

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500
<http://www.regulations.gov>

June 10, 2024

RE: FR-6362-P-01 Reducing Barriers to HUD-Assisted Housing

To Whom It May Concern:

The members of the Safe Housing Task Force submit these comments to the *Notice of Proposed Rulemaking - Reducing Barriers to HUD-Assisted Housing* (“NPRM” or “proposed rule”), Docket Number FR-6362-P-01. The Safe Housing Task Force is a collective of national, state, and local organizations and advocates devoted to advocating on behalf of and providing services to survivors of domestic violence, dating violence, sexual assault, stalking, and human trafficking. Many of the Safe Housing Task Force members or individuals within their organizations also identify as survivors and have lived experiences relevant to this notice of proposed rulemaking. Safe Housing Task Force Members also drafted key recommendations pertaining to housing protections in the Violence Against Women Act (“VAWA”) and continue to advance the law’s implementation in their training, technical assistance, direct advocacy and policy reform. We applaud the proposed rule’s direction and believe the inclusion of survivor needs will improve the rule’s efficacy and reach.

We write these comments to urge the U.S. Department of Housing and Urban Development (“HUD”) to consider and specifically acknowledge the experiences of survivors, both when they are criminalized and when they are victimized. The proposed rule must acknowledge VAWA protections and gender-based violence, and give guidance on how housing providers will be expected to competently and safely comply with both VAWA and these regulations. HUD must also speak to how these two important goals - reducing housing insecurity among survivors of gender-based violence and reducing barriers to HUD-assisted housing for persons in contact with the criminal legal system - can work together. To do this, HUD must schedule listening sessions with gender-based violence experts, survivors, and others to discuss best practices and model policies.

The Proposed Rule Should Discuss and Recognize the Experiences of Criminalized Survivors

We ask that the proposed rule discuss and recognize the experiences of criminalized survivors, lifting up how criminal contact occurs in different ways among different kinds of victimization. The rule should also recognize the connection between victimization, criminalization, trauma, and the corresponding increased risk of homelessness and housing insecurity. A summary of the research on incarcerated women demonstrates a clear connection between experiencing

violence and abuse and being involved with the criminal legal system. The summary finds that experiences of physical or sexual violence in childhood are reported by approximately 60-70% of incarcerated women or girls, and experiences of adulthood intimate partner violence are reported by approximately 70-80% of incarcerated women.¹ Advocates consistently note that criminal records continue to exclude survivors from housing supports and programs. Survivors are often criminalized for the acts of violence against them and the steps they take to survive. Often survivors may be justice-impacted when they are defending themselves from violence or when perpetrators of harm use the criminal system as a tool of violence against them. In other cases, a survivor may be forced into criminal conduct or the underlying conduct may be related to ongoing trauma resulting from their victimization. Criminal activity may also have been necessary for survival or to gain economic and physical independence from the harm-doer. For example, a survivor may be coerced into committing fraudulent financial activity or may engage in this type of activity to meet basic needs when trying to flee violence. Perpetrators of violence may also leverage substance use as a mechanism to maintain power and control over a survivor. This can also contribute to a survivor's continuous contact with law enforcement and the criminal legal system. Other survivors of gender based violence turn to substance use to escape ongoing, unaddressed trauma and should not be penalized for past coping mechanisms that have since been mitigated.

Contact with the criminal legal system, especially for BIPOC and LGBTQIA+ survivors, further complicates their ability to gain a stable footing, which often leads to a never-ending cycle of homelessness and further violence. Increased contact with law enforcement because of homelessness further destabilizes survivors and can result in the loss of their children to the child welfare system or the few possessions they may have left. It can also impact their ability to secure employment, thus hindering their ability to stabilize financially and secure stable housing. Housing stability through access to safe and affordable housing, can profoundly impact a survivor's ability to recover and heal.

