U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500
April 21, 2022

Office of Fair Housing and Equal Opportunity (FHEO) Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties

I. Introduction

Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits discrimination on the basis of race, color, and national origin in programs or activities receiving federal financial assistance.[1] The Office of Fair Housing and Equal Opportunity (FHEO) issues this guidance concerning how Title VI applies to marketing and application processing at HUD-subsidized multifamily properties - including Project-Based Rental Assistance, Section 202, and Section 811 programs.[2]

II. Background

The more than 1.5 million HUD-subsidized multifamily units nationwide are a critical affordable housing resource for low-income residents. However, many properties employ marketing, rental application processing, and waitlist management practices that limit access for eligible housing-seekers in the market areas.[3] These practices can contribute to segregation of HUD-subsidized properties and disparate outcomes by race, color, or national origin. For example, a white family living in a unit with Project-Based Rental Assistance (PBRA) is more than three times as likely to live in a low-poverty neighborhood as a Black family living in a PBRA unit.[4] This guidance sets forth how certain marketing, rental application processing, and waitlist management practices may perpetuate segregation or otherwise discriminate in violation of Title VI and related authorities.[5] It also discusses more inclusive practices that are less likely to have such discriminatory results.

III. Legal Authority

Title VI requires that no person in the United States shall be excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving

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[1] 42 U.S.C. § 2000d, 24 CFR Part 1.

[2] This guidance is directed at subsidized multifamily programs (listed in Figure 1-1 in HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, November 2013). Note however that Title VI applies to all programs or activities receiving federal financial assistance, including, for example, Public Housing and HOME projects.

[3] The term "market area" here means a geographic area from which tenants may reasonably be expected to be drawn, such as a County or a metropolitan statistical area, depending on patterns of commuting, employment, services, *etc*.

[4] The Center on Budget and Policy Priorities, Realizing the Housing Voucher Program's Potential to Enable Families to Move to Better Neighborhoods, 2016 (Table A-2).

[5] Note that a number of related authorities apply to HUD-subsidized multifamily properties, including Section 504 of the Rehabilitation Act (29 U.S.C. § 794) and the Fair Housing Act (42 U.S.C. § 3601 et seq.), and their implementing regulations. HUD-funded housing providers have an obligation to affirmatively further fair housing. The Americans with Disabilities Act (42 U.S.C. § 12101) and its regulations may also be applicable.

federal financial assistance on the ground of race, color, or national origin. Title VI prohibits intentional discrimination on the basis of race, color, or national origin. Title VI regulations also prohibit discriminatory effects, which occur when a facially neutral policy or practice disproportionately affects members of a group identified by race, color, or national origin, where the recipient's policy or practice lacks a substantial legitimate justification, and where there exists one or more alternatives that would serve the same legitimate objectives but with less disproportionate effect on the basis of race, color, or national origin. Title VI encompasses a wide range of harm that may be caused by a recipient's administration of its programs or activities, including perpetuating the repercussions of past discrimination. HUD Title VI regulations specify that a recipient may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

- Restrict a person in any way in access to housing, services, or benefits;[6]
- Afford persons an opportunity to participate in housing, services, or benefits different than that afforded to others;[7]
- Treat a person differently from others in determining whether they satisfy eligibility criteria;[8]
- Provide any housing, services, or benefits to a person differently than to others;[9]
- Utilize criteria or methods of administration which have the effect of subjecting persons to discrimination or defeating or impairing the objectives of a funded program or activity.[10]

IV. Marketing

For marketing practices to afford equal opportunity and access to housing as Title VI requires, a recipient should aim "to ensure that all racial groups in a marketing area have knowledge of and an opportunity to rent units in a particular building."[11] Marketing practices that have "[t]he inevitable result" of excluding members of a protected class may violate fair housing and civil rights requirements.[12] When groups protected by Title VI are underrepresented

