

Extension to 2013

The Administration will extend the sunset date for the Home Affordable Modification Program to 2013. The program originally was set to expire at the end of 2012.

Conclusion

As the nation continues to struggle through the foreclosure crisis, the wave of home repossessions has not waned. At least 2.7 million households have lost their homes, and reports predict that an additional 3.6 million households are still at risk of foreclosure.¹⁷ As a result, the Administration and state attorneys general have faced increasing pressure to provide assistance to distressed borrowers, and the mortgage settlement and expansion of HAMP are the latest steps in that direction.

The national mortgage settlement presents a significant opportunity for housing advocates to help their clients gain access to legal services and relief from foreclosures. Working with their state attorney general offices, advocates can ensure that the settlement funds go toward legal services for homeowners and tenants affected by the foreclosure crisis, instead of being diverted to other uses. Advocates also should monitor compliance with the new mortgage servicing standards and forward any violations to their state attorneys general. ■

Discrimination Based on Sexual Orientation, Gender Identity Prohibited in HUD Programs

The Department of Housing and Urban Development (HUD) has published final regulations to prevent discrimination in its programs on the basis of sexual orientation and gender identity.¹ Among several other protections, the regulations require owners and operators of HUD-assisted housing to make housing available without regard to the sexual orientation or gender identity of applicants or occupants. The regulations follow a January 24, 2011, proposed rule that cited evidence indicating that lesbian, gay, bisexual, and transgender (LGBT) individuals have been arbitrarily denied housing. HUD received 376 public comments on the proposed rule, and made some changes to the rule based on these comments.

Definitions

The final regulations update HUD's definition of "family" to clarify that households may not be excluded from HUD-assisted housing because of sexual orientation, gender identity, or marital status.² HUD revised the definition of "family" that appeared in the proposed rule to make clear that perceived, as well as actual, sexual orientation, gender identity, and marital status cannot be factors for determining eligibility for HUD-assisted housing. "Gender identity" means actual or perceived gender-related characteristics.³ "Sexual orientation" means homosexuality, heterosexuality, or bisexuality.⁴

Equal Access to Housing

The final regulations require owners and operators of HUD-assisted housing to make housing available regardless of the actual or perceived sexual orientation, gender identity, or marital status of applicants or occupants.⁵ This policy covers HUD's rental assistance and homeownership programs, which include public and assisted housing programs, community development programs and the Federal Housing Administration (FHA) mortgage insurance programs. HUD added this provision in response to requests from several advocacy groups, including the National Housing Law Project, that the final rule make explicit that eligibility decisions for HUD-assisted housing must be made without regard to sexual orientation, gender identity, or marital status.

¹⁷Center for Responsible Lending, *LOST GROUND*, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 4 (2011), <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>.

¹Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662 (Feb. 3, 2012).

²*Id.* at 5,674 (to be codified at 24 C.F.R. § 5.403).

³*Id.* (to be codified at 24 C.F.R. § 5.100).

⁴*Id.*

⁵*Id.* (to be codified at 24 C.F.R. § 5.105(a)(2)(i)).

Additionally, the final regulations prohibit owners and operators of HUD-assisted housing from asking about an applicant's or occupant's sexual orientation or gender identity for purposes of determining housing eligibility or otherwise making housing available.⁶ However, the regulations do not prohibit inquiries of an applicant's or occupant's sex where the housing is temporary, emergency shelter with shared sleeping areas or bathrooms.⁷ HUD states that inquiries as to sex are permitted only when determining eligibility for a temporary, emergency shelter that is limited to one sex because it has shared sleeping areas or bathrooms.⁸ According to HUD, "[s]uch inquiries are not permitted in any other homeless shelter or housing."⁹ HUD anticipates that the regulations will improve transgender individuals' access to shelters and will monitor its programs to determine whether additional guidance is necessary.

With regard to FHA-insured mortgages, the final regulations prohibit lenders from using sexual orientation or gender identity as a basis to determine a borrower's eligibility.¹⁰ The regulations require that a lender's determination of the adequacy of a borrower's income be made without regard to the borrower's actual or perceived sexual orientation or gender identity.¹¹ HUD seeks to ensure that FHA-approved lenders do not deny or otherwise alter the terms of mortgages on the basis of "irrelevant criteria."¹²

Other Issues

A significant shortcoming of the regulations is that they do not clearly explain how HUD plans to enforce the new protections. Commenters requested that HUD provide a mechanism by which claims of discrimination in HUD programs can be voiced by the LGBT community. Commenters also suggested that HUD provide a clear procedure for submitting complaints, holding hearings, and making determinations of violations of the regulations. In response, HUD declined to adopt any procedures to specifically address violations of the LGBT rules. Instead, HUD states that individuals "may complain to the appropriate HUD office that administers the program."¹³ In addition, HUD notes that certain complaints would

be covered by the Fair Housing Act, such as a claim of discrimination based on nonconformity with gender stereotypes.¹⁴ Because HUD did not establish a system for remedying violations of the LGBT rules, much of the burden will fall on advocates to investigate and challenge discrimination against LGBT individuals in HUD programs.

HUD also declined to adopt a national system to record the sexual orientation and gender identity of beneficiaries of HUD housing programs. Several commenters had requested that HUD adopt such a system to allow the agency to better understand the extent to which its programs are serving LGBT individuals. HUD states that it needs more time to consider the feasibility of such a system, including the privacy rights of individuals who would be subject to reporting.¹⁵

Conclusion

As stated by HUD Secretary Shaun Donovan, "With this historic rule, the Administration is saying you cannot use taxpayer dollars to prevent Americans from choosing where they want to live on the basis of sexual orientation or gender identity—ensuring that HUD's housing programs are open, not to some, not to most, but to all."¹⁶ The final rule will be especially critical in jurisdictions that do not have state law protections prohibiting housing discrimination on the basis of sexual orientation or gender identity, and regions that lack housing and homelessness resources for LGBT individuals. ■

⁶*Id.* (to be codified at 24 C.F.R. § 5.105(a)(2)(ii)).

⁷*Id.* The regulations also do not prohibit inquiries made for the purpose of determining the number of bedrooms to which a household may be entitled.

⁸*Id.* at 5,666.

⁹*Id.*

¹⁰*Id.* at 5,675 (to be codified at 24 C.F.R. § 203.33(b)).

¹¹*Id.*

¹²Press Release, HUD, HUD Secretary Donovan Announces New Regulations to Ensure Equal Access to Housing For All Americans Regardless of Sexual Orientation or Gender Identity (Jan. 30, 2012), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-014.

¹³Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5,671.

¹⁴*Id.*

¹⁵*Id.* at 5,663.

¹⁶Press Release, *supra* note 12.