The Proposed Rule Should Expressly Recognize VAWA and its implementing regulations and Describe How They Intersect with the Regulations

It is critical that HUD lift up how VAWA rules should also be recognized and how they intersect with the proposed rule. For example, under VAWA, a covered housing provider must provide a VAWA Notice of Occupancy Rights and HUD VAWA Certification form to all applicants and tenants at admission, denial, termination, or eviction. 81 Fed. Reg. 80724, 80724 (Nov. 16, 2016); 24 C.F.R. § 5.2005(a)(i), (ii). With the proposed rule, housing providers will now also have to undertake a fact-specific and individualized assessment of applicants denied housing due to a criminal history. 89 Fed. Reg. 25332, 25333 (April 10, 2024). In many cases, the survivor may be the person accused of contact with the criminal legal system and that contact may be as a result of their victimization.

¹ Dichter, M.E and Ostoff, S. (2015). *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*. VAWnet.org

Given this common connection between gender-based violence and criminalization, HUD should provide explicit guidance to covered housing providers, tenants, and applicants on how to comply with both laws, especially in the multiple ways they intersect. HUD must also ensure that survivors continue to benefit from VAWA's protections that were designed to address their specific needs and safety concerns, such as documentation requirements, the adverse factors framework, and confidentiality.

For example, when a survivor is denied housing or threatened with termination or eviction, covered housing providers must comply with their dual obligations and will require guidance on how a survivor may qualify both for VAWA's protections through the adverse factors framework if their criminal involvement is related to their status, *see* 81 Fed. Reg. at 80728, PIH Notice 2017-08, *and* for protections under this proposed rule as information about their victimization is considered evidence of mitigating circumstances. 89 Fed. Reg. at 25358 (Question #4). The adverse factors framework must be expressly recognized as an appropriate example of evidence in mitigation. This also means that HUD must make clear that in the event that a survivor is denied housing or threatened with termination or eviction as a result of contact with the criminal legal system, covered housing providers must comply with VAWA's prohibition against mandating third-party documentation unless there is conflicting information, 24 C.F.R. § 5.2007(b)(2).

The proposed rule must also take into account VAWA's underlying requirements with regard to confidentiality, family break-up processes and emergency transfers. Covered housing providers must be advised of VAWA's strict confidentiality requirements, which prohibit third-party fact finding by the housing provider and obligate the housing provider to maintain any information submitted in strict confidence. 24 C.F.R. § 5.2007(c). This is particularly important when a survivor is alleging that someone else in the home or on the application forced them into criminal conduct, that they were defending themselves against the person harming them, or that the criminal legal system was used against them as a further tool for abuse, power, and control.

At the same time, survivors often need to remove someone harming them from their home. They do this by exercising their rights under a housing provider's VAWA family break-up and lease bifurcation policies. 24 C.F.R. § 5.2009; PIH Notice 2017-08. Under this policy, the survivor seeks to remove the person harming them from the home and subsidy. Generally, a survivor makes the request and provides proof of their VAWA status. The person accused is given a notice of termination and an opportunity to be heard. If the person accused denies the allegations, both parties may be required to submit third-party documentation, pursuant to the VAWA documentation requirements. 24 C.F.R. § 5.2007(b)(2). The housing provider then decides who retains assistance, but VAWA regulations in the voucher program say that the victim must retain assistance. 24 C.F.R. § 982.315(a)(2).

HUD must work with the survivor community and criminal legal system advocates and experts to ensure that the family break-up policy can work for everyone - the survivor and the person accused of doing harm. We strongly encourage HUD to convene listening sessions with gender-based violence experts, survivors, and others to better understand the complexities of

family break-up policies currently and to understand what reform is necessary. Engaging gender-based violence experts in listening sessions builds on the practice established before the passage of VAWA 2005, which then ultimately included for the first time the critical housing protections survivors have relied upon for nearly two decades. Listening sessions should include discussions on both process considerations for the survivor and perpetrator (e.g., access to information, notice of procedure, hearing procedure), as well as how to address safety and trauma concerns throughout the decision-making process.

