

June 14, 2017

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

Electronically submitted via www.Regulations.gov

Re: Comments Regarding U.S. Department of Housing and Urban Development's Response to Executive Orders 13771 and 13777, "Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda," Docket No. FR-6030-N-01

Dear Secretary Carson:

The following comments are submitted on behalf of the Sargent Shriver National Center on Poverty Law ("Shriver Center") and the undersigned members of the Legal Impact Network regarding the notice published on Monday May 15, 2017, "Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda."¹

The Shriver Center provides national leadership in promoting laws and policies that secure justice to improve the lives and opportunities of people living in poverty by using a unique, proven approach of blending grassroots advocacy and innovative legal theory to promote economic and social justice for low-income people on a national, state, and local level. Through its Housing Justice unit, the Shriver Center advocates for the enforcement of civil rights and fair housing laws, protects the housing rights of survivors of violence and justice-involved individuals, and preserves and improves the nation's dwindling supply of affordable housing.

The Legal Impact Network is a community of state-based legal organizations from thirty-three states and the District of Columbia, all working to advance the interests of people living in poverty. The undersigned Legal Impact Network member organizations are deeply invested in the preservation of access to affordable housing for their clients and engage in a range of advocacy strategies designed to ensure the availability of fair, widely-available housing opportunities.

¹ Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22,344 (May 15, 2017).



Pursuant to Executive Orders 13771 and 13777, HUD seeks comments related to whether its regulations can be made more effective and less burdensome in achieving the U.S. Department of Housing and Urban Development (HUD)'s mission to create strong, sustainable, inclusive communities, and quality affordable homes for all. As described herein, we submit that HUD's regulations are essential to protecting the health and wellbeing of tenants and applicants of federally assisted housing. Further, for some of these regulations, there is an opportunity to be even more effective if revised. In addition, we support and incorporate by reference the comments submitted by National Housing Law Project, Poverty and Race Research Action Council, National Low Income Housing Coalition, National Law Center on Homelessness and Poverty, and Loyola University Chicago's Health Justice Project.

I. The Undersigned Organizations Reject the Regulatory Reform Agenda and the Premise of Executive Orders 13771 and 13777.

Foremost, the Shriver Center and the undersigned organizations object to the false premise of the Executive Orders that HUD's regulations are burdensome and must be reformed. Public safeguards are essential to protecting people living in poverty. Federal regulations provide important and often constitutionally or statutorily required protections for tenants and applicants to HUD-assisted housing. Absent a private right of action, federal regulations often provide the only legal enforcement remedy available to tenants and applicants. Aside from the legal impediments to implementing the Executive Orders, HUD has a moral obligation to preserve existing regulations that help low-income individuals and families obtain and maintain safe and stable housing.

The Shriver Center and the undersigned organizations are deeply concerned about the implications that the Executive Orders will have on families with low-incomes in the United States. Arbitrarily repealing two sets of regulations for every new regulation – no matter how vital – will prevent HUD from carrying out its Congressional mandate to create strong, sustainable, inclusive communities, and quality affordable homes for all. All of HUD's existing regulations have been subject to public notice and comment and the Shriver Center has regularly participated in that public comment process. Moreover, since the Reagan Administration, each promulgated regulation has undergone a rigorous regulatory impact analysis that required HUD to weigh the benefit and cost of proposed regulations.²

Considering the detailed process for promulgating regulations and the actions by previous administrations to review regulations, HUD's regulations are not rife with unnecessary regulatory burden. HUD should instead be focused on how it can effectuate its mission by strengthening its regulatory framework with robust protections aimed at protecting low-income tenants and applicants. HUD's regulations have improved health outcomes for tenants and their children, spurred economic development, allowed economic growth and mobility for many low-income tenants, and protected the most vulnerable members of our society. As such, our comments highlight certain regulations that are

² See Executive Orders 12291 (Reagan) and 13563 (Obama).



vital to protecting tenants of and applicants to federally-assisted housing followed by specific regulations that could be improved to better protect tenants.

II. Notwithstanding Our Objections, HUD Should Involve HUD-Assisted Tenants in the Regulatory Reform Task Force.

We urge HUD to invite tenants to participate in the Regulatory Reform Task Force, as required by Executive Order 13777. The Task Force will identify regulations appropriate for repeal, replacement, modification, and consistent with applicable law. According to the Executive Order, the Task Force “shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations including State, local, and tribal governments, small businesses, *consumers*, non-governmental organization, and trade associations.”³ Consumers in the housing context include HUD-subsidized and other tenants. Tenants are the most likely to experience the direct impacts of HUD’s regulatory reform agenda and their input is essential in the evaluation process.

II. HUD Should Maintain the Following Regulations Because They Are Essential to Effectuating HUD’s Statutory Obligation to Provide Safe, Decent, and Affordable Housing Free From Discrimination.

In order to effectuate HUD’s mission and fulfill its Congressional mandate, HUD promulgates regulations. Thus, HUD cannot simply repeal a regulation even if it poses a cost or regulatory burden on the agency. We provide several examples below of regulations that protect the rights of tenants and are grounded in federal statute and therefore cannot be repealed by HUD simply because of the Administration’s regulatory reform agenda.

