technical guidance memoranda, most of which exist only in draft form.[74] TGMs issued in FY 1991 for the most part dealt with special situations, such as processing multibased complaints involving handicap or familial status by grandfathered agencies; procedures for zoning and land use cases; and expedited case processing procedures in situations of apparent prima facie discrimination.

FHEO did, however, publish "Vivienda Justa—Es su derecho," a Spanish language pamphlet and guide to the Fair Housing Act that includes a Spanish language complaint form (Form 903A).[75]

HUD did not develop FY 1992 or 1993 management plans for FHEO headquarters. The field management plan for FY 1992[76] called for a reduction in the aged case inventory of 90 percent; monitoring of every FHAP agency receiving capacity-building or incentive funds; one onsite visit during each 18-month grant period; and performance assessments of all FHAP agencies whose interim agreements will be more than 9 months old September 30, 1992.[77]

A region-by-region analysis reveals that in FY 1992, although every region did reduce its aged cases, no region met the 10 percent threshold. The percentage of aged cases ranged from 13.1 percent in Region I (Boston) to 42.8 percent in Region VIII (Denver).[78] The rate of decrease in the proportion of aged cases ranged from a low of 12.1 percent, again in Region I, to a high of 58.8 percent in Region X (Seattle).[79] Of the 10 regions, 6 reduced their number of aged Title VIII cases by at least 25 percent.[80] Nationally, the rate of reduction in the proportion of aged cases was 36.1 percent.[81]

The FY 1993 Field Management Plan[82] identified 11 priorities similar to those of preceding plans, but the priorities were spelled out with more detail and precision. Two pertained to Title VIII enforcement. The first priority is a familiar one: enhance efficiency of processing Fair Housing Act complaints. Six "processing standards" were identified:

Reduce the ratio of Fair Housing Act cases that age during the fiscal year by at least 10 percent.

Reduce the inventory of cases filed before October 1, 1992, by at least 90 percent by the end of the fiscal year.

74 The topics of FY 1991 TGMs included the Fair Housing Assistance Program Incentive Component; Procedures for Processing Multi-Based Complaints Involving Handicap or Familial Status by Grandfathered Agencies; Monitoring the Fair Housing Initiatives Program; Use of Fair Housing and Equal Opportunity (FHEO) Investigation Credentials; Multiple Chemical Sensitivity Disorder; Case Processing Procedures for Zoning and Land Use Cases; Expedited Case Processing Procedures.

75 U.S. Department of Housing and Urban Development, *Vivienda Justa—Es su derecho*. (Washington, D.C.) September 1991.

76 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1993 Field Management Plan, Part B—Regional Priority Plan (unpaged).

77 Ibid.

78 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1992 Year End Report, Objective 22: Reduce Aged Title VIII Cases (chart).

79 Calculations based on "Objective 22."

80 Ibid. The six were Regions II (New York), III (Philadelphia), IV (Atlanta), V (Chicago), VI (Ft. Worth), and X (Seattle).

81 Ibid.

82 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1993 Field Management Plan (unpaged).

Process all cases in accordance with technical guidance received from Headquarters.

Implement guidance from Headquarters, including training of staff in concurrent case processing functions, maintaining the system for control of all case files, maintaining and reconciling the integrated data base system.

Develop recommendations for reasonable cause so that no more than 10 percent of cases submitted to Headquarters FHEO are remanded for additional information.

Thoroughly investigate all issues and document investigative records so that no more than 10 percent of determinations reviewed are found to contain substantive deficiencies.[83]

The plan went on to note that:

The amount of the reduction will be based upon a comparison of the ratio of cases that aged in FY 1992 with the ratio of cases that age in FY 1993. Where a Region had fewer than 10 percent of its cases aged during FY 1992, such Region would be required only to maintain or reduce its aged case ratio.

The second priority concerned promotion of substantial equivalency and assessment of agencies with interim certification.

The second quarter report on the field management plan[84] provides an interim view of HUD's success. While all but two regions reduced the number of aged cases, in seven regions the proportion of aged cases actually rose due to an increase in the number of cases filed. The proportional increases may have been influenced by the efforts made to reduce aged cases carried over from FY 1992. The 1992 cases were dramatically reduced, by percentages ranging from 100 percent to a low of 56.3 percent.[85]

In six regions, the number of cases remanded for further investigation by headquarters was zero or one. (In those regions, the number of cases sent varied from 6 to 17). However, 8 of 13 cases sent to headquarters by Region X (Seattle) were remanded, as were 5 of 42 cases sent by Region V (Chicago); 4 of 22 cases from Region VI (Ft. Worth); and 4 of 48 cases sent by Region IX (San Francisco).[86]

Assessing HUD's Progress

FHEO's analysis of progress on aging cases was at times problematic. The Assistant Secretary summarized HUD's performance in FY 1991 as follows:

The nationwide performance in this area of 4.1 percent exceeded expectations. All of the Regions met or exceeded the 10 percent goal. Performance was outstanding in Region I with no aging cases at the end of the fiscal year, 0.8 percent in Region II, 2.1 percent in Region III, 1.5 percent in Region V, 1.3 percent in Region VI, 0.7 percent in Region VII, and 4.4 percent in Region IX. The Regions successfully implemented management initiatives designed to expedite case processing.[87]

This assessment overlooks evidence that HUD was struggling to process cases in a timely fashion. Other HUD data reveal that, between FY 1990 and 1992, the backlog of cases over 100 days old was rarely less than 50 percent of inventory, and typically ranged

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83 Ibid.

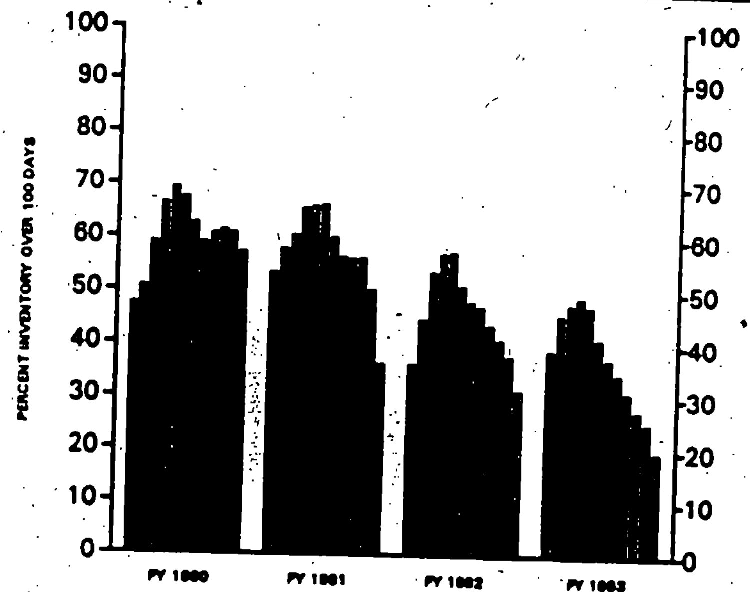
84 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Field Management Plan—FY 1993, Second Quarter Report (unpaged).

85 Ibid.

86 Ibid.

87 Ibid., p. 4

FIGURE 5.1
Cases over 100 Days as Percentage of Inventory All Regions



Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

between 40 and 70 percent (see figure 5.1).[88] Although by the end of 1991 the backlog of aged cases had fallen to its lowest level in 2 years, even then the rate was still 36 percent, substantially more than the 4 percent rate of "aging cases" reported for the regional offices. Furthermore, in FY 1992 the backlog rose again and remained significantly above 40 percent throughout most of the year.

After falling to 33 percent at the end of FY 1992, backlog rates once again rebounded in the first 4 months of FY 1993 to reach a peak of 49 percent at the end of January. Thereafter, rates tended downward, reaching a low of 19.5 percent by the end of the year. Unlike previous years, however, the backlog did not rebound in the first 4 months of FY 1994, suggesting that HUD may be able to consolidate gains made in 1993 and bring the backlog rate down to 20 percent or less.

Because HUD established the 73-day standard for regional office processing expressly in order to meet the 100-day standard set by the law, the apparent disparity in HUD's success in meeting these two goals is surprising. One explanation is that HUD's assumption that headquarters could complete processing cases investigated by regional offices in 27 days was too optimistic.

Alternatively, the disparity may have resulted from accounting differences: whereas the Assistant Secretary's measures of

88 Figure 5.1 is based on HUD's Title VIII Database. It shows the fraction of cases in inventory that were more than 100 days old at the end of each month.

regional office performance excluded cases that had been sent on to headquarters, the calculation here of the aged (i.e., 100-day +) caseload included *all* complaints. In other words, while "aging" and "aged" cases that were sent to headquarters prior to September 30, 1990, did not count in year-end measures of regional performance, they are counted in this report's calculations of systemwide backlog rates.

These explanations do not, however, account for the precipitous drop in the systemwide backlog rate during September 1990. A review of backlog rates for individual regions (see figures 5.2–5.11), suggests that the drop occurred because several regional offices placed special emphasis on closing aged cases as the end of the fiscal year approached. The pattern exhibited by Region III, although more dramatic than most, is illustrative.

Evidently these were stopgap efforts, because during the first months of FY 1992, backlog rates rebounded in each of the regions that had experienced a drop. Thus it appears that some regions redirected resources away from processing newer cases and toward eliminating aged cases. In delaying action on new cases in 1991, many cases became aged in 1992.[89]

Consistent with high backlog rates, it took an average of more than 100 days to close[90] complaints in each year from 1990 to 1993, as discussed earlier (see table 3.1).[91] In 1990 and 1991, the average time requir. d to close cases exceeded 6 months; over 60 percent of all cases exceeded the 100-day requirement, and over a third were more than 200 days old. Although processing time dropped significantly in 1992 to 140 days (but rose again to 151 in 1993), 40 percent of closed cases exceeded the 100-day requirement, and 19 percent were more than 200 days old in 1992; 39 percent exceeded 100 days in 1993, with 22 percent over 200 days.[92]

Comparing Regions

Earlier, this report described differences in the organization, procedures, training, resources, and performance of the regional fair housing operations. Some of these differences result from "environmental" factors, such as geographic size and the extent of complaint referral to State and local agencies. Other differences, however, may result from inconsistent supervision and case management and uneven resource allocation across regions. It is important to separate these two types of influences so that problems in management and resource allocation that hurt the efficiency and effectiveness of fair housing enforcement can be identified and corrected.