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[6] 24 C.F.R. § 1.4(b)(1)(iv).
[7] 24 C.F.R. § 1.4(b)(1)(vi).
[8] 24 C.F.R. § 1.4(b)(1)(v).
[9] 24 C.F.R. § 1.4(b)(1)(ii).
[10] 24 C.F.R. § 1.4(b)(2)(i).
[11] *See Alschuler v. Dep't of Hous. & Urban Dev.*, 515 F. Supp. 1212, 1234 (N.D. Ill. 1981). While this guidance primarily addresses Title VI, persons with disabilities may be similarly affected by many of the practices described. Program accessibility and reasonable accommodation obligations apply during the outreach and application stage.
[12] *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 447 (E.D.N.Y. 1995). *See e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) ("Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence ... is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.") (internal quotation marks and citation omitted).

at a property compared to their representation among qualified housing-seekers in the market area, housing providers should evaluate their marketing efforts' contribution to that result and consider alternatives.[13] Note that the requirements of Title VI are in addition to, and not co-extensive with, other legal requirements, including the Department's Affirmative Fair Housing Marketing rules.[14]

Certain marketing practices may not equitably reach potential applicants across the market area. For example, reliance on word-of-mouth marketing (without additional efforts designed to reach a broader applicant pool) can disadvantage potential applicants who are not connected to the familial or social networks of existing residents. The same effect may occur when marketing through or relying on referrals from a single community organization or small number of community organizations that serve limited or targeted populations. Similarly, placing "for rent" signs at a property, in the absence of other, broader outreach, will be unsuccessful in reaching applicants who do not live near, visit, or pass by the property, and may perpetuate existing patterns of residential segregation.

In contrast, marketing strategies that employ a variety of community contacts, media, and social media, covering a broad geographic area are more likely to equitably reach potential applicants and avoid perpetuating segregation or exclusion. Many of these strategies are low-cost and can provide sufficiently detailed information. For example, housing providers may distribute detailed flyers and blank applications to local organizations across the market area with ties to a wide range of prospective applicants, such as social service providers (*e.g.*, foodbanks, legal-aid offices, emergency shelters, health clinics), employers, advocacy organizations and other agencies, local governmental offices, housing authorities, and community gathering places (*e.g.,* senior centers, recreation centers, libraries, schools, and places of worship). As many organizations serve only a subset of eligible residents, in general, the more organizations that are contacted, the more likely marketing efforts are to reach a diverse pool of applicants across the market area. Partnership with community contacts throughout the market area may be particularly effective for reaching potential applicants who have limited internet access, limited English proficiency, or who may otherwise require assistance in applying.

In addition, maintaining a web or mobile site with clear information about availability, eligibility, and application processes can be a low-cost way to inform eligible housing-seekers about housing opportunities at the property – especially those who have difficulty calling or visiting during business hours.[15] The same applies for posting on social media, local listservs,

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[13] While case law has not established a threshold of significance for disparities, the greater the disparity, the more responsiveness is warranted. *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1526 (M.D. Ala. 1991). ("There is no rigid mathematical threshold that must be met to demonstrate a sufficiently adverse impact.").

[14] *See* 24 C.F.R. § 200 Subpart M; 24 C.F.R. part 108.

[15] While not all eligible residents may use or have access to the internet, so other strategies should be employed, a website is a key tool for making important documents publicly accessible, such as waitlist opening notifications, applications, welcome packets, Tenant Section Plans, translated documents and other language resources, FAQs, *etc*.

and other sites relevant to housing-seekers in the market area (including registries of affordable housing maintained by local governments, housing authorities, or community organizations). Placing advertisements with local radio stations, newspapers, and newsletters, as well as posting advertisements in public places, such as buses, trains, and billboards can be effective in reaching additional applicants.

