

Proudly Opening the Doors to Fair Housing

HUD Addresses LGBT Housing Discrimination

by J. Frank Vespa-Papaleo and Kenneth J. Carroll

"The story of HUD is a story of expanding civil rights—a story that begins with a painful history, but leaves a proud legacy: one of opening the doors of America's homes to all Americans."

HUD SECRETARY SHAUN DONOVAN
NATIONAL CENTER FOR
TRANSGENDER EQUALITY CONFERENCE
NOV. 15, 2011

In 1965, the United States Department of Housing and Urban Development (HUD) was created as a cabinet-level agency to focus on increasing housing opportunities throughout the nation. Three years later, and only days after the assassination of Martin Luther King Jr., Congress enacted the federal Fair Housing Act¹ to prohibit discrimination in the sale, leasing, and financing of housing on the bases of race, color, national origin, and religion. In 1974, Congress amended the Fair Housing Act to add sex as a prohibited basis of discrimination. The Fair Housing Act was further amended in 1988 to cover discrimination on the bases of familial status and disability.

Since the Fair Housing Act does not explicitly include sexual orientation and gender identity as prohibited bases, doors have remained closed to millions of Americans who identify as lesbian, gay, bisexual or transgender (LGBT). Now, President Barack Obama's administration, including HUD Secretary Shaun Donovan, have begun to address this issue.

On Feb. 3, 2012, HUD promulgated a final regulation titled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity."² The LGBT Equal Access Rule, as it is commonly referred to, requires housing assisted by HUD, housing subject to mortgages insured by the Federal

Housing Administration (FHA), and FHA-insured mortgages to be provided without regard to actual or perceived sexual orientation, gender identity, or marital status. In addition to the new regulation, HUD now recognizes its authority under the Fair Housing Act to pursue certain complaints of housing discrimination from LGBT individuals, including when discriminatory actions are alleged to be motivated by a person's non-conformance with gender stereotypes.

The Need to Address LGBT Housing Discrimination

HUD is aware of evidence of LGBT housing instability and housing discrimination. A 2007 Michigan study³ showed a high rate of differential treatment based on sexual orientation. The study utilized fair housing testing,⁴ in which individuals posing as same-sex couples and opposite-sex couples sought rental housing in Michigan. The tests of 120 housing providers revealed unfavorable treatment against the same-sex couples in 32 of the 120 tests, or 26 percent of the time. The same-sex couple testers received unfavorable treatment on issues such as whether housing was available, the rent amount, application fees, and levels of encouragement, as compared to the opposite-sex couple testers. The same-sex couple testers were also subjected to offensive comments.

A recent national survey of 6,450 transgender individuals indicated significant levels of housing instability among transgender persons. According to the study, published by the National Gay and Lesbian Task Force and the National Center for Transgender Equality in 2011,⁵ 19 percent of those surveyed reported being refused a house or apartment because of gender identity; 19 percent reported being homeless at some point in their lives because of gender identity; 55 percent of those trying to access shelters were harassed; 29 percent were turned

away from shelters altogether; and 22 percent were sexually assaulted by residents or staff of a shelter.⁶

Many states and localities throughout the country are recognizing the need to address LGBT housing discrimination by enacting laws and ordinances that explicitly prohibit sexual orientation and gender identity housing discrimination. In New Jersey, for example, the Law Against Discrimination has included sexual orientation in its housing discrimination protections since 1991, and gender identity or expression since 2006.⁷ HUD has certified the New Jersey Law Against Discrimination as substantially equivalent to the Fair Housing Act, and refers housing discrimination complaints to the New Jersey Division of Civil Rights for action under the state law. Through its notice of funding availability, HUD now requires recipients of its discretionary funding to be in compliance with certified substantially equivalent fair housing laws that, like New Jersey's, prohibit sexual orientation and gender identity housing discrimination.⁸

As the nation's housing agency, HUD is charged with the federal goal of providing decent housing and a suitable living environment for all.⁹ Accordingly, HUD is utilizing its authority to ensure LGBT equal access to housing and HUD programs.