A. *By mandating tenant participation, the regulations at 24 C.F.R. Part 903 makes the PHA Plan process more inclusive, informed, and effective.*

We strongly urge HUD to refrain from rescinding or significantly altering its regulations related to the Public Housing Authority (PHA) Plan process, found at 24 C.F.R. Part 903, Subpart B. These regulations implement provisions found in the Quality Housing and Work Responsibility Act (QHWRA), which requires PHAs to prepare and submit to HUD a “PHA Plan” which includes an annual plan and a five-year plan to report on the PHA’s activities.⁴ These provisions are essential because they establish procedures by which PHAs solicit and collect input from residents, either individually or through their Resident Advisory Boards, tenant advocates, and members of the community, thus making the planning processes more informed and inclusive. In preserving the rights of tenants to participate in the decision-making that impacts their housing, these regulations are carrying out the statutory language that they mirror in federal law. In the Shriver Center’s experience this participatory process has allowed tenants to raise important issues that ultimately improve the operations of the PHA. Although ensuring tenant participation

³ Executive Order 13777 § 3(e) (2017) (emphasis added).

⁴ 42 U.S.C. §1437c-1.





may result in some burden on PHAs, the benefit of robust tenant input into the federally subsidized programs outweighs these costs. Furthermore, Congress and HUD sought to help alleviate any such burden by exempting the following: (i) “high performing” PHAs, (ii) PHAs with less than 250 public housing units (and are not considered “troubled”); and (iii) PHAs that only administer tenant-based assistance and do not own or operate public housing.⁵ Given that these regulations so closely resemble an existing statute by which Congress sought to minimize the burdens on PHAs, HUD should refrain from rescinding or significantly altering these essential provisions guaranteeing tenant participation in the PHA Plan process.

B. *The Affirmatively Furthering Fair Housing Regulations (80 Fed. Reg. 42,772) provide essential regulation mandated by the Fair Housing Act.*

We strongly urge HUD to refrain from repealing, replacing, or significantly modifying its Affirmatively Furthering Fair Housing regulation.⁶ Although the regulation was adopted in 2015, the AFFH regulation implements key provisions of the Fair Housing Act, landmark legislation that Congress passed at the height of the civil rights movement almost fifty years ago.⁷ The centerpiece of the FHA is its prohibition against discrimination in housing-related transactions because of “race, color, religion, sex, familiar status, national origin, or handicap.”⁸ The FHA also requires that all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing.⁹ HUD-funded programs and activities must also be administered in a manner that affirmatively furthers fair housing.¹⁰ The AFFH regulation is essential to protecting racial and ethnic minorities, people with disabilities, and other protected classes from unwarranted discrimination and the harmful effects of segregation.

Before the AFFH rule, HUD funding recipients received little guidance about how to assess fair housing issues and were using an outdated, ineffective analysis of impediments, a sentiment shared by the Government Accountability Office.¹¹ Developed in response to such calls for additional guidance, the AFFH regulation created a standardized process for identifying and evaluating local fair housing issues and their contributing factors, known as the Assessment of Fair Housing (AFH). Because the AFH requires HUD funding recipients to consider several types of data, community input, and a variety of contributing factors, the result is a much more thorough and holistic picture of fair housing in a given jurisdiction. In requiring housing and

⁵ 42 U.S.C. § 1437c-1.(3)(A); 24 C.F.R. § 903.11.

⁶ 80 Fed. Reg. 42,772 (July 16, 2015).

⁷ Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619.

⁸ 42 U.S.C. §§ 3604-3605.

⁹ 42 U.S.C. § 3608.

¹⁰ 42 U.S.C. § 3608(e)(5); *see also* 42 U.S.C. § 5304(b)(2) (requiring that, to receive federal funds under this statute, entitlement jurisdictions must certify that it will affirmatively further fair housing).

¹¹ Government Accountability Office, “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” (Sept. 2010).



community development funded recipients, including state and local governments, state housing finance agencies, and housing authorities to consider issues such as access to good schools, employment, affordable transportation, and environmental health, HUD is squarely in line with the growing consensus that housing is a platform for the opportunities necessary for people to leave poverty behind them. Even more so, any effort to assess fair housing without considering these related issues will ultimately be incomplete. Although there are costs associated with such an assessment, these costs are necessary to implement the underlying legislation, the Fair Housing Act. Repealing the rule would only force HUD funding recipients to revert back to using the less effective analysis of impediments, which would greatly weaken their ability to fulfill their AFFH duties.

To help HUD funding recipients comply with their AFFH duties, HUD has released or is drafting AFH Assessment Tools for local governments, states and insular areas, PHAs, and qualified PHAs. Most of these assessment tools have undergone a multi-year drafting process with public comments and subsequent revisions in response to those comments. Moreover, HUD is supposed to solicit public comment on the assessment tool every three years. Given the time and energy that has already been expended on these assessment tools as well as the existence of a process in place for future re-evaluation, it would be a premature and costly mistake to rescind or significantly modify these long-awaited-for assessment tools before giving local governments and PHAs a meaningful opportunity to use them.