In advance of these listening sessions, there are some initial policy considerations with regard to the proposed rule and the VAWA family break-up. First, housing providers must comply with VAWA requirements including proof, confidentiality, eviction, and admission requirements when there is an allegation of gender-based violence, and they must also consult with gender-based violence experts as they develop and implement their family break-up policy. Importantly, survivors cannot be required to submit more documentation, including arrest or conviction records in order to advance a family break-up request. Both parties should have access to their tenant files, regardless of their status as head of household. A survivor should be notified in advance of a notice of termination being issued to the person accused of harming them, so that they can undertake safety planning. A person accused of harm should receive notice and have access to the file for purposes of challenging the termination, with the exception of the VAWA documentation provided by the survivor. Both parties are entitled to their due process rights. If a hearing is requested, there should be two separate hearings so that survivors are not forced to be in the same room as the person accused of harming them or be directly questioned by the person accused of harming them. If there is conflicting information and the housing provider requests third-party documentation from both parties, the evaluation of that new documentation should be limited to reviewing the documentation. There should not be additional fact-finding or interviews. Housing providers must be conscious of the trauma associated with multiple interviews of survivors and should limit any questioning.

When a housing provider is presented with mitigating evidence from the person accused, such as evidence of rehabilitation that addresses any past criminal conduct, the burden does not shift back to the survivor to prove why they are entitled to retain the subsidy or to otherwise refute the mitigating evidence. This information also cannot be used against the survivor to deny their request for a family break-up. However, this evidence of mitigation should be used by the housing provider to determine if two subsidies should be issued. HUD should be clear that housing providers have the discretion to issue two subsidies, particularly where there is evidence in mitigation, such as rehabilitation, disability, children, or other factors, and that this could be the necessary balance struck for all parties. PIH Notice 2017-08 currently suggests that option to PHAs, as does the [CoC guidance on VAWA and family break-up](#).

Consistent with VAWA's "Adverse Factors," the Rule Should Require Housing Providers to ask Why There is a Criminal Record

HUD should do more to require the housing provider to ask why there is a criminal record, rather than to assume a criminal record is per se a negative and then to look at mitigating

factors like evidence of rehabilitation. It might be better to understand first why it happened. For example, trafficking survivors are frequently exploited and forced into criminal conduct or must continue it in order to survive. Housing providers may not see that as evidence of mitigation, unless the survivor participates in rehabilitation for example, even though the underlying conduct was related to their victimization. VAWA's adverse factors language is potentially a better or necessary additional consideration. 81 Fed. Reg. at 80728, PIH Notice 2017-08. Considering a person's survivor status first will help a housing provider understand why there was or may continue to be criminal legal system contact. This approach - of looking first at a person's identification as a survivor - provides important context as to why someone's criminal conduct may be more recent (i.e., within the three-year lookback period) and why, under the adverse factors framework, the housing provider should still admit or not terminate/evict the person. For example, a survivor forced into prostitution that results in a criminal conviction should still be able to present the connection between that conviction and their victimization. Under the adverse factors framework, a housing provider should "have to consider the individual's statement and any possible supporting documentation in determining if an adverse factor was a direct result of domestic violence, dating violence, sexual assault, or stalking. If further information is necessary for this determination, the PHA or owner may request additional supporting documentation from the applicant or tenant." PIH Notice 2017-8 at 9. However, any request for additional documentation must comply with VAWA's documentation and confidentiality requirements.

However, VAWA's framework for understanding why someone may be involved in criminal activity or other adverse factors currently only applies to VAWA covered survivors. It does not, for example, apply to survivors of human trafficking who are not expressly covered by VAWA. HUD should apply this framework more broadly so that all forms of victimization are considered upfront.

Evictions or Admission Denials Based upon Interfering or Threatening the "Health, Safety, or Right to Peaceful Enjoyment" of Others Must Be Strictly Defined

The current proposed rule specifies that housing providers of various programs may evict or deny admission to an applicant or tenant based on criminal record, criminal activity, criminal history, illegal drug use, or alcohol abuse, that may interfere with or threaten the "health, safety, or right to peaceful enjoyment" of others, including residents and staff. Department of Housing and Urban Development, 89 Fed. Reg. 25332 (proposed Apr. 10, 2024) (to be codified at 24 C.F.R. pts. 5.852, 5.854, 5.855, 5.857, 5.858, 882.518, 882.519, 960.203, 960.204, 966.4, 982.306, 982.310, 982.553)(pt. 982.306 notes a PHA may deny approval of an assisted Section 8 Housing Choice Voucher tenancy if the *owner* is currently engaged or has engaged in criminal activity that would threaten the "health, safety, or right to peaceful enjoyment" of other residents and staff.).