The LGBT Equal Access Rule

On Jan. 24, 2011, HUD published a rule proposing regulatory changes to ensure LGBT individuals have equal access to housing assisted by HUD or subject to a mortgage that is insured by HUD, and to FHA loans.¹⁰ Following a public comment period and revisions to the proposed rule, the final LGBT Equal Access Rule was published on Feb. 3, 2012, and went into effect on March 5, 2012.¹¹ The substance of the LGBT Equal Access Rule focuses on four major areas: 1) requiring equal access to HUD-funded and HUD-insured programs; 2) clarifying definitions of "family" and "household" to ensure coverage for LGBT persons; 3) prohibiting

certain inquiries; and 4) prohibiting eligibility determinations for FHA-insured loans on factors unrelated to income.

General Equal Access Provision

The first main substantive provision of the LGBT Equal Access Rule is an addition to Part 5 of HUD's regulations. This includes general program and civil rights requirements that cover all HUD programs, except as may be otherwise noted in a specific program's regulation, or unless inconsistent with a program's authorizing statute. To that section, HUD has added a broad provision titled "Equal Access to HUD-Assisted and Insured Housing."¹²

The provision states that a "determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status."¹³

For the purposes of the rule, federally assisted housing includes, but is not limited to, public housing, Section 8 project-based or tenant-based housing, FHA-insured loans, and housing funded under the Community Development Block Grant, Housing Opportunities for People with AIDS (HOPWA), Section 202 Supportive Housing for the Elderly (202), and Section 811 Supportive Housing for Persons with Disabilities (811).¹⁴

The general equal access provision was not in the proposed LGBT Equal Access Rule. In response to suggestions received during the public comment period, and to ensure rule coverage of all programmatic equal access issues, HUD added the general equal access provision to the final rule.

Definitions of Family and Household

The LGBT Equal Access Rule also clar-

ifies the definition of family and household in various HUD regulations that pertain to eligibility for federally assisted housing. In many HUD core programs, eligibility determinations require identifying the household or family members. The more inclusive definition of family or household enumerated in the LGBT Equal Access Rule ensures that eligibility decisions are made without regard to sexual orientation, gender identity, or marital status.

Historically, long before the LGBT Equal Access Rule, the term "family" in HUD programs had broad meaning. The LGBT Equal Access Rule does not change the definition of family but merely adds language to clarify that it includes individuals regardless of actual or perceived sexual orientation, gender identity, or marital status of the family members.

In the public housing and Section 8 contexts, for example, local housing authorities must adopt HUD's more inclusive definition of family in regard to beneficiaries of public housing programs—that is, who is eligible for a housing voucher, who can live in public housing, who can be added to a housing voucher, and who would be considered a family member, as opposed to an unauthorized guest, in a public housing unit. Explicitly stating that family includes people regardless of sexual orientation, gender identity, or marital status means that local housing authorities will not be able to exclude otherwise eligible same-sex partners or other LGBT family members from their HUD-funded programs.

Specifically, the LGBT Equal Access Rule amends the family definition for Section 8 and public housing, 24 C.F.R. § 5.403, to provide that "Family includes, but is not limited to, the following, regardless of actual or perceived sexual orientation, gender identity, or marital status: (1) A single person... [and] (2) A group of persons residing together..."¹⁵

The definition at 24 C.F.R. § 5.403

defines family only for purposes of Section 8 and public housing assistance programs. Other HUD regulatory definitions of family refer back to Section 5.403 for their family definition. HUD's supportive housing programs for the elderly and people with disabilities, also known as 202/811, do not include definitions of family. However, eligibility regulations for 202/811 programs were amended to refer back to the LGBT inclusive language of 24 C.F.R. § 5.403.¹⁶ In the case of the Community Development Block Grant program, LGBT-inclusive language was added to the definition of household.¹⁷

It is important to note that these clarifications have no impact on other program eligibility requirements. Like any other family, an LGBT family or a family perceived to be LGBT, must meet all program requirements, including income qualifications, annual certifications, and

ensuring that all family members are named on the lease.¹⁸

Inquiries

In addition to the equal access and definitional provisions, the LGBT Equal Access Rule prohibits inquiries "about the sexual orientation or gender identity of an applicant for, or occupant of, HUD-assisted housing or housing whose financing is insured by HUD, whether renter- or owner-occupied, for the purposes of determining eligibility for the housing or otherwise making such housing available."¹⁹ It does not prohibit inquiries about a person's marital status.