This section examines the performance of HUD's 10 regional offices from 1990 to 1993 in one key element: timeliness of case processing, as measured in the size of the complaint backlog and the time required to close cases.

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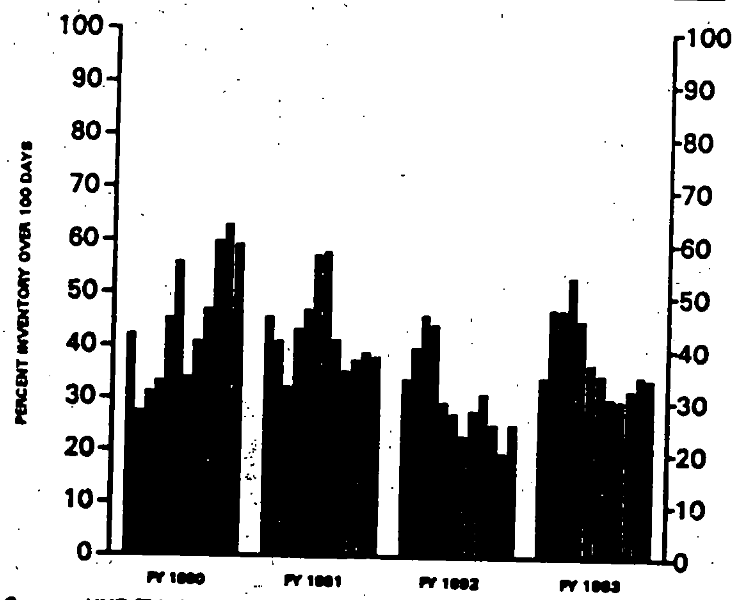
89 Backlog rates for each region reflect *all* complaints assigned to that region, regardless of whether control had been passed to headquarters.

90 In order to conform to the statutory concept of an aged case, the Commission treated cases as "closing" on the date a cause determination was issued or, if processing ended before a determination was made, on the date of the action (e.g., conciliation agreement, withdrawal of complaint).

91 Title VIII Database. These calculations reflect only cases processed by HUD.

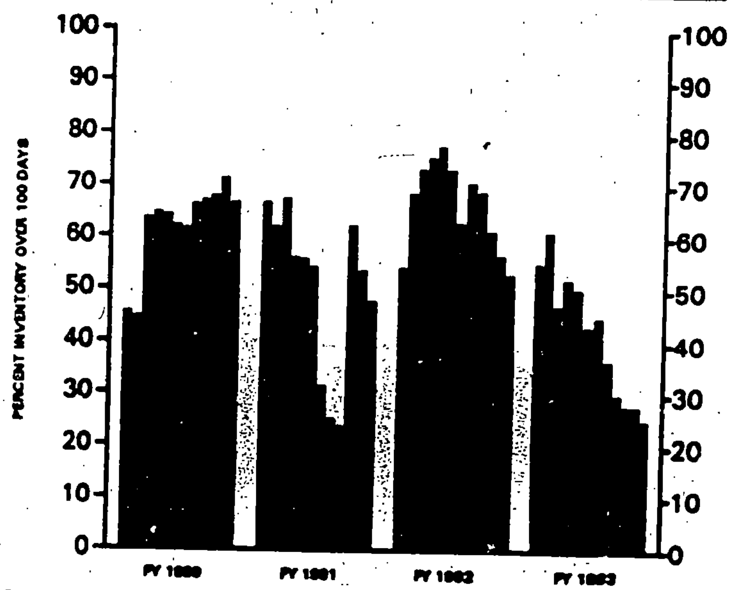
92 More than 1,400 cases were added to HUD's caseload on Sept. 13, 1992, as a result of the reactivation of cases previously deferred to State and local agencies when those agencies did not achieve certification as substantially equivalent. Although many had already been in the system for some time, the reactivated cases were treated as new cases. See chap. 6.

FIGURE 5 2
Cases over 100 Days as Percentage of Inventory: Region I



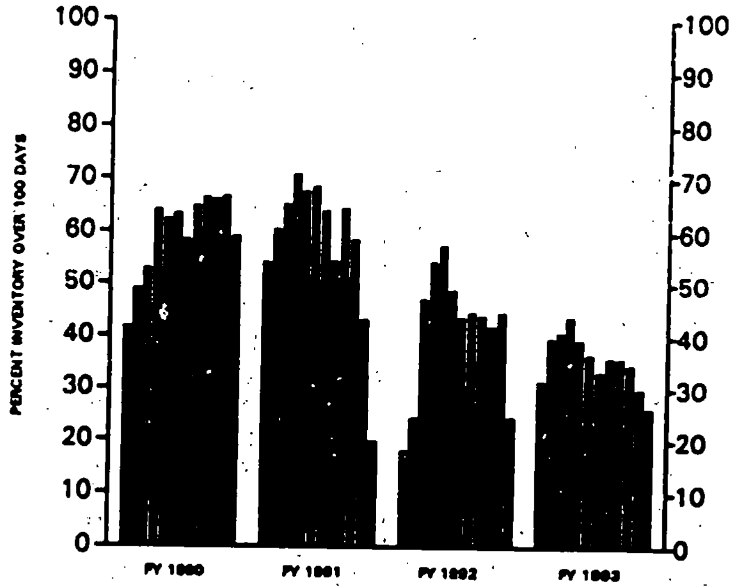
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5 3
Cases over 100 Days as Percentage of Inventory: Region II



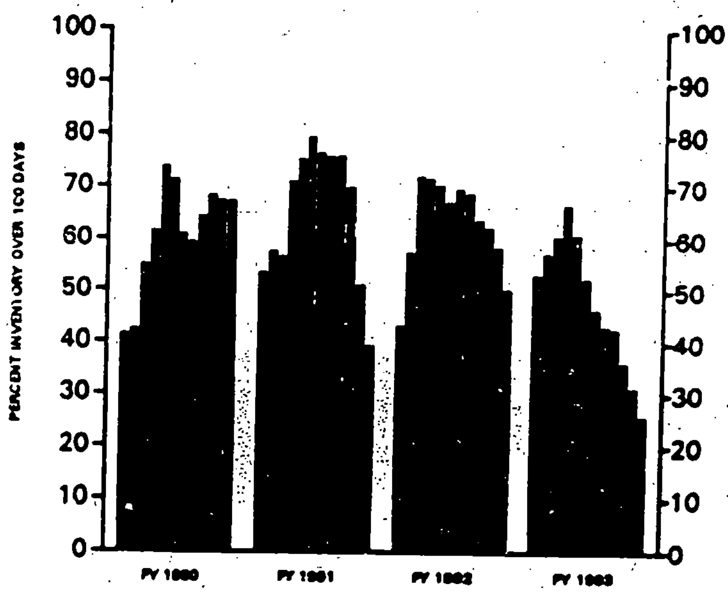
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1979.

FIGURE 5.4
Cases over 100 Days as Percentage of Inventory   Region III



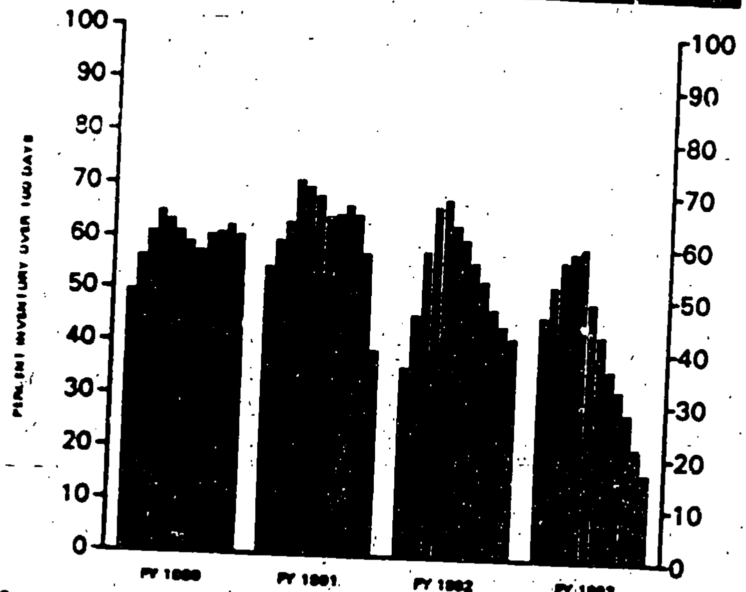
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.5
Cases over 100 Days as Percentage of Inventory   Region IV



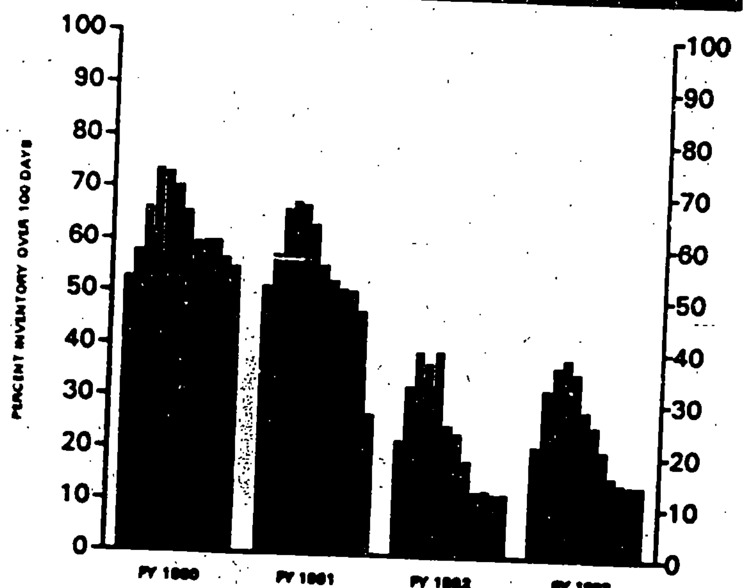
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 old on the last day of October 1989.

