



August 26, 2024

Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Room 10276
Washington DC 20410-0500

Submitted electronically via www.regulations.gov

Re: Comments on Notice of Proposed Information Collection: Affirmative Fair Housing Marketing Plan-HUD 935.2A, HUD 935.2B and HUD 935.2C, OMB Control Number: 2529-0013

The National Fair Housing Alliance (NFHA) is pleased to provide comments in response to HUD's Solicitation of Public Comment on the Affirmative Fair Housing Marketing Plan, HUD Forms 935.2(A0, (B) and(C) in response to HUD's Notice.

NFHA is the nation's only national non-profit, civil rights organization dedicated to eliminating all forms of housing discrimination. Founded in 1988, we have worked for over 30 years to advance fairness and equal opportunities in our nation's housing, lending and insurance markets. The National Fair Housing Alliance has used the federal Fair Housing Act, including its work on assuring equitable access to housing by people of color and other protected characteristics, to provide fair housing opportunities for millions of people.

As reported in NFHA's 2023 Trends report¹, fair housing organizations, HUD, state and local enforcement agencies and the Department of Justice investigated over 34,100 complaints of discrimination in 2023, a 5.68 percent increase from 2022. NFHA itself and many of its members have brought administrative complaints and private lawsuits and have worked with the Department of Justice to challenge discriminatory practices by lenders, appraisers, municipalities, developers, the GSEs and others that perpetuate segregation based on race, national origin and other protected characteristics. In particular NFHA has challenged discriminatory practices by lenders and GSEs that perpetuated segregation and inequities in treatment in neighborhoods of color and supports rental and homeownership opportunities in neighborhoods that will advance

¹ National Fair Housing Alliance, 2024 Fair Housing Trends Report, <https://nationalfairhousing.org/resource/2024-fair-housing-trends-report/>

housing choices for people of color, including support for first generation housing assistance, maintenance of housing in communities of color and development of affordable single- and multi-family housing. NFHA has also engaged extensively with HUD and other federal agencies to support increased access to opportunity and investment in communities of color required under the statutory obligation of HUD to affirmatively further fair housing and under the Fair Housing Act generally.

Higher levels of metropolitan area residential segregation by race, ethnicity, and income are associated with negative social, economic, and health outcomes for disadvantaged racial and ethnic groups and those with low incomes. Government policy that influences higher-income household moves into lower-income neighborhoods would not only have a larger impact on integration but would also avoid placing the sole responsibility of integration on those who have been historically discriminated against.² Government policy that influences increased access by people of color to higher opportunity areas also would have an important impact on segregation and access to opportunity.

AFHMPs are an important part of HUD's arsenal of tools that provide a vehicle for integration by race, national origin and income. Affirmative marketing programs continue to be necessary to diversify and integrate communities by reaching out to potential residents who are unlikely to apply and providing information and access to affordable housing projects. Requiring participants in HUD programs, including its mortgage insurance programs, to develop and follow affirmative marketing practices makes information about housing opportunities available to people who may be unaware of, or lack information about, housing opportunities where they are unlikely otherwise to explore. It is a tool that works to support integrated housing choices.

An expansive study of the affirmative fair housing marketing program conducted in 2012 made several recommendations for improving the application and scope of HUD's AFFMP program, stating:

Robust, thoughtfully crafted marketing and tenant selection policy can help federal and state agencies (as well as individual developers) ensure that their resources foster diverse communities and counter the legacies of exclusion. In addition to being good policy, these responsibilities arise from the Fair Housing Act, which established the civil rights mandates of nondiscrimination and integration and includes a statutory directive that all federal housing programs "affirmatively further fair housing" (AFFH). This directive requires that all agencies administering housing-related programs go beyond policing

² Steil, Justin, and Michael Lens, Public Policies To Address Residential Segregation And Improve Health, <https://www.healthaffairs.org/content/briefs/public-policies-address-residential-segregation-and-improve-health>

discrimination to ensure that federal housing resources actively advance integration and housing choice.³

Finally, and critically, HUD's Office of Fair Housing and Equal Opportunity and each regional office must be staffed, have guidance, and be trained to provide effective, prompt review and feedback on AFHMP submissions. Without adequate resources and training to review the documents, improving the process will be a useless act.