Moreover, as the National Housing Law Project explains in its comments, HUD has recognized that some of its funding recipients may have limited resources and capacity and has tried to ensure that the AFFH rule and implementation are responsive to those limitations while still prioritizing their duty to affirmatively further fair housing. For example, under the AFFH rule, HUD funding recipients that are required to complete an AFH may engage in joint or regional collaborations, which HUD expected would both improve fair housing planning and reduce costs.¹² HUD is also helping HUD funding recipients complete their analysis by providing an AFFH Data and Mapping Tool, and it has also provided small grantees more time to complete the Assessment of Fair Housing.¹³ As these various measures demonstrate, the implementation of the AFFH rule and its assessment tools provide ample opportunity for grantees of varying sizes and capacities to engage in a meaningful fair housing analysis. For a more detailed explanation of the various ways that the AFFH regulation and its implementation address the potential issue of limited resources of HUD funding recipients, please see the comments submitted by the National Housing Law Project and the Housing Justice Network.

To protect fair housing rights, therefore, we strongly urge HUD to maintain the AFFH regulations and its accompanying assessment tools.

¹² 24 C.F.R. § 5.156(a) (encouraging HUD funding recipients to “collaborate to conduct and submit a single AFH” for the “purposes of sharing resources and addressing fair housing issues from a broader perspective”).

¹³ 24 C.F.R. § 5.160(a).





C. *The Discriminatory Effects Standard Regulation (78 Fed Reg. 11460) provides essential regulation mandated by the Fair Housing Act.*

We strongly urge HUD to refrain from rescinding or significantly modifying the regulation entitled Implementation of the Fair Housing Act’s Discriminatory Effects Standard.¹⁴ Like the AFFH regulation, this regulation implements a key provision of the Fair Housing Act, enacted nearly fifty years ago. HUD and federal courts have long recognized that the Fair Housing Act’s prohibition on discrimination includes a prohibition on facially neutral practices that have an unjustified discriminatory effect on protected classes, regardless of the underlying intent. Indeed, two years after HUD passed this regulation in 2013, the U.S. Supreme Court affirmed the disparate impact theory under the Fair Housing Act.¹⁵ The most critical function of the regulation is that it standardizes the analytical framework for a disparate impact claim. Under this burden-shifting standard, plaintiffs/complainants must first show that the defendant/respondent’s practice results in a discriminatory effect. The burden then shifts to the defendant/respondent justify the challenged practice by demonstrating that it is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.” A defendant/respondent that meets this burden avoids liability under the Fair Housing Act, provided that the plaintiff cannot show a less discriminatory alternative.

Prior to the regulation, each of the federal circuits recognized the disparate impact theory, but they applied slightly different tests in judging these claims, which could alter the results depending on the circuit where a case was filed. Now, parties appearing in federal court and before HUD, whether they are bringing or defending a case, benefit from a uniform standard.

Additionally, as HUD has noted, the discriminatory effects rule does not result in additional costs to housing providers and other engaged in housing transactions since it codifies substantive law long-recognized by HUD and the federal courts and standardizes the framework by which these claims are analyzed.

In light of the essential nature of this regulation in protecting the fair housing rights of protected classes in this country, we strenuously recommend that HUD refrain taking any steps that will weaken its protections.

D. *Regulations requiring equal access regulations for LGBTQ tenants (77 Fed. Reg. 5661, 81 Fed. Reg. 64763, and 81 Fed. Reg. 80989) provide necessary safeguards for LGBTQ persons accessing HUD programs while imposing no significant economic impact on HUD.*

¹⁴ 78 Fed Reg. 11460 (Feb. 15, 2013).

¹⁵ *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* 135 S. Ct. 2507, 2521, 576 U.S. ____ (2015).



We strongly urge HUD not to rescind or significantly modify the following regulations that have been adopted to protect the housing rights of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) persons in various federally subsidized housing programs:

- Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity¹⁶
- Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs¹⁷
- Equal Access to Housing in HUD's Native American and Native Hawaiian Programs-Regardless of Sexual Orientation or Gender Identity¹⁸

Together, these equal access rules prohibit discrimination on the basis of sexual orientation, gender identity, and gender expression in the following: (i) HUD programs, including HUD-assisted programs and HUD-insured housing; (ii) temporary, emergency shelters and other buildings and facilities used for shelter that have shared sleeping or bathing facilities; and (iii) HUD's Native American and Native Hawaiian programs.

Imposing no significant economic impact, these rules are imperative to protecting LGBTQ people from unwarranted discrimination in federally subsidized housing programs. LGBTQ people, and especially transgender and gender nonconforming people, are significantly more likely to experience homelessness and housing instability than the general population. In fact, 40% of young people experiencing homelessness identify as LGBTQ or gender nonconforming. Given that HUD's mission is to ensure decent housing and a suitable living environment for all, it is incumbent upon HUD to preserve these rules to prevent LGBTQ people from falling victim to discriminatory practices that would further increase their disproportionate rates of housing instability and homelessness.