FIGURE 5 6
Cases over 100 Days as Percentage of Inventory Region V



Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

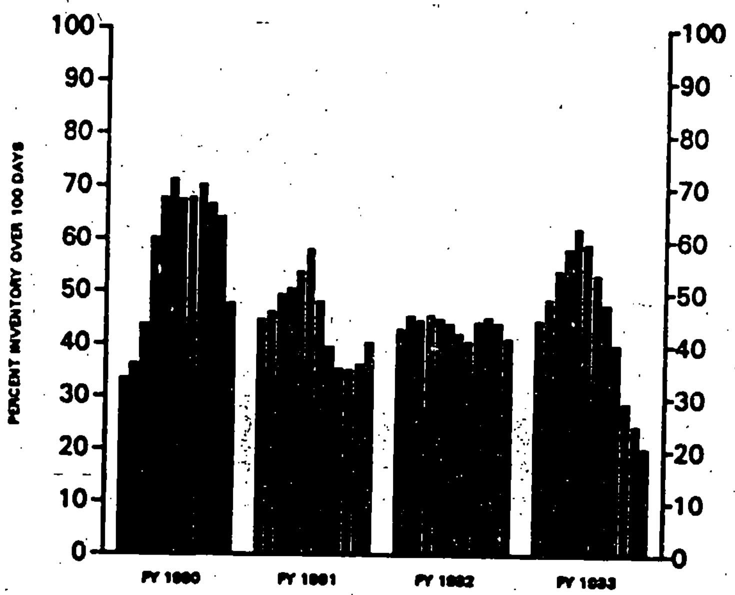
FIGURE 5 7
Cases over 100 Days as Percentage of Inventory Region VI



Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.8

Cases over 100 Days as Percentage of Inventory Region VII

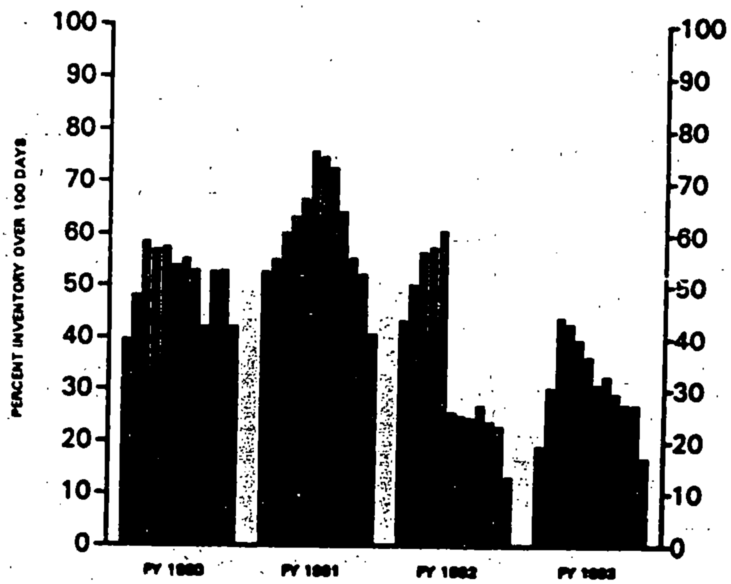


Source: HUD Title VIII database.

Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.9

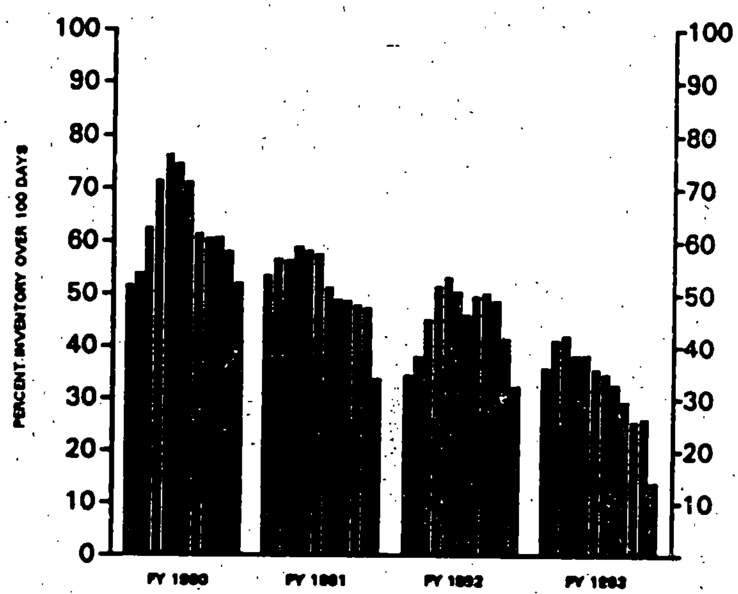
Cases over 100 Days as Percentage of Inventory Region VIII



Source: HUD Title VIII database.

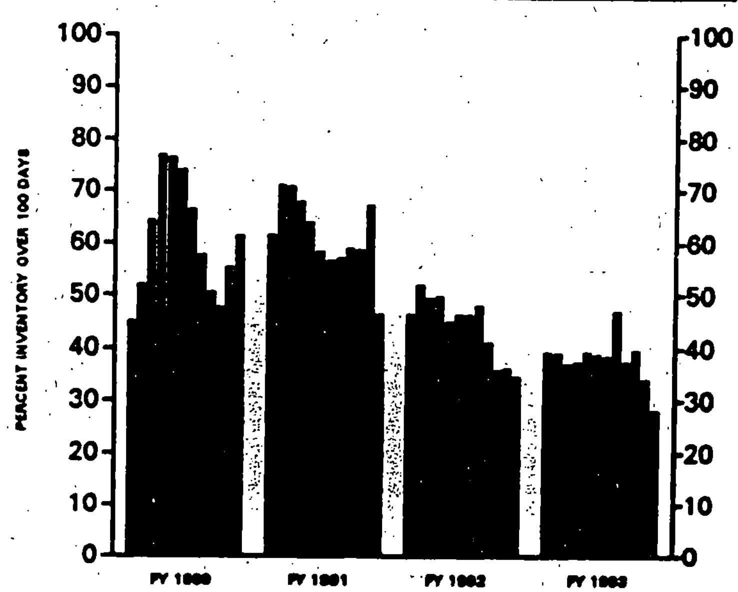
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5-10
Cases over 100 Days as Percentage of Inventory Region IX



Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5-11
Cases over 100 Days as Percentage of Inventory Region X



Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

One measure of timeliness, particularly important because it is derived from the law itself, is the fraction of cases in each region older than 100 days—the so-called aged cases.[93] Figures 5.1 to 5.10 show that, although the fraction of aged cases declined gradually between 1990 and 1993, trends varied greatly from region to region. While some regions made steady gains in reducing their backlog rates (e.g., region IX. X), others showed no apparent improvement or actually worsened. Moreover, in 1993, after 4 years of experience with the FHAA, not only were backlog rates generally high (39 percent overall), but substantial differences still remained among the 10 regions: regions III, VI, VIII, IX, and X—near or below 40 percent; and the remaining regions (I, II, IV, V, and VII—ranging between 20 and 60 percent, but averaging significantly above 40 percent. Several regions exhibited strong improvement through most of FY 1993 in reducing their backlogs (II, III, IV, V, IX) while the other regions (I, VI, VII, VIII, X) exhibited little or no improvement. At the end of 1993, backlog rates ranged from a low of 13.7 percent in region IX to a high of 34.1 percent in region I.

A more direct measure of timeliness is the amount of time it takes to resolve a complaint. From case to case, processing time may vary for many reasons, including the complexity of issues and the basis of the complaint, the strength of the case, availability of resources, and case management practices. To the extent these factors can be measured, statistical methods[94] can be used to separate the effects of largely nondiscretionary factors, such as the characteristics of complaints, from the effects of discretionary factors, such as regional differences in resources and management.

HUD data provide information on three key characteristics of complaints that influence processing time: the basis(es), issue(s), and method of closing each complaint. While a complaint's basis and issue are largely out of HUD's control, processing times will vary for a particular type of complaint according to a region's case management practices, staff training, and the like. However, the most important determinant of processing time is the method by which a case is closed. For example, cases in which cause determinations are made generally take much longer to complete than cases closed administratively.[95] Regional management, training, etc., can influence not only the average time required to close cases in different categories, but also the relative likelihood that a case will fall into one of these categories.

Since 1989, improvements by HUD in case management, resources, and staff capabilities have reduced processing times. While these gains are systemwide, major differences are observed from region to region. Both the national and regional trends in processing times are captured by estimating separate trends for each region as well as an overall, i.e., national, trend common to all regions for FYs 1989–1993.

At the national level, the basis, issue, and method and year of closure are found to have statistically significant effects on processing time (measured in days). Consistent with the results on inventories discussed above, important and statistically significant differences in regional trends were also found.[96]

93 The count of aged cases on a given date in a given region includes all active complaints processed by the region, regardless of which office has them on that date.

94 The analysis of variance technique for accounting for variation in processing times is used in this report.

95 As noted above, cases may be closely administratively, conciliated, found to have no cause, settled or litigated after a cause determination.

