



January 19, 2016

Regulations Division, Office of General Counsel  
Department of Housing and Urban Development  
451 – 7<sup>th</sup> St. SW, Room 10276  
Washington, DC 20410-0500

Re: Instituting Smoke-Free Public Housing, Docket No. FR 5597-P-02

Dear Secretary Castro:

The Tobacco Control Legal Consortium (“the Consortium”) at the Public Health Law Center is pleased to submit these comments in partnership with the other listed organizations to the U.S. Department of Housing and Urban Development (HUD) on the proposed regulation that would restrict smoking in public housing. The Tobacco Control Legal Consortium is a national network of nonprofit legal centers providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.<sup>1</sup>

HUD’s proposed regulation represents a critical step forward in protecting the health of people who reside and work in public housing. It cannot be emphasized enough that there is no risk-free level of exposure to secondhand smoke.<sup>2</sup> Beyond the obvious public health benefits of protecting residents from the well documented adverse effects of secondhand smoke seeping into their dwelling units, this proposed rule has several other benefits. Notably, it would be supported by a majority of potential tenants, will help prevent fire deaths, will reduce maintenance costs, will model positive behavior, and will help reduce legal liability for public housing authorities

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<sup>1</sup> Affiliated legal centers include: ChangeLab Solutions in Oakland, California; the Legal Resource Center for Public Health Policy at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center, a project of the Public Health Advocacy Institute at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project at the Center for Social Gerontology in Ann Arbor, Michigan; the Public Health Law Center at Mitchell Hamline School of Law in Saint Paul, Minnesota, where the Consortium is based; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and Public Health and Tobacco Policy Center in Boston, Massachusetts, which provides technical assistance to communities in the states of New York and Vermont.

<sup>2</sup> U.S. Dept. of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), available at <http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf>. See also Federal Register, Vol. 80 No. 221, p. 71763.

(PHAs).<sup>3</sup> These benefits of smoke-free public housing are explained well in the proposed rule and its preamble, and this comment will not reiterate those points.

This proposal also promotes health equity and clean air for all by addressing tobacco-related disparities. While overall smoking rates and exposure to secondhand smoke have declined, certain populations disproportionately bear the burden of the tobacco epidemic. For example, people with mental illness or substance use conditions make up 25% of the general population, but smoke 40% of all cigarettes.<sup>4</sup> Additionally, one in four nonsmokers – or approximately 58 million people – remains exposed to secondhand smoke, often in their homes.<sup>5</sup> The highest exposure is among children, non-Hispanic blacks, renters, and those living in poverty.<sup>6</sup> In order to achieve health equity, the differences in tobacco use and secondhand smoke exposure among these groups must be eliminated. Well-enforced, comprehensive policies like HUD’s proposed rule are a best practice for achieving health equity in tobacco control.<sup>7</sup> Many public housing entities and other multi-unit housing complexes have already successfully gone smoke-free.<sup>8</sup> The proposed HUD regulation is the next logical step.

Some provisions in the proposed rule are particularly strong from a public health and health equity standpoint and should be adopted without hesitation. The 25-foot setback provision is a strong public health measure that will help minimize smoke infiltration into dwelling units. The proposed rule does not “grandfather” in existing tenants who smoke. Such a policy is not legally required, would damage public health, and would be difficult to enforce.<sup>9</sup> PHAs are given the authority to adopt additional restrictions on smoking in order to protect the health of their residents. Each of these provisions should be maintained in the final rule.

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<sup>3</sup> For more on these topics, see the Tobacco Control Legal Consortium’s publication “*Regulating Smoking in Multi-Unit Housing*,” attached and available at <http://www.publichealthlawcenter.org/sites/default/files/resources/Regulating%20Smoking%20in%20Multi-Unit%20Housing%202015.pdf>.

<sup>4</sup> Substance Abuse and Mental Health Services Administration, *The NSDUH Report: Adults with Mental Illness or Substance Use Disorder Account for 40 percent of All Cigarettes Smoked*. Rockville, MD: US Dep’t of Health and Human Services, Substance Abuse and Mental Health Services Administration; 2013, available at <http://www.samhsa.gov/data/sites/default/files/spot104-cigarettes-mental-illness-substance-use-disorder/spot104-cigarettes-mental-illness-substance-use-disorder.pdf>.

<sup>5</sup> Federal Register, Vol. 80 No. 221, p. 71764.

<sup>6</sup> Centers for Disease Control and Prevention, “Vital Signs: Disparities in Nonsmokers’ Exposure to Secondhand Smoke — United States, 1999–2012,” 64(4) *Morbidity and Mortality Weekly Report*, 103-08 (2015), [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6404a7.htm?s\\_cid=mm6404a7\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6404a7.htm?s_cid=mm6404a7_w).