Note that recipients must take reasonable steps when marketing to ensure meaningful access for individuals with limited English proficiency (LEP).[16] A recipient's failure to provide meaningful access to LEP individuals can be a form of national origin discrimination that violates Title VI.[17] When conducting marketing and outreach, the presence of LEP persons among the eligible population in the market area should be evaluated and appropriate language assistance services resources, including translated materials, should be developed accordingly. As outlined in the Department's 2007 Title VI LEP recipient guidance, reasonable steps may include: advertising in non-English language newspapers, radio, and other media; "[w]orking with grassroots and faith-based community organizations and other stakeholders to inform LEP individuals of the recipients' services;" "[u]sing a telephone voice mail menu ... in the most common languages encountered;" "[providing] information about available language assistance services and how to get them;" and "stating in outreach documents that language services are available from the recipient" in statements "translated into the most common languages."[18]

No matter what marketing methods are used, marketing efforts should commence well before *any* waitlist opening, such as sixty days before, to have a meaningful effect on reducing disparities.[19] Making detailed, clear, and consistent information available to all potential applicants is also vital – including descriptions of property amenities, eligibility criteria, approximate rent, procedures for obtaining and submitting applications, and an explanation of how tenants will be selected (*i.e.*, by lottery according to preferences). Further, marketing materials should be written and designed in a manner that conveys that all applicants are welcome regardless of their race, color, or national origin. Particularly if a property has a name, logo, location, or reputation that may suggest affiliation with a particular group (*e.g.*, a religious reference) or other limitation on applicants, affirmative efforts should be made to overcome this perception.[20] Such efforts may include a prominent statement that the property is not limited in

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[16] HUD documents translated into other languages are on HUD's limited English proficiency page.
[17] *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977-78 (N.D. Cal. 2013) (Finding a Title VI intentional discrimination claim by a Spanish-speaking LEP tenant survived a motion to dismiss based, in part, on 28 C.F.R. § 42.405(d)(1)).
[18] Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2731, Jan. 22, 2007.
[19] HUD's Affirmative Fair Housing Marketing Plan (AFHMP) – HUD-935.2A – requires advertising to begin at least ninety days before occupancy for new construction and substantial rehabilitation projects.
[20] Note that the Fair Housing Act's prohibition on discriminatory statements is violated if the notice, statement, or advertisement indicates discrimination to an "ordinary reader" or "ordinary listener," regardless of whether the defendant has discriminatory intent. *See, e.g.*, *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266-67 (7th Cir. 1996); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905-07 (2d Cir. 1993); *HOME v. Cincinnati Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991). Section 3604(c) of the Act makes it unlawful "[t]o make, print, or publish, or cause

that way and welcomes applicants of all backgrounds, as well as images of diverse human models and other visual content that affirmatively conveys that the property is actively seeking a diverse applicant pool.

While every marketing strategy may not be necessary for multifamily developments with a small number of units, it is important that each property employ marketing strategies that are responsive to existing racial or other demographic concentrations in the property and seek to afford equal opportunity to all eligible residents of the market area. Many effective strategies are little to no cost, such as emailing flyers and applications to community contacts and maintaining a website. To ensure compliance with Title VI requirements, housing providers should periodically assess the effectiveness of outreach strategies and develop new strategies as appropriate. Housing providers may facilitate this assessment by tracking how applicants heard about the property and adjusting efforts accordingly.

V. Application Procedures

Burdensome application procedures can form barriers to housing that are functionally equivalent to a denial.[21] Likewise, making it difficult for potential applicants to obtain "necessary and correct information concerning what [they] must do to become a tenant discourages and impedes [their] application and results in [their] exclusion from the apartments."[22] When such hurdles have the purpose or effect of excluding members of a protected group from a development, they may violate Title VI.

For example, requiring applications to be picked up and/or submitted in person can function as a barrier, unjustifiably excluding potential applicants who cannot travel to the property – because they do not live in the neighborhood, have inflexible work schedules or caretaking responsibilities, rely on limited transportation options, or other reasons. Distributing and/or accepting applications only during a narrow window of time – such as one day or a few hours over several days – can also operate as barriers.