96 Technically, the analysis was not confined to estimating trends, since effects were estimated separately for each year. Thus, estimated effects could exhibit systematic (e.g., trend) or nonsystematic patterns.

Nevertheless, even when the combined effects of the systemwide factors and regional trends are taken into account, statistically significant differences in processing times remained among the 10 HUD regions. Although not conclusive, these results support the need for a closer examination of regional case management practices, resources, and training.

6. The Fair Housing Assistance Program

The Fair Housing Assistance Program is the vehicle through which HUD funds the processing of housing complaints by State and local government agencies. It has played an important, albeit currently diminished, role in fair housing enforcement in the last two decades.

State and local fair housing laws were implemented as early as 1950, and by 1968, when the Federal Fair Housing Act (Title VIII) was originally enacted, almost half the States had prohibited at least some forms of housing discrimination.[1] With the passage of Title VIII, HUD was required to turn over fair housing complaints to any State or local agency that had a fair housing law "substantially equivalent" to the Federal statute.[2] However, in the subsequent decade the progress of State and local laws toward the goal of substantial equivalence was slow. By 1979, HUD recognized only 23 jurisdictions as substantially equivalent.[3]

The situation began to change with the approval of regulations implementing the Fair Housing Assistance Program (FHAP).[4] First funded in FY 1980,[5] FHAP was designed to assist State and local agencies by providing financial support for complaint processing, training, technical assistance, data and information systems, and other fair housing projects, and to provide incentives for States and localities to assume greater responsibility for administering fair housing laws.[6]

From 1980 to the FHAA effective date of March 13, 1989, the number of recognized State and local agencies grew from 23 to 122, while the percentage of the total national caseload of housing discrimination complaints processed by these agencies rose from less than 10 percent in 1979 to more than 70 percent in 1988.[7] Over a 10-year period, HUD spent more than $30 million assisting FHAP agencies.[8]

Pending certification under the 1988 FHAA, State and local agencies continued to process a significant portion of housing discrimination complaints. In fiscal 1990, they handled 3,502 complaints, or 46 percent of the total cases logged by both HUD and local agencies. In fiscal 1991, the figure was 3,508, or 38 percent, and in fiscal year 1992, the agencies handled 3,212 housing complaints,

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1 By 1961, 17 States had banned at least some forms of discrimination in housing. Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (New York: Clark Boardman and Callaghan, 1991), § 3.9, pp. 3-11–3-12 (hereafter cited as Schwemm, *Law and Litigation*).

2 42 U.S.C. § 3610(f) (1982).

3 U.S. Department of Housing and Urban Development, *1992 Programs of HUD* (Washington, D.C.: 1992), p. 92 (hereafter cited as 1992 HUD Programs).

4 45 Fed. Reg. 31,880 (1980).

5 Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1981, Pub. L. No. 96–526, 94 Stat. 3044, 3049 (1980).

6 24 C.F.R. § 111.103 (1993).

7 Steven J. Sacks, "New Federal Fair Housing Approach Endangers A Relationship That Works," *Governing*, p. 82 (August 1989). Sacks formerly directed the Federal, State, and Local Programs Division in HUD's Office of Fair Housing and Equal Opportunity.

8 Ibid.

or about 34 percent of the total caseload. (During this period, cases handled by HUD rose from 4,067 to 6,268, while State and local caseloads were stable.)[9]

FHAP Funding

To provide funds for FHAP agencies, HUD allocated $4.554 million for 120 agencies from its 1989 budget,[10] $5.292 million for 120 agencies from its 1990 budget,[11] and $6.575 million for 125 agencies from its 1991 budget.[12] In 1992 HUD requested $5 million for 125 agencies.[13] However, in September 1992, most of the agencies lost their substantial equivalency status due to failure to enact expanded legislation based on the FHAA. Consequently, actual obligations for agencies were only $964,000 for 19 awards, not $5 million as estimated.[14]

Prior to fiscal 1992, the funds were divided into two categories:[15] capacity building funds and contribution funds. Capacity building funds were awarded to agencies in their first 2 years of FHAP participation to enable them to strengthen their ability to process fair housing complaints.[16] Each eligible agency was allocated $35,000 from HUD's 1990 budget[17] and $50,000 from HUD's 1991 budget.[18] These funds were intended for participation in HUD-sponsored training, complaint monitoring and reporting systems, case processing, and other activities that must be related to fair housing.[19]

Contribution funds were divided into three categories.[20] Training funds were dispensed in a fixed amount[21] ($4,000 per agency in HUD's 1990 and 1991 budget).[22] Complaint processing funds were paid to agencies on a

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9 Data obtained from Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Integrated Title VIII Database System (hereafter Title VIII Database).

10 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1991*, 101st Cong., 2d sess., 1990, p. 629 (hereafter cited as *FY 1991 Budget Hearings*).

11 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1992*, 102d Cong., 1st sess., 1991, p. 642 (hereafter cited as *FY 1992 Budget Hearings*).

12 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1993*, 102d Cong., 2d sess., 1992, p. 654 (hereafter cited as *FY 1993 Budget Hearings*).

13 *FY 1992 Budget Hearings*, p. 642.

14 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1994*, 103d Cong., 1st sess., 1993, p. 451 (hereafter cited as *FY 1994 Budget Hearings*).

15 24 C.F.R. § 111.105 (1993).

16 *Id.* § 111.105(a).

17 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1989* (Washington, D.C. 1990) app. 1, pp. 38–40 (hereafter cited as *The State of Fair Housing 1989*).

18 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1990* (Washington, D.C. 1990) app. 1, p. 31 (hereafter cited as *The State of Fair Housing 1990*).

19 24 C.F.R. § 111.105(a) (1993).

20 *Id.* § 111.105(b).

21 *Id.* § 111.105(b)(1).

22 *State of Fair Housing 1989*, app. 1; *The State of Fair Housing 1990*, app. 1.

per case basis.[23] Incentive funds were made available to agencies that processed a minimum number of Fair Housing Act complaints expeditiously,[24] or that:

- process a minimum of 20 complaints (State) or 15 complaints (local) during 12 consecutive months within an 18-month period;
- demonstrate satisfactory performance in the timely submission of vouchers;
- consistently process complaints within 100 days;
- demonstrate comprehensive and thorough investigation activities (as per latest performance review); and
- certify that 20 percent of the fair housing funds spent during the previous fiscal year were non-Federal Community Development Block Grant (CDGB) funds.[25]

Effective fiscal year 1992, HUD no longer awarded incentive funds under the FHAP program.[26] Incentive funds may have been eliminated because so many of the FHAP agencies were operating under new laws and had not had the caseload or experience in complaints processing to meet the eligibility requirements to receive these funds.[27] The funds were used instead to increase support for complaint processing.[28]

In addition to the funding categories above, in March 1990 State and local agencies under contract to HUD received $650 for each fair housing complaint for which they produced an acceptable final investigative report or which was successfully conciliated.[29] Beginning in October 1991, the amount was increased to $800 for each case closed.[30]

Those local and State agencies that were substantially equivalent prior to the FHAA and that investigated handicap and familial status complaints under their own laws received special processing contracts for handling such complaints.[31] In 1990 HUD signed 34 contracts with those agencies;[32] in 1991, 20 contracts; and in 1992, 14 contracts.[33]

After passage of the 1988 amendments, HUD revised the FHAP regulations to increase recipients' ability to plan long-term programs and to provide greater incentives to

23 24 C.F.R. § 111.105(b)(2) (1993).

24 *Id.* and Policy Conference on National Fair Housing Assistance Program 1989, Executive Summary, sponsored by the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, p. 13.

25 Ibid., pp. 13–14, and 24 C.F.R. § 111.105(b)(1) (1993). Also, other HUD funds became available; see chap. 7.

26 Although FHAP funding for these categories was discontinued, the regulations still exist.

27 *Compare* 57 Fed. Reg. 22,872 (1992) *with* 56 Fed. Reg. 20,500 (1991).

28 "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 7 (hereafter cited as HUD Comments).

29 Memorandum from Maxine Cunningham, Deputy Director, Office of Fair Housing Enforcement and Section 3 Compliance, U.S. Department of Housing and Urban Development, to Alice Nolte, contracting officer, Office of Procurement and Contracts, U.S. Department of Housing and Urban Development, dated Mar. 15, 1991; Re: Cost of Investigations by State and Local Agencies of Fair Housing Complaints Based (on) Handicap and Familial Status, p. 1.

30 Jacquelyn Shelton, Director, Investigative Services, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, HUD Meeting, Jan. 21, 1992.

31 *State of Fair Housing 1989*, p. 12. These payments for case processing under contract were not made as part of the FHAP program. *See* HUD Comments, p. 8.

32 Of these, 23 were extended from 1989 and 11 were new. *State of Fair Housing 1990*, p. 4.

33 *See* List of Agencies with Contracts, provided by Jacquelyn Shelton, Director, Investigative Services, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Jan. 23, 1992.

