

January 11, 2024

The Honorable Marcia L. Fudge
Secretary
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0001

Submitted electronically via <http://www.regulations.gov>

RE: Notice of Proposed Rulemaking,
Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs (Docket No. FR-6355-P-11)

Dear Secretary Fudge:

The National Fair Housing Alliance® (NFHA™)¹ and the undersigned civil rights, consumer advocacy, housing, and community development organizations write to offer comments in response to the U.S. Department of Housing and Urban Development’s (HUD) notice of proposed rulemaking entitled, *Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs* (“Proposed Rule”).² We commend HUD for seeking input on this important topic and we believe that our comments below will help inform HUD’s view. These comments convey our support for the proposed rule.

1. *Local FHIP and FHAP-funded Agencies, Not the Federal Government, Should Establish Their Own Qualification Standards for Fair Housing Testers*

Allowing FHIP and FHAP-funded agencies to establish their own qualifications for fair housing testers provides them with the flexibility to tailor testing strategies based on the unique characteristics and challenges of their local housing markets. Different communities may have distinct patterns of discrimination or specific housing issues, and agencies familiar with these nuances are better equipped to design testing programs that effectively address local concerns. By permitting agencies to determine tester qualifications, HUD enables them to select individuals with relevant local knowledge and expertise, ensuring that testing efforts are targeted and impactful.

¹ The National Fair Housing Alliance® (NFHA™) leads the fair housing movement. NFHA works to eliminate housing discrimination and ensure equitable housing opportunities for all people and communities through its education and outreach, member services, public policy, advocacy, housing and community development, tech equity, enforcement, and consulting and compliance programs.

² HUD, Notice of Proposed Rulemaking, *Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs*, 88 Fed. Reg. 74381 (Oct. 31, 2023) (to be codified 24 C.F.R. § 115.311 and 24 C.F.R. § 125.107).

Housing discrimination often intersects with cultural, social, and economic factors that vary across regions. Allowing local agencies to choose their own tester qualifications, without dictates from HUD, enables them to prioritize cultural competence and sensitivity. In some communities, for example, high incarceration rates may impact the scope and nature of housing discrimination in particular markets. Testers who understand the nuances of the local community, including its diverse demographics, languages, and social dynamics, can more accurately simulate real-world scenarios of housing interactions. This can lead to more nuanced and effective testing outcomes, as testers with a deep understanding of local cultures are better positioned to identify subtle forms of discrimination that may be overlooked by testers without such insight.

Allowing local FHIP and FHAP-funded agencies the discretion to determine tester qualifications can also lead to increased community engagement. Agencies can involve community members, advocates, and local experts in the testing process, fostering a sense of ownership and collaboration. Many communities host active reentry programs that support residents seeking housing opportunities upon release from incarceration. Relieving local fair housing programs of restrictive tester qualifications may allow for enhanced coordination between these programs and local fair housing efforts. This approach not only ensures that testing efforts are rooted in the community but also promotes transparency and trust. Moreover, it encourages the participation of individuals who may have a personal stake in addressing housing discrimination, thereby strengthening the overall impact of FHIP and FHAP-funded initiatives. Ultimately, by allowing agencies to choose their own tester qualifications, HUD promotes a bottom-up approach that empowers communities to actively contribute to the fight against housing discrimination.

The proposed rule should not interfere with measures that FHIP and FHAP-funded agencies currently implement to screen testers for suitability to participate in tests for which they are considered. Testing is a controlled process, and testers are selected for participation in tests based on their personal, experiential, and circumstantial characteristics as well as their ability to follow through with test instructions. Furthermore, HUD's rules continue to prohibit the use of testers in FHIP and FHAP-funded testing who may have an economic interest in a test; are a relative of any party in a case; have had employment or other affiliations within one year (or five years) with the person or organization to be tested; or are licensed competitors of the person or organization to be tested in the listing, rental, sale, or financing of real estate.³ Additionally, testers may be required to testify about matters not preserved in audio or video recordings, especially in jurisdictions that require multi-party consent. Therefore, FHIP and FHAP-funded agencies continue to have a responsibility to lawfully collect information that enables them to determine each tester's suitability *on a test-by-test basis*.

³ See 24 C.F.R. § 115.311(d)(1) – (4), 24 C.F.R. § 125.107(c)(1) – (4).

