

January 11, 2024

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

Re: Docket No. FR-6355-P-01 Removing Criminal Conviction Restrictions for Testers in FHIP- and FHAP-Funded Testing Programs

Submitted via regulations.gov

We, the undersigned members and allies of the Partnership for Just Housing, write to support the Biden-Harris administration's proposed rule seeking to remove criminal conviction restrictions for fair housing testers in programs funded by the Fair Housing Initiatives Program (FHIP) and Fair Housing Assistance Program (FHAP).

Convened by the Shriver Center on Poverty Law, the National Low Income Housing Coalition (NLIHC), VOICE of the Experienced, the Formerly Incarcerated and Convicted People and Families Movement (FICPFM), and the National Housing Law Project (NHLP), the Partnership for Just Housing (PJH) is a national collaborative of directly impacted leaders and other advocates working to end housing discrimination against people impacted by the criminal-legal system. Together, we work to advance economic and racial equity at the intersection of housing and the criminal-legal system. PJH centers the expertise of people with direct criminal-legal system involvement in forming and executing its agenda. Please note that FICPFM, a national network of organizations composed of formerly incarcerated persons and their families, has also submitted its own comment, which we support.

HUD's current regulation prohibiting people with felony and other prior conviction histories from serving as fair housing testers is overly broad, acting largely as a blanket ban regardless of mitigating factors and failing to consider totality of circumstances surrounding a prior conviction. Antiquated and unnecessary, the ban stymies HUD's ability to identify and mitigate discriminatory practices against people with conviction histories, both through disparate impact and intentional pretextual discrimination against members of protected classes. Relatedly, because of law enforcement's targeting of marginalized communities, the prohibition disproportionately impacts prospective testers who are Black, Latino, or Native, as well as people with disabilities and members of the LGBTQ+ community.

Removing the ban on people with conviction histories from serving as FHIP and FHAP testers would also strengthen HUD's fair housing testing and enforcement by helping gather data on the frequency with which people with conviction histories are denied housing, and the prevalence of using criminal record status to mask discrimination against members of groups protected under the Fair Housing Act (FHA). Importantly, the change would also further HUD's and the Biden-

Harris Administration’s broader work advancing racial equity. PJH and our members, partners, and allies support HUD’s proposal, and look forward to working with HUD on its implementation.

Background and Current Context

The Fair Housing Initiatives Program (FHIP) and Fair Housing Assistance Program (FHAP) provide funding to private non-profits and governmental agencies working to enforce the federal Fair Housing Act of 1968 (FHA) and state and local fair housing protections. Among other eligible uses, both programs fund fair housing “testing” activities, in which testers pose as prospective homebuyers or renters, with the goal of gathering information to help determine whether a housing provider is complying with fair housing laws. These testing activities serve as a way of obtaining “credible and objective evidence of discriminatory housing practices¹” in response to a “bona fide allegation²” of housing discrimination.

Historically, guidance related to FHIP and FHAP implementation has specified fair housing testers “must not have prior felony convictions or convictions of any crimes involving fraud or perjury.^{3,4}” While HUD has never provided an explicit reason for this prohibition, FHIP guidelines immediately preceding the ban note FHIP grantees should conduct a “formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers.⁵” It is likely the restriction on testers with conviction histories is rooted in the perception that a conviction history undermines a tester’s credibility and objectivity, particularly in a courtroom trial. Rule 609 of the Federal Rules of Evidence also asserts certain convictions – including convictions “punishable by death” or incarceration for more than a year, and convictions “involving dishonesty or false statement⁶” – may be admitted as evidence against a witness’s character.

Current Bans Are Unnecessary, Discriminatory, and Misaligned with HUD’s Values

HUD first published its prohibition on people with conviction histories from serving as fair housing testers in 1989 –before the ubiquitous availability of tools like video cameras and audio recorders, which provide a clear, unbiased record of events. FHIP and FHAP testers typically rely on video and audio recordings of their interactions with housing providers, in addition to direct testimony, and are trained by FHIP and FHAP grantees to conduct testing activities in an impartial, objective way.

Even without these tools and safeguards available, HUD’s current ban rests on the flawed assumption that people with conviction or arrest histories are less trustworthy, or more likely to

¹ Section 561, *Housing and Community Development Act of 1987*

² 24 CFR Part 125

³ 60 FR 58452

⁴ 24 CFR 115.311(b)

⁵ *Ibid.*

⁶ FRE 609(a)(1)(A)

give false testimony, than people who have not been impacted by the criminal-legal system – an assumption for which there is no evidence. In Montana, a witness’s conviction history cannot be used as evidence against their character, noting the state “does not accept as valid the theory that a person’s willingness to break the law can automatically be translated into a willingness to give false testimony,” and that conviction history has “low probative value in relation to credibility.”⁷ HUD itself noted in a message from Policy Development and Research Senior Leadership, “no empirical evidence exists to justify a ‘blanket exclusion’ of people with criminal histories.”⁸ Indeed, basing policy on the assumption that people with conviction histories will not testify truthfully or accurately embraces the exact sorts of “bald assertions based on generalizations or stereotypes” which HUD’s 2016 Criminal Records Guidance militates against.

Generations of biased policing policies and practices and structural discrimination have led Black, Latino, and Native people,⁹ as well as people with disabilities¹⁰ and members of the LGBTQ+ community,¹¹ to be disproportionately represented in the criminal-legal system. As such, blanket bans against hiring people with conviction and arrest histories as fair housing testers are also more likely to impact members of these protected classes.

