No. FR-5482-N-02, to "provide *consistency* in testing and testing methodologies" and to cover "*proper and consistent* procedures for structuring tests, producing tester reports, and debriefing testers" (emphasis added) would perhaps be appropriate for a research-based testing project, but is not an appropriate framework for enforcement-based testing methodologies.

Paired testing is an accepted methodology that has been utilized for enforcement and research purposes for decades.[1] As noted in the National Academy of Sciences 2004 article *Measuring Racial*

[1] The use of fair housing testing evidence has uniformly been accepted by the courts, including the Supreme Court. See e.g. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-374 (1982), *Wharton v. Knefel*, 562 F.2d 550, 554 (8th Cir. 1977)

The National Fair Housing Alliance (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, advocacy and enforcement.

Discrimination, fair housing testing was first developed by private fair housing organizations for enforcement purposes. Social scientists then used the methodology developed by private fair housing organizations and adapted it for research purposes.

Tests conducted for social science research purposes are similar to those conducted for enforcement purposes, with several notable differences. First, these types of research tests are conducted from a random sample of housing providers. They are designed to measure the level of discrimination across a large number of *consistent* and comparable tests, with scientific specificity. Because research tests are designed to capture statistically significant levels of discrimination across a market place, it is important for scientific purposes that those tests be *consistent* and uniform for statistical measurements. Enforcement tests, on the other hand, are generally conducted in a targeted manner and not from a random sample of housing providers. Both research and enforcement tests provide factual evidence. The evidence for enforcement purposes is that of *specific treatment* by a *specific housing provider*.[2] As evidence in subsequent enforcement actions, enforcement tests are subject to normal rules of evidence but not to the scientific standards research includes for documenting levels of discrimination.

The differences between research based and enforcement based testing are also recognized by those in the research community. For example, Margery Austin Turner, Vice President for Research at the Urban Institute has written:

> Although research testing shares common origins with enforcement testing, it differs in several important ways. Because its goal is to measure the prevalence of discrimination across the market as a whole, research testing usually covers a representative sample of businesses or employers, rather than targeting attention to those where discrimination is suspected. In addition, to produce generalizable results, research testing requires a fairly large number of tests, covering many different businesses, rather than multiple tests to clearly establish discrimination by a single business. In order to generate results that can be aggregated across many tests, *research protocols have to be rigidly consistent for every test, whereas the best enforcement protocols are flexible enough to respond to circumstances that arise in particular tests*. And finally, research testing report forms require pre-defined, closed-ended responses that can be consistently compared across many tests, rather than detailed and nuanced narratives that convey exactly what happened in an individual test. (emphasis added).[3]

(stating the use of testers was commonplace); *United States v. Balistrieri*, 981 F.2d 916, 924-25, 928-30 (7th Cir. 1992), *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1420-21 (11th Cir.); *Pollitt v. Bramel*, 669 F. Supp. 172, 174 (S.D. Ohio 1987); *Davis v. Mansards*, 597 F. Supp. 334, 338-42 (N.D. Ind. 1984); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 348-50 (W.D. Tenn 1982); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 647, 656 (N.D. Cal 1973), aff'd as modified, 509 F.2d 623 (9th Cir. 1975).

[2] Often times, local fair housing organizations conduct market-wide audit tests of specific components of the housing market. These audits are meant to identify local patterns of discrimination in the housing market, and should not be treated as research testing as explained below. Rather, market-audits and related reports should be viewed as a collection of enforcement tests that shine a light on particular housing practices in local areas.

[3] Turner, Margery Austin and Carla Herbig. 2007. "Measuring the Extent and Forms of Discrimination in the Marketplace: Lessons from Paired-Testing Research." Pages 148-189 in Brian D. Smedley and Alan Jenkins (editors), *All Thinks Being Equal: Instigating Opportunity in an Inequitable Time.* New York: The New Press.

Therefore, HUD's proposed training should not refer to consistency in testing and testing methodologies. Instead, the training should focus on the appropriate standards for enforcement based fair housing testing relating to evidentiary rules such as credibility and probativeness. As noted by the Department of Justice (Justice) in an amicus brief filed in a Missouri federal district court case (*EHOC v. Gundaker)*:

> Fair Housing Testing Evidence Is Fact Evidence
> Fair housing testing refers to the use of individuals who, without a bona fide intent to rent or purchase a home, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information which may indicate whether a housing provider is complying with fair housing laws. Testing is a simulation of a housing transaction for the purpose of comparing the responses given by housing providers to different types of homeseekers in order to determine whether unlawful discrimination is occurring. Since it is not always obvious to actual renters or home purchasers that they have been subjected to a discriminatory housing practice, such as being lied to as to the availability of housing, testing has become an important investigative tool in the enforcement of fair housing laws. Fair housing testing evidence can be presented to the factfinder in many forms. Testers may testify about their recollections of their interaction with the agent or owner. Testing evidence can also be presented in the form of tape recordings of the conversation between a tester and an agent or owner, forms completed by the tester setting forth the facts of what happened during the test, and testimony from the testing coordinator explaining how the test was conducted. The testers do not provide expert testimony and do not offer their opinion. They merely provide an account of what occurred on the test and are no different than an eyewitness testifying about what they observed. In this respect testers are no different than an undercover law enforcement agent or informant who poses as a participant in a transaction and provides testimony about their conversation and experience with a defendant."[4]

Because testing is fact-based evidence admitted under evidentiary rules, testing may be considered admissible and more probative or less probative. As fact evidence, it is admissible unless to do so would violate Federal Rules of Evidence 402 and/or 403. The finder of fact in any case where testing evidence is offered may find testing evidence more credible or less credible, but a fact finder does not determine whether testing is "consistent" or whether the testing methodology followed "proper and consistent procedures for structuring" a test. The factfinder ultimately has the responsibility for determining whether there were differences in treatment, whether there is any explanation of the differences other than race, and whether a defendant's non-discriminatory reasons for the differences are credible.

In the *Gundaker* case referenced above, defense attorneys attempted to block the admission of testing evidence gathered for enforcement purposes, arguing that it was not "consistent". The court noted: "[t]he Court agrees that the test forms are not consistent as to the targeted test area, and certainly vary as to the quality and quantity of information provided on them. However, the Court cannot agree that pursuant to Rules 402 and 403, the information contained in the forms is irrelevant and thus,

[4] This amicus brief can be obtained at http://www.justice.gov/crt/about/hce/documents/gundaker1.php

inadmissible."[5] Ultimately, the judge concluded that it would be up to the jury to determine the weight of the evidence and its credibility.

HUD's proposed training and technical assistance in testing and testing methodologies for FHIP recipients should provide participants with an understanding of the use of fair housing enforcement testing as fact based evidence in enforcement proceedings. This would include an understanding of evidentiary rules and standards as applied to testing. Discussions related to methodology and implementation of testing for fair housing enforcement purposes should focus on factors that may make a test more probative or less probative and affect its credibility. Additionally, because the housing market itself varies from city to city and state to state, the focus of the training should be on testing methodologies and implementation that are flexible enough to capture credible evidence related to specific housing transactions in a variety of housing markets. Under this framework, the training could also be used to enhance the capacity and provide technical assistance to investigators and fair housing specialists at HUD and other administrative agencies. This training could assist those at administrative agencies who investigate fair housing complaints which involve testing to understand the factors that should be applied to properly assess testing evidence.

Sincerely,

Shanna L. Smith
President & CEO

[5] *Metropolitan Equal Housing Opportunity Council v. Gundaker*, 132 F.Supp.2d 1210, 2001 WL 209499 (E.D.Mo. 2001)