

March 25, 2011

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> St., SW  
Room 10276  
Washington, DC 20410-0500

**RE: Docket No. FR-5359-P-01, Equal Access to Housing in HUD Programs – Regardless of Sexual Orientation or Gender Identity. 76 F.R. 15 (Jan. 24, 2011)**

To Whom It May Concern:

On behalf of its Board of Directors and member organizations, the National Fair Housing Alliance (NFHA) submits the following comments and recommendations regarding the Department of Housing and Urban Development's proposed Rules regarding "Equal Access to Housing in HUD Programs – Regardless of Sexual Orientation or Gender Identity."

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. We offer these comments in addition to the comments submitted by the Housing Justice Network and the National Center for Lesbian Rights, to which NFHA is a listed signatory. Many of the ideas expressed below are also expressed in each of those comment letters.

Our comments below suggest ways to improve this proposed rule so that it will be as inclusive and effective as possible. In particular, we urge the final proposed rule to (A) provide clear standards for both affirmatively marketing HUD programs to LGBT people and enforcing the rule against non-compliant covered housing providers and grantees, (B) provide clear disclosure standards that covered housing providers and grantees must follow so that LGBT people are aware of their rights and provide an avenue for complaints, (C) clearly protect people based on actual or perceived sexual orientation and gender identity rather than simply prohibiting inquires based upon sexual orientation or gender identity, (D) strengthen the definition of family, and (E) improve the definition of gender identity and clarify the exception for gender segregated facilities.

The federal Fair Housing Act protects Americans from housing discrimination that limits choice and opportunity, based on race, color, religion, national origin, sex, disability, and familial status. The existence of the law alone has not protected people in these protected classes from discrimination. People of color continue to be steered into neighborhoods where their race predominates and steered



away from others, people with disabilities continue to encounter illegal physical barriers that serve to either prevent them from entering a home or using it effectively, and families with children – many of whom are seeking homes following foreclosure – find themselves turned away from available rental housing because they have kids. Fortunately, fair housing laws provide them with the options and avenues to vindicate their rights and get the housing that they need. It has been NFHA’s experience that a combination of both education and outreach to housing providers and to homeseekers and legal and administrative enforcement are necessary to make people aware of discrimination and to prevent discrimination from continuing to harm families and communities.

It is a travesty that the federal protections extended to so many Americans do not extend to the lesbian, gay, bisexual and transgender (LGBT) community. Predictably, in the absence of such federal protections, many in the LGBT community are particularly vulnerable to housing discrimination, and many housing providers openly discriminate against LGBT individuals believing that it is appropriate to do so. Similarly, fair housing organizations around the country, especially in places where LGBT people are not protected under state or local laws, report an unfortunate reality: victims of discrimination based on actual or perceived sexual orientation or gender identity are unlikely to report such discrimination because they do not believe they will find any kind of remedy. LGBT people do not have the benefit of an antidiscrimination law to shine a spotlight on discriminatory behavior. NFHA remains committed to working for the passage of legislation that would add protections based on sexual orientation and gender identity to the federal Fair Housing Act.

### **Evidence of Housing Discrimination against LGBT People**

In spite of minimal protections offered by federal law and inconsistent protections offered by state and local laws, private fair housing organizations have worked diligently to protect the rights of LGBT individuals, and research by LGBT-advocacy groups has demonstrated the slanted playing field in the housing market that LGBT people must work against in order to find a home. We supply the following anecdotes by way of example.

- **NFHA member Fair Housing Justice Center of New York City** assisted New York resident William Cruz file a lawsuit against Miguel Nieves, Lisse Nieves, Eliezer Cohen, and Townhouse Management in August of 2007, after Cruz endured a tenancy of persistent harassment. Miguel Nieves, the building’s superintendent, and his wife Lisse Nieves repeatedly harassed Cruz, who paid for his Bronx apartment with a section 8 rental voucher, by calling him derogatory names like “faggot” and the Spanish translation “pato” every time they saw him in the building. They also vandalized his apartment with crude drawings. When Cruz complained to the apartment’s management company, they did nothing.<sup>1</sup> After a week-long trial in 2011, a jury found the Nieves liable and awarded Mr. Cruz \$35,000 in damages.
- **In Spokane, Washington, NFHA member Northwest Fair Housing Alliance** assisted domestic partners Mitch Cain and Michelle DeShane resolve a fair housing complaint that they filed against the Richland (WA) Housing Authority in April 2009. Mitch, who was transitioning from male to female, and Michelle, a lesbian, filed their complaint after the housing authority would not permit Mitch to add Michelle to his section 8 voucher as a family

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<sup>1</sup> *William Cruz v. Miguel Nieves, et al.* Supreme Court of the State of New York, County of Bronx. Case No. 1883407. (Complaint filed August 22, 2007)

member. As they applied for a section 8 voucher, a receptionist for the housing authority told them, “I don’t think we take your kind here.” Mitch and Michelle were later told to apply for a voucher from another housing authority which accepted “everyone, even Martians.”<sup>2</sup>