<sup>7</sup> Centers for Disease Control and Prevention, *Best Practices User Guide: Health Equity in Tobacco Prevention and Control* (2015), attached and available at <http://www.cdc.gov/tobacco/stateandcommunity/best-practices-health-equity/pdfs/bp-health-equity.pdf>.

<sup>8</sup> For a list of jurisdictions that have adopted laws requiring multi-unit housing to be smoke-free, as well as a list of public housing authorities with smoke-free policies in place, see American Nonsmokers’ Rights Foundation, U.S. Laws and Policies Restricting or Prohibiting Smoking in Private Units of Multi-Unit Housing, attached and available at <http://www.no-smoke.org/pdf/smokefreemuh.pdf>.

<sup>9</sup> See Tobacco Control Legal Consortium, *Creating Smoke-Free Affordable Housing* (2015) at 5, attached and available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-creating-smoke-free-affordable-housing-2015.pdf>. See also U.S. Dep’t of Housing and Urban Development, *Notice: Further Encouragement of O/As to Adopt Optional Smoke-Free Housing Policies* at 4, Oct. 26, 2012, <http://portal.hud.gov/hudportal/documents/huddoc?id=12-22hsgn.pdf> (noting that PHAs with smoke-free policies are not required to grandfather existing tenants).

Although this proposed regulation is an important public health measure, there are several ways in which the final regulation or future rulemakings should be strengthened to maximize public health benefits and better effectuate health equity. Specifically: the smoking restrictions should apply to water pipe smoking and electronic cigarette usage using a clear definition of “smoking”; the regulation should apply to all indoor areas and define the term “indoor”; the smoking restrictions should apply to Section 8 housing and dwelling units in mixed-finance buildings; the Regulatory Impact Analysis (RIA) should be modified to more accurately reflect the full benefits of such a rule; and additional provisions in the proposed rule should be clarified.

This comment is organized according to the preceding recommendations. However, when the discussion implicates one of the nine questions for which HUD requested comment, the question number is indicated in **[bracketed boldface text]** that precedes the commentary. Attached to this comment are selected references cited in the footnotes.

### **I. The definition of “lit tobacco products” should be replaced with a broad definition of “smoking” to include a greater range of products.**

[2] The proposed rule requires public housing authorities to adopt policies prohibiting the use of lit tobacco products. “Lit tobacco products” are defined as “those that involve the ignition and burning of tobacco leaves, such [as] cigarettes, cigars, and pipes.”<sup>10</sup> The materials supplementing the proposed regulation note that “waterpipe tobacco smoking (referred to as hookahs)” and “electronic nicotine delivery systems (ENDS), including electronic cigarettes (‘e-cigarettes’)” are excluded from the proposed smoking restrictions.<sup>11</sup> These exclusions from the smoking restrictions are harmful to public health and reflect a larger problem with the proposed rule’s definition of “lit tobacco products.”

[9] The exclusion of hookahs from the proposed rule undermines the strong arguments for having smoke-free housing. Certainly, the health risks of hookahs are well documented.<sup>12</sup> Hookah smoke contains significant amounts of nicotine, tar, heavy metals, and carcinogens, and may also contain charcoal or wood cinder byproduct carcinogens and carbon monoxide.<sup>13</sup> Many of these substances are known to cause lung, bladder, and oral cancers, as well as clogged arteries and heart diseases.<sup>14</sup> An unfortunate myth persists that hookah use is less damaging to health than cigarette smoking because the water filtration system and extended hose serve as filters for harmful agents.<sup>15</sup> In fact, the water filtration system only cools the smoke, allowing the user to inhale greater amounts of smoke over a longer period of time. A typical hookah session may last for an hour or more, a period of sustained inhalation that increases exposure to

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<sup>10</sup> 24 C.F.R. § 965.653(c).

<sup>11</sup> Federal Register, Vol. 80 No. 221, p. 71765.

<sup>12</sup> Centers for Disease Control and Prevention, *Hookahs* (2015), attached and available at [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/tobacco\\_industry/hookahs/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/hookahs/).

<sup>13</sup> *Id.*

<sup>14</sup> World Health Org., WHO Study Group on Tobacco Product Regulation, Advisory Note: *Waterpipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators*, 3 (2005), available at [http://www.who.int/tobacco/global\\_interaction/tobreg/Waterpipe%20recommendation\\_Final.pdf](http://www.who.int/tobacco/global_interaction/tobreg/Waterpipe%20recommendation_Final.pdf).

<sup>15</sup> *Id.* at 3-5.

carcinogens.<sup>16</sup> Also, because hookah smoking is typically practiced in groups, the same mouthpiece is passed from person to person, raising the risk of the transmission of infectious diseases such as herpes, hepatitis, and tuberculosis.<sup>17</sup>

Although the fire risk associated with hookah smoking may not have been studied as comprehensively as the fire risk associated with conventional cigarettes, there are certainly several examples of hookahs causing serious fire damage. A number of news reports demonstrate the fire risk posed by hookahs, including a house fire in St. Paul, Minnesota,<sup>18</sup> an apartment fire in Fort Collins, Colorado,<sup>19</sup> and a basement apartment fire in Fargo, North Dakota.<sup>20</sup> Certainly, it does not require a great deal of imagination to see how a method of smoking that involves an open flame and charcoal during hour-long sessions could create a risk of fire.

