

June 3, 2013

Reports Liaison Officer
Department of Housing and Urban Development
451 7th St. SW, Washington D.C. 20410-2000

Re: Notice of information collection, Affirmative Fair Housing Marketing (AFHM) Plan (OMB Control No. 2529-0013)

To Whom It May Concern:

We are submitting the recommendations below in response to the request for comments on HUD's Affirmative Fair Housing Marketing (AFHM) Plan, as required of developers to demonstrate compliance with the AFHM regulations, 24 C.F.R. § 200.600 and 24 C.F.R. part 108.

The development and review of AFHM Plans remains crucial to HUD's ability to assess compliance with this regulatory mandate; to help agency staff efficiently target their technical assistance efforts; and to ensure that developers take concrete steps to market properties in a manner that promotes fair housing goals. Affirmative marketing programs are needed to diversify and integrate communities by reaching potential residents who are otherwise unlikely to apply, often due to racial disparities in exposure to and information about particular neighborhoods. AFHM helps implement the statutory mandate to "affirmatively further fair housing"¹ by requiring participants in certain HUD programs, including mortgage insurance, to pursue an *affirmative* marketing policy: that is, those developers (and other program participants) must not only abide by nondiscrimination law, but must promote their properties and engage prospective occupants so as to actively advance fair housing goals. AFHM programs serve an important role in ensuring equal access to information, helping people overcome the legacies of exclusion, and promoting fair and open housing choice. The information collected through AFHM Plans provides a framework for HUD to evaluate developers' activities in this regard.

However, we recommend that the content required by the AFHM Plan forms be enhanced and clarified in several respects. These changes are needed in order for the AFHM Plan requirement to achieve its intended functions of delivering clear expectations about marketing to developers while documenting their relevant efforts. We note that many of these recommendations are consistent with (current) FHEO practice, but it is important that they be incorporated formally into HUD guidance for future continuity, and that they are communicated adequately to developers via the AFHM Plan Form. We urge HUD to take this opportunity to correct current deficiencies in the Plan requirements, including: the lack of clear performance standards that can be used to effectively target technical assistance resources (as well as compliance reviews); the failure to consistently require region-wide outreach; the paucity of marketing content relevant to potential tenants; tenant selection procedures that tend to disadvantage minority group members and non-local applicants; and the institution of meaningful Plan evaluations.

¹ See 42 U.S.C. §3608.

Specifically, we recommend the following improvements to the AFHM Plans:

Identification of Market Area

Marketing should occur on a region-wide scale if it is to be successfully integrative and overcome the problem of racial informational disparities. The “market area” should encompass the metropolitan statistical area or the regional planning area.²

In contrast, the current AFHM Plan form gives the applicant wide discretion in designating the “market area” for each property, stating that this is the area from which an applicant can “reasonably expect to draw a substantial number of its tenants.”³ This market area is then used to determine who is “least likely to apply” (through a comparison between tenant composition and market area composition), as well as whether the use of residency preferences is likely to be discriminatory. This approach is problematic because it does not require applicants (or the reviewing office) to acknowledge and address regional patterns of segregation. Rather, the applicants may designate whatever local area they deem appropriate as their “market area,” excusing themselves from outreach to neighboring areas and throughout the region. Yet metropolitan areas can be a racial patchwork in which neighborhood quality differs dramatically among communities, often due to zoning, racial steering, and other exclusionary practices. The promotion of fair housing is a region-wide responsibility.⁴ AFHM guidance that permits the program participant broad flexibility to identify its market area falls short of meeting HUD’s responsibilities in this regard. The ability to limit marketing to local areas (such as Census tracts) defeats the program’s intent in reaching those “least likely to apply.”

Targeting and identification of potential residents “least likely to apply”

HUD’s current AFHM Plan form provides a worksheet for identifying the group “least likely to apply,” based on the developer’s assessment of a demographic group’s underrepresentation in

² See, e.g., Connecticut Fair Housing Regulations, § 8-33ee, providing that “Recipients’ plans shall provide for the dissemination of information at a minimum in (a) the largest city located in the nearest Primary Metropolitan Statistical Area or Areas or Metropolitan Statistical Area or Areas, (b) the regional planning area, and (c) any other areas which are likely to contain high minority group populations and where public transportation or public highways and/or job availability make it likely that minorities might wish to move where the development is located.”

³ HUD instructs that an “Expanded Market Area” should be used “if the immediate housing market area is not demographically diverse enough to draw applicants considered least likely to apply for housing in this Project,” see HUD’s AFHMP Tip Sheet, available at www.hud.gov/local/shared/working/r10/mf/afhmptipsheet.pdf; however, this is largely left as a discretionary determination. The instructions provide that “If a housing market area is not demographically diverse in terms of race, color, national origin, religion, sex, disability, or familial status, an expanded housing market area may be used. An expanded housing market area is a larger geographic area that may provide additional diversity.” AFHM Plan at 6. Note that the regional “market area” appropriate for marketing outreach may be different from the area assessed in the developer’s “market study.”