E. *Anti-harassment regulations (81 Fed. Reg. 63054) help protect individuals in their homes by providing a uniform standard for assessing claims long recognized under the Fair Housing Act.*

We strongly recommend against rescinding or significantly modifying the regulation *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*.¹⁹ HUD and the courts have long recognized that the Fair Housing Act prohibits harassment in housing and housing-related transactions on the basis of race, color, religion, sex, national origin, disability, and familial status.²⁰ This rule clarified *quid pro quo harassment* and *hostile environment harassment* as harmful activity prohibited by the Fair

¹⁶ 77 Fed. Reg. 5661 (Feb. 2, 2012).

¹⁷ 81 Fed. Reg. 64763 (Sept. 21, 2016).

¹⁸ 81 Fed. Reg. 80989 (Nov. 17, 2016).

¹⁹ 81 Fed. Reg. 63054 (Sept. 14, 2016).

²⁰ 42 U.S.C. §§ 3604-3605.



Housing Act and established standards for evaluating such claims. Since such standards had previously been lacking, this rule serves a vital function of giving housing providers guidance on how to keep their properties free of unlawful harassment and thus take preventative measures to avoid costly litigation. The rule also empowers victims of harassment by giving them a standard by which to assess their Fair Housing Act claims. Because this rule does not create any new forms of liability under the Fair Housing Act, it does not result in additional costs for housing providers and therefore should be maintained.

F. *Grievance procedures for public housing residents (24 C.F.R. 966.50-966.57) provide essential process required by due process protections and federal law.*

We strongly urge HUD not to rescind or significantly alter the grievance regulations at 24 C.F.R. 966.50-966.57. These regulations provide a process for tenants and PHAs to resolve disputes and were promulgated to implement the requirements and spirit of the U.S Housing Act of 1937.²¹ Grievance rights are an essential process to resolve disputes between public housing tenants and PHAs, and provide tenants with the opportunity to be heard. HUD cannot repeal regulations pertaining to the right to a grievance procedure for public housing tenants because the right derives from due process protections afforded by the Constitution and is embedded into the fabric of federal housing law and policy.

G. *The regulations implementing the Violence Against Women Act (78 Fed. Reg. 47,717) are fundamental to protecting the housing rights and safety of survivors of violence.*

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) provides critical protections for victims of domestic violence, dating violence, sexual assault, and stalking who are tenants and applicants of most forms of HUD-assisted housing.²² VAWA 2013 ensures that victims of violence are not punished for the acts of their perpetrators or due to their status as crime victims. VAWA 2013 was as a result of a years' long effort to identify what additional protections survivors required in order to be safe. These 2013 additions included expanding VAWA to the most of the remaining federal housing programs, protecting the housing rights of sexual assault survivors, requiring the creation of emergency transfer plans by HUD and project owners; and requiring that victims receive a notification of VAWA housing rights at three critical junctures. HUD issued a final VAWA 2013 rule in 2016 which builds upon the statute's requirements. Housing providers subject to VAWA need these regulations in order to fully implement VAWA and have joined victim and tenant advocates in seeking additional guidance. The primary costs of implementing the VAWA regulations – such as creating the notice of VAWA rights and the VAWA certification form – are, as HUD has identified, not significant. HUD's actions have played an important role in protecting the housing rights, safety, and well-

²¹ 42 U.S.C. § 1437d(k).

²² 42 U.S.C.A. § 14043e-11.



being of survivors of violence and importantly, have helped to influence how private property owners treat survivors. VAWA 2013's regulations should be maintained.

III. HUD Should Revise the Following Regulations Because They Are “Outdated, Unnecessary, or Ineffective.”

The HUD Regulatory Burden Notice requests comments on regulations that are “outdated, unnecessary, or ineffective.”²³ We recommend that HUD revise its regulations related to Section 3, the demolition/disposition of public housing, lead poisoning prevention, and portability to increase their effectiveness and to ensure compliance with Congressional intent.

A. *HUD should update the Section 3 regulations, at 24 C.F.R part to provide greater opportunity for residents of HUD-assisted housing to receive employment and contracting opportunities that can raise them out of poverty.*

Tenants in HUD-assisted housing have requested that HUD update its weak and ineffective regulations concerning Section 3 for decades. The interim rule has functioned as the placeholder regulation implementing Section 3 of the Housing and Urban Development Act of 1968 since 1994.²⁴ A proposed rule published by HUD for comment on March 27, 2015 took many positive steps in implementing HUD's Section 3 obligations, but the updated rule was never finalized. We encourage HUD's Section 3 regulations to ensure that groups of people who have historically been excluded from certain job opportunities, including women and racial and ethnic minorities, be targeted for employment opportunities provided by Section 3. Secretary Carson has repeatedly urged a move towards self-sufficiency for HUD tenants. Revisions to Section 3 could greatly increase meaningful employment opportunities for low-income tenants as well as other low-income people. Our suggestions for improving the effectiveness of Section 3 are discussed in the Shriver Center's comment letter dated May 24, 2015 and the National Housing Law Project's comment letter, which the Shriver Center joined, dated May 26, 2015.