Finally, excluding hookah from the proposed rule has the potential to create confusion with the many existing smoke-free policies for public housing.<sup>21</sup> Consortium attorneys were unable to locate an existing smoke-free policy for public housing that excludes hookah smoking. It is potentially confusing for HUD to adopt a standard that is weaker than a majority of the existing public housing authority smoke-free policies.

**[8]** Although the health and safety risks of electronic cigarettes have not been studied as thoroughly as conventional cigarettes or hookahs, the reasons to include them in HUD's proposed smoking restrictions are no less compelling. While the U.S. Food and Drug Administration and many leading public health organizations generally agree on the need for further scientific study to assess unproven safety claims about electronic cigarettes and to determine the overall public health impact of electronic cigarette use, a growing evidence base indicates that electronic cigarettes are harmful to health. Potentially harmful constituents have been documented in some electronic cigarette cartridges, including diethylene glycol, genotoxins, animal carcinogens,<sup>22</sup> and diacetyl, a butter flavoring known to cause serious lung damage to factory workers who manufacture microwave popcorn.<sup>23</sup> The nicotine in electronic cigarettes, as in all tobacco products, is highly addictive, can be toxic in high doses, and has

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<sup>16</sup> *Id.*

<sup>17</sup> Am. Lung Ass'n, *An Emerging Deadly Trend: Waterpipe Tobacco Use*, 2 (2007), available at [http://www.lungusa2.org/embargo/slati/Trendalert\\_Waterpipes.pdf](http://www.lungusa2.org/embargo/slati/Trendalert_Waterpipes.pdf).

<sup>18</sup> Raya Zimmerman, *5 Dogs Die in St. Paul House Fire Likely Started by Teen's Hookah*, Pioneer Press, May 11, 2014, [http://www.twincities.com/localnews/ci\\_25741957/5-dogs-die-st-paul-home-fire-woman](http://www.twincities.com/localnews/ci_25741957/5-dogs-die-st-paul-home-fire-woman).

<sup>19</sup> Jason Pohl, *Mishandled hookah sparked May apartment fire*, Coloradoan, July 26, 2015,

<http://www.coloradoan.com/story/news/2015/07/25/pfa-mishandled-hookah-sparked-may-apartment-fire/30670277/>.

<sup>20</sup> Erin Wencel, *Hookah Starts Fire in North Fargo Basement*, KVRN News, Nov. 26, 2015,

<http://www.kvr.com/news/local-news/hookah-starts-fire-in-north-fargo-basement-no-injuries-in-wahpeton-house-fire/36677270>.

<sup>21</sup> See American Nonsmokers' Rights Foundation, *supra* note 8.

<sup>22</sup> Nathan Cobb et al., *Novel Nicotine Delivery Systems and Public Health: The Rise of the "E-Cigarette,"* 100 Am. J. Pub. Health, 2340-42 (2010).

<sup>23</sup> Joseph Allen et al., *Flavoring Chemicals in E-Cigarettes: Diacetyl, 2,3-Pentanedione, and Acetoin in a Sample of 51 Products, Including Fruit-, Candy-, and Cocktail-Flavored E-Cigarettes*, Environ. Health Persp. (2015) [Epub ahead of print].

immediate bio-chemical effects on the brain and body.<sup>24</sup> The Surgeon General cautions that nicotine may harm developing fetuses, and may negatively impact adolescent brain development.<sup>25</sup>

Additionally, the secondhand aerosol emitted from electronic cigarettes contains heavy metals, ultrafine particles, and lower levels of toxins that are known to cause cancer.<sup>26</sup> Studies also show that those exposed to electronic cigarette aerosol may absorb nicotine at levels comparable to being exposed to conventional cigarette smoke, electronic cigarette aerosol may worsen respiratory conditions like asthma, and risk of thirdhand exposure to nicotine from electronic cigarette aerosol deposits on indoor surfaces.<sup>27</sup>

The use of electronic cigarettes could complicate enforcement of smoke-free policies. Electronic cigarette use can appear to resemble smoking conventional cigarettes and could create confusion when PHAs enforce their policies. To avoid this confusion and protect the public's health, HUD's smoke-free rule should include electronic cigarettes.