States and localities to assume responsibility for a larger share of fair housing activities.[34]

The fiscal 1993 appropriation was $4.4 million, based on 125 agencies implementing the law under the FHAP program.[35] Of that amount, $560,000 was designated for capacity building; $390,000 for case processing; and $290,000 for training and support.[36] The fiscal 1994 appropriation of $4.5 million was projected to include $360,000 for capacity building, $4 million for case processing and $159,000 for training and support services.[37] To receive funds, an applicant agency must have interim or full certification (see below).[38]

FHAP Agency Certification

The 1988 amendments required State and local jurisdictions to enact laws that were generally broader, stronger, and weighted with greater sanctions for violations than had previously been the case in order to process cases for HUD. Prior to the 1988 amendments, HUD's regulations on substantial equivalency permitted the "recognition" of a jurisdiction, even though the State or local law did not contain all of the prohibitions found in the act.[39] HUD's final regulations issued January 23, 1989, recognize that the rights and remedies, as well as the procedures and availability of judicial review, including all of the rights provided in the 1988 amendments, must be protected by substantially equivalent laws.[40] To meet the substantial equivalency requirement under the new act, agencies first had to satisfy criteria set forth in the FHAA[41] and in HUD's 1989 implementing regulations,[42] and then formally apply for certification.[43] The Assistant Secretary for Fair Housing and Equal Opportunity was designated by the Secretary of HUD to implement the FHAA with respect to certification of agencies and to make all certification decisions.[44]

For each agency seeking certification, HUD first determined "whether the law, administered by the agency, on its face," provides rights, procedures, remedies, and judicial review that are "substantially equivalent" to those of Title VIII, in accordance with criteria set forth in HUD regulations.[45]

Second, HUD was to determine whether an agency's "current practices and past performance demonstrate that, in operation, the law in fact provides rights and remedies that are substantially equivalent."[46]

34 54 Fed. Reg. 20,094 (1989).

35 *FY 1993 Budget Hearings*, pt. 7, p. 654.

36 Ibid., pp. 656–57.

37 *FY 1994 Budget Hearings*, pt. 6, p. 453.

38 24 C.F.R. §§ 111.107(b) and 115.11 (1993).

39 HUD Comments, p. 8.

40 Ibid.

41 42 U.S.C. § 3610(f)(3) (1988).

42 24 C.F.R. §§ 115.1–115.11 (1993).

43 *Id.* § 115.5(a).

44 *Id.* § 115.1(a)(3).

45 *Id.* § 115.2(a) and 115.3(a). Prior to the approval of 42 U.S.C. § 3616a, the regulations were similar except that they did not have the phrase "administered by the agency."

46 *Id.* § 115.2(b).

During interim certification, HUD refers complaints to the agency to allow it to build a track record adequate for HUD to monitor and assess performance.[47] Although the term "recognition" was replaced by the term "certification" with the enactment of the FHAA in 1988, the concepts detailed in HUD's 1989 regulations remained consistent with the previous requirements.[48]

Complaint Referral

When a complainant alleges a violation of Title VIII, as amended, the FHAA requires that the Secretary first attempt to refer the claim to a State or local agency before taking any action.[49] Regulations governing the referral process include the qualifications for referral to the State or local agencies, the certification of the State and local agencies, and the requirements for reactivation by HUD.

HUD regulations for the initial referral basically adopt the statutory language of the FHAA. The law requires that the Secretary first refer any complaint alleging a discriminatory housing practice to a State or local agency when the complaint is within the jurisdiction of the agency, and the agency has been certified by the Secretary.[50] The agency must be either certified as a substantially equivalent State or local agency, or permitted to accept interim referrals.[51] In addition, the regulations require that the Assistant Secretary notify the State or local agency of the referral by certified mail.[52]

The Assistant Secretary must notify the aggrieved party and the respondent of the referral to the agency. The regulations specify the form and content of the notification to both parties.[53] The parties must receive notice either by certified mail or personal service. The notice must advise both parties of the aggrieved person's right to commence a civil action under the FHAA[54] in an appropriate United States district court, not later than 2 years after the occurrence or termination of the questioned practice.[55]

The notice also must explain how the 2-year period is calculated. The computation excludes any time during which a proceeding is pending before a referral agency or the Secretary[56] regarding the complaint or charge based on the alleged discriminatory practice. However, the 2-year period does include the time during which an action for a breach of a conciliation agreement is pending.[57]

After a referral of a complaint is made, the Assistant Secretary is prohibited generally from taking any further action on the complaint.[58] However, a referral does not prohibit the Assistant Secretary from reviewing or investigating matters in the complaint that

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47 *Id.* § 115.11.

48 24 C.F.R. Ch. I, Subch. A, App. I, 911, 972–73 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

49 42 U.S.C. § 3610(f)(1) (1988).

50 *Id.*

51 24 C.F.R. § 103.100(a) (1993). For regulations addressing certification of substantially equivalent agencies, see 24 C.F.R. §§ 115.1–115.11 (1993).

52 *Id.* § 103.100(b).

53 *Id.* § 103.110.

54 42 U.S.C. § 3613 (1988).

55 24 C.F.R. § 103.100(b) (1993).

56 *Id.* § 103.45(d).

57 *Id.* § 103.100(b).

raise issues cognizable under other civil rights authorities applicable to departmental programs.[59]

The Assistant Secretary may reactivate a referred complaint only in three types of situations: consensual reactivation, decertification, or failure to process promptly.[60] According to the regulations, reactivation by consent of the State or local agency covers requests for reactivation by the agency, as well as consent to reactivation initiated by the Assistant Secretary.[61] Reactivation may also occur if the Assistant Secretary determines that "the agency no longer qualifies for certification as a substantially equivalent State or local agency and may not accept interim referrals."[62]

If the State or local agency fails to commence proceedings on the complaint within 30 days of receiving notification and referral, then the Assistant Secretary may reactivate the complaint.[63] In addition, if the agency commences proceedings within 30 days, but the Assistant Secretary determines that the agency has failed to move forward with reasonable promptness, the complaint may be reactivated.[64]

If the agency fails to move forward promptly, HUD will not reactivate the complaint until the appropriate HUD regional office has conferred with the agency to assess the reasons for the delay.[65] This provision allows the Assistant Secretary to decide whether the agency will proceed effectively after the conference with the HUD regional office, so reactivation can be avoided.

The Assistant Secretary makes the reasonable promptness determination on a case-by-case basis. In making the assessment, the Assistant Secretary must consider several factors, including the subject matter and complexity of the issues involved in the complaint, the number of aggrieved people, the progress made by the agency since referral, and the workload and resources available to the agency.[66]

If reactivation is to occur for any reason, the Assistant Secretary will notify the agency, the aggrieved person, and the respondent by certified mail or personal service.[67] The notification to the aggrieved person and the respondent must include notice of the time limits applicable to complaint processing, and the parties' procedural rights and obligations.[68]

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58 42 U.S.C. § 3610(f)(2) (1988).

59 24 C.F.R. § 103.105(b) (1993). The other applicable civil rights authorities are listed in 24 C.F.R. § 103.5 (1993), and include Title VI of the Civil Rights Act of 1964 and the Age Discrimination Act.

60 *Id.* § 103.110.

61 *Id.* § 103.110(a).

62 *Id.* § 103.110(b).

63 *Id.* § 103.110(c).

64 *Id.*

65 *Id.*

66 24 C.F.R. Ch. I, Subch. A, App. I, 911, 952–53 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

67 24 C.F.R. § 103.115(a) (1993).

68 *Id.* § 103.115(b)(1).

The notice must also explain that while HUD will continue to process the complaint under the FHAA, the agency may continue to process the complaint under State or local law.[69] This provision was added to ensure that the parties continue to cooperate with the agency after reactivation, if the agency is pursuing the complaint under State or local law.[70] In addition, the notification must include the same advice as required in the notification of referral regarding the availability and timing of a civil action under the FHAA.[71]

According to the model "Agreement for Interim Referrals or Other Utilization of Services," complaints filed with HUD will be referred to FHAP agencies within 3 days, and the parties will be notified of the referral within 10 days.[72] Complaints filed with FHAP agencies are to be sent to HUD for dual filing within 5 days. In turn, HUD will inform the FHAP agency whether HUD has found other civil rights laws to be applicable. Complainants filing with FHAP agencies are to be encouraged to file with HUD as well.[73] FHAP complaints are to follow the general format used by HUD. The agreement also recapitulates the regulatory requirements outlined above.

Complaints may be reactivated by mutual consent of HUD and the FHAP agency:

(1) If the respondent is a Federal, State, or local governmental agency;
(2) If the respondent has properties outside the jurisdiction in which the agency operates;
(3) If the case is systemic; or
(4) If handling the case would result in a conflict of interest for the agency.[74]

In the model agreement, as above, HUD agrees to consult with the agency prior to reactivating any complaint because of delayed processing.[75] In monitoring the FHAP agencies' performance under the agreement, HUD will use three milestones. The agency must begin investigating the complaint within 30 days of filing; must complete the final investigative report (if conciliation has failed) within 75 days; and must submit the final investigative report to HUD within 100 days.[76] If the last milestone is not met, the agency must provide written reasons for delay with supporting documentation and a reasonable projected date for completion.

Under no circumstances will HUD refer Secretary-initiated complaints or complaints regarding breach of an approved conciliation agreement.[77]

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69 *Id.* § 103.115(b)(2).

70 24 C.F.R. Ch. I, Subch. A, App. I, 911, 953 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

71 24 C.F.R. § 103.115(b)(3) (1993).

72 U.S. Department of Housing and Urban Development, "Agreement for Interim Referrals or Other Utilization of Services between Department of Housing and Urban Development and (Agency Name)," (undated), p. 4.

73 Ibid., p. 5.

74 Ibid., p. 8.

75 Ibid., p. 9.

76 Ibid., p. 14. While the law sets a 100-day goal including a cause determination for HUD, the FHAP regulations only state that a certified agency must make a final administrative disposition of a complaint within 1 year of the date of receipt. 24 C.F.R. § 115.4(b)(2) (1993).