These are some of the stories behind the statistics that have been collected by fair housing organizations and LGBT advocacy groups. Fair housing organizations in the State of Michigan found that 27% of same-sex couples posing as homeseekers encountered discrimination on the basis of sexual orientation. The National Gay and Lesbian Task Force found in 2007 that between 20 and 40 percent of homeless youth identify as LGBT.<sup>3</sup> A comprehensive national survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force provides a sobering look at the barriers that transgendered people of all incomes face when search for a home or searching for shelter. According to the survey, one in five transgendered people has become homeless because of either discrimination or mistreatment based on their gender identity or expression.<sup>4</sup>

LGBT people who are homeless face significant barriers when seeking the social services they need. According to the 2011 survey, one-in-three transgendered people found themselves turned away from homeless shelters. Of those who did access homeless shelters, 55% reported harassment, 42% said they were forced to live as the wrong gender in order to stay at the shelter, and 47% left the shelters because of the treatment they received.<sup>5</sup>

### **HUD’s Actions to Protect the LGBT Community**

In light of this well-documented need for further protections, we applaud HUD’s recent efforts to better protect the housing rights of the LGBT community. Prior to the issuance of this proposed rule, HUD announced guidance instructing HUD staff and state and local fair housing agencies on ways in which it could apply the Fair Housing Act to protect the LGBT community from invidious housing discrimination. Under this guidance, HUD announced that it would retain jurisdiction over complaints filed by LGBT people that could be brought under the Fair Housing Act alleging discrimination based on currently protected classes such as gender or disability. It announced that it would refer cases to state, local, and district governments for investigation in the event that those localities offered more broad protections. This guidance was a positive step forward by HUD.

We are pleased that HUD is continuing to advance protections for LGBT people within the constraints of its statutory authority. Many low- and moderate-income LGBT people and families rely upon HUD programs, but have faced barriers to entry because of their actual or perceived sexual orientation, gender identity, marital status, or family status. If well-enforced, this proposed rule has the potential to make a significant difference in the lives of LGBT people who access HUD programs and in the lives of LGBT people who have attempted without success to access HUD programs. We are also pleased that these protections extend to the Federal Housing Administration (FHA) mortgage loan program.

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<sup>2</sup> Northwest Fair Housing Alliance. “NWFHA Helps Domestic Partnered Couple Raise Awareness of Regional Lesbian/Gay/Transgender Housing Discrimination.” Press Release. July 1, 2010. Available at <http://www.nwfairhouse.org/projects.php?id=269>. (accessed March 24, 2011).

<sup>3</sup> “Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic in Homelessness.”

<sup>4</sup> Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the national Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

<sup>5</sup> *Id.*

Transgendered people have a homeownership rate of 32%, which is well under half the national homeownership rate.<sup>6</sup> By protecting transgendered people at this key time, the HUD rule has the potential to increase affordable homeownership for LGBT people.

## **Suggested Improvements to the Proposed Rule**

### **A. The Need for Both Affirmative Marketing and Strong Enforcement**

In its proposed rule, HUD acknowledges that it is issuing this rule because its programs have not always been open to all people, and LGBT people, in particular. Data cited above demonstrate the disproportionate number of homeless youth who are LGBT and also demonstrate the large numbers of LGBT people who have been turned away from housing programs because of their sexual orientation or gender identity.

A simple change to program rules is not enough to overcome the weight of discriminatory experiences, and HUD-funded housing providers and grantees must work with HUD to repair the reputations of programs that have discriminated against LGBT people in the past. To overcome past barriers, HUD and covered housing providers and grantees should consider the LGBT community one that is “least likely to apply,” and affirmatively market programs to the community. Public housing authorities, in particular, should affirmatively market to the LGBT community through community centers, outreach groups, and by other means, and HUD forms should be amended to include gender identity and sexual orientation as targeted groups for affirmative marketing.

Additionally, we expect that many subject housing providers may not necessarily comply with the conditions of the final rule. If this is the case, we believe they must be subject to clearly defined and reasonable sanctions. In the past, HUD program offices have been reluctant to sanction non-compliant housing providers and grantees. By way of example, in 1999, Flagstar Bank was found liable under the Fair Housing Act for discriminating against minority borrowers and was simultaneously an FHA endorsed lender. Later, in 2003, a federal court in Indianapolis found one of Flagstar’s written pricing policies to be so overtly discriminatory that it ruled against the bank on summary judgment. Yet, HUD took no action against Flagstar in 1999 or 2003.<sup>7</sup> Similarly, the City of Zanesville, Ohio, a recipient of Community Development Block Grant Funds (CDBG), was found guilty by a federal jury for discriminating against an African American community by refusing to provide it with water access that was provided to white residents with CDBG funding; however, the city continued to receive CDBG funds, which are granted on the condition that the grantee affirmatively furthers fair housing.<sup>8</sup>

In order to ensure that this rule be enforced, it is imperative that HUD not remain silent on an enforcement mechanism and include as part of the rule a section that states HUD will sanction, suspend, debar, or seek civil penalties against covered housing providers that violate these regulations. In the rule, HUD should indicate how the Office of Fair Housing and Equal Opportunity will be involved in enforcing the rule and how it will also be involved in training pertinent program staff as to the requirements of the rule.