Electronic cigarettes also increase the risk of fire and property damage. A recent report from the U.S. Fire Administration describes the fire risk posed by electronic cigarettes,<sup>28</sup> including that most fires begin by improper charging of the device, which can ignite nearby surroundings such as carpet, drapes, bedding, and couches. The federal government does not regulate the manufacture of electronic cigarettes. The U.S. Department of Transportation's (DOT) Federal Aviation Administration also released a safety alert recommending restrictions on electronic cigarettes in checked bags,<sup>29</sup> which was recently formalized in an interim final rule published by the DOT.<sup>30</sup>

[2] The exclusion of hookahs and electronic cigarettes speaks to a larger issue with the definition of "lit tobacco products" in the proposed rule. By limiting the smoke-free provisions to products "that involve the ignition and burning of tobacco leaves," HUD would allow products to be smoked that create public health hazards, fire risks, and increased maintenance costs comparable to conventional cigarettes. HUD's limited definition not only excludes products already discussed such as hookahs and electronic cigarettes, but herbal cigarettes and marijuana.

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<sup>24</sup> U.S. Dep't of Health & Human Servs., *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General* (2010), <http://www.ncbi.nlm.nih.gov/books/NBK53017>; see also U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking: Nicotine Addiction* (1988), <https://profiles.nlm.nih.gov/ps/access/NNBBZD.pdf>.

<sup>25</sup> U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

<sup>26</sup> Maciej Lukasz Goniewicz et al., *Levels of selected carcinogens and toxicants in vapour from electronic cigarettes*, 23(2) *Tob. Control* 133-9 (2014).

<sup>27</sup> Americans for Nonsmokers' Rights, *Electronic (e-) Cigarettes and Secondhand Aerosol* (2015), attached and available at <http://www.no-smoke.org/pdf/ecigarette-secondhand-aerosol.pdf>.

<sup>28</sup> U.S. Fire Admin., *Electronic Cigarette Fire and Explosions* (2014), attached and available at [https://www.usfa.fema.gov/downloads/pdf/publications/electronic\\_cigarettes.pdf](https://www.usfa.fema.gov/downloads/pdf/publications/electronic_cigarettes.pdf).

<sup>29</sup> U.S. Dep't of Transp., *SAFO 15003* (Jan. 22, 2015), attached and available at [http://www.faa.gov/other\\_visit/aviation\\_industry/airline\\_operators/airline\\_safety/safo/all\\_safos/media/2015/SAFO15003.pdf](http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2015/SAFO15003.pdf).

<sup>30</sup> Hazardous Materials: Carriage of Battery-Powered Electronic Smoking Devices in Passenger Baggage, 80 Fed. Reg. 66817 (proposed Oct. 30, 2015) (codified at 49 C.F.R. pt. 175).

To address this problem, many jurisdictions have adopted a more comprehensive definition of “smoking” that includes a greater number of harmful products. The group Americans for Nonsmokers’ Rights (ANR) has developed a model ordinance with a definition that is instructive:

*“Smoking” means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form. “Smoking” also includes the use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Article.<sup>31</sup>*

The model ordinance contains an additional definition of “electronic smoking device” to ensure that it comprehensively defines electronic cigarettes:

*“Electronic Smoking Device” means any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the product. The term includes any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen, or under any other product name or descriptor.<sup>32</sup>*

These definitions work in concert to ensure that the public is protected from secondhand smoke and aerosol to the maximum possible extent. The definition improves on HUD’s proposed definition of “lit tobacco products” in several ways. First, it is not limited to products that are directly combusted; it includes products that are “heated.” This helps ensure that hookah smoke and electronic cigarette aerosol is included. Second, it is not limited to products that involve tobacco leaves; any burned or heated plant product is included. This ensures that marijuana cigarettes and herbal products smoked in hookahs are included in the smoking restrictions. Using such a definition would also make enforcement easier for PHAs if hookahs are included in the smoking restrictions. It is possible that a resident could claim that an herbal, non-tobacco product is being smoked in a hookah pipe,<sup>33</sup> and verifying this claim would be beyond the ability of most PHAs.

We encourage HUD to replace its definition of “lit tobacco products” with a broad definition of “smoking” to ensure public health is protected and fire risk is reduced.

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<sup>31</sup> Americans for Nonsmokers’ Rights, *Model Ordinance Prohibiting Smoking in All Workplaces and Public Places*, Sec. 1002(R), attached and available at <http://www.no-smoke.org/pdf/modelordinance.pdf>.

<sup>32</sup> *Id.*, Sec. 1002(C).

<sup>33</sup> See, e.g., Samer Hijazi, *Hookah lounge ordinance passes city council, ‘herbal’ debate surfaces*, The Arab American News, Feb. 12, 2015, [http://www.arabamericannews.com/news/news/id\\_10070/Hookah-lounge-ordinance-passes-at-city-council,-herbal-debate-surfaces.html](http://www.arabamericannews.com/news/news/id_10070/Hookah-lounge-ordinance-passes-at-city-council,-herbal-debate-surfaces.html).

## II. The regulation should apply to all indoor areas and define the term “indoor.”

[2] One strength of the regulation is the inclusion of a 25-foot setback provision. The breadth of the provision will help ensure that smoke will not infiltrate into dwelling units through entrances, exits, windows, patios, balconies, and other openings. Further, the setback provision helps ensure that residents will not need to cross a “gauntlet” of smokers while entering the building.<sup>34</sup> Consequently, the 25-foot setback provision should be retained in the final rule.