For example, a public housing rental manager may not ask an applicant or tenant about his or her sexual orientation or gender identity when determining whether to approve a rental application or renew a lease for Section 8 housing.

It is important to note that the

inquiry provision does not prohibit any individual from voluntarily self-identifying sexual orientation or gender identity. The rule also recognizes exceptions to the inquiry prohibition.²⁰ The rule permits lawful inquiries of an applicant or occupant's sex where the housing provided or to be provided is temporary, emergency shelter that involves the sharing of sleeping areas or bathrooms. The rule does not prohibit inquiries made for the purpose of determining the number of bedrooms to which a household may be entitled. The rule also permits the collection of voluntary and anonymous reporting of sexual orientation or gender identity for compliance with state, local, or federal data collection requirements.

FHA-approved Lenders and FHA-insured Loans

Finally, the rule prohibits lenders

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approved by the Federal Housing Administration from basing eligibility for an FHA-insured loan on factors unrelated to income eligibility, such as actual or perceived sexual orientation or gender identity. Prior to the LGBT Equal Access Rule, the FHA regulations listed race, color, religion, sex, national origin, familial status, disability, marital status, source of income, and location of property as prohibited grounds upon which to base eligibility determinations.

Specifically, the regulation for single-family mortgage insurance has been amended to provide that determinations about the adequacy of a mortgagor's income for FHA-insured loans "shall be made in a uniform manner without regard to race, color, religion, sex, national origin, familial status, handicap, marital status, actual or perceived sexual orientation, gender identity, source of income of the mortgagor, or location of the property."²¹

This means, for example, that an FHA-approved lender cannot refuse a federally insured mortgage to a same-sex couple who is not married but is otherwise eligible. Recently, HUD investigated a claim that Bank of America (BOA) violated this provision of the LGBT Equal Access Rule when it denied an FHA-insured loan to an otherwise eligible lesbian in Florida. In this case, because the woman's partner was not employed, she enlisted her partner's mother as the co-applicant on the loan. The couple claimed they worked with BOA for several weeks to provide all of the necessary loan application documents, and BOA assured the applicant that she would likely receive the mortgage. One business day prior to closing, BOA allegedly denied the mortgage because it did not consider the loan applicant and co-applicant directly related, since the applicant and her partner were not married and Florida does not recognize same-sex marriage. As a result of BOA's actions, the couple was not able to close on the loan.

In a historic settlement reached on Nov. 1, 2012, BOA agreed to pay HUD \$7,500. This represents the maximum penalty HUD could have imposed on BOA for the alleged violation if HUD had successfully brought the matter before the Mortgagee Review Board.²² As part of the settlement, BOA also agreed to notify all of its residential mortgage loan originators, processors and underwriters of the settlement agreement and include instruction on the LGBT Equal Access Rule in its fair lending training.²³

The BOA case is an example of HUD's efforts to ensure compliance with the LGBT Equal Access Rule by working with its recipients, FHA-approved lenders, and FHA-insured housing providers and, when necessary, pursuing regulatory enforcement. To the extent possible, HUD will also continue to collaborate with state and local fair housing partners, including the New Jersey Division on Civil Rights, to investigate housing discrimination complaints involving LGBT individuals.

Utilizing Fair Housing Act Protections

While the Fair Housing Act does not explicitly prohibit discrimination on the basis of sexual orientation or gender identity, certain complaints involving sexual orientation or gender identity housing discrimination may nonetheless be covered under the Fair Housing Act.

For example, HUD may pursue certain matters under the Fair Housing Act's prohibition of sex discrimination. Beginning with the United States Supreme Court decision in *Price Waterhouse v. Hopkins*,²⁴ courts have routinely recognized discrimination because of non-conformity with gender stereotypes as prohibited discrimination because of sex under Title VII of the Civil Rights Act of 1964.²⁵ Since courts look to Title VII precedent in interpreting the Fair Housing Act,²⁶ HUD guidance issued on June 15, 2010, extended this recognition to complaints filed under the Fair Housing Act that involve allegations

of discrimination based on gender non-conformity.²⁷ For example, if a female applicant for rental housing is rejected because she dresses in a way that appears masculine to the rental agent, the case is jurisdictional under the Fair Housing Act as sex discrimination because the denial was based on non-conformity with gender stereotypes.