Broader application distribution and acceptance requirements can reduce disparities and promote equitable housing opportunity, especially given the ease of digital communication. Examples include making applications available on a property's website, including the mobile version of the property's website, distributing applications to community contacts throughout the market area, and accepting applications through a variety of methods, including in-person, mail, web-based forms, and email. Housing providers should ensure that applications may be picked-up and dropped off outside of regular business hours, including evenings and weekends, ideally at multiple locations. Distributing and accepting applications for longer periods of time will also

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to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, [disability], familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

[21] *See United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973) (finding "racially discriminatory conduct occurred because the owners and their top assistants failed to take aggressive action to [e]nsure that agents dealing with applicants treated everyone alike without regard to race or color.").

[22] *Id.*

afford a wider range of potential residents the opportunity to apply. Finally, placing applicants on a waitlist pursuant to lottery rather than by prioritizing those who are first to apply is similarly likely to yield a more diverse tenant body, particularly when there is very high demand for the property.

Clearly explaining how applicants may submit their applications and how applicants will be prioritized and selected for tenancy -- including prominently explaining the procedure for requesting a reasonable accommodation in the application process -- is also key to ensuring equal opportunity. As with marketing strategies, housing providers should periodically assess whether application processing requirements are perpetuating segregation or unjustifiably restricting access to the housing opportunity. This is especially true as technological advances change how housing-seekers find and engage with housing opportunities.

V. Applicant Screening and Waitlist Management

Applicant screening and waitlist management practices also may create unnecessary barriers to housing opportunity or be inconsistently applied in practice, in a way that disproportionately excludes individuals based on their race, color, or national origin.[23] When protected class groups are underrepresented at a property compared to their representation among qualified applicants (and potential applicants in the market area), housing providers should evaluate applicant screening and waitlist management practices such as eligibility criteria, preferences, and waitlist update protocols and consider less discriminatory alternatives.[24]

Screening criteria, such as those related to criminal records, credit, and rental history, may operate unjustifiably to exclude individuals based on their race, color, or national origin. HUD has issued guidance regarding criminal records screening noting that housing providers should not rely on arrest records, and should consider the nature, severity, and recency of conviction records, as well as extenuating circumstances.[25] Similarly, in evaluating rental history, housing providers should consider the accuracy, nature, relevance, and recency of negative information rather than having any negative information trigger an automatic denial. For example, records from eviction or related cases in which the tenant prevailed or that were settled without either party admitting fault do not necessarily demonstrate a poor tenant history. Likewise, extenuating or mitigating circumstances may apply (*e.g.*, an eviction was due to unexpected medical or emergency expenses, or a negative reference reflected bias). This is

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[23] A typical disparity measure involves a comparison between the proportion of persons in the protected class who are adversely affected by the challenged practice and the proportion of persons not in the protected class who are adversely affected. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576–77 (2d Cir. 2003). A disparity is established if the challenged practice adversely affects a significantly higher proportion of protected class members than non-protected class members. *Id.*

[24] Note that housing providers must follow tenanting requirements outlined in 24 C.F.R. § 8.27 regarding units that have accessible features.

[25] U.S. Department of Housing, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016.

important because non-white households may be more likely to face eviction actions, even for the same housing history as white counterparts.[26]

Policies for screening tenants should be available to prospective applicants and contain enough detail for an applicant to tell whether they are likely to qualify. For example, a criminal records screening policy should specify the types of records being considered (*e.g.*, convictions), which specific types of crimes are disqualifying, the lookback period (*e.g.*, three years from application date), and that evidence of mitigating circumstances or rehabilitation and requests for disability-related reasonable accommodations will be considered.[27] Housing providers should not request or consider records of criminal activity or rental history that fall outside the scope of their stated policies. Housing providers who utilize a third-party tenant screening service should ensure that screenings are conducted in accordance with all tenant selection policies.

