

# NOW & NEXT

## Affordable Housing Alert

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### New HUD civil rights guidance on marketing, waitlist management for subsidized properties

By Harry J. Kelly, Richard Michael Price, and Myra A. Benjamin

FHEO's new civil rights guidance document covers new marketing, application, and waitlist management directives intended to improve compliance with Title VI.



#### What's the Impact?

- / FHEO's new guidance spells out requirements for marketing, application distribution, and screening/waitlist procedures
- / HUD now requires increased proactive effort that will impose additional costs and administrative burdens on owners
- / Enforcement activity has increased, so owners must adhere to stricter standards to avoid scrutiny

Over the last year, we've seen a dramatic increase in the number of compliance reviews by HUD's Office of Fair Housing and Equal Opportunity ("FHEO") under Title VI of the Civil Rights Act of 1964 into the ways that providers of federally subsidized housing market their properties and operate their waitlists. FHEO's concern appears to focus on properties that have resident and waitlist demographics that depart significantly from the larger population of the market area—

for example, properties that have no or only a handful of minority residents, or whose residents or waitlists reflect an unexpected concentration of one racial or ethnic group.

Whatever the cause, these disparities are viewed by FHEO as evidence of potential violations of Title VI, which prohibits discrimination on the basis of race, color, and national origin in any program that receives federal financial assistance, including project-based rental assistance, HOME and CDBG funds, and other HUD-subsidized programs. Almost inevitably, these compliance reviews lead to voluntary compliance agreements (VCAs) that include complicated plans to remarket the property to minority groups, revise Affirmative Fair Housing Marketing Plans (AFHMPs) and tenant selection plans, and often include steps to improve language assistance for persons with limited English proficiency. Many VCAs also require housing providers to pay some sort of financial price for non-compliance, such as establishing a victim's compensation fund or a fund to promote fair housing and affordable housing goals. VCAs are time-consuming to negotiate and expensive to implement.

It is much better to take steps to avoid FHEO scrutiny than to operate under a VCA that intrudes into your property's marketing and tenant selection practices. The good news—sort of—is that FHEO has recently issued a new [guidance document on marketing, rent application, and waitlist management practices](#) intended to improve compliance with Title VI and an accompanying "[implementation sheet](#)"—basically, a set of Title VI dos and don'ts. Here's a summary of some of the highlights:

## Marketing

FHEO wants housing providers to affirmatively market their properties to all racial groups in their market area. Some marketing procedures, such as word-of-mouth advertising or "for rent" signage, limit outreach and may have potentially discriminatory effects. Instead, rental properties should implement a marketing strategy that includes a wider reach and better accessibility. This can be accomplished by:

- / Using social media/local listservs to reach a larger number of prospective tenants;
- / Maintaining a mobile-friendly website from which applicants have access to all the information needed to apply, such as: unit availability, eligibility requirements, and the application process;
- / Advertising at least 60 days in advance of any waitlist opening;
- / Distributing blank rental applications and flyers to local organizations such as: grocery stores, food banks, legal aid offices, libraries, schools, recreation centers, etc.;
- / Distributing advertising and marketing materials (including applications) in different languages to outreach to sub-communities who may not be proficient in English;
- / Advertising with local media outlets, such as radio stations and newspapers;
- / Ensuring that all information about the property and units for rent is consistent—including information about approximate rents, amenities, the application process, subsidies, etc.

## Application distribution procedures

HUD is also focused on ensuring that potential tenants are not limited in their ability to access and submit applications, for example, by limiting the hours during which applications can be submitted or by distributing applications in a limited time and manner. The following list outlines procedures that will help providers ensure compliance with Title VI:

- / Distributing applications through a variety of methods including: fillable forms on a website, allowing printing of blank applications from a website, distributing blank applications to local organizations and other outreach groups;
- / Accepting applications not only in-person, but also electronically and via mail;
- / Allowing physical pick-up and drop-off of applications outside of business hours by using secure drop boxes; and
- / Making available clear instructions on how applications may be picked up and submitted.

## Applicant screening and waitlist procedures

Applicant screening procedures can be prohibitive and unduly discriminatory. The following procedures should be implemented to ensure consistency and inclusion across a housing provider's process for applicant screening:

- / Criminal records: Following the 2016 guidance from HUD's Office of General Counsel, FHEO warns about the potentially discriminatory effect of using criminal history as a screening device. If owners use criminal history to screen applications, they should not use arrest records; instead, they should evaluate conviction records on a case-by-case basis. This means looking at the nature and magnitude of the offense, its severity, and how recent the conviction is;
- / Rental history: providers should evaluate the accuracy, relevance, and nature of any negative information in a prospective tenant's rental history—this means not eliminating an applicant just because that individual was unable to pay past rents at market rates;
- / Alternative methods of proof and documentation to establish residency; and
- / Allowing applicants to specify their preferred method of contact.

Why is this new guidance only sort of good news? First, FHEO's new guidance goes well beyond what HUD has formally required in the past. Apparently mere adherence to your HUD-approved AFHMP is no longer sufficient to assure that you have met your affirmative marketing duties. Second, FHEO's new guidance requires a lot more proactive effort, which will impose additional costs and administrative burdens on owners. Finally, and perhaps most important, FHEO's compliance review initiative started more than a year before this new guidance was published. If FHEO is going to hold housing providers to a stricter standard of civil rights compliance, shouldn't it have published that guidance *before* embarking on an enforcement campaign?

The bottom line is that FHEO has laid a new marker for what satisfies Title VI's requirements. At least now, providers of subsidized housing who want to get a target off their backs—especially

owners whose properties have significant demographic disparities—know what FHEO wants them to do to comply with Title VI. You've been warned.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

**Harry J. Kelly**

202.585.8712

[hkelly@nixonpeabody.com](mailto:hkelly@nixonpeabody.com)

**Richard Michael Price**

202.585.8716

[rprice@nixonpeabody.com](mailto:rprice@nixonpeabody.com)

**Myra A. Benjamin**

202.585.8738

[mbenjamin@nixonpeabody.com](mailto:mbenjamin@nixonpeabody.com)

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