

## Ensuring NAHMA Members Receive the Latest News and Analysis of Breaking Issues in Affordable Housing

National Affordable Housing Management Association – 400 N. Columbus Street, Suite 203 - Alexandria, VA 22314  
Phone 703-683-8630 - Fax 703-683-8634 - [www.nahma.org](http://www.nahma.org)



September 24, 2013

NAHMAanalysis 2013-0924

### HUD's Proposed Rule: Affirmatively Furthering Fair Housing and NAHMA's Comments

#### Background

The Fair Housing Act of 1968 (Title VIII of the Civil Rights Act) requires that HUD programs and activities be administered in a manner to affirmatively further fair housing policies. The Act outlawed discrimination and set the necessary steps to overcome issues of segregation and promote inclusiveness the housing market. It is left to the Secretary to define the precise scope of the affirmatively furthering fair housing obligations for HUD program participants. As time progressed, fair housing rules were clarified and extended to include the needs of the disabled and persons with HIV/AIDs.

Through the obligation of “affirmatively furthering fair housing” in the Fair Housing Act, HUD staff and program participants aimed to promote fair housing choice. However, a 2010 Government Accountability Office (GAO) [report](#) found that the fair housing elements of current housing and community development planning are not as effective as they could be. The GAO report focused on the Analyses of Impediments (AI), which are produced by the program participants (i.e. Public Housing Agencies (PHAs) and state and local governments) to identify impediments to fair housing in their communities. States, local governments, and PHAs must examine their programs, or proposed programs, and identify any impediments to fair housing choice. These impediments should be addressed in a reasonable fashion in view of the resources available. Yet, the report found that a sizeable portion of available AI forms are outdated, lack content, and are not comprehensive enough to fully address fair housing impediments. Furthermore, the report claimed that HUD rarely requested AIs during on-site reviews. The GAO recommended that HUD require program participants to update their AIs periodically, follow a specific format, and submit them for review.

In response to this report and similar issues raised by program participants and advocates, HUD issued a proposed rule that seeks to provide direction, guidance, and procedures for program participants to promote fair housing choice. This proposed rule, Affirmatively Furthering Fair Housing, was introduced on July 19, 2013, and according to HUD, it responds to the critiques outlined in the GAO report by:

1. Refining the current requirement that program participants complete an AI with a more effective and standardized Assessment of Fair Housing (AFH), through which program participants would evaluate fair housing challenges and goals using regional and national benchmarks and data tools to facilitate the measurements of trends and changes over time;
2. Improving fair housing assessment, planning, and decision-making by providing data that program participants must consider in their Assessments of Fair Housing (AFHs), thereby aiding program participants establish fair housing goals to address these issues and concerns;
3. Incorporating, explicitly, fair housing planning into existing planning processes, the consolidated plan and PHA Annual Plan, which in turn incorporates fair housing priorities and concerns more effectively into

housing, community development, land-use, and other decision-making that influences how communities and regions grow and develop;

4. Encouraging and facilitating regional approaches to addressing fair housing issues, including effective incentives for collaboration across jurisdictions and PHAs, and incorporation of fair housing planning into regionally significant undertakings, such as major public infrastructure investments;
5. Bringing people historically excluded because of characteristics protected by the Fair Housing Act into full and fair participation in decisions about the appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of program participants' AFHs; and
6. Establishing an approach to affirmatively further fair housing that calls for coordinated efforts to combat illegal housing discrimination, so that individuals and families can make decisions about where to live, free from discrimination, with necessary information regarding housing options, and with adequate support to make their choices viable.

HUD intends the guidance, data, tools, and procedural improvements provided under this proposed rule to reduce the current data collection burden on program participants as well. The Department claims that technical assistance and guidance “will allow program participants to spend less time gathering information and more time engaged in conversation with the community regarding the most effective means of advancing their fair housing goals”.

#### **NAHMA’s Comments on Proposed Rule**

Stakeholders and the public were invited to submit comments to the proposed Affirmatively Furthering Fair Housing rule. In the comments, NAHMA supported HUD’s efforts to issue regulations that would add clarity to the Fair Housing Act requirements, and provide participants with tools to meet statutory obligations. To better meet the goals that HUD has outlined, NAHMA offered several recommendations that would assist program participants understand their responsibilities and options:

- HUD must clarify the rule to ensure that preservation of existing rental housing is encouraged. In its current form, the rule casts doubt on grantees’ ability to invest in neighborhoods with ethnic and racial concentrations of poverty. Much of the housing stock in need of revitalization is currently located in distressed areas. The final rule should make clear that grantees’ investments to preserve, rehabilitate and revitalize properties in distressed neighborhoods does affirmatively further fair housing.
- NAHMA strongly urged HUD to clarify the proposed certification requirement that grantees “will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” HUD should clarify what is meant by “materially inconsistent” so that the rule does not inadvertently discourage preservation, rehabilitation or recapitalization of properties in distressed areas. Under this standard, a PHA may be hard pressed to justify capital improvements on a property that exists in a neighborhood lacking community assets. Similarly, a PHA could struggle to explain how lowering their voucher payment standard in order to be able to stretch their budget and continue to serve the same number of families meets the definition of AFFH.
- NAHMA strongly urged HUD to add a “safe harbor.” The proposed rule provides no assurances that grantees have sufficiently met their AFFH obligations. The rule should be amended to include a safe harbor provision that would recognize grantees’ efforts and hold them harmless for factors outside of their control.
- It is critical that HUD provide an opportunity for a more thorough review of the nationally uniform data that “will be the predicate for and help frame program participants’ assessment activities.” According to the summary section:

“...HUD will provide states, local governments, insular areas, and public housing agencies (PHAs), as well as the communities they serve, with data on patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to education, employment, low-poverty, transportation, and environmental health, among other critical assets; disproportionate housing needs based on the classes protected under the Fair Housing Act; data on individuals with disabilities and families with children; and discrimination. From these data, program participants will evaluate their present environment to assess fair housing issues, identify the primary determinants that account for those issues, and set forth fair housing priorities and goals. The benefit of this approach is that these priorities and goals will then better inform program participant’s strategies and actions by improving the integration of the assessment of fair housing through enhanced coordination with current planning exercises.”

Considering the importance placed on this information, the Department should provide an opportunity for additional public comments on the data, as well as HUD’s intended uses of it. Rather than a clear, consistent, and easily comprehensible picture, it is possible that the data will show various needs in various locations. Interpretations will be drawn from this data, and it is possible that grantees and different stakeholders may draw different conclusions from the same data.

- Finally, HUD should continue working with grantees to achieve the goals of the proposed rule through the most cost effective and least administratively burdensome means. Before finalizing the rule, the Department should carefully evaluate the administrative and compliance costs to the grantees in the context of sequestration and other federal budget cuts.

As a result of the increased emphasis on affirmatively furthering fair housing within the planning process, HUD anticipates that there may be increased compliance costs for some program participants. As more fully addressed in the Regulatory Impact Analysis that accompanies this rule, HUD estimates net annual compliance costs in the range of \$3 to \$9 million.

### **Conclusion**

The rule does not directly apply to owners and managers of privately owned assisted multifamily housing. Nevertheless, NAHMA felt it was important to comment on this proposed rule because, in its current form, it could have unintended negative consequences for preservation and new development of affordable multifamily properties. We felt it was important to offer constructive feedback before the rule is implemented.

Please be assured that NAHMA will continue following the status of this proposed rule and we will inform members of any new developments.