



March 28, 2011

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RE: Notice of Submission of Proposed Information Collection to OMB; Fair Housing Initiatives Program Grant Application Testing Training, Docket No. FR-5482-N-02

To Whom It May Concern:

My name is Fred Freiberg and I am the Field Services Director for the Fair Housing Justice Center (FHJC), a non-profit, civil rights organization serving New York City and the surrounding region. The mission of the FHJC is to challenge systemic housing discrimination, promote policies and programs that create more open and inclusive communities, and strengthen the enforcement of local, state, and federal fair housing laws. The FHJC is a HUD-designated "Qualified Fair Housing Organization" and receives some of its funding from HUD's Fair Housing Initiatives Program (FHIP). Testing is the centerpiece of FHJC's fair housing enforcement efforts. My primary responsibility is the supervision of testing investigations conducted by the FHJC.

Professionally, I have over 35 years of experience in the field of fair housing testing and enforcement. In 1991, I assisted the Civil Rights Division of the Department of Justice to establish a formal testing capability within the Division's Housing and Civil Enforcement Section and directed the program for approximately seven years. From 2000-2002, I directed the field implementation on the third and largest national Housing Discrimination Study (HDS) sponsored by HUD. Over the course of my career, I have supervised thousands of testing investigations in virtually all segments of the housing market and in nearly twenty states. I have been named as a witness in hundreds of fair housing cases and I have provided sworn testimony in fair housing cases on at least 42 occasions in depositions, hearings, or trials. The depth and breadth of my involvement in this field has made me one of the leading experts on the use of testing as an investigative tool in the enforcement of fair housing and other civil rights laws. I submit these remarks on behalf of the FHJC in response to OMB's request for comments.

Testing is an investigative tool used to gather evidence. It is an investigation in which one or more persons participate, it is “covert” in nature, and it is conducted for the purpose of obtaining a comparison. Testing may be conducted to compare how comparably qualified persons with different characteristics are treated. Testing may be conducted to compare the practices of a housing provider against the requirements of fair housing laws. Testing can be conducted to investigate specific allegations of housing discrimination or as part of planned systemic investigations. While the specific purpose of testing investigations may vary, the goal of all enforcement testing is to gather credible, objective, and admissible evidence.

The value of testing in fair housing law enforcement is well-established. Complaint-responsive testing investigations are initiated in response to specific allegations of unlawful housing discrimination. The value of a complaint-responsive testing investigation is that, in situations where unlawful discrimination is occurring, testing can often provide the vital corroborative evidence needed by victims to meet their burden of proof. Since violators typically deny discriminating and try to conceal discriminatory practices, testing can often document the alleged discriminatory conduct.

Systemic testing investigations are not conducted in response to a specific allegation of housing discrimination. Systemic testing is beneficial because it can uncover and document patterns or subtle forms of unlawful discrimination which may be difficult for ordinary consumers to detect, but which may be just as effective in restricting access to housing opportunities as more overt discrimination. Systemic testing investigations enable an enforcement agency to take a more pro-active approach to enforcement of civil rights laws by documenting and eliminating discriminatory practices before individuals have to endure the insult, embarrassment, and humiliation that often results from an act of housing discrimination. Systemic testing can lead to enforcement action that more broadly opens up housing opportunities to entire populations.

First, there are four areas where we generally agree with HUD’s intent in making this request to OMB:

1. Need to Promote Greater Use of Testing by Public and Private Fair Housing Enforcement Organizations and Agencies.

Testing is grossly underutilized as an investigative tool in the enforcement of fair housing laws. Anyone familiar with the current state of fair housing enforcement understands this fact. Despite the overwhelming acceptance of testing evidence by courts, the vast majority of people who file housing discrimination complaints with public fair housing enforcement agencies, including HUD, can not expect to have any testing investigation conducted in response to their complaints. With only a few exceptions, most state

and local public fair housing enforcement agencies have little or no testing capability. This is true regardless of whether the state or local law has been deemed “substantially equivalent” by HUD. While there are private fair housing groups capable of conducting testing investigations in many areas, there are still too many metropolitan and rural areas not served by any private testing organization. The paucity of resources available for this investigative activity accounts for some of the spotty coverage. The lack of an institutional, financial, and programmatic commitment by HUD to testing as being central to the effective enforcement of fair housing laws remains a factor as well. HUD needs to do more to ensure that testing is integrated as an essential investigative tool in all of its fair housing enforcement programs.

2. Need for More Consistent Quality in the Design and Implementation of Testing Investigations.

There are unquestionably variations in the quality of testing being conducted by private fair housing testing organizations, including those funded through the FHIP program. This situation leads to uneven enforcement and undoubtedly means that some unlawful housing discrimination goes undetected and unchallenged. While we know that high-quality investigative work is achieved when fair housing testing organizations are able to hire, train, and retain qualified and experienced professionals, too many fair housing organizations operate with such limited resources that doing so is a daunting challenge. Too often test coordinators receive low wages and do not remain in their positions long enough to develop the expertise and experience that would improve the quality of the organization’s fair housing testing activities. There is more that HUD can and should do to ensure that FHIP funds are adequate to support effective testing and that, within FHIP-funded organizations, funds are devoted to testing and not diverted for other purposes.