HUD has posed four questions for public comment in its Notice:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

NFHA strongly supports the continued use of the AFHMP's concept and general structure by HUD. The utility of an AFHMP in expanding awareness of housing opportunities is an important tool as HUD continues its work under the obligation to affirmatively further fair housing and as the responsibility of HUD to end discrimination and affirmatively use its programs to advance housing choice. The absence of use of AFHMP provisions can result in significant challenges to local actions and inactions that perpetuate segregation. For example, in a case brought some years ago, failure to comply with AFHMP commitments resulted in a successful False Claims Act case being brought against the Village of Island Park, New York, which, filled a number of housing units provided under a HUD program only by white applicants, and ignored its AFHMP obligations. See *U.S. v. Inc. Village of Island Park*, 888 F. Supp. 419, 439-41 (E.D.N.Y. 1995) (the decisionmaker. "knowing that it was improper and illegal, pre-

³ Habele, Megan, Ebony Gayles and Philip Tegeler, "Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs ("PRRAC Report"), December 2012, <https://www.prrac.org/pdf/AFHMExecutiveSummary.pdf>

selected the purchasers of the Phase I and Phase II houses by giving them advance notice of when the program was to be advertised and by telling them to deliver their letters to Village Hall prior to 9:00 a.m. on the day in question. . . . The Section 235 purchasers, so selected, were chosen in violation of the conditions on which the program was approved – that is, that the purchasers be approved on a first-come, first-served basis, and that a diligent good faith attempt to comply with the AFHMP would be made in administering the program.”) (citations omitted), A False Claims Act award amounting to more than \$5 million was ultimately awarded.

The data that is currently collected by AFHMP forms is necessary because affirmative marketing requirements still require a commitment to reaching out to applicants who are least likely to apply to accomplish the purposes of the Fair Housing Act.

We encourage HUD, however, to amplify the instructions on the form to clarify what the “market area” that is relied upon should include. Currently the form provides only that the market area include the area from which an applicant can “reasonably expect to draw a substantial number of its tenants.” Note that the obligation to select a market area may apply to homeownership so the form could be changed to “potential residents.” The instructions are subjective and do not include consideration of regional patterns of segregation. A market area must be drawn to reasonably include broader metropolitan areas such as MSAs or regional planning geographies rather than the developer’s subjective view of the market area which might be narrower and exclude consideration of broader patterns of segregation within a large community.

In addition, demographics of income-eligible prospective homeowners may differ from the general demographics. Thus, HUD may want to allow consideration of the demographics of income-eligible persons in larger regional area.

Making demographic data available for larger geographies including the MSA would be an important addition to the AFHMP process.

Given recent challenges to various types of local residency preferences,⁴ the provisions in the forms to identify local preferences should also remain. We encourage HUD to require that any local residency preference be clearly defined by its geographic impact and documented by census tract data that demonstrates that such a preference will not discriminatorily limit access by applicants. This analysis requires data to support a two-part analysis: which is the demographic make-up of the MSA or regional planning area, and what will be the likely impact of the residency preference on the applicant pool. For example, if an applicant had a local or community preference which would exclude

⁴ *Noel v. City of New York*, No. 15-CV-5236-LTS (S.D.N.Y. Apr. 28, 2023), *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994), *Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S. 2nd 831, 837 (Sup.Ct. N.Y. 2011), (application of preference “only serves to perpetuate segregation in the Broadway Triangle” in violation of the FHA). And see, NYU Furman Center, *Community Preferences and Fair Housing*, available at <http://furmancenter.org/research/iri/discussions/community-preferences-and-fair-housing..>

applicants from a nearby metropolitan area that were otherwise qualified and not expected to apply without affirmative marketing, the applicant could not exclude the metropolitan area from its expected market area.

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

Completion of an AFHMP could take substantially longer than estimated in the Notice, unless demographic information is readily and easily available to be available as the basis for the analysis required in the AFHMP submission.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

As noted above, the ready availability of census data electronically would significantly improve the utility of the AFHMP form. Clear instruction on identifying the market area and developing a fair housing analysis of the proposed market area would be helpful.

HUD could include recommendations about a variety of alternative media to use to reach out to people least likely to apply. For consideration of people least likely to apply, outreach to persons on waiting list for Housing Choice Vouchers would likely amplify applications from persons least likely to apply for housing in areas of higher opportunity as would making information available to offices that serve voucher holders and others of limited income, something that few developers of affordable multifamily housing consider. Other possible alternative marketing techniques include social media, direct mailings, local transportation advertising (including buses as well as trains), local newsletters and circulars, radio ads, flyers or pamphlets at daycare, senior, and recreation centers, flyers on local grocery store boards and other venues, and organized tours of the housing and the neighborhood.⁵

Additional instructions outlining procedures for consideration and analysis of local preferences, not limited to residency preferences, would be helpful to those who intend to include such preferences. For example, First Generation homebuyers are often a priority for some developers, especially in states and localities which authorize or encourage such preferences. Instructions around use of such preferences and their analysis to ensure that they are, intentionally or not, excluding applicants that are least likely to apply could be helpful.

⁵ PRRAC Report at 28 (citing interviews with housing practitioners on affirmative marketing).

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

NFHA supports increased use of technology to improve and enhance the collection of the AFHMP electronically. NFHA also supports the increased use of technology to allow easy, detailed analysis by FHEO officials of the information submitted as part of the AFHMP submission.

Thank you for the opportunity to comment on this important Notice. Please contact Morgan Williams, General Counsel, at [REDACTED] if you have any questions.

Sincerely,

Lisa Rice
President and CEO
National Fair Housing Alliance