However, the rule could be strengthened by having a clear definition of the term “indoor.” The rule states that PHAs may establish smoking locations outside of the 25-foot setback area and that these smoking areas “may include partially enclosed structures, to accommodate residents who smoke.”<sup>35</sup> The phrase “partially enclosed structures” is not defined, is potentially subject to abuse, and may conflict with state and local clean indoor air laws.

Smoke-free laws without a clear definition of “indoor” are difficult to enforce, subject to abuse, and have resulted in litigation.<sup>36</sup> Business owners have constructed structures to skirt unclear definitions of “indoor” or “enclosed” areas for the sole purpose of allowing smoking to occur. When this occurs, the public health benefits of a smoke-free law cannot be fully realized. HUD should heed the lessons learned from these challenges to smoke-free law in the final regulation.

Consequently, the proposed rule would be strengthened with the addition of a comprehensive definition of “indoor area” to which all of the smoking restrictions would apply. ANR’s model ordinance contains helpful language:

*“Enclosed Area” means all space between a floor and a ceiling that is bounded on at least two sides by walls, doorways, or windows, whether open or closed. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent and whether or not containing openings of any kind.*<sup>37</sup>

The Minnesota Clean Indoor Air Act also contains a definition that may be useful:

*“Indoor area” means all space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent.*<sup>38</sup>

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<sup>34</sup> See Americans for Nonsmokers’ Rights, Smokefree Outdoor Air, “Entryways,” <http://www.no-smoke.org/learnmore.php?id=669>.

<sup>35</sup> Federal Register, Vol. 80 No. 221, p. 71766.

<sup>36</sup> See, e.g., *MC, Inc. v. Cascade City-County Board of Health*, 343 P.3d 1208 (Mont. 2015) (attached); *Kickback Jack’s v. New Hanover County Board of Health*, No. 12-CVD-2842 (New Hanover Co. Dist. Ct. Oct. 8, 2012) (attached).

<sup>37</sup> *Model Ordinance Prohibiting Smoking in All Workplaces and Public Places*, supra note 31, Sec. 1002(F).

<sup>38</sup> Minn. Stat. § 144.413, Subd. 1a (2015), attached and available at <https://www.revisor.mn.gov/statutes/?id=144.413>.

Both of these definitions help ensure that the areas in which the smoking restrictions apply meet a commonsense understanding of what constitutes an indoor area. Both definitions require a floor and a ceiling for the smoking restrictions to apply. The ANR definition requires walls on two sides. The Minnesota definition, in contrast, does not rely on the number of walls, but the percentage of the vertical perimeter area taken up by a wall or other solid surface. This ensures that public health is protected even in structures that are circular or have the shape of an irregular polygon.

The Consortium has received several questions about whether the smoking restrictions in the proposed rule apply to balconies. Most balcony areas would presumably fall within the 25-foot setback provision. Further, HUD has strongly suggested that smoking is prohibited on balconies, noting in an FAQ document that smoking is prohibited “on attached structures if they are part of the building or within 25 feet of the housing or building.”<sup>39</sup> However, the proposed codified text and rule’s preamble are ambiguous on this point, and we encourage HUD to state unequivocally in any final rule that smoking is prohibited in all attached balconies.

### **III. The smoke-free provisions should apply to Section 8 properties and dwelling units in mixed-finance buildings.**

[2] The proposed rule states that it does not apply to Section 8 properties or “public housing units that are part of a mixed-finance project.” The only reason given for these exclusions is a cursory statement in the proposed rule’s preamble that “the PHA may not be the primary owner, and non-public housing units may be contained within the building.”<sup>40</sup> These are not compelling reasons for these exemptions. These exemptions should be removed, either in the final rule or through a separate process. Certainly, the risk to public health, possibility of fire damage, and increased maintenance costs are no less of an issue whether the unit at issue is a Section 8 property, mixed-finance development, or conventional public housing unit. Moreover, these exemptions may worsen health disparities and run contrary to existing HUD precedents.

In the case of mixed-finance projects, HUD has stated a preference for mixed-finance projects that “are attractive and marketable, improve or are harmonious with the surrounding neighborhood, meet the long-term needs of the occupants, and are sustainable over the long run.”<sup>41</sup> All of these criteria would be strengthened by requiring mixed-finance projects to be smoke-free. Throughout the country, survey after survey finds a majority of renters favor living in smoke-free multi-unit housing.<sup>42</sup>

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<sup>39</sup> U.S. Dep’t of Housing and Urban Development, *Questions and Answers on HUD’s Smoke Free Public Housing Proposed Rule*, p. 4, <http://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf>.

<sup>40</sup> Federal Register, Vol. 80 No. 221, p. 71765.