The above language is used several times throughout the proposed rule, yet it is not defined, and thus, highly subjective. The subjectivity of the "health, safety, or right to peaceful enjoyment" language could lead to inequity in how housing providers decide whether to evict or

deny someone housing. We suggest that the final rule define this language more strictly and narrowly to avoid any issues in its application.

As an example, VAWA has a clear definition of “actual and imminent threat” when discussing whether a housing provider can terminate a survivor’s housing assistance because of abuse. 24 C.F.R. § 5.2003. VAWA defines “actual and imminent threat” as “...a physical danger that is real, would occur within an immediate time frame, and could result in death or serious bodily harm”. 24 C.F.R. § 5.2003. Further, VAWA details the factors to use in determining whether an individual poses an actual and imminent threat as the following: “...[t]he duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the length of time before the potential harm would occur”. 24 CFR § 5.2003).

These clear definitions in VAWA provide a safeguard for survivors to avoid an unnecessary and arbitrary termination of tenancy because of the threat posed by someone who abuses them. The proposed rule’s current language should be more narrowly defined to protect tenants from denial of housing and termination of tenancy due to a subjective interpretation of criminal records, criminal activity, illegal drug use, and alcohol abuse. We urge HUD to consider using the aforementioned VAWA definitions as a guidepost for potentially replacing and further defining the language “health, safety, or right to peaceful enjoyment”.

HUD Should Make Clear that Crime-Free Programs and Nuisance Property Ordinances Are Contrary to the Rule and Cannot Be Followed by Covered Housing Providers

We support the proposed clarification that these regulations are not “intended to pre-empt operation of State and local laws that provide additional protections to those with criminal records.” **Additionally, we strongly recommend that HUD state explicitly that these regulations create a policy “floor,” which covered housing providers must not undermine by complying with state or local laws that violate the proposed rule.** Crime-free programs and nuisance property ordinances (CFNO) are a classic example of such a law. CFNOs interfere with important federal “good cause” requirements, the proposed goals of the proposed rule, and federal civil rights laws. Covered housing providers need clear guidance from HUD as a counterpoint to often direct and intense pressure from local governments for covered housing providers to evict or deny admission to tenants as a result of any contact with the criminal legal system.

CFNOs violate these proposed regulations, and PHAs and covered housing providers should not adopt or enforce them. Historically, these policies have had a disparate impact on low-income tenants of color's ability to access or retain housing. Since the 1990s, there has been a proliferation of local jurisdictions adopting these policies targeted at rental property owners and prospective and actual renters. CFNOs threaten the housing of the most vulnerable tenants, particularly low-income tenants of color, survivors of gender-based violence, and tenants with disabilities.

In 2016, HUD recognized the harm created by CFNOs and issued Guidance on the Application of Fair Housing Act Standards on the Enforcement of Local Nuisance and Crime-Free Housing

Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services. This guidance focused on how these laws and programs harm victims of domestic violence, as acts of violence against survivors can easily be identified as “nuisance” conduct.² However, the guidance failed to note the discrimination of other protected groups, including intersectional discrimination experienced by survivors of color, survivors with disabilities, and people of color with disabilities, all of whom are particularly vulnerable to be targeted under these laws and programs.³ Despite this guidance and HUD’s guidance on criminal records screening, local CFNOs continue to dominate in thousands of communities across the United States, resulting in the eviction or admission denial of individuals, including survivors of violence.

CFNOs frequently involve the attachment of lease addenda requiring a landlord to automatically terminate the lease of all tenants in a home if there is any alleged criminal activity by any tenant, guest, or other person. Such aggressive, strict liability language directly conflicts with the “good cause” eviction protections of tenants living in federally assisted housing programs and with the protections first created by VAWA in 2005 to protect survivors from admission denial or evictions due to the violence committed against them. Survivors are also more likely to have a criminal record related to the violence they experienced. CFNOs fail to make exceptions for survivors of gender-based violence or other crimes who were not at fault or experienced violent crime as a result of their status and improperly shift the burden of proof to tenants for alleged lease violations based on alleged criminal activity. Even when a CFNO does exempt victims of gender-based violence on paper, law enforcement will often subjectively determine that the person is not a “true survivor” and demand their eviction.