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<sup>6</sup> *Id.*

<sup>7</sup> National Fair Housing Alliance. *Fair Housing Enforcement: Time For a Change. 2009 Fair Housing Trends Report.* Available at <http://nfha.objectwareinc.com/LinkClick.aspx?fileticket=dsT4nlHikhQ%3D&tabid=3917&mid=521>, 41.

<sup>8</sup> *Id.* at 34-35.

**B. The Need for Clear Notification of Anti-Discrimination Protections and Information on Where Victims Can File Complaints**

As stated above, and as with other types of housing discrimination, discrimination against LGBT individuals is substantially under-reported because most victims of discrimination either believe nothing can be done about it or are unaware of the fact that they are victims. To that end, the final rule should provide language requiring covered housing providers and grantees to affirmatively provide visible and accessible information about these protections. This notification must also provide necessary information on how people can submit complaints when they believe their rights have been violated.

The final rule should describe a method in which complaints will be received and handled. We urge HUD to designate a staff coordinator to handle all complaints related to the proposed rule and also to establish a centralized system to receive and process discrimination complaints based on sexual orientation and gender identity. It is important that the Office of Fair Housing and Equal Opportunity be involved in the handling and resolution of complaints in addition to the HUD program offices that oversees the program at issue, including but not limited to Public and Indian Housing, FHA, and Community Planning and Development.

**C. The Need to Protect People Based on Actual or Perceived Sexual Orientation and Gender Identity**

Section II.B of the proposed rule prohibits inquires with regard to sexual orientation and gender identity. We share the concern discussed in the Housing Justice Network's comment letter and the National Center for Lesbian Rights' comment letter regarding the challenge that this proposed change can provide to data collection. Data collection regarding the extent to which HUD programs serve the LGBT community and regarding the extent to which members of the LGBT community are discriminated against by HUD programs is of the utmost importance, and we urge HUD to continue to work with the LGBT community, the housing community, and the fair housing community to establish confidential ways in which these needed data can be collected.

Just as important, we believe that a prohibition on inquiries related to sexual orientation or gender identity, while helpful for some individuals, does not go far enough. Rather than simply prohibiting inquiries, we urge HUD in its final rule to prohibit discrimination based on LGBT status for all HUD-assisted and HUD-insured housing. Housing discrimination against LGBT people does not always occur because of inquiries, but often occurs because of a housing provider's action with regard to an individual's actual or perceived sexual orientation or gender identity. This rule should protect all people, including those who choose to and are able to hide their sexual orientation or gender identity and those who are unable to or choose not to hide their sexual orientation or gender identity. To that effect, no information about a person's gender identity or social orientation should be able to be used in decisions made by housing providers and grantees covered by the rule.

**D. Strengthen the Definition of Family**

We echo recommendations made by both the National Center for Lesbian Rights and the Housing Justice Network which urge HUD to clarify its definition of "family" in the proposed rule. In

particular, we urge HUD to amend the definition in 24 CFR 5.403 to include actual or perceived marital status and we urge HUD to include a clarification in the definition of “child.” LGBT parents must not be discriminated against because of their inability to create legal relationships with their children, and these regulations should be written in such a way that includes the diverse types of family constructs that currently exist throughout the United States.

**E. Improve the Definition of “Gender Identity” and Clarify the Exception for Gender Segregated Facilities**

As do the National Center for Lesbian Rights’ comments, we urge HUD to adopt a different definition of “gender identity.” Rather than defining gender identity as “actual or perceived gender-related characteristics,” which is consistent with the definition in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Public Law 111-84, Division E, Section 41707(c)(4), we urge HUD to adopt the definition of gender identity found in the 111<sup>th</sup> Congress’s Employment Non-Discrimination Act (ENDA). ENDA defines gender identity as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”

We also echo the National Center for Lesbian Rights’ comments regarding exceptions for gender-segregated facilities, and urge HUD to clarify language in its proposed rule to ensure that it is consistent with its Fair Housing Act guidance. Housing providers and grantees should be able to inquire about an individual’s gender identity for purposes of placing them in a gender-specific accommodation, but must not be able to inquire about the person’s birth sex, anatomy, or medical history. As the National Center for Lesbian Rights notes, this is an accepted best practice, is endorsed by homelessness experts, and is in line with HUD’s July 2010 Fair Housing Act guidance announcing that HUD would interpret the prohibition on discrimination based on sex to include prohibition against discrimination based on gender identity.

On a final note, we urge HUD to work with other federal agencies, including the Department of the Treasury, the Veterans’ Administration, and the Department of Agriculture to develop similar rules for other federal housing programs under their purview, including the Low Income Housing Tax Credit Program and the Department of Agriculture’s rural housing programs.

Thank you, again, for your continued efforts to better protect the LGBT community from discrimination in housing. Please do not hesitate to contact Ben Clark, Project Coordinator for Public Policy and Communications, with any questions. He may be reached at [bclark@nationalfairhousing.org](mailto:bclark@nationalfairhousing.org) or (202) 898-1661, ext. 134.

Sincerely,



Shanna L. Smith  
President & CEO