



## Equal Access to Federal Assistance under the National Affordable Housing Program

### Issue

Regulations drafted by the Department of Housing and Urban Development for the National Affordable Housing Program<sup>1</sup> result in underprivileged families headed by same-sex couples being unfairly denied equal access to federal assistance.

### Short Answer

The Department of Housing and Urban Development (“HUD”) should amend the regulations defining “family” for the purposes of need-based housing assistance programs to cover families headed by gay and lesbian couples.

### Background

The Affordable Housing Program is administered by the Office of Community Planning and Development (“CPD”) of HUD.<sup>2</sup> Under the Program, federal money is provided to state and local agencies to develop affordable housing and subsidize rents and to approved lending institutions to provide down payments and below-market mortgages to eligible families.<sup>3</sup> Families are eligible if their annual income is 80% or less of the median income in their geographic area, adjusted for family size.

The authorizing statute<sup>4</sup> incorporates the definition of “family” found in another statute,<sup>5</sup> the United States Housing Act of 1937.<sup>6</sup> Under that Act, as amended, the term “family” “includes families consisting of a single person” and nowhere mentions the terms “marriage” or “spouse” in defining “family.”<sup>7</sup> The definition of “family” is quite broad. The term “spouse” appears in the definition of “first-time homebuyer.”<sup>8</sup> However, this does not appear intended to limit the definition of family. Rather, the statute’s use of the term “spouse” merely makes it clear that, if *either* spouse has owned the homebuyer’s principle residence during the past three years, the family – with certain exceptions – cannot be considered “first-time homebuyers.”<sup>9</sup>

How HUD defines “family” has significant implications for determining eligibility for financial

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<sup>1</sup> Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12701 *et seq.* (1990). *See also* 24 C.F.R. Part 92. The HOME Investment Partnership Program (HOME) was created by the passage of the Cranston-Gonzales National Affordable Housing Act. The American Dream Downpayment Initiative (ADDI) is codified at 42 U.S.C. § 12821 (2003).

<sup>2</sup> DEP’T OF HOUS. AND URBAN DEV., OFFICE OF CMTY. PLANNING AND DEV., *Affordable Housing Programs*, <http://www.hud.gov/offices/cpd/affordablehousing/programs/index.cfm>.

<sup>3</sup> FEDERAL HOUSING FINANCE BOARD, *Housing Programs*, <http://www.fhfb.gov/default.aspx?page=47>.

<sup>4</sup> 42 U.S.C. §§ 12701 *et seq.* (1990).

<sup>5</sup> *Id.* at § 12704(11).

<sup>6</sup> *Id.* at § 1437a(b)(3) (1937).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 12852(b)(1)(A).

<sup>9</sup> *Id.* at § 12852(b).



assistance. Family income is determined by aggregating the incomes of the homebuyer and members of the family residing with the homebuyer, which is then adjusted by the number of members in that family.<sup>10</sup> Because relative income level determines a family's eligibility,<sup>11</sup> whether the administrating agency regards a partner or his dependents as members of a prospective homebuyer's or renter's family can have a material impact on whether a family headed by a same-sex couple receives aid.

### Recommendation

The Secretary of the Department of Housing and Urban Development should amend 24 C.F.R. § 5.403 to broaden the definition of families in such a manner that it would cover families headed by gay and lesbian couples.<sup>12</sup>

### Authority

The Secretary of the Department of Housing and Urban Development has the authority to “make such rules and regulations as may be necessary to carry out his functions, powers, and duties” in the administration of statutory programs under his department's purview.<sup>13</sup> Pursuant to this authority, the Secretary has already promulgated regulations governing the definition of “family” for the purposes of the Affordable Housing Program.<sup>14</sup> It is within the Secretary's authority to add a provision such that families headed by gay and lesbian couples would be covered in the definition of “family” for the purposes of the Affordable Housing Program.

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<sup>10</sup> *Id.* at §12852(b)(2).

<sup>11</sup> *Id.*

<sup>12</sup> The recommended change will only be effective if a policy of non-discrimination against families headed by unmarried and same-sex couples is adopted. *See infra*, memorandum on expanding Executive Order 11,063.

<sup>13</sup> 42 U.S.C. § 3535(d).

<sup>14</sup> *See* 24 C.F.R. § 92.2 (incorporating by reference the definition of “family” used for Section 8 and other public housing assistance programs under regulation 24 C.F.R. § 5.403).