Race may be the central driver for the origination of CFNOs. These programs and ordinances have been used to maintain residential segregation and racial boundaries within a community.⁴ Research from the RAND Corporation found that jurisdictions with crime-free programs have a larger proportion of Black residents than jurisdictions without.⁵ These policies validate discriminatory policing and permit white neighbors to influence the racial make-up of the neighborhood, by using the ordinance or program to oust Black and Latinx neighbors. This puts survivors of color who live in covered housing in an incredibly vulnerable situation - they cannot rely upon their covered housing provider, police, or even their neighbors for help and protection.

Survivors of gender-based violence are also more likely to call 911 or other emergency services, making them highly vulnerable to CFNO enforcement since calls to the police are

² Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

³ *Id.* at 13.

⁴ See, e.g., Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173 (2019); Deborah N. Archer, ‘Crime-Free’ Housing Ordinances, Explained, *The Appeal* (Feb. 17, 2021), <https://theappeal.org/the-lab/explainers/crime-free-housing-ordinances-explained>.

⁵ Griswold et. al., *Analyzing the Effects of Crime-Free Housing Policies on Completed Evictions Using Spatial First Differences* 26 *Cityscape: A Journal of Policy Development and Research* 1 195 (2024).

generally the trigger for enforcement. **HUD should clarify that this kind of conduct, and other behavior penalized by crime-free programs and nuisance property ordinances, do not constitute a “threat to health, safety, or peaceful enjoyment” under the proposed rule.**

HUD’s federally subsidized housing program owners and tenants, often due to anti-Black racism and opposition to affordable housing, are also often the intended targets of these laws and programs.⁶ For example, in some communities, the CFNO jurisdiction will gather information on where project-based Section 8 housing, public housing, or voucher holders reside in a community.

- In Illinois, the city of DeKalb requested that a large project-based Section 8 property add DeKalb’s crime-free lease addendum to its HUD model lease for the project-based Section 8 program, and comply with all terms of its crime-free housing program in exchange for a zoning variance. Although only 8 percent of DeKalb’s housing stock is subsidized, at least 18 percent of the notices issued under its crime-free ordinance from July 2013 to August 2014 were sent to properties with project-based housing subsidies, and many of the alleged violations concerned incidents of domestic violence or sexual assault.
- In *Briggs v. Borough of Norristown*, a survivor and Section 8 Voucher participant survived repeated incidents of violence committed by her abuser. Despite serious injuries that would lead to her hospitalization, the survivor did not want to call for help out of fear of being evicted. Local officials tried to force her landlord to evict her under the local nuisance ordinance due to the number of times she called police.
- Similar litigation has been brought against the cities of Hesperia, California, Peoria, Illinois, and Bedford, Ohio. All three cases involve subsidized housing and allegations that the jurisdictions enacted and/or aggressively enforced their laws and programs with the purpose of excluding or segregating Black or Latinx residents and eliminating the federally subsidized housing in their communities.⁷ In Peoria, Illinois, police regularly targeted survivors of gender-based violence living in federally assisted housing even though its ordinance specifically excluded incidents of domestic violence and sexual assault.

Municipalities also seem to be aware of how these programs function and will take the steps necessary to interrupt family housing stability. For example, in addition to taking steps that ensure a family is evicted, a municipality may also take steps to ensure the families’ loss of a tenant-based voucher or trigger the loss of a project-based subsidy. PHAs and other covered housing providers are thus placed in an impossible position – comply with federal law and the

⁶ Justin Garcia, *Tampa’s ‘crime-free’ housing program is under federal investigation, but the city is still defending it*, Creative Loafing Tampa Bay (Apr. 29, 2022), <https://www.cltampa.com/news/tampas-crime-free-housing-program-is-under-federal-investigation-but-the-city-is-still-defending-it-13334899>.