<sup>41</sup> U.S. Dep’t of Housing and Urban Development, *HOPE VI Guidance: Mixed-Finance Public Housing Development*, p. 5, March 2001, [http://portal.hud.gov/hudportal/documents/huddoc?id=doc\\_10114.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=doc_10114.pdf).

<sup>42</sup> In a Massachusetts survey, for example, 75 percent of renters would support or were neutral towards the immediate implementation of a smoke-free policy. Pub. Health Advocacy Inst., *Market Demand for Smoke-Free Rules in Multi-Unit Residential Properties*, 5 (2009), attached and available at <http://www.phaionline.org/wp-content/uploads/2009/04/phaihousingurvey.pdf>.

In the case of Section 8 housing, HUD has published notices encouraging owners and management agents of project-based Section 8 properties to adopt smoke-free policies.<sup>43</sup> It is incongruous to encourage Section 8 properties to be smoke-free, while exempting them from the proposed rule requiring other categories of public housing to be smoke-free. Even if non-public housing is contained within the same building as Section 8 properties, requiring Section 8 properties to be smoke-free may cause a property owner to declare a whole building to be smoke-free. This would benefit public health, promote health equity, and would reduce the risk of fire.

We encourage HUD to apply the smoking restrictions to all HUD-subsidized housing units, including Section 8 properties and dwellings in mixed-finance projects.

#### **IV. The RIA underestimates the benefits of the proposed rule and overestimates the costs.**

[2] The RIA contains several troubling assumptions about the costs and benefits of the proposed rule. It estimates the cost to smokers as \$209 million. This cost is attributed to “smoker inconvenience” in the preamble to the proposed rule. The benefit to smoker health, in contrast, is “not quantified,” despite an extensive discussion of the benefits to smokers.<sup>44</sup> We are not economists, and our comments on this issue will be necessarily brief. Further, it is our understanding that experts in this field will be submitting comments that provide a more in depth analysis of the problems with HUD’s cost-benefit analysis. However, the issues raised by the RIA must be acknowledged.

In determining the costs of the proposed regulation, the RIA spends twelve pages calculating the amount of time it will take smokers to walk outside to smoke a cigarette, calculating factors such as the average length of corridors, the speed of elevators, and the time it takes to traverse the 25-foot setback. It uses these calculations to determine that the “aggregate annual opportunity cost” of the regulation is approximately \$68 million. While these calculations make for an interesting intellectual exercise, they are hardly the basis for sound policy.

The \$209 million “smoker inconvenience” cost is similarly troubling. This cost seems to be based on a flawed assumption that the policy will make it more difficult to smoke and that added difficulty is a cost to smokers. In almost any context, a government policy that forces behavior change could rightly be called a cost. However, in the public health context, and especially in tobacco control, this assumption is inherently flawed. The policy does not make it harder for smokers to do something that they want to do or enjoy doing. Quite the contrary, nearly seven out of ten smokers want to quit.<sup>45</sup> Nearly ninety percent began smoking before the age of eighteen<sup>46</sup> and did not make a rational choice to start smoking. They continue to smoke because they have a physiological addiction to nicotine and not because they want to smoke. A policy

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<sup>43</sup> See, e.g., U.S. Dep’t of Housing and Urban Development, *Notice: Further Encouragement of O/As to Adopt Optional Smoke-Free Housing Policies*, Oct. 26, 2012, <http://portal.hud.gov/hudportal/documents/huddoc?id=12-22hsgn.pdf>.

<sup>44</sup> See Regulatory Impact Analysis at 34-41.

<sup>45</sup> See, e.g., Centers for Disease Control and Prevention, *Quitting Smoking: Smokers’ Attempts to Quit*, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/cessation/quitting/index.htm#quitting](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/index.htm#quitting).

<sup>46</sup> Centers for Disease Control and Prevention, *Youth and Tobacco Use: Background*, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm#background](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#background).

that encourages smokers to quit or to reduce their consumption is not a cost to smokers; it is a benefit. The \$209 million of “smoker inconvenience” would be better characterized as “encouraging smokers to quit or reduce consumption” and should be calculated as a benefit.

No less troubling is the underestimation of the benefits of the proposed regulation, particularly HUD’s reluctance to explicitly consider and quantify the potential benefits to smokers. Smoke-free policies have been demonstrated to reduce costs from acute coronary events and hospital admissions because of asthma, heart attacks and stroke.<sup>47</sup> One study estimated that the 27 states without a comprehensive smoke-free policy would save an estimated \$1.32 billion in health care costs if they adopted smoke-free laws.<sup>48</sup> To be sure, these studies analyze the benefits of statewide smoke-free laws, not the benefits of smoke-free public housing policies. However, many of the same benefits would be present with a smoke-free public housing policy, and they should not be discounted – much less casually dismissed.