⁴ See *Thompson v. HUD*, 348 F.Supp.2d 398, 408 (D.Md. 2005) (requiring agency to consider regional, not merely local, approaches to AFFH and integration); see also Florence Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333 (2007).

the project or waiting list “relative to the surrounding housing market area.”⁵

However, applicants need greater clarity on how to use statistical comparison to determine when groups are underrepresented or likely to be underrepresented without additional outreach. First, as noted above, this should be based on a regional market area rather than a discretionary market area. Additionally, the current form does not explain how a “least likely to apply” determination should be made in new, unoccupied developments. To identify those “least likely to apply,” developers seeking to market new (that is, not yet occupied) properties should compare the demographic composition of the Census tract with that of eligible families in the *regional* market area. For occupied developments, the composition of applicants, the waitlist, and tenants should be compared to *regional* demographics. If certain groups are underrepresented by either of these measures, they should be targeted for marketing efforts (or more-enhanced efforts, in the case of existing developments).

In addition, while the current worksheet requests data on occupants and waitlistees, it does not request demographic data on applicants. An additional field should be added requiring data on applicants: this is necessary to capture whether demographic underrepresentation is attributable to the marketing stage, the tenant selection stage, or other factors.

Evaluation of Marketing Activities

The current AFHM Plan form requests that developers establish and explain their own evaluation processes;⁶ and the metrics suggested in HUD’s AFHM Handbook, such as the number of referrals by community organizations and the number of visits to the site or walk-ins due to outreach or advertising,⁷ fail to show whether they actually have reached the targeted “least likely to apply” group(s) unless they are accompanied by demographic data.

Clear performance standards are needed in order to indicate whether marketing efforts are achieving their aims, or whether changes to an AFHM plan should be made. Current guidance, including the AFHM Plan form, does not measure or incentivize actual progress toward the AFHM aim of integrated, open housing. The lack of performance standards also means that the current system does not ensure technical assistance resources are well aimed.

As with the targeting process, demographic comparisons (using regional data, and data on applicants, waitlistees, and tenants) should be a required metric in AFHM evaluations. Guidance should clearly indicate the level of statistical disparity that will trigger review.⁸ Significant demographic disparities should trigger oversight by compliance staff, who should examine

⁵ Form HUD-935.2A, Field 3b and Worksheet 1.

⁶ *Id.*, Field 6.

⁷ U.S. Dept. of Housing and Urban Development, Handbook: Implementing Affirmative Fair Housing Marketing Requirements (8025.1)(hereinafter “Handbook”), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80251/index.cfm>.

⁸ Policymakers should determine an appropriate “trigger” in consultation with social scientists and practitioners, including fair housing attorneys. A similar framework is used in employment discrimination actions, where the EEOC uses the rule that evidence of an adverse impact exists when the selection rate for any race, sex, or ethnic group is less than four-fifths of the rate for the group with the highest rate. See 29 C.F.R. § 1607.4(D). A different number may be appropriate in this context.

marketing procedures for their sufficiency and may provide recommendations for changes or enhancements. Demographic comparison will not itself result in any penalties, but simply trigger a review of whether sufficient, good faith marketing efforts have been exerted. However, if the review indicates that the disparities are attributable to a failure to affirmatively market, then additional outreach efforts should be required. Similarly, tenant selection or waitlist management practices may need to be adjusted. This may delay unit occupancy until the applicant pool is sufficiently diverse.⁹

Residency Preferences

We recommend that HUD clarify the appropriate use of residency preferences, as addressed in Field 4a and Worksheet 2 of the Multifamily AFHM Plan form. Currently, HUD program applicants submitting a residency preference for HUD's nondiscrimination review complete a worksheet (as part of the AFHM Plan) showing how the "percentage of the population in the residency preference area conforms to that of the occupancy of the project, waiting list, census tract, and housing market area." This review procedure is insufficient to assess whether the preference has a discriminatory effect beyond the immediate area, since applicants are currently able to designate their own market area and the use of an extended market area is not mandatory.

HUD should make explicit in the AFHM Plan form and other guidance that residency preferences are not permitted unless HUD determines that they will not have a discriminatory impact, including where they perpetuate segregation, and will not undermine AFHM objectives. This assessment should be based on regional data. Contrary to the approach in the current Plan, the determination whether the preference is discriminatory should not primarily be based on comparison of the racial composition within the preference's geographic scope to that of the Census tract or developer-defined market area. The worksheet should also require (not simply offer as an option) comparison to eligible families in the full metropolitan area.

There should be a strong presumption against the use of residency preferences, with HUD re-assessing approval at regular periods to ensure that the preference remains appropriate and legal given changing demographics.

Substantive marketing requirements

In addition to making the improvements to the AFHM Plan form that we recommend above, HUD should provide more substantive guidance on effective marketing practices. These substantive guidelines are needed to make clear to developers that affirmative marketing requires meaningful engagement with those "least likely to apply," particularly if the developer otherwise falls short of meeting demographic performance standards. For example, simply providing notice of available rentals in minority group media publications is unlikely to suffice in encouraging minority group members to choose a historically exclusionary neighborhood of which they have little knowledge.

⁹ See Connecticut Fair Housing Regulations, §8-33ee-2(a).