A few key provisions in the proposed Rule would provide greater opportunities for low-income tenants and other low-income people, and we encourage HUD to maintain these provisions in any future rulemaking:

- Close a loophole allowing businesses to qualify for a Section 3 contracting preference by paying their employees poverty wages.
- Require recipients to ensure that their subrecipient and contractor selection procedures assess bidders' previous compliance and ability to retain Section 3 hires, comply with Section 3 requirements, and provide training opportunities. This requirement would make it more likely that Section 3 will be taken seriously. We urge HUD to facilitate the evaluation of developers and contractors by creating a national database of outcomes on

²³ Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22,344, 22,345 (May 15, 2017).

²⁴ 24 C.F.R. part 135.



completed Section 3 projects, and to facilitate the inclusion of training and retention programs in bid materials by collecting and sharing best procurement practices.

- Focus on apprenticeship utilization by requiring that agreements between recipients and labor unions provide employment, apprenticeship, training, contracting and other opportunities for Section 3 residents. There are numerous examples of successful collaboration between municipalities/PHAs and labor unions that have produced impressive results, but this practice is underutilized.
- Eliminate the \$100,000 per-contract threshold. The existing per-contract threshold makes it possible for contractors to receive a cumulative amount of Section 3 financial assistance in excess of the threshold, yet not have to comply with Section 3. The agency-wide coverage threshold proposed by HUD in the proposed regulations would be simpler and more transparent.

B. HUD should improve the Section 18 Demolition and Disposition Regulations (24 C.F.R. part 970) to maximize tenant consultation, protect tenants who are displaced, and preserve the supply of deeply subsidized housing.

HUD has specific statutory authority over the demolition and disposition of public housing.²⁵ HUD's regulations codify these statutory demolition/disposition provisions and provide many vital safeguards for protecting public housing residents and maintaining the supply of affordable housing for low-income families.²⁶ HUD last updated its demolition and disposition regulations in 2006. The Shriver Center supported the proposed improvements to Part 970 published for comment on October 16, 2014. This proposed rule was never finalized, and, as our comment letter submitted with the National Housing Law Project dated December 15, 2014 demonstrates, a final revision to Part 970 requires still more adjustment to protect residents and preserve public housing by minimizing unwarranted demolitions and dispositions. In implementing revised regulations on the demolition and disposition of public housing, HUD should focus on maintaining the maximum number of units, affordability level of the units (both that the units are targeted to very-low and extremely-low income families and in terms of how rents are calculated), and the tenant protections for existing tenants.

Meaningful tenant involvement around the future of a community is fundamental to all public housing decisions. The demolition and disposition application process should be as transparent as possible so tenants can substantively participate in the development of the PHA's application. The current rule only requires resident consultation at the final application stage, causing many PHAs to treat resident participation as merely a formality and secondary to the PHA's actions. Residents are generally simply told their housing will be demolished – they are not told of their right to raise concerns or object. More importantly, by the time a PHA consults with residents, the PHA has already invested considerable resources into the application process and is unlikely to change course or create meaningful revisions in response to resident consultation. HUD

²⁵ 42 U.S.C. 1437p.

²⁶ 24 C.F.R. part 970.



should require meaningful consultation with the residents, resident groups, and other stakeholders early in and throughout the process.

Additionally, improvements are needed to the resident relocation provision in the current regulations. The proposed rule strengthened these protections, by requiring housing mobility counseling to residents and to show each family at least one comparable unit in a non-minority concentrated area, while still permitting resident choice. More vigorous resident relocation requirements will help further a PHA's goals to de-concentrate poverty and affirmatively further fair housing.

Absent imminent health and safety concerns, HUD should prohibit PHAs from starting to relocate residents before the application is approved and from rushing the relocation process after an application for demolition has been approved. Rushed relocations result in families being unable to choose to live in comparable housing or to move to communities of opportunity. Once or even before HUD approves a demolition application, too many PHAs have tried to hasten the moving process in order to begin the demolition. Families should be allowed sufficient time for mobility counseling and given a reasonable time to move, particularly when the comparable housing is in the form of a Housing Choice Voucher.

Additionally, HUD should seek to preserve as many public housing units as possible by clarifying HUD's grounds for approval of demolition and disposition applications and increasing requirements on PHAs to fully utilize units. For example, the standard for HUD to approve a demolition application are too vague to provide any meaningful guidance.²⁷ Merely listing "serious outstanding capital needs" identifies the majority of older public housing sites in the country, and does not involve an evaluation of other alternatives. The same is true with the phrase "design or site problems." HUD should instead evaluate the process the PHA has undergone to address concerns at the site and the reasons those actions have failed to maintain the development. Otherwise, PHAs have been known to purposefully fail to maintain units in order to make them eligible for demolition. These actions do not serve in the interest are a gross misuse of funds and threaten the health and safety of low-income households who rely upon decent, safe, and sanitary housing. Thus, HUD should identify when PHAs are engaging in deferred maintenance to stop this abuse and identify what actions PHAs should take to preserve the public housing and extend its useful life.