Tobacco control regulations proposed by the Food and Drug Administration (FDA) present an interesting comparison. A comment to one such regulation noted that the “FDA omitted many potentially important benefits, including ... benefits associated with reduced maternal smoking during pregnancy, and benefits attributable to reductions in several categories of health care costs omitted from FDA’s analysis.”<sup>49</sup> With its simple statement that smoker health is “not quantified,” the proposed HUD regulation suffers from the same flaws.

Additionally, similar to proposed FDA regulations that controversially and substantially discounted the benefits of quitting smoking because of “lost pleasure,” HUD discounts the net benefit of quitting by 33%.<sup>50</sup> This speaks to a larger problem with the economic analysis underlying the proposed smoke-free public housing regulation. The same comment to the FDA’s proposed regulation noted that:

*Applying assumptions derived from traditional economic theory, while reasonable when evaluating regulations on many consumer goods, can result in grossly distorted estimates of benefits and costs when applied to the analysis of tobacco products, given the market failures caused by self-control problems and imperfect and asymmetric information, exacerbated by initiation of product use and addiction, for most, during adolescence.<sup>51</sup>*

We urge HUD to adopt a cost-benefit analysis that more accurately reflects the true costs of smoking to smokers and nonsmokers alike, as well as the benefits of a smoke-free policy for public housing.

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<sup>47</sup> See, e.g., Centers for Disease Control and Prevention, *Smoke-Free Policies Improve Health*, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/protection/improve\\_health/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/improve_health/).

<sup>48</sup> American Cancer Society Cancer Action Network, *Saving Lives, Saving Money: A State-by-State Report on the Health and Economic Impact of Comprehensive Smoke-Free Laws*, 2 (2011), attached and available at <http://www.acscan.org/pdf/tobacco/reports/acscan-smoke-free-laws-report.pdf>.

<sup>49</sup> Frank J. Chaloupka et al., *An Evaluation of FDA’s Analysis of the Costs and Benefits of the Graphic Warning Label Regulation*, 2 (July 2014), submitted to Docket No. FDA-2014-N-0189, attached and available at <http://www.regulations.gov/contentStreamer?documentId=FDA-2014-N-0189-65050&attachmentNumber=1&disposition=attachment&contentType=pdf>.

<sup>50</sup> Regulatory Impact Analysis at 41.

<sup>51</sup> *Id.*

## **V. Additional provisions in the proposed rule should be clarified.**

### **A. Any “reasonable accommodation” must not include the ability to smoke indoors.**

[3] The proposed rule’s preamble notes that PHAs have the ability to designate outdoor smoking locations. It then notes that the Americans with Disabilities Act (ADA) gives residents “the right to seek a reasonable accommodation, including requests from residents with mobility-impairment or mental disability.”<sup>52</sup> While this is an accurate summary of the ADA’s reasonable accommodation provision, the placement of the reference immediately following a reference to outdoor smoking locations might leave some with the impression that the ADA requires the accommodation of smokers with disabilities by allowing them to smoke indoors. This is not the case, as acknowledged in a HUD fact sheet about the proposed rule,<sup>53</sup> and the final rule would be strengthened by making this point clear.

Courts that have weighed in on this issue have flatly concluded that neither status as a smoker nor addiction to nicotine constitutes a “disability” within the meaning of the ADA.<sup>54</sup> Further, public housing residents – particularly those who have disabilities themselves – have a right to breathe uncontaminated air, regardless of the disability status of smokers within the same housing complex.<sup>55</sup> An example of a reasonable accommodation might involve moving a resident with disabilities who smokes to the ground floor so that she has more convenient access to an outdoor smoking area or providing her access to free nicotine replacement therapy, but it would not include allowing her to smoke indoors. The proposed rule creates no legal burden on people with disabilities, and the final rule would be strengthened by making this point more clear.

### **B. HUD should encourage PHAs to create outdoor smoke-free areas and discourage PHAs from designating outdoor smoking areas.**

[2] The proposed rule is strong in that it expressly permits PHAs to designate additional smoke-free areas beyond the rule’s requirements or to make the entire grounds smoke-free. The preamble cites a playground as one example of an outdoor location where a PHA may wish to prohibit smoking. The proposed rule would be strengthened by more actively encouraging PHAs to adopt such measures. Secondhand smoke can pose a health hazard outdoors, smoking outdoors raises littering concerns, and public smoking can create pro-smoking norms for young

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<sup>52</sup> Federal Register, Vol. 80 No. 221, p. 71766.

<sup>53</sup> U.S. Dep’t of Housing & Urban Development, *Questions and Answers on HUD’s Smoke Free Public Housing Proposed Rule*, 3, <http://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf>.

<sup>54</sup> See, e.g., *Brashear v. Simms*, 138 F. Supp.2d 693 (D.Md. 2001) (attached); *Stevens v. Inland Waters, Inc.*, 220 Mich. App. 212, 559 N.W.2d 61 (1996) (attached). See also Susan Schoenmarklin, *Tobacco Control Legal Consortium, Secondhand Smoke Seepage into Multi-Unit Affordable Housing*, 6-7 (2010), attached and available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-secondhand-2010.pdf>.

