



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

August 2, 2021

MEMORANDUM FOR: Office of Fair Housing & Equal Opportunity
Fair Housing Initiatives Program Grantees

FROM: *Jeanine Worden*
Jeanine M. Worden, Acting Assistant Secretary for Fair Housing & Equal Opportunity

SUBJECT: Testing that Qualifies as an Eligible Activity under the Private Enforcement Initiative of the Fair Housing Initiatives Program

The Fair Housing Act, 42 U.S.C. §§ 3601 – 3619 (Act), prohibits discrimination because of race, color, religion, sex (including gender identity and sexual orientation), familial status (including pregnancy), national origin, and disability. Because the Act has been in effect for decades, most landlords and lenders know it is illegal to tell potential renters and home buyers that they will not be permitted to rent housing or receive a home mortgage loan because of their race, the color of their skin, their national origin, the religion they observe, their sex, the children who live in their home, or their disability. Despite this, people throughout this nation are denied equal housing opportunities every day, often without knowing they have been subjected to housing discrimination.

While housing discrimination is sometimes overt, such as a housing provider's or lender's discriminatory statements to applicants, design and construction of multifamily housing that does not comply with the Act's accessibility requirements, or the denial of reasonable accommodations or modifications requested by individuals with disabilities, much of the housing discrimination that occurs today goes unrecognized because it is covert or not easily identified during a single transaction.

Fair housing testing is a critical tool for rooting out hidden housing discrimination. Instead of limiting the information about a housing provider's or lender's actions to a single transaction viewed in isolation, fair housing testing allows the Office of Fair Housing and Equal Opportunity (FHIO) and its Fair Housing Initiatives Program (FHIP) grantees to assess a housing provider's or lender's actions in multiple transactions with people of different protected characteristics.¹ By comparing a housing provider's or lender's actions toward people with different protected characteristics, fair housing testing can be highly effective in identifying disparate treatment even when discrimination is covert.

¹ Under the Act, the HUD Secretary provides funds for FHIP contracts with private nonprofit fair housing enforcement organizations for programs or activities designed to obtain enforcement of the rights granted by title VIII of the Act of April 11, 1968 [42 U.S.C. 3601 et seq.], or by State or local laws that provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies. 42 U.S.C. 3616a(a)(1).

But the Act is not limited to the prohibition of disparate treatment and FHIP grantees should not limit their testing and enforcement programs to intentional discrimination. As the Supreme Court made clear in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), the Act also prohibits policies or practices that have unnecessarily discriminatory effects. A policy to refuse to rent or lend based on the source of income an individual or family will use to pay their rent or mortgage may be facially neutral because it focuses on the income, but such a policy may have the effect of discriminating against certain protected classes. For example, Housing Choice Voucher (HCV) holders may include much greater numbers of members of specific racial groups than the population as a whole. In 2016, 48 percent of participants in HUD's HCV Program nationwide identified as "Black, non-Hispanic." See HUD & Urban Institute, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* (Sept. 2018), Table 2.1, available at <https://www.huduser.gov/portal/pilot-study-landlord-acceptance-hcv.html>. Similarly, the Social Security Disability Insurance program and veterans' disability benefits are federal programs designed to provide sources of income for individuals with disabilities. Because of correlations between certain sources of income and individuals with particular protected characteristics, a housing provider's or lender's decision not to rent or lend to HCV holders or people who receive disability-related income may disproportionately affect individuals because of their race, color, national origin, disability, or another characteristic protected by the Act. Such policies would violate the Act if further investigation revealed that the discriminatory effect of the policy is unjustified.

Because fair housing testing is such a critical investigative tool, FHEO has consistently approved a wide range of FHIP testing projects designed to identify discrimination that violates the Act, whether through disparate treatment or unjustified discriminatory effects, as well as discrimination that contributes to a failure to affirmatively further fair housing. FHEO reliably approves and provides payment for source of income testing and enforcement activities designed to address such discrimination even if the FHIP agency decides to pursue individual relief by filing a source of income complaint in a local or state court.

To provide clarity on this issue, this memorandum confirms that FHEO will approve FHIP testing projects and pay for activities so long as they are designed to identify any form of discrimination that may violate the Act, or actions or policies that contribute to a failure to affirmatively further fair housing. At this time when the Department is focusing on advancing racial equity and support for underserved communities, and revitalizing enforcement of fair housing and civil rights laws, fair housing testing must address intentional discrimination as well as facially neutral policies or practices that have unjustified discriminatory effects. Because of this, I am clarifying that it is FHEO's policy to encourage and support all testing designed to expose discriminatory effects discrimination under the Act, as well as discrimination that contributes to a failure to affirmatively further fair housing. FHIP source of income testing designed for these purposes is a vital tool to fair housing enforcement, and, FHEO will provide approval of such projects and provide payment to FHIP grantees for fair housing testing that targets source of income policies and other policies that may appear to be neutral but, when tested and further investigated, may reveal covert, camouflaged, or unintentional discrimination under the Act, under a substantially equivalent state or local law, or if the testing affirmatively furthers fair housing.