HUD has recognized the potentially discriminatory impact of broad bans against people impacted by the criminal-legal system. In a 2016 memo, the Department advised housing providers that policies and practices imposing broad bans against people with conviction or arrest histories from housing may be discriminatory under the FHA, due to the disproportionate impact such a policy has on members of protected classes.¹² HUD notes in the memo “a housing provider that imposes a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then – will be unable” to prove the “policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.”¹³

While this memo sets an important precedent, HUD’s current prohibition on people with conviction histories serving as FHIP and FHAP testers directly contradicts the Department’s own best practices. When evaluating potential testers, grantees are not required under current guidance to consider mitigating factors or totality of circumstances, including how long ago a conviction occurred, circumstances leading to a conviction, or an individual’s behavior since a

⁷ Mont. Code Ann. Rule 26–10–609.

⁸ HUD PD&R. May 2022. “Tenant Screening With Criminal Background Checks: Predictions and Perceptions Are Not Causality.” <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-051722.html>

⁹ Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons (Sentencing Project, October 13, 2021). <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

¹⁰ Becky Crowe and Christine Drew, Orange is the New Asylum: Incarceration of Individuals with Disabilities (Behavior Analysis in Practice, 14, 387-395, February 22, 2021). <https://link.springer.com/article/10.1007/s40617-020-00533-9>

¹¹ Alexi Jones, Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System (Prison Policy Initiative, March 2, 2021). <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/>

¹² https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF

¹³ Ibid.

conviction. Such a broad ban can also bar people with a juvenile record, or people with convictions that have been expunged, annulled, or pardoned, from serving as fair housing testers.

The current prohibitions against people with conviction histories working as FHIP and FHAP testers is also difficult to reconcile with the principles embraced by federal guidance against employment discrimination.¹⁴ This puts testing organizations in a precarious position and these organizations to spend valuable resources determining who they may or may not hire as testers under these seemingly conflicting federal policies.

Removing Bans Will Facilitate Enforcement of Fair Housing Protections and Align HUD Guidance with Best Practices

In its notice of proposed rulemaking, HUD notes “landlords may discriminate [by] using a criminal records policy as cover (or pretext) for intentional discrimination because of a protected class.¹⁵” For example, a landlord may reject Black applicants with a conviction record, but accept white applicants with the same or similar records. However, because FHIP and FHAP testers cannot have a conviction record, it is exceptionally difficult to adequately test for these types of discrimination.

An oft-cited statistic asserts that 79% of formerly incarcerated people report experiencing housing discrimination based on their conviction status,¹⁶ but formal investigations into the prevalence of housing discrimination based on conviction status are limited. However, anecdotal evidence of unjust housing practices against people with conviction histories abounds, undoubtedly fueling homelessness rates that are ten times higher among formerly incarcerated people than the general population.¹⁷ Permitting people with conviction histories to work as fair housing testers would provide valuable insight into the frequency with which criminal record status is used as a reason to deny an applicant tenancy.

This proposed change will also better align HUD guidance with the Biden-Harris Administration’s Executive Order (EO) to advance racial equity and support underserved communities,¹⁸ and with the values and goals outlined in HUD Secretary Marcia Fudge’s April 2022 memorandum, “Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs.¹⁹”

¹⁴ See EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (2012); see also *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975).

¹⁵ <https://www.federalregister.gov/documents/2023/10/31/2023-23678/removing-criminal-conviction-restrictions-for-testers-in-fhip--and-fhap-funded-testing-programs#citation-26-p74384>

¹⁶ <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions/#:~:text=Another%20study%20of%20community%20members,people%20who%20have%20not%20been>

¹⁷ <https://www.prisonpolicy.org/reports/housing.html>

¹⁸ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

¹⁹ https://www.hud.gov/sites/dfiles/Main/documents/Memo_on_Criminal_Records.pdf

The EO outlines the administration’s pledge to “pursue a comprehensive approach to advancing equity for all,” and notes “advancing equity requires a systemic approach to embedding fairness in decision-making processes.” Accordingly, the EO charges administrative offices – including HUD – with identifying, assessing, and removing barriers faced by members of underserved communities in accessing federal resources and programs. Recognizing the disproportionate impact of the criminal legal system on people of color and people with disabilities, Secretary Fudge’s April 2022 memorandum builds on the EO’s directive to institute “a HUD-wide effort to review programs and put forth changes that ensure funding recipients are as inclusive as possible of individuals with criminal histories.”

The proposed change to FHIP and FHAP testing guidance represents an important step in HUD’s ongoing effort to remove barriers faced by people with conviction histories, and in the Biden-Harris Administration’s broader work to advance racial equity.

Conclusion

We thank you for your time, and for HUD’s efforts reviewing and updating guidance to increase access to HUD programs and resources for formerly incarcerated and convicted people and their families. For questions or follow-up, please reach out to Kim Johnson, policy manager at the National Low Income Housing Coalition, at kjohnson@nlihc.org, and Eric Sirota, director of housing justice at the Shriver Center on Poverty Law, at ericsirota@povertylaw.org.

Sincerely,

All of Us or None – Texas
Center on Budget and Policy Priorities
Chicago Area Fair Housing Alliance
Corporation for Supportive Housing
Drug Policy Alliance
Grassroots Leadership
Justice Impact Alliance
Kansas Appleseed Center for Law and Justice
LeadingAge
Legal Aid Justice Center
Legal Aid Society of Cleveland
National Community Reinvestment Coalition
National Housing Law Project
National Low Income Housing Coalition
NETWORK Lobby for Catholic Social Justice
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Virginia Nonprofit Resource Information Help for the Disadvantaged and Disenfranchised
Voice of the Experienced
Voters Organized to Educate
Washington Legal Clinic for the Homeless
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