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Affordable Housing Alert

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HUD proposes to eliminate affirmative fair housing marketing regulations

By Harry J. Kelly

Reversing 50 years of policy and practice, HUD seeks to rescind its regulations requiring covered housing providers to affirmatively market their properties to underserved populations, calling the regulations unconstitutional and against the Fair Housing Act.

What's the impact?

- Removing HUD's affirmative fair housing marketing regulations will not change housing providers' obligations to comply with the Fair Housing Act.
- Without HUD's preapproval of Affirmative Fair Housing Marketing Plans, housing providers may find it more difficult to defend themselves against fair housing complaints.

On June 3, 2025, the US Department of Housing and Urban Development (HUD) issued a *notice in the Federal Register* proposing to rescind its affirmative fair housing marketing regulations (AFHM Regulations). These regulations, first implemented in the 1970s, require housing providers in some of HUD's most popular programs (e.g., FHA mortgage insurance and Section 8) to affirmatively market units to buyers and tenants regardless of their membership in protected

classes (e.g., race, sex, and religion). To comply with these regulations, providers must create marketing plans and submit them to HUD for approval. Once providers begin marketing the project, they must send HUD information about their efforts. HUD uses this information to determine the providers' compliance with the Fair Housing Act ("FHAct") and its implementing regulations. The AFHM Regulations do not require owners to preferentially admit minorities to HUD-insured and -assisted housing but to take positive steps to market their properties to underserved groups.

HUD's proposed rule would eliminate the AFHM Regulations entirely. In the proposed rule, HUD offers six justifications for its rescission:

- The AFHM Regulations are inconsistent with HUD's authority under the FHAct because, rather than preventing discrimination in housing, they require private parties to engage in discrimination.
- The AFHM Regulations are unconstitutional under the Fourteenth Amendment's Equal Protection Clause.
- The FHAct does not authorize the AFHM Regulations, so if they stay on the books, HUD, as part of the executive branch, would be unconstitutionally usurping Congress's legislative power.
- The AFHM Regulations violate HUD's commitment to race neutrality.
- The burden of complying with the AFHM Regulations outweighs their benefit to ensuring fair housing.
- The AFHM Regulations prioritize statistical equalization over substantive antidiscrimination.

We want to explore a couple of these rationales more deeply.

From equal opportunity to discrimination?

Several of HUD's rationales assert that the AFHM Regulations are discriminatory. This was not how they were originally intended. When HUD first created the AFHM Regulations, it "intended to promote a condition in which individuals of similar income levels in the same housing market area have available to them a similar range of choices in housing, regardless of the individuals" membership in a protected class. 36 F.R. 11869. In other words, HUD wanted to obligate housing providers to market their units as widely as possible, ensuring all Americans had equal opportunities to access housing.

Now, HUD is asserting that the AFHM Regulations are discriminatory in multiple different ways. Does this newer interpretation have merit? To support its allegation that the AFHM Regulations are discriminatory, HUD claims that the regulations require housing providers to affirmatively attract and prefer individuals in protected classes, thereby discriminating against individuals who

aren't in those classes. However, the regulations unambiguously compel providers to market their housing stock to as large an audience as possible. The AFHM Regulations merely recommend ways housing providers can accomplish this; there is no requirement that they only solicit minority groups. Certainly, they do not contain any provision requiring owners to preferentially admit those groups to their properties.

Additionally, HUD's claim that the FHAct is unconstitutional under the Fourteenth Amendment's Equal Protection Clause seems implausible. HUD cites the Supreme Court's recent decision overturning Harvard University's race-conscious admissions practices pursuant to the Equal Protection Clause. However, in that case, Harvard made preferential decisions based on individuals' race. In support of its claim that the current regulations are racially preferential, HUD cites part of one of the AFHM Regulations but ignores the fact that the AFHM Regulations explicitly require housing providers to attract buyers or tenants "of all minority and majority groups" not to prefer one group over another. 24 C.F.R. 200.620(a).

Usurping or enacting congressional will?

While HUD claims it does not have the constitutional authority to enact regulations affirmatively furthering fair housing without additional statutory language, it overlooks the text of the FHAct itself. In Section 808 of the FHAct (42 U.S.C. 3608(e)(5)), Congress specifically requires HUD to administer its programs in ways that affirmatively further fair housing. So, by creating and implementing the AFHM Regulations, HUD is following a specific directive included in the FHAct. HUD could conceivably eliminate the AFHM Regulations and still fulfill this statutory commandment as long as other regulations that affirmatively further fair housing are on the books. However, earlier this year, HUD already rescinded much of the Affirmatively Furthering Fair Housing rule (intended to make HUD grantees take affirmative steps to overcome barriers to fair housing) and could cut other affirmative fair housing regulations even further. By proposing to rescind the AFHM Regulations, HUD seems to be undermining its own duties under the FHAct.

Navigating a post-rescission world

If this rescission becomes a final rule, two outcomes appear likely.

First, rescission of the AFHM Regulations will not alter housing providers' duties to comply with the FHAct. The FHAct itself remains law and continues to prohibit covered housing providers from making housing unavailable to people based on their membership in a protected class. So, if, for example, a housing provider does not market housing opportunities to the broadest possible group of people, intentionally or not, it could still find itself the subject of a complaint under the FHAct.

Second, removing HUD's preapproval of Affirmative Fair Housing Marketing Plans will make it more difficult for providers to defend themselves against fair housing complaints based on their

marketing practices. Under the current scheme, if a provider complies with the terms of their marketing plan, HUD's preapproval serves as a powerful defense against a complainant's claims that the plan violates the FHAct. Without HUD's preapproval of these plans, housing providers can no longer rely on that defense, potentially subjecting them to more protracted and costly fair housing proceedings.

If HUD ultimately decides to rescind the AFHM Regulations, providers should continue drafting formal written housing marketing plans that demonstrate an intent to provide equal access to their properties. Second, providers should adequately train their staff on these plans' requirements. These recommendations can proactively reduce the risk that providers will have to defend themselves against fair housing complaints related to their marketing practices and, if a complaint is filed, help them defend themselves more easily, saving valuable time and money.

Comment deadline

HUD adopted a shortened 30-day comment period for its proposal to rescind the AFHM Regulations, saying that interested persons are already "familiar with these regulations and should be able to respond effectively within the 30-day period." 90 F.R. 23493. Comments must be submitted to HUD no later than July 3, 2025.

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

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