⁷ *An Affordable Home on Reentry*, 197-201 (2018), <https://www.nhlp.org/wp-content/uploads/Reentry-Manual.pdf>

federal effort to move away from a strict liability standard when it comes to the criminal legal system – or comply with the local government’s demand to deploy this aggressive, blanket strict liability standard. Indeed, certain PHAs have even been known to insist that, unless HUD explicitly instructs otherwise, they must follow crime-free policies or nuisance property ordinances in their jurisdictions.

For instance, a PHA in San Bernardino County, until recently after advocate intervention, required Section 8 applicants, tenants, and landlords to comply with an aggressive crime-free addendum that required mandatory eviction and termination of housing assistance. The crime-free addendum required eviction and termination of housing assistance for anyone or their families who had been arrested or come into contact with law enforcement, regardless of whether the alleged criminal conduct occurred, how long ago the criminal conduct had taken place, and whether there was any mitigating circumstances for such contact under VAWA or any other circumstances. The PHA also required applicants and tenants to sign and abide by the addendum to receive housing assistance, citing refusal to do so as good cause to deny or terminate housing assistance.

The PHA initially refused to change its policy regarding the mandated use of its crime-free addendum, stating that HUD had to instruct them to do so. However, upon the change in the law by the California Legislature prohibiting the use of CFNOs to mandatorily evict tenants or their family members with criminal history, the PHA acknowledged the law’s applicability to it, and decided to discontinue the use of its crime-free addendum. The PHA has removed it from its admission and tenancy materials and will plan to amend its Administrative Plan accordingly.

Covered housing providers need to be able to buttress these pressures by pointing to HUD regulations that make clear that HUD’s rules in this area are the floor and that they cannot comply with local laws and policies providing fewer protections.

HUD Should Require Covered Housing Providers to work with Victim Service Providers and Culturally Specific Organizations to Understand How Gender-based Violence and Criminalization Intersect.

HUD should require covered housing providers to work with victim service providers and culturally specific organizations to understand how GBV and criminalization intersect. As already encouraged by HUD with VAWA emergency transfer plans, HUD should also make clear that victim service providers and culturally specific organizations should have their information included on any notices and they are consulted on evictions, admission denial, and family break-up policies.

Thank you for the opportunity to comment on the NPRM. We stand ready to help HUD to consider the complex but important issues that arise when there is an allegation of gender-based violence and contact with the criminal legal system. Please contact Kate Walz at kwalz@nhlp.org, Shenna Morris at smorris@nrcdv.org, Monica McLaughlin at mmclaughlin@nndv.org, and Brittni Gulotty at brittni@endsexualviolence.org for more information or to discuss the requested listening sessions.

Sincerely,

Alaska Network on Domestic Violence and Sexual Assault
California Partnership to End Domestic Violence
Caminar Latino – Latinos United for Peace and Equity
DC Coalition Against Domestic Violence
DE Coalition Against Domestic Violence
Family Violence Appellate Project
Illinois Coalition Against Domestic Violence
Indiana Coalition Against Domestic Violence
Iowa Coalition Against Domestic Violence
Jane Doe Inc. (JDI), Massachusetts Coalition Against Sexual Assault and Domestic Violence
Kansas Coalition Against Sexual & Domestic Violence
Maryland Network Against Domestic Violence, Inc.
Mid MN Legal Aid
Mississippi Coalition Against Domestic Violence
Missouri Coalition Against Domestic & Sexual Violence
National Alliance to End Sexual Violence
National Housing Law Project
National Low Income Housing Coalition
National Network to End Domestic Violence
National Resource Center on Domestic Violence
Nevada Coalition to End Domestic and Sexual Violence
Pennsylvania Coalition Against Domestic Violence
StrongHearts Native Helpline
Texas Council on Family Violence
The National Domestic Violence Hotline
Ujima, The National Center on Violence Against Women in the Black Community
Utah Domestic Violence Coalition
Vermont Network Against Domestic and Sexual Violence
Violence Free Minnesota
Virginia Sexual and Domestic Violence Action Alliance
Washington State Coalition Against Domestic Violence
ZeroV