In considering applications for disposition, HUD should push to preserve the maximum number of affordable housing units as possible. HUD should not set arbitrarily low thresholds. One for one replacement should be the expectation, and we encourage HUD to require that PHAs justify why this expectation cannot be met. In reviewing a disposition application, HUD should not only consider the number of replacement units, but whether the resident protection -- such as rents, bedroom sizes, and income targeting, -- are similar to those at the original public housing site. A

²⁷ 24 C.F.R. § 970.15(a)(1).



one for one replacement requirement can also serve to deter PHAs from purposefully failing to maintain housing in order to tear it down and not replace.

Finally, when considering the number of replacement units required in an application for demolition or disposition, HUD should require a look-back period for vacancies to guard against purposeful deferred maintenance and the failure to fully lease to tenants all available public housing units. We further encourage HUD to remove the existing text that prohibits PHAs from renting units at turnover and encourage HUD to require that PHAs lease-up units while HUD is considering an application for demolition or disposition. Section 970.25(b) should be amended to read, “a PHA shall lease public housing units at turnover...” while the demolition or disposition application is pending.²⁸ Otherwise, a PHA may be motivated to actively remove tenants from the development, through eviction or other means, while the application is pending. Vacancies frequently contribute to the decline of a public housing development and threaten the health and safety other existing tenants. We also suggest adding a provision that requires PHAs to repair the units at turnover to keep them decent, safe, and sanitary, consistent with the Annual Contributions Contract (ACC).

C. HUD should maintain and strengthen the Lead Safe Housing Rule (24 C.F.R. part 35) to better protect children across HUD programs.

A Petition for Rulemaking co-authored by the Shriver Center and Loyola University Chicago School of Law’s Health Justice Project, and submitted on behalf of a coalition of scientists, medical providers, public health experts, advocates, national nonprofits, medical-legal partnerships, and civil legal aid groups urged critical amendments to the Lead Safe Housing Rule²⁹ and raised awareness about the lead epidemic in federally assisted housing. In response, HUD finalized a rule in January 2017 designed to provide greater protection to children exposed to lead hazards. We urge HUD to maintain these critical improvements to the Lead Safe Housing Rule.

Prior to the promulgation of this rule, antiquated federal regulations required that a child develop an elevated blood lead level of 20 micrograms per deciliter — *four times* the Centers for Disease Control and Prevention (CDC) standard — before any corrective intervention was required. HUD’s definition of lead poisoning under the final Lead Safe Housing Rule now aligns with the CDC’s standards (for the first time in two decades) and the new rule includes primary prevention strategies that will protect the millions of children in federally assisted housing from lead poisoning.

HUD can, and should, do more to protect children. These updated regulations will not fully prevent children from being lead poisoned in federally assisted housing. The CDC’s longstanding position is that, “because no level of lead in a child’s blood can be specified as safe,

²⁸ 24 C.F.R. § 970.25(b).

²⁹ 24 C.F.R. § 35 *et seq.*



primary prevention must serve as the foundation of the effort.”³⁰ Thus, primary prevention should guide HUD’s approach to future amendments to the regulation. We direct you to our comments on the proposed rule submitted on October 31, 2017 (Docket No. FR-5816-P-01) and the petition for rulemaking submitted on February 11, 2016 for more information.

In recognition of increasing reports of lead poisoning in federally assisted housing and lack of compliance with lead poisoning prevention laws, Congress included numerous directions to HUD in the recently passed Consolidated Appropriations Act of 2017, including:

- improved lead hazard inspections;
- preference for UPCS inspections;
- updated lead hazard definitions based on health standards;
- removing the zero-bedroom dwelling unit exemption;
- identification of lead service lines;
- increased data collection, training, compliance, and oversight.

Congress has recognized that more is needed to protect children from lead poisoning, and has taken action accordingly. We concur with the concerns regarding the Lead Safe Housing Rule raised by Loyola University Chicago School of Law’s Health Justice Project (HJP) and the Green and Healthy Homes Initiative (GHHI)’s comments submitted in response to the regulatory reform agenda. Please see HJP and GHHI’s comments for a more complete discussion of the concerns with the current lead rule.

At a minimum, HUD should conduct risk assessments in all its inspection programs: Under the current regulations, children in the HCV program and project-based Section 8 buildings receiving less than \$5,000 per unit still must be lead poisoned and suffer permanent neurological damage before any interventions are triggered. To ensure that no families move into a unit with a lead hazard, it is critical that HUD require robust lead hazard evaluation throughout its inspection programs. Current regulations only maintain the use of visual assessments in Housing Quality Standards (HQS) Inspections, despite evidence of the practice’s inability to identify the majority of lead hazards that result in lead poisoning. HUD must stop relying on visual assessment alone and replace it with the more accurate evaluation tool of risk assessment in all pre-1978 housing. A risk assessment should include the collection of dust, dirt, water, and paint samples in homes.