3. Need for Comprehensive Training for Test Coordinators

We agree with HUD that there is a need for more comprehensive, high-quality training to increase the effective use of testing as an investigative tool to enforce fair housing laws. The formidable challenge for HUD will be to determine who can provide this training and how it will be funded. HUD has not fully developed its own internal expertise or institutional knowledge about testing techniques and HUD-sponsored training on testing has been negligible over the past ten years.

4. Need for HUD Officials to Learn More about the Value and Role of Testing in Fair Housing Law Enforcement

It would be useful if HUD took steps to expand its own internal knowledge base about current testing techniques and methods. Data collection and surveys, however, may not be the best instruments for accomplishing this goal. Leading testing practitioners who have consistently demonstrated their ability to use testing to gather vital evidence, who effectively use that evidence in administrative proceedings and courts, and who consistently obtain favorable outcomes in fair housing cases are in the best position to advise HUD personnel. By reaching out to such experts, to learn more about testing protocols and investigative techniques, HUD could begin to raise the bar in this highly specialized field of endeavor.

Next, we will underscore three areas where we disagree with HUD and explain the reasons why we think this request is flawed and ill-timed.

1. Need for Development of Consistent Testing Methodologies

HUD asserts that the proposed data collection “is intended to provide consistency in testing and testing methodology.” In proposing to create a training program, HUD states that “participants will learn consistent methodologies for rental tests, home buying tests, and lending tests.” In this instance, our view is that consistency is not the desired goal. A “one size fits all” approach to testing methodologies would be a serious mistake for the following reasons:

- a. Housing market characteristics and dynamics vary greatly from place to place. Different housing markets often require different testing techniques. Effective approaches to testing rental housing providers in New York City differ from testing approaches needed to investigate rental housing providers in Grand Rapids, Michigan or rural North Carolina.
- b. Within local housing markets, there is a wide diversity of housing provider practices. The development of effective testing strategies or approaches requires a test coordinator to understand the varieties of local housing provider practices. Whether testing is conducted in response to housing discrimination complaints or as part of a systemic testing investigation, information about the particular housing provider to be tested can aid with the development of a credible and effective testing approach.
- c. Housing discrimination takes many forms and can reveal itself at different stages of a housing transaction. Those who continue to

violate fair housing laws do not do so in the same manner. A certain amount of flexibility and creativity in the design and implementation of testing investigations is not only beneficial, it is essential for the effective enforcement of fair housing laws.

- d. The structural or organizational features of local testing programs may dictate some differences in the range of options and approaches available to conduct testing. Whether the testing program uses volunteers or employees as testers, whether the testing program equips testers with audio-recorders (in states that permit one-party consensual recording), whether the testing program has testers who can be verified through an application process, etc. are all factors that might determine the types of approaches that should be considered when gathering evidence in a testing investigation.

The following quote from Ralph Waldo Emerson, “A foolish consistency is the hobgoblin of little minds,” may apply in this situation. It would be foolhardy, unwise, and contrary to sound law enforcement to work for consistency in testing and testing methodologies. Instead, any training provided by HUD should expose testing practitioners to the widest possible range of credible testing approaches and evidence-gathering techniques and methods.

2. Need to Create Course to Train Test Coordinators on “Paired Testing”

For some reason, HUD continues to be unduly fixated on “paired testing” even though this is only one type of test structure. It is important to understand the function and value of testing as an investigative tool within the fair housing enforcement context and the complexity of contemporary housing discrimination. Experienced testing practitioners recognize that paired testing is not always the best approach for gathering evidence of housing discrimination.

It would be a serious mistake for HUD to assume that what it has learned about paired testing from research projects like the national Housing Discrimination Study (HDS) is automatically transferable to enforcement testing. Research which is geared to measuring discrimination (counting things) requires a single testing protocol that is consistently applied and paired testing has been the test structure of choice for many researchers. While this approach meets the rigorous requirements of social science research and may tell us something about discrimination across housing markets, the approach also misses a lot of illegal housing discrimination and tells us very little about the practices of individual housing providers. In the enforcement arena, the context of each situation (i.e. other facts and circumstances) must be considered in developing an effective approach to


testing a particular housing provider. There are many other viable test structures (e.g., wrap-around tests, sandwich tests, proxy tests, etc.) that are routinely and effectively used by test coordinators to investigate discriminatory housing practices.

The reference exclusively to "paired testing" in this request is very troubling. Over the past forty years, many testing practitioners have made significant strides in developing and using creative and effective investigative techniques other than paired testing to uncover and document discriminatory housing practices. HUD should do nothing to stifle or undermine this innovation by prescribing a more narrow or consistent approach to testing or offering training with that end in mind. Any training must include information about the vast array of investigative techniques and approaches that can be used in conducting testing investigations.

3. Data Collection that Further Burdens Fair Housing Testing Organizations that are Strapped for Resources and Personnel is Counterproductive.

If HUD is seriously interested in developing the capacity of private fair housing groups to conduct effective testing investigations, a data collection request which places an additional burden on fair housing groups already strapped for resources and personnel should be reconsidered. HUD has already collected information from FHIP recipients for roughly twenty-five years, it has the results of a Congressionally-mandated evaluation of FHIP testing guidelines conducted in 1990-91, and it has access to the leading testing practitioners and fair housing attorneys in the nation. With these resources already available to HUD, it is hard to imagine, and the request fails to explain, why any additional data collection is needed at this time to develop a training program for fair housing test coordinators.

Respectfully submitted,



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