77 Ibid., p. 15.

Temporary Referral and Extension Procedures

In order to allow State and local agencies to revise their existing fair housing laws to conform to the FHAA, Congress provided a 40-month transition period (from September 13, 1988, when the FHAA was passed, until January 13, 1992) during which "grandfathered" State and local agencies could continue to receive referrals of HUD complaints.[78] During the transition period, State and local agencies handled only those complaints referred by HUD for which they were already certified, i.e., those based on race, color, religion, national origin, and sex. Complaints based on the new jurisdictions—familial status and handicap—were not referred to these agencies, since HUD had not yet certified them as operating under substantially equivalent laws.[79]

The 40-month grace period maintained the Title VIII referral system, while giving previously recognized agencies an opportunity to bring their laws and operations into substantial equivalency with the FHAA.[80] Under the FHAA, HUD could extend the grandfathered status of the 122 agencies for up to 8 months, if exceptional circumstances prevented them from becoming substantially equivalent by January 13, 1992.[81] Agencies receiving such extensions could thus receive interim referral agreements under the FHAA until September 13, 1992.

Between the effective date of the 1988 amendments and the end of the grace period to achieve substantial equivalency, any complaint based on the new bases of familial status and disability and all complaints arising out of alleged discrimination occurring outside a jurisdiction covered by one of the grandfathered agencies were afforded the full rights and remedies, including judicial review, provided by Federal law. On the other hand, members of the original, pre-1988 classes of race, color, national origin, religion, and sex, who were covered by a grandfathered (FHAP) agency, were only afforded those protections prescribed by State or local law.[82]

Thus in all jurisdictions with FHAP agencies, different standards of justice applied to the "new" and "old" protected groups. Members of the original protected groups living in areas with enforcement agencies recognized by HUD prior to 1988 typically had weaker protections than those living in areas served directly by HUD. For example, in such States a person filing a complaint alleging discrimination based on disability or familial status could receive punitive damages and attorneys' fees under Federal law, while someone discriminated against as a member of the other, "old" protected classes could not receive such remedies unless they filed a private lawsuit.

To address the dual standard problem, HUD instituted a special procedure for handling agency complaints during the 8-month extension period.[83] Under the procedure, an

78 42 U.S.C. § 3610(f)(4) (1988); 24 C.F.R. § 115.6(d) (1993). *See* U.S. Commission on Civil Rights, *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System* (Washington, D.C.: 1992), (hereafter cited as *Prospects and Impact*), pp. 11–13.

79 24 C.F.R. § 115.6(d)(1) (1993). Some agencies received contracts from HUD to investigate complaints involving handicap of familial status, provided that their laws covered these areas.

80 42 U.S.C. § 3610(f)(4) (1988).

81 *Id.*

82 *Prospects and Impact*, pp. 12–13.

83 The new procedure was worked out by HUD with the NAACP Legal Defense and Education Fund, the National Fair Housing Alliance, and the International Association of Official Human Rights Agencies, a group whose membership includes fair housing agencies. *66 State, Local Agencies Receive Extensions of 'Substantially Equivalent' Certification Status*, 1 Fair Housing-Fair Lending (P-H), vol. 7, no. 8, ¶ 8.2, p. 2 (Feb. 1, 1992).

agency that had received the extension continued to process Federal complaints as before until making a determination of reasonable cause. In the event the agency found reasonable cause, the parties to the complaint were to be apprised of the rights and remedies available under Federal law and could opt to have their case referred to HUD for processing. If the case came back to HUD and HUD agreed with the agency's finding of reasonable cause, HUD would then assist the agency in seeking to resolve the complaint through conciliation.[84] Should conciliation efforts fail, the case was brought into HUD's system and processed as were other HUD cases.[85]

Some agencies opted out of trying to achieve substantial equivalency and ceased processing complaints for HUD. According to HUD, 16 agencies either did not establish "exceptional circumstances" or did not apply for an extension.[86]

By the expiration of the grace period during which agencies not deemed substantially equivalent could continue to process cases for HUD, only 15 agencies—11 States and 4 cities—achieved interim certification. They all had signed interim referral agreements with HUD pending final certification after the 2-year performance period in which they were to demonstrate "operational" equivalency.[87]

The Reactivated Caseload

HUD was required by law to reactivate the cases being handled by agencies that had not received interim certification by September 13, 1992.[88] At that time, HUD's caseload was 2,189, of which 1,133 were aged 100 days, and HUD calculated that the reactivated caseload September 14 added 1,520 complaints to its total, an increase of nearly 75 percent.[89] In an analysis prepared in August 1993,[90] HUD stated that 1,479 cases were actually eligible for reactivation on September 11, 1992. Of these, 206 were not reactivated pending imminent interim certification of the originating agency, leaving 1,273 cases for reactivation. Of the second group, HUD estimates that approximately 1,000 were reactivated, and that "The others may have been closed by the agencies prior to HUD reactivation, or systemic errors were made during data entry, resulting in certain cases not showing as reactivated in the system. Approximately 23 percent of these cases are still open [as of August 1993]."[91]

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84 Ibid.

85 Ibid.

86 Leonora Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Jan. 13, 1992.

87 *15 State, Local Agencies Sign Referral Pacts as September Deadline Passes*, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 4, ¶ 4.5, p. 7–8 (Oct. 1, 1992).

88 24 C.F.R. § 103.110(b) (1993).

89 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, "FHAP Cases Open in Agencies as of September 13, 1992." HUD started the clock over on these cases, regardless of when they were originally filed, so they were not counted as aged until late December 1992.

90 Jacquelyn Shelton, Director, Office of Fair Housing Assistance and Voluntary Programs, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Aug. 19, 1993.

91 Ibid.

The remaining cases were closed in a variety of ways, often after reinvestigation by HUD regional staff:

No cause determinations	10.3%
Successful conciliations (includes cases withdrawn by the complainant after resolution)	26.7%
Administrative closures	39.7%
Post cause determination closures and noncause determination cases closed per DOJ	.001%
Cause determinations not yet closed.	.002%[92]

Continuing efforts by State and local agencies and by HUD led to the interim certification of 51 agencies by mid-June 1993, including 26 States. Texas and North Carolina have since been fully certified (see below).

Performance Assessments

In addition to certifying that the State or local law is substantially equivalent to the Fair Housing Act of 1988, HUD must also decide whether the agency has met the performance standards outlined in HUD regulations.[93] In essence, HUD must determine whether or not each FHAP agency, in its current practice and past performance, is substantially equivalent as well.

Standards to be met include comprehensive investigations, timely proceedings, and thorough documentation. In processing complaints, agencies must begin procedures within 30 days of receipt and make a final disposition within 1 year. Within 100 days of receipt, the agency must complete the investigation and prepare the final investigative report per HUD guidelines.[94]

In obtaining relief, agencies must conduct compliance reviews of all settlements, conciliation agreements, and other orders designed to correct discriminatory housing practices.[95] They must also seek the elimination of all prohibited practices in an affirmative and consistent manner.[96]

In assessing the agencies' fair housing performance where agencies also handle other civil rights matters (such as employment complaints):

> [T]he Assistant Secretary may consider such matters as the relative priority given to fair housing administration, as compared to such other duties and responsibilities, and the compatibility or potential conflict of fair housing objectives with the agencies' other duties and responsibilities.[97]

To implement the regulations, HUD prepared procedures in a draft technical guidance memorandum (TGM) entitled "Conducting the Performance Assessment of Agencies Certified under the Fair Housing Act."[98] These

92 Ibid.

93 24 C.F.R. §§ 115.1–115.11 (1993).

94 Id. § 115.4(b)(2)(i).

95 Id. § 115.4(b)(3). However, the regulations state only that HUD itself "*may*, from time to time, review compliance with the terms of any conciliation agreement." (Emphasis added.) *Id.* § 103.335.

96 Id. § 115.4(b)(4).

97 Id. § 115.4(c).

98 Undated (hereafter cited as "Draft Performance Assessment TGM."

procedures require the appropriate HUD Regional Fair Housing and Equal Opportunity Office (RFHEO) to conduct an onsite performance assessment within 18 months of the signing of an interim agreement.[99] However, the regional office is to begin periodic reviews of the agency's performance earlier, within 6 to 8 months of signing, to allow for additional technical assistance and training as needed.[100]

The TGM also includes instructions for carrying out the performance assessment, including obtaining evidence through interviews and documentation of the agency's budget, staffing, training, data support systems, complaint processing, organizational structure, complaint determination process (including its standards for determining cause and its rules and regulations generally), and caseload data.[101]

In an effort to assess the visibility of an agency and its impact on the community, HUD is also required to interview other government officials, private organizations, community leaders, and industry representatives to determine if the community is aware of the agency's presence and if the presence is viewed positively or negatively.[102] Agency "outreach" activities may include but are not limited to lectures, forums, training, newsletters, and other programs in fair housing.

If an agency is judged to be deficient in its operation, the RFHEO is required to offer technical assistance designed to correct the deficiencies identified, "with special emphasis on the areas of training, outreach, complaint processing, and conciliations."[103] The assistance is to be carried out in accordance with a written plan, including reasonable timeframes for remedial action and reassessment.[104] Where specialized assistance is needed, the RFHEO is responsible for ensuring that such assistance is forthcoming, using other regional or headquarters staff and other public or private experts, as necessary.[105] In either case, the assistance must be rendered within 3 months of the onsite visit, and must be followed within 6 to 8 months by a special performance assessment.[106]

The complete performance assessment must be submitted to the Funded Programs Division at FHEO headquarters within 45 days of the onsite visit, and no later than 18 months from the date when the interim agreement was signed by the Assistant Secretary, in the case of agencies with interim agreements; and no less than 18 months from the last assessment, in the case of agencies with full certification.[107]

After permanent certification is granted, HUD is required by law to determine whether agencies continue to qualify for certification at least once every 5 years.[108] To fulfill this requirement, HUD guidance instructs the regional offices to assess the agencies no less than every 18 months using the same

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99 Ibid., p. 8.

100 Ibid., p. 10.

101 Ibid., p. 14.

102 Ibid., pp. 14–15. Also, see "Initial Performance Assessment of the North Carolina Human Relations Commission," June 1992, p. 9.