In the 2017 Consolidated Appropriations Act, Congress clarified that HUD has the authority to provide more rigorous standards, stating, “HUD has the statutory authority necessary to require more stringent inspections when checking homes for lead paint. HUD’s current visual lead inspections have proven insufficient, and more rigorous standards, such as requiring risk

³⁰ Ctrs. for Disease Control and Prevention, Preventing Lead Poisoning in Young Children: A Statement by the Centers for Disease Control and Prevention (Aug. 2005), <http://www.cdc.gov/nceh/lead/publications/PrevLeadPoisoning.pdf>.



assessments prior to a family moving into a home, should be implemented to ensure that children living in federally assisted housing are protected from lead poisoning.”³¹ A continued reliance on visual assessments would not only ensure that lead hazard control occurs only after the child suffers permanent harm, it would also contravene Congressional intent. To ensure that no families move into a unit with a lead hazard, it is critical that HUD amend its regulations to replace visual assessment with the evaluation tool of risk assessment in all pre-1978 construction in all programs. Lead hazard inspections should be conducted in all units whether or not a child is expected to reside in them. This is an important preventative measure, because children are often regular visitors to relatives’ or neighbors’ homes that do not have a permanent child resident.

HUD must update its lead-dust, lead soil, and lead paint definitions: Currently, HUD’s standards for lead-paint, lead-dust, and lead-soil are not based in the prevailing science. HUD has the express authority to revise its standard for lead-based paint in housing constructed prior to 1978.³² Without health-based standards, risk assessments prior to occupancy and clearance testing following interim controls, renovation, or abatement are unreliable and potentially place occupants in danger.³³ 42 U.S.C. § 4822(c) directs HUD to periodically review its standards as the technology makes lower detection feasible and the medical evidence warrants a lower level. HUD last reviewed these standards in 1992, although the technology and science on lead-based paint have dramatically improved since then. The technological advances and overwhelming medical evidence about the dangers of lead poisoning—even at the lowest level of exposure—necessitate that HUD update the lead-based paint definition in any future rule.

Amend the Lead Safe Housing Rule to Extend Protections to 0-Bedroom Dwelling Units: In May 2017, Congress amended the Lead-Based Paint Poisoning Prevention Act by removing the exception for zero-bedroom dwellings, in which any child under the age of six resides or is expected to reside, from the definition of target housing. In many cities where affordable housing is scarce, families and single parent households commonly live in efficiency, or zero-bedroom dwelling units, where their children could be exposed to lead-based paint hazards in pre-1978 housing. To protect these children and to comply with Title X, as amended, HUD must update the Lead Safe Housing Rule by removing “zero-bedroom dwelling unit” from the exemptions to the rule.³⁴

Include the identification of lead risks from lead water service lines in Environmental Investigations and the replacement of any lead service lines: In the 2017 Consolidated Appropriations Act, Congress dedicated significant funding to address lead-contaminated water and directed the General Accountability Office to assess the number of lead service lines in the

³¹ H. Rep. No. 114-606, at 94 (2017).

³² 42 U.S.C. § 4822(c).

³³ Bruce Lanphear et al., Lead-Contaminated House Dust and Urban Children’s Blood Lead Levels, 86 AM. J. PUB. HEALTH 1416, 1420 (1996).

³⁴ 24 C.F.R. §§ 35.100, 35.115.



United States.³⁵ It is critical that HUD identify lead exposure caused by lead service lines and subsequent lead in drinking water as part of its Environmental Investigations and ensure that lead service lines are eliminated from federally assisted housing. While HUD guidelines have long recommended sampling water in limited circumstances, the recent findings of lead contamination in water in over 1,500 water systems, serving more than three million Americans across the country, increased knowledge and highlighted the importance eliminating exposure to the neurotoxin in all forms. HUD should require designated parties to determine the presence or absence of a lead service line and develop a timeframe for replacing it.

Increase oversight and data collection to ensure PHAs are in compliance with the lead poisoning prevention laws: Congress recently expressed extreme concern over HUD's oversight and quality assurance capacity, especially considering media coverage related to lead poisoning in federally assisted housing, despite a mandate to abate public housing and protect residents from lead poisoning. Congress recently directed HUD to establish and implement a process that improves data collection and analysis of actions PHAs are taking to comply with lead-based paint regulations in housing choice voucher units by March 31, 2017.³⁶ Congress also directed HUD to report on the incidences of lead poisoning in federally assisted housing, specifically HCV Program. In addition, Congress directs HUD to issue Guidance and provide trainings on recent amendments to the Lead Safe Housing Rule and best practices in applying lead-safe standards, especially for maintenance and property management staff.

The overwhelming cost benefits of preventing lead poisoning are undisputed. Today, the scientific research proves, and EPA, Children's Health Protection Advisory Committee, the CDC, and the American Academy of Pediatrics, among others agree: **no blood lead level is safe and children require a wide margin of safety.**³⁷ Children and adults exposed to the neurotoxin regularly experience an elevated risk for permanent brain damage and disability. Blood lead levels well below 5 µg/dL can be harmful and result in brain damage.³⁸ Lead poisoning causes severe and permanent biological and neurological damage that affects cognition, behavior, bodily functions, growth, and development. Once a child is lead poisoned, the harm is immediate and permanent and no clinical or public health interventions can reverse it.³⁹ Overall, elevated blood lead levels cause multiple and irreversible health conditions that have a significant cost to society and the individual. Gould estimated the total costs for medical treatment, lost earnings, special education, lead-linked ADHD, and criminal activity resulting from lead poisoning to be a total of \$192 to \$270 billion. Gould concluded that, for just one cohort of children, the "net

³⁵ H. Rep. No. 115-632, at 5 (2017).