Another avenue of enforcement recognized in HUD's 2010 guidance is the Fair Housing Act's protection from disability discrimination.²⁸ This can include being "regarded as" having a disability, as well as having a disability or a record of having one. For example, if a gay man alleges he is being evicted because his landlord believes he will infect other tenants with HIV, the allegation is jurisdictional under the Fair Housing Act as disability discrimination because the man is regarded as having a disability, HIV/AIDS.

Since issuing the 2010 guidance, HUD and its state and local fair housing partners have pursued close to 200 housing discrimination complaints from LGBT persons under the Fair Housing Act. Most have involved allegations of discrimination because of non-conformity with gender stereotypes, especially from transgender and gender non-conforming persons alleging discrimination and harassment due to non-conformance with gender stereotypes.

Additional information and resources on this topic can be found at www.HUD.gov/lgbthousingdiscrimination. To file a housing discrimination complaint with HUD, individuals and attorneys may contact their local HUD office, which in New Jersey would be HUD's Office of Fair Housing and Equal Opportunity in Newark. ☪

Endnotes

1. 42 U.S.C. § 3601.
2. *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*, 77 Fed. Reg. 5662

- (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).
3. *Sexual Orientation and Housing Discrimination in Michigan: A Report of Michigan's Fair Housing Centers* (Jan. 2007), available at www.fhcmichigan.org/images/Arcus_web1.pdf (last viewed on March 5, 2013).
 4. "Testers" are individuals who, without any *bona fide* intent to rent or purchase a home, apartment, or other dwelling, pose as prospective buyers or renters of real estate for the purpose of gathering information, which may indicate whether a housing provider is complying with fair housing laws.
 5. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), available at www.the-taskforce.org/downloads/reports/reports/ntds_full.pdf (last viewed on March 5, 2013).
 6. *Id.*
 7. N.J.S.A. 10:5-1, *et seq.*
 8. Notice of HUD's Fiscal Year 2013 Notice of Funding Availability, Docket No. FR-5700-N-01 (July 16, 2012).
 9. *See, e.g.*, Section 2 of the Housing Act of 1949, 42 U.S.C. § 1441.
 10. *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*; Proposed Rule, 76 Fed. Reg. 4194 (Jan. 24, 2011) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 570, 574, and 982).
 11. 77 Fed. Reg. 5662.
 12. 24 C.F.R. § 5.105(a)(2).
 13. *Id.*
 14. 24 C.F.R. § 5.100.
 15. 24 C.F.R. § 5.403.
 16. 24 C.F.R. § 891.
 17. 24 C.F.R. § 570.3.
 18. 77 Fed. Reg. 5662.
 19. 24 C.F.R. § 5.105(a)(2)(ii).
 20. 24 C.F.R. § 5.105.
 21. 24 C.F.R. § 203.33(b).
 22. 12 U.S.C. § 1735f-14; 24 C.F.R. § 30.35 (2012).
 23. Settlement agreement *In the Matter of Bank of American, N.A.*, HUD Docket No.: 12-1657-MR, available at portal.hud.gov/hudportal/documents/hud-doc?id=13boasettlement.pdf (last viewed on March 5, 2013).
 24. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 268-69 (1989)(sex stereotyping is actionable under Title VII).
 25. 42 U.S.C. 2000e, *et seq.*; *see, e.g.*, *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1039 (8th Cir.2010) (female front desk worker at hotel claimed she was fired because she lacked "prettiness" and a "Midwestern girl look" stated a Title VII claim); *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 292 (3d Cir. 2009) (man who alleged harassment because he talked in a high voice, walked in an effeminate manner, refused to curse, filed his nails and crossed his legs stated Title VII claim based on sex stereotyping); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (employer that fails to promote female employee based on assumption that she will neglect job duties in favor of children violates Title VII); *see also, Mia May v. Eric Holder*, EEOC Appeal No. 0120120821 (April 20, 2012) (discrimination against transgender individual is sex discrimination under Title VII).
 26. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988) (Title VII analysis is persuasive in interpreting Fair Housing Act).
 27. *See* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last viewed on March 5, 2013).
 28. *Id.*
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