103 Draft Performance Assessment TGM, p. 10.

104 Ibid.

105 Ibid.

106 Ibid., p. 16.

107 Ibid., p. 11.

108 42 U.S.C. § 3610(f)(5) (1988).

standards and any other data that demonstrate enforcement capability.[109]

When an agency is determined to be in operational compliance through the performance assessment, presumably the Funded Programs Division will send such a recommendation to the Assistant Secretary. The Assistant Secretary will publish a notice in the *Federal Register* to allow public comment for 30 days on the impending determination. Copies of all written comments will be forwarded to the RFHEO "to ensure that all comments are dealt with adequately."[110]

When the Assistant Secretary has finally determined an agency is substantially equivalent in operation, she or he will notify the agency that:

> HUD is prepared to enter into a written agreement which will provide for the referral of complaints to the agency and for procedures for communication between the agency and HUD that are adequate to permit HUD to monitor the continuing substantial equivalency of the State or local law. The written agreement may be a memorandum of understanding (MOU) as described in 111.104(a)(2).[111]

The RFHEO will negotiate the agreement with the agency on behalf of the Assistant Secretary. If, for some reason, the agency chooses not to participate in the Fair Housing Assistance Program—that is, not to receive Federal funds for processing complaints,[112] a written agreement rather than an MOU will be drawn up between HUD and the agency.[113]

If the Assistant Secretary proposes to deny certification to an agency, the agency has at least 15 days to show why it should be granted certification and has the opportunity to request a conference.[114] If such a conference is requested, a presiding officer shall be designated by the Assistant Secretary and the issues specified, along with any procedural instructions.[115] Persons commenting shall be notified along with the agency in accordance with regulations.[116] A transcript of the proceedings shall be kept and made available to all interested parties.[117] The conference officer will propose findings and a determination to be served on each participant, who in turn may file written exceptions within 20 days. The entire record shall be reviewed by the Assistant Secretary for a final determination within 30 days, to be published in the *Federal Register* as applicable.[118]

Completed Assessments

In 1992 HUD conducted performance assessments at the North Carolina Human Relations Commission in Raleigh and the Texas Commission on Human Rights in Austin. These two State agencies were among the first to receive interim referral agreements, and,

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109 Draft Performance Assessment TGM, p. 11.

110 Ibid., p. 35.

111 Ibid., p. 30.

112 It is not clear why an agency operating under a substantially equivalent law would reject Federal funding, and as of June 1993 no agencies with interim or full certification had done so. Marcella Brown, telephone interview, June 18, 1993.

113 Draft Performance Assessment TGM, p. 31.

114 Ibid., p. 32; 24 C.F.R. § 115.7(b) (1993).

115 24 C.F.R. § 115.9(a) (1993).

116 *Id.* § 115.9(b)(1).

117 *Id.* § 115.9(c).

118 *Id.* § 115.9(d).

consequently, were the first to achieve substantial equivalency certification.[119]

HUD's onsite assessment of the North Carolina Human Relations Commission was conducted in June 1992.[120] The commission's budget for 1992 was $749,904, including $104,800 from the Fair Housing Assistance Program. Of the remaining State funds, 40 percent were allocated for fair housing.

During the period of review (May 1, 1991, through May 30, 1992), the commission processed 81 dual-filed cases. Of these, 59 cases were closed, including 16 with predetermination settlements, 6 withdrawn with resolution, 6 with probable cause, and 7 with no cause. The remaining 18 cases were administratively closed. A review of the settlement agreements showed that relief ranged from retention of the unit in question to $11,000 in unspecified damages, and routinely included affirmative action relief.[121]

Complaints were handled in a timely manner and case delays beyond 100 days were fully justified. Open cases examined were in order. In addition, compliance reviews were computerized for the 25 existing agreements; 11 such agreements were monitored during the period covered by HUD's report. The commission also conducts a random testing program.[122]

Staff attended three HUD-required training conferences in addition to three other training sessions. In turn, the North Carolina commission itself conducted two training sessions—one for real estate professionals and one for a mixed audience. Other outreach activities included assistance to tenant groups and apartment complexes, publication of a quarterly newsletter including fair housing news, and fair housing awareness programs.[123]

Civic leaders interviewed about the agency's performance included three groups in Raleigh, two in Wilson, and one each in Elizabeth City and Washington, North Carolina. They included a community development program, the North Carolina Housing Finance Agency, a public defender's office, a local board of realtors, a mental health association, a local human rights agency, and a community development block grant program. Those interviewed were generally positive, but some pointed to the need for increased education and outreach efforts in rural areas of the State and advocated creation of regional service areas due to the State's size.[124] HUD did not report interviewing any civil rights or women's groups or any private fair housing groups.

In July 1992, HUD conducted a performance assessment of the Texas Commission on Human Rights, covering October 1, 1990, to July 10, 1992.[125] The agency received $50,000 in capacity building funds in FY 1992 and $35,000 in fiscal 1991.[126]

Due to the agency's lack of experience in processing housing discrimination complaints, not all complaints arising in Texas

119 58 Fed. Reg. 39,561 (1993) (North Carolina); 57 Fed. Reg. 60,220 (1992) (Texas).

120 U.S. Department of Housing and Urban Development, Region IV, "Initial Performance Assessment of the North Carolina Human Relations Commission," June 1992.

121 Ibid., p. 6.

122 Ibid., p. 8.

123 Ibid.

124 Ibid., p. 10.

125 U.S. Department of Housing and Urban Development, Region VI, "Annual Performance Evaluation Report of the Texas Commission on Human Rights," July 1992.

126 The Texas agency's total budget was apparently appended to HUD's performance assessment, but not supplied to the Commission.

and filed with HUD were referred to the State agency. Since the Texas law became effective, the agency had not had occasion to use its prompt judicial action authority or its subpoena power and had issued only one cause finding, although its conciliation rate was high.[127] The cause finding resulted in the election of a judicial forum and the case was forwarded to the Justice Department. In another case, criminal charges were under consideration for retaliation, and a meeting had been held with DOJ regarding a potential pattern and practice case.

Complaints were processed in a timely and satisfactory manner. None took longer than 100 days, and the average time to closing or determination was 59 days. The proper respondents were joined or substituted, according to HUD. Complaint data were computerized and compatible with HUD's format. Unlike HUD, the Texas agency has its own investigations compliance manual.[128]

Agency staff attended three HUD-sponsored fair housing training conferences and conducted two training activities.[129] The staff was known and active in the community, according to HUD, and maintained regular contact with staff of other fair housing agencies. Indeed, as a result of its technical assistance, five cities in Texas passed fair housing ordinances, three of which have requested HUD certification.[130]

HUD reported that community leaders in Austin were aware of the agency, but not of its authority or the law's provisions. Two groups were personally interviewed by HUD staff; the directors of the American GI Forum and the Mental Health Association.[131] The GI Forum asserted the agency's presence was felt but that more outreach to remote locations in Texas was needed. The director of the Mental Health Association did not know of the agency's function. No interviews with civil rights or women's groups or private fair housing groups were reported.

Since many of the agencies are seeking FHAP agreements for the first time under FHAA, and others have vastly changed their laws to obtain certification, they have often had little opportunity to exercise all of their new enforcement mechanisms. Nevertheless, since an agency may not hold interim certification longer than the 2 years prescribed by law, HUD must evaluate them regardless or cease referring complaints.

Complaint Outcomes

Prior to certification, the data maintained by HUD are comparable to that of the FHAP agencies only with regard to the bases of complaints filed. The stages of complaint processing, particularly the terms used for closing cases, are not comparable and may not be used to assess FHAP agency performance versus HUD performance.[132] Since very few agencies achieved certification, either interim or full certification, by fiscal 1992, no analysis of FHAP agency complaint processing is included here.

127 Ibid., p. 4.

128 Ibid.

129 Ibid., p. 2.

130 Ibid., p. 5.

131 The particular association was not identified.

132 *See* Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Integrated Title VIII Data Dictionary, revised May 17, 1993, p. 39–40.

7. Fair Housing Initiatives Program

In addition to processing complaints, HUD has engaged in a variety of other activities designed to enhance compliance with Title VIII. Through the Fair Housing Initiatives Program, HUD has carried out education and outreach programs, testing and research projects, and recently begun efforts to assist in the formation of fair housing groups. In addition, HUD has promoted voluntary compliance through work with real estate associations, community groups, and advocacy organizations. These activities are examined below.

Fair Housing Initiatives Program

The Fair Housing Initiatives Program (FHIP) was established by the Housing and Community Development Act of 1987[1] as a 2-year demonstration program that would give grants to private organizations and State and local government agencies engaged in fighting housing discrimination. FHIP is managed by the Assistant Secretary of Fair Housing and Equal Opportunity,[2] who is authorized:

> to make grants to, or enter into contracts or cooperative agreements with, State or local governments or their agencies, public or private nonprofit organizations or institutions, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.[3]

According to HUD:

> These funds will enable the recipients to carry out activities designed to obtain enforcement of the rights granted by the Fair Housing Act or by substantially equivalent State or local fair housing laws and education and outreach activities designed to inform the public concerning rights and obligations under such Federal, State, or local laws prohibiting discrimination.[4]

From its inception, the regulations have provided FHIP funding in three program areas, or "initiatives:" administrative enforcement, education and outreach, and private enforcement.[5]

The Administrative Enforcement Initiative

Through the administrative enforcement initiative, HUD provides funding to State and local government fair housing enforcement agencies in support of programs designed to broaden the range of enforcement and compliance activities.[6] Participating State and local agencies must be deemed substantially

1 Pub. L. No. 100–242, Tit. V, § 561, 101 Stat. 1942 (1987). (The law was passed in 1987 but effective in Feb. 5, 1988.) FHIP was amended 2 years later in the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101–625, Tit. IX, § 953, 104 Stat. 4419 (1990), and again in 1992 in the Housing and Community Development Act of 1992, Pub. L. No. 102–550, Tit. IX, § 905(b), 106 Stat. 3869 (1992) (codified, as amended, at 42 U.S.C.A. § 3616a (West Supp. 1993)).