³⁶ S. Rep. No. 114-243, at 97-98 (2017).

³⁷ H. Rep. No. 115-632, at 5 (2017).

³⁸ National Toxicology Program, U.S. Dept. of Health and Human Services, *Health-Effects from Low-Level Lead* at xviii-xix (June 2012), <https://perma.cc/UJ8H-R9TQ>

³⁹ US GOV'T ACCOUNTABILITY OFFICE, GAO-73-577, LEAD AND CHILDREN'S HEALTH 11 (2007).



benefit of lead hazard control ranges from \$181 to \$269 billion, resulting in a return of \$17-\$221 for each dollar invested in lead hazard control.”⁴⁰

D. HUD should improve the portability regulations (24 C.F.R. 353-355) to increase housing choice for families and to reduce administrative burdens on PHAs.

The current portability regulations do not effectively promote housing choice for HCV families. HUD’s new portability rule revised the portability regulations with the goal of reducing the burden on participating families and streamlining the portability process for PHAs.⁴¹ Portability is a key feature of tenant mobility and it provides a crucial avenue for tenants seeking the ability to make opportunity moves with the HCV program. While the rule made important changes to the portability process, it failed to remove significant barriers to housing choice and reducing administrative burdens on PHAs.

As HUD analyzes regulations for modification, it should consider revising the portability rule to promote housing choice and mobility, the cornerstone of the voucher program. Key revisions would also increase the effectiveness of the voucher program and reduce administrative burdens on PHAs. We urge HUD to adopt the following recommendations in a revision to the portability rules:

- Prohibit receiving PHAs from re-screening program participants who are seeking to port their vouchers to other PHAs.⁴²
- Require information about porting to be shared with families regularly, including at the initial briefing and after a request to port is submitted to better facilitate understanding of mobility in the HCV program.
- Allow ports where there may be loose ends from a prior tenancy that do not call into question the tenant’s eligibility for the program. This would promote strengthen the credibility of the HCV program among prospective landlords and would prevent temporary homelessness among HCV participants.
- Require that PHAs allow tenants to search for a new apartment without giving a definitive 30-day notice of intent to vacate.

E. HUD Should Finalize the Enhanced Voucher Regulations.

In 1999, Congress enacted Unified Enhanced Voucher authority to protect tenants residing in certain properties undergoing conversion actions. Since then, HUD has failed to promulgate regulations implementing this authority. In October of 2016, HUD issued a proposed enhanced

⁴⁰ *Id.* at 1665-6.

⁴¹ 81 Fed. Reg. 74372 (Oct. 26, 2016).

⁴² See the following authority for prohibiting receiving PHAs from conducting elective screening of current participants. 42 U.S.C. § 1437f(o)(6)(B); 24 C.F.R. § 982.307(a)(1); 64 Fed. Reg. 49,656, 49,657 (Sept. 14, 1999); 64 Fed. Reg. 56,894 (Oct. 21, 1999).





voucher regulation.⁴³ This proposed regulation had several significant shortfalls, including its failure to ensure that all eligible tenants will receive enhanced vouchers and its failure to protect the tenants' statutory right to remain. Our suggestions for improving the effectiveness of the Enhanced Voucher regulations are discussed in comments joined by the Shriver Center and submitted by the National Housing Law Project. Most importantly, the regulation should require that all Enhanced Voucher tenants receive a lease addendum which is essential to effectuate these long-standing protections, so that tenants, owners, PHAs, and courts know that tenants have enhanced vouchers with certain special protections. To effectuate Congress' intent that tenants not be displaced by conversions, HUD should promptly issue a required lease addendum explaining that the tenant has an enhanced voucher with specific rights and protections.

Thank you in advance for your time and consideration of our comments and recommendations in response to the notice entitled "Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda." If you have any questions, you may contact Kate Walz, the Shriver Center's Director of Housing Justice/Director of Litigation by phone at (312) 368-2679 or by email at katewalz@povertylaw.org.

Sincerely,

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Director of Housing Justice/Director of Litigation
Sargent Shriver National Center on Poverty Law

And the following members of the Legal Impact Network:

- Center for Civil Justice (Michigan)
- Colorado Center on Law and Policy
- Columbia Legal Services (Washington)
- Community Legal Services of Philadelphia
- Empire Justice Center (New York)
- Florida Legal Services
- Hawaii Appleseed
- Kansas Appleseed
- Kentucky Equal Justice Center
- Legal Aid Justice Center (Virginia)
- Massachusetts Law Reform Institute
- Mississippi Center for Justice
- North Carolina Justice Center
- Ohio Poverty Law Center
- Public Justice Center (Maryland)
- South Carolina Appleseed

⁴³ 81 Fed. Reg. 74372 (Oct. 26, 2016).





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