2. *Broad Bans Based on an Individual's Criminal Background Are Rarely Justified by Data and Are Generally Racially Discriminatory*

In the housing context, there is no justifiable reason to implement broad bans for housing based on one's criminal background. All people have a right to decent, safe, affordable housing regardless of their criminal records. HUD itself has repeatedly warned against the potential discriminatory impact of using criminal history as a disqualifying factor when making housing available.⁴

In general, African Americans, Hispanics, and Native Americans are disproportionately affected by the criminal justice system. Disparities in law enforcement practices, such as racial profiling and biased policing, also contribute to the overrepresentation of minorities in the criminal justice system. The latest research demonstrates how and why people of color are overrepresented in arrests, jails, and prisons.⁵

Using one's criminal history as an automatic disqualification to serve as a tester without careful consideration may perpetuate racial disparities and hinder efforts to promote equal housing opportunities and to effectively use federal funding to conduct fair housing investigations.

3. *Some Fair Housing Testing May Require Using Testers with a Criminal Record*

As noted above, blanket bans on the availability of housing based on criminal background may be illegal. In order to test housing providers for the existence or consistent application of blanket bans, some fair housing agencies may want to use testers with verifiable criminal records. This is all the more important because the provision of rental housing increasingly hinges on tenant screening performed by third-party entities at the request of landlords, potentially obfuscating discriminatory policies and decisions. Eliminating the existing prohibition will allow FHIP and FHAP-funded agencies to involve testers who have felony and other convictions, if they choose to do so, without risk of losing their federal funding.

Conclusion

Thank you for the opportunity to comment on the Proposed Rule. For the reasons outlined above, we urge HUD to finalize the Proposed Rule and to remove criminal conviction restrictions for testers in FHIP- and FHAP-funded testing programs. Please contact Nikitra

⁴ See, e.g., U.S. Dep't of Hous. and Urban Dev., Office of General Counsel, *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 4, 2016), available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; Secretary Marcia L. Fudge, U.S. Dep't of Hous. & Urban Dev., *Memorandum for Staff, Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs* (April 12, 2022), available at https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf.

⁵ See, e.g., Prison Policy Initiative, *Research Library: Race and Ethnicity*, available at https://www.prisonpolicy.org/research/race_and_ethnicity/.

Bailey, NFHA Executive Vice President, at nbailey@nationalfairhousing.org, or Morgan Williams, NFHA General Counsel, at mwilliams@nationalfairhousing.org with any questions.

Sincerely,

National Fair Housing Alliance
Americans for Financial Reform Education Fund
Center for Fair Housing
Chicago Lawyers' Committee for Civil Rights
CNY Fair Housing
Community Legal Aid
Denver Metro Fair Housing Center
Equal Rights Center
Fair Housing Advocates of Northern California
The Fair Housing Center
Fair Housing Center of Central Indiana
Fair Housing Center of the Greater Palm Beaches
Fair Housing Center of Metropolitan Detroit
Fair Housing Center of Southeast & Mid Michigan
Fair Housing Center of Northern Alabama
Fair Housing Center of Southwest Michigan
Fair Housing Center of Washington
Fair Housing Center of West Michigan
Fair Housing Contact Service
Fair Housing Justice Center
Fair Housing Resource Center, Inc.
Fair Housing Rights Center in Southeastern PA
The Fortune Society
High Plains Fair Housing Center
HOPE Fair Housing Center
Housing Education and Economic Development
Housing Opportunities Made Equal, Inc.
Housing Opportunities Made Equal of Greater Cincinnati
Housing Opportunities Made Equal of Virginia, Inc.
Housing Opportunities Project for Excellence (HOPE), Inc.
Housing Research & Advocacy Center dba Fair Housing Center for Rights & Research
Intermountain Fair Housing Council, Inc.
Justice in Aging
The JustUS Coordinating Council
LeadingAge
Legal Aid of North Carolina, Inc.
Massachusetts Fair Housing Center
Metro Fair Housing Services, Inc.
Metropolitan Milwaukee Fair Housing Council

Miami Valley Fair Housing Center, Inc.
MICAH-Metropolitan Interfaith Council on Affordable Housing
Montana Fair Housing
National Coalition for Asian Pacific American Community Development (National CAPACD)
National Community Stabilization Trust (NCST)
National Disability Rights Network
National Housing Law Project
National Housing Resource Center
Northwest Fair Housing Alliance
North Texas Fair Housing Center
Open Communities
Prosperity Now
Shriver Center on Poverty Law
South Suburban Housing Center
Southwest Fair Housing Council
UIC Law Fair Housing Legal Clinic
Westchester Residential Opportunities