While the current AFHM Plan form requires a description of proposed marketing activities, including community contacts and advertising methods (see Multifamily Form, Fields 4b and 4c), we recommend that HUD add a more detailed worksheet that identifies best practices. HUD should also update its AFHM Handbook to promote these activities. Developers' documented engagement in these activities, as well as their progress toward performance goals, should then be used to assess AFHM compliance.

Our specific substantive marketing recommendations include:

Adopt best practices developed in state AFHM regulatory schemes

Several states – including Massachusetts, New Jersey, and Connecticut – have formulated AFHM marketing requirements with successful features that can be informative in improving federal-level guidance. Those three states have successfully developed requirements that target those least likely to apply. Their plans also have controls in place to ensure developers' compliance.

- Requiring the marketing of properties 4-6 months prior to occupancy, allowing developers ample time to develop a waiting list inclusive of aspiring tenants otherwise “least likely to apply.”¹⁰
- Requiring all affordable units to be listed on the same website
- Requiring applications for affordable units be available at public locations including at least one that has night hours¹¹
- Requiring in-person informational meetings with prospective applicants¹²
- Requiring that “least likely to apply” be clearly defined, and delaying occupancy unless sufficient outreach occurs¹³
- Require that the marketing of properties is done regionally rather than locally¹⁴

Require strategic, information-rich content

HUD's current AFHM guidance does not require strategies tailored to address the gaps in knowledge that may result from decades of residential exclusion – such as the presentation of clear comparative data on school quality, services, or other neighborhood features.¹⁵ Marketing programs should mirror successful housing mobility programs by offering an array of clearly presented, specific information likely to be of concern to prospective residents. Default marketing techniques – which may only provide notice that housing is available, as through short newspaper ads – indirectly rely on an applicant's comfort with and external knowledge of an

¹⁰ Massachusetts Department of Housing and Community Development, Affirmative Fair Housing Marketing Plan Guidelines, at 2, available at <http://www.mass.gov/Ehed/docs/dhcd/hd/fair/afhmp.pdf>; N.J. Admin. Code § 5:80(g).

¹¹ Massachusetts guidelines at 5.

¹² Massachusetts guidelines at 5.

¹³ Connecticut Fair Housing Regulations, §8-33ee-2(a).

¹⁴ N.J. Admin. Code § 5:80(a).

¹⁵ While the Handbook suggests that brochures “may include a range of information that influences decisions regarding housing choice” such as the location of schools, transportation, hospitals, etc., it does not *require* that any such information be provided. Handbook at 2-10.

area's character, so are insufficient to overcome residential disparities and reach those "least likely to apply." Marketing materials should include information addressing the specific concerns of residents (particularly school quality). In addition, we recommend that guidance discourage the use of terminology that is likely to deter applicants (such as "luxury housing") and require affirmative language to encourage applicants, such as "rent assistance welcome."

Personalize and simplify access to information

Centralized listings of available rentals should be compiled for access by prospective tenants throughout a region. Listings should include profiles of the developments that highlight key neighborhood features, including indicators of neighborhood quality such as poverty rates. This information should be publicly available through a variety of sources.¹⁶ The list should be made available on the internet, at organizations such as public libraries, and through entities likely to connect with a wide range of prospective applicants, including public housing agencies and housing counselors, but also in less likely locations such as health centers, legal service centers and community colleges.

Personalized community outreach is a key strategy in effective marketing. Developers should be required to employ active strategies, such as offering neighborhood tours to applicants from outside the locality.¹⁷ Rental lists should also be accompanied by referrals to certified counselors who can guide prospective residents to high-opportunity areas and provide them with the information to make informed moves; and it should provide a concise statement of nondiscrimination requirements.

Requiring the adoption of these practices will help ensure that marketing reaches those least likely to apply and that racial and economic integration is being promoted by developers.¹⁸

AFHM Plan Evaluation

We recommend that HUD refine several aspects of its evaluation process for AFHM Plans. First, recipients should be provided with written comments regarding any deficiencies that HUD identifies in their AFHM Plans. Second, recipients should be notified that if they fail to correct deficiencies in their AFHM Plans, they would be subject to program sanctions. This may include withdrawal of funding, challenges to certifications, or other penalties that lie within HUD's authorization and that HUD determines are appropriate.

We appreciate this opportunity to comment. Thank you for your consideration of the above recommendations.

¹⁶ See Connecticut Fair Housing Regulations, § 8-33ee-7(e).

¹⁷ See John Infranca, Furman Center for Real Estate & Urban Policy, *An Overview of Affirmative Marketing and Implications for the Westchester Fair Housing Settlement* (2011), http://furmancenter.org/files/publications/Furman_Center_Review_of_Affirmative_Marketing.pdf.

¹⁸ For a fuller discussion, see *Accessing Opportunity: Recommendations for Marketing and Tenant Selection in LIHTC and Other Housing Programs*, Megan Haberle, Ebony Gayles, and Philip Tegeler (Dec. 2012), available at www.prrac.org/full_text.php?item_id=13706&newsletter_id=0&header=Current%20Projects.

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