The use of preferences in housing programs can also significantly restrict access to housing opportunities in a discriminatory manner, especially when demand for housing is so high that persons without a preference have little to no chance of obtaining housing. Preferences should be carefully considered in light of existing patterns of residential segregation and past discriminatory practices. Preferences for residents of a geographic area like a City or County are permitted only with advance approval by HUD, and may not discriminate in violation of civil rights laws.[28] Housing providers must clearly inform all applicants about available preferences and must give applicants an opportunity to show that they qualify for available preferences.[29] The use of preferences must not operate in a manner contrary to civil rights protections and also must be consistent with federal requirements applicable to the housing program.

It is important to note that preferences and screening criteria can discriminate in the mechanics of their application, as well as their overall design. In many areas, residents experiencing housing insecurity or homelessness are disproportionately minority,[30] so adopting practices that account for the needs of these populations can help ensure compliance with Title VI.[31] For example, limitations on the type of proof accepted to establish residency may disadvantage applicants living in housing insecurity – *e.g.*, requiring a lease or mail with the applicant's name and current address may disadvantage applicants staying with friends or family, moving frequently, sleeping in shelters or their car, receiving mail at a P.O. box, *etc*. Similarly, a

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[26] Peter Hepburn, Renee Louis, and Matthew Desmond, "Racial and Gender Disparities among Evicted Americans," Sociological Science ("[T]he threshold for filing against white renters is higher than the threshold for filing against Black and Latinx renters" (citing Matthew Desmond and Carl Gershenson. 2017. "Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors." Social Science Research 62:362–77.)).

[27] Housing providers must use adequate matching procedures to match information to applicants, including not using "name-only matching." *See* Fair Credit Reporting; Name-Only Matching Procedures, Op. C.F.P.B. (2021), https://files.consumerfinance.gov/f/documents/cfpb_name-only-matching_advisory-opinion_2021-11.pdf.

[28] 24 C.F.R. § 5.655(c)(1)(i) (citing 24 C.F.R. § 5.105(a)(1)); and 24 C.F.R. § 5.655(c)(1)(iii).

[29] 24 C.F.R. § 5.655(c).

[30] HUD, Annual Homeless Assessment Report to Congress, 2019.

[31] *Boykin v. Gray*, 895 F. Supp. 2d 199, 212 (D.D.C. 2012) ("If a disproportionately high percentage of the homeless population in Washington, D.C. is minority, then action by the District adversely affecting that population could state a claim for disparate impact.").

lack of clarity around *when* applicants must live in a jurisdiction to qualify for a residency preference may operate to exclude or deter applicants who may need to move one or more times over the course of time they are on a waitlist.

Procedures for updating the waitlist and removing applicant names can also disadvantage or exclude certain groups of persons in accessing the housing opportunity. Applicants experiencing housing insecurity or homelessness may have difficulty if a stable mailing address is required, rather than allowing for communication by phone or email. When wait times are long, removing applicants from the waitlist if mail is returned as undeliverable without any other attempt to reach an applicant can disadvantage applicants who are transient due to housing insecurity. This is especially true as people rely increasingly on phone and email, even for more formal communication with government agencies, banks, *etc*. Allowing applicants, the choice of how they would like to be contacted, including by mail, email, phone, or all three is less likely to unjustifiably exclude applicants.

As with marketing, clear communication is key to non-discriminatory application of preferences and screening criteria. Detailed information in English and non-English languages should be available to potential applicants about screening criteria and preferences, what information may be requested and reviewed, and how applicants may contest adverse determinations – including on a property's website. Applicants should be made aware of how the property may contact them, and what is required to remain active on the waitlist. Housing providers should keep such records as are necessary to evaluate the impact of screening criteria, preferences, and waitlist management practices such as applications, requests for more information, decisions, appeals, *etc*.