<sup>55</sup> See 42 U.S.C. § 3604(f)(9).

people.<sup>56</sup> Further, a final rule that recommended outdoor smoke-free provisions would be consistent with existing HUD guidance.<sup>57</sup>

[3] Additionally, while there is no legal requirement to provide a smoking accommodation, the creation and placement of designated outdoor smoking areas, particularly those with structural amenities like benches, picnic tables, or shelters, may raise accessibility concerns and the need to provide a reasonable accommodation. The final rule should discourage PHAs from designating outdoor smoking areas in order to avoid these issues altogether, further protect residents and workers from harmful exposure to secondhand smoke, and model a smoke-free norm.

### **C. HUD should explicitly state the non-preemptive effect of the final rule.**

[2] Another strength of the proposed rule is its non-preemptive effect, which allows for local tailoring based on the unique needs of different communities. Preemption is detrimental to tobacco control efforts because the strongest and most innovative policies often emerge at the local level.<sup>58</sup> The proposed rule makes clear that “PHAs may choose to create additional smoke-free areas outside the restricted areas or to make their entire grounds smoke-free” and that PHAs’ smoke-free policies “must, *at a minimum*, include a prohibition on the use of all lit tobacco products.”<sup>59</sup> Additionally, HUD’s fact sheet on the proposed rule indicates that the rule’s requirements only set a floor of minimum requirements.<sup>60</sup> Any PHA policy or state or local law that is more stringent must be followed.

Any changes to the codified text should unequivocally state that nothing in the regulation limits or otherwise affects the authority of PHAs or tribal, state or local governments to adopt restrictions on smoking in public housing that are more stringent than the provisions in the proposed rule.

### **D. HUD should recommend or require that PHAs start implementation quickly.**

[1] The proposed rule requires that PHAs adopt smoke-free policies within 18 months of the effective date of the final rule.<sup>61</sup> However, the rule does not specify when PHAs should begin this process. HUD should strongly recommend that PHAs begin the implementation process soon after the effective date – for example, within sixty days. This will help ensure that PHAs have time to go through all the necessary steps before adopting a policy. These steps include engaging residents, holding public meetings, and incorporating new provisions into tenants’

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<sup>56</sup> See Americans for Nonsmokers’ Rights, *Smokefree Outdoor Air*, attached and available at <http://www.no-smoke.org/learnmore.php?id=669>.

<sup>57</sup> See, e.g., U.S. Dep’t of Housing and Urban Development, *Notice: Further Encouragement of O/As to Adopt Optional Smoke-Free Housing Policies* at 3, Oct. 26, 2012, <http://portal.hud.gov/hudportal/documents/huddoc?id=12-22hsgn.pdf> (encouraging owners and management agents to adopt smoke-free policies for playgrounds).

<sup>58</sup> See Tobacco Control Legal Consortium, *Why Preemption Is Bad for Tobacco Control*, attached and available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-why-preemption-bad-tobacco-control-2014.pdf>.

<sup>59</sup> 24 C.F.R. § 965.653(b), (c) (emphasis added).

<sup>60</sup> U.S. Dep’t of Housing & Urban Development, *Questions and Answers on HUD’s Smoke Free Public Housing Proposed Rule* at 5, <http://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf>.

<sup>61</sup> 24 C.F.R. § 965.655(b).

leases.<sup>62</sup> Without sufficient time to address issues such as these, a PHA's smoke-free policy may lack the community buy-in necessary for implementation to be successful.

**E. The Tobacco Control Legal Consortium is willing to provide technical assistance to PHAs.**

[7] The proposed rule rightly recognizes that “PHAs developing smoke-free policies may need technical assistance in writing the policies, engaging residents, and assisting residents who want to stop smoking.” The proposed rule states that “contact information for local organizations” will be provided through HUD's website.

The Consortium would welcome the opportunity to provide technical assistance related to drafting and evaluating policies, so long as it is within our capacity. Indeed, this has been a main function of our legal centers for more than fifteen years. We would welcome inclusion on HUD's website, and our contact information is as follows:

Tobacco Control Legal Consortium at the Public Health Law Center  
875 Summit Avenue  
St. Paul, MN 55105  
(651) 290-7506  
[publichealthlawcenter@mitchellhamline.edu](mailto:publichealthlawcenter@mitchellhamline.edu)

**VI. Conclusion**

We appreciate this opportunity to share our observations and recommendations regarding HUD's proposed regulation restricting smoking in public housing.

Respectfully,

Americans for Nonsmokers' Rights  
Association for Nonsmokers - Minnesota  
National African American Tobacco Prevention Network  
North American Quitline Consortium  
Tobacco Control Legal Consortium

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<sup>62</sup> See Federal Register, Vol. 80 No. 221, p. 71767.