2 24 C.F.R. § 125.104(a) (1993).

3 *Id.* § 125.102.

4 54 Fed. Reg. 6,492 (1989).

5 24 C.F.R. § 125.104(c) (1993).

6 *Id.* § 125.203.

equivalent.[7] Funded activities may include, but are not limited to:

a) Providing technical assistance to State and local government agencies administering housing and community programs concerning applicable fair housing laws and regulations;

b) Implementing fair housing testing programs; and

c) Conducting investigations of systemic discrimination for further enforcement processing by State or local agencies, or for referral to HUD and the Department of Justice.[8]

HUD did not fund State and local enforcement agencies under this initiative until fiscal 1992;[9] instead, funds were provided to these agencies through the Fair Housing Assistance Program.[10] FHAP funding is formula-based for use by agencies in processing HUD complaints, training, and education and outreach. All agencies that qualify receive funds.[11] FHIP provides funds on a competitive basis; its administrative enforcement funds are available to substantially equivalent agencies for case processing, systemic investigations, and testing, among other activities.[12]

Education and Outreach Initiative

The education and outreach initiative provides funding for developing, implementing, or coordinating education and outreach programs designed to inform the public of its rights and obligations under the provisions of Federal, State, and/or local fair housing laws.[13] Funding provided under this initiative is intended to assist the development of national, regional, or local media campaigns or other special efforts to educate the general public and housing industry groups about fair housing rights and obligations.[14]

In its first solicitation for funding proposals under this initiative, HUD outlined its agenda for education projects by quoting language from its regulations:

1. Developing informative material on fair housing rights and responsibilities;
2. Developing fair housing and affirmative marketing instructional material for education programs for State, regional, and local housing industry groups;
3. Providing educational seminars and working sessions for civic associations, community-based organizations, and other groups; and
4. Developing educational material targeted at persons in need of specific or additional information on their fair housing rights.[15]

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7 *Id.* § 125.202.

8 *Id.* § 125.203.

9 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1992*, 102d Cong., 1st sess., 1991, p. 648 (hereafter cited as *FY 1992 Budget Hearings*).

10 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1991*, 101st Cong., 2d sess., 1990, p. 635 (hereafter cited as *FY 1991 Budget Hearings*). See chap. 6 for a discussion of the Fair Housing Assistance Program.

11 *See* 24 C.F.R. § 111.105 (1993).

12 Marcella Brown, Director of Funded Programs, FHEO, U.S. Department of Housing and Urban Development, telephone interview, Dec. 20, 1993.

13 24 C.F.R. § 125.301 (1993).

14 *Id.*

15 54 Fed. Reg. 17,873 (1989); *see also* 24 C.F.R. § 125.303(a) and (b) (1993).

For outreach projects, HUD emphasized:

1. Developing State, regional or local media campaigns regarding fair housing;
2. Bringing housing industry and civic or fair housing groups together to identify illegal real estate practices and to determine how to correct them;
3. Designing specialized outreach projects to inform persons of the availability of housing opportunities;
4. Developing and implementing a response to new or more sophisticated practices that result in discriminatory housing practices; and
5. Developing mechanisms for the identification of and quick response to housing discrimination cases involving the threat of physical harm.[16]

Private Enforcement Initiative

The private enforcement initiative provides funding to nonprofit organizations and other private entities engaged in carrying out litigation or other programs to prevent or eliminate discriminatory housing practices.[17] The awards are designed to assist in the development, implementation, or coordination of programs or activities directed at enforcement of the rights granted either by Title VIII or by State or local laws deemed to be substantially equivalent to Title VIII.[18]

HUD's regulations described the scope of such activities:

1. Conducting investigations of systemic housing discrimination;
2. Professionally conducting testing or other investigative support for administrative and judicial enforcement.
3. Linking fair housing organizations regionally in enforcement activities designed to combat broader housing market discriminatory practices; and
4. Establishing effective means of meeting legal expenses in support of litigation of fair housing cases.[19]

However, no funds were to be used "for payment of expenses in connection with litigation against the Unit d States."[20]

FHIP Expansion

Congress revised and expanded the Fair Housing Initiatives Program in the Housing and Community Development Act of 1992[21] to create the new fair housing organizations initiative, a program designed to provide funds for the purpose of organizing (start-up) and capacity building of fair housing enforcement organizations, especially in underserved areas.[22] Funds are also available under the initiative specifically to fund a national media campaign for fair housing education and outreach and to develop activities in observance of an annual national fair housing month.[23]

The expansion of the FHIP program and its role in enforcement was endorsed by the Assistant Secretary for Fair Housing and Equal Opportunity at the time of her 1993 confirmation:

> I view the Fair Housing Initiatives Program (FHIP) as a crucial component of the Department's fair housing enforcement strategy....

16 54 Fed. Reg. 17,874 (1989).

17 24 C.F.R. § 125.401 (1993).

18 *Id.*

19 *Id.* § 125.403. The investigations could be on behalf of private lawsuits.

20 *Id.* § 125.404.

21 Pub. L. No. 102–550, Tit. IX, § 905(b), 106 Stat. 3869 (1992) (codified at 42 U.S.C.A. § 3616a (West Supp. 1993)).

22 42 U.S.C.A. § 3616a (West Supp. 1993).

23 *Id.* § 3616a(d)(1). *See also* U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1994*, 103d Cong., 1st sess., 1993, p. 457–58 (hereafter cited as *FY 1994 Budget Hearings*).

A major emphasis of the strategy will be to help establish, organize, and build the capacity of fair housing organizations, particularly in those areas of the country where large concentrations of protected classes exist and are currently unserved or underserved by fair housing enforcement organizations and/or HUD. These organizations will provide support to HUD's Title VIII complaint processing by conducting tests for Fair Housing Act violations, providing technical assistance, litigating cases and investigating Fair Housing Act complaints, both individually and on behalf of the Department.[24]

Administrative Overview

FHIP was enacted February 5, 1988,[25] and program regulations were first proposed by HUD July 7, 1988.[26] Although the comment period ended August 8, 1988,[27] the regulations were not finalized until February 10, 1989, and were not effective until May 9, 1989.[28] Internal HUD instructions for the awards and monitoring of FHIP grants by regional offices were not finalized until fiscal year 1991.[29]

A year by year account of total spending for FHIP reveals a chronic inability to meet disbursement goals through fiscal 1993. In its fiscal 1989 budget, HUD reported drafting regulations in anticipation of FHIP's first appropriation.[30] In the fiscal 1990 budget, HUD reported that it expected the $5 million fiscal 1989 appropriation to be obligated in the last quarter of 1989.[31]

In the 1991 budget, HUD reported that no money had been obligated in fiscal 1989, and $5 million had been carried over to fiscal 1990.[32] HUD expected to obligate both the fiscal 1989 and 1990 appropriations in the last quarter of fiscal 1990.[33] The fiscal 1990 appropriation was $6 million.

In the fiscal 1992 budget, HUD reported that the 1989 appropriation was obligated in 1990, but no outlays had been made. The delay was attributed to "the late receipt of applications and the administrative difficulty of executing many small contracts, particularly with private organizations unfamiliar with federal procedures."[34] A carryover of

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24 Roberta Achtenberg, Assistant Secretary for the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Answers to Questions Posed by the Senate Committee on Banking, Housing, and Urban Affairs, April 29, 1993, pp. 14–15 (hereafter cited as Achtenberg Answers) (provided to the Commission by Laurence Pearl, Director, Office of Program Standards and Evaluation, FHEO, U.S. Department of Housing and Urban Development).

25 42 U.S.C. § 1616 note (1988).

26 53 Fed. Reg. 25,576 (1988).

27 *Id.*

28 54 Fed. Reg. 6492 (1989) (codified at 24 C.F.R. §§ 125.101–125.405 (1993)).

29 Office of Fair Housing and Equal Opportunity, Management Plan, Part B, 1990, p. 108.

30 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Housing and Urban Development and Independent Agencies Appropriations for 1989*, 100th Cong., 2d sess., 1989, p. 511 (hereafter cited as *FY 1989 Budget Hearings).*

31 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1990)*, 101st Cong., 1st sess., 1990, p. 497 (hereafter cited as *FY 1990 Budget Hearings).*

32 *FY 1991 Budget Hearings*, p. 634.

33 Ibid, p. 637.

34 *FY 1992 Budget Hearings*, p. 647.

$5.8 million from fiscal 1990 funds prompted increased estimates of outlays for fiscal 1991, from $7.5 million to $10 million.[35] The latter figure included unliquidated carryover balances from both 1989 and 1990 previously projected to be spent in 1990. Meanwhile, the fiscal 1991 appropriation was $5.6 million.[36]

In the fiscal 1993 budget proposal, HUD reported that fiscal 1991 obligations were actually $5.6 million and outlays were $4.5 million; the outlays were all from fiscal 1990 funds.[37] Fiscal 1991 funds totaling $5.8 million were carried over to fiscal 1992.[38] Some fiscal 1991 money was projected to be liquidated in fiscal 1993.[39] The fiscal 1992 appropriation was $8 million.

By the fiscal 1994 budget, HUD reported that actual fiscal 1992 obligations were $5.9 million, down from a projected $13.8 million, while outlays were down from $5 million to $4.6 million—all from 1991 funds.[40] Fiscal 1992 moneys were carried over to 1993. The delay was attributed to the publication of three notices of funding availability (NOFAs): one for the three initiatives, one for mortgage lending, and one to satisfy a court order and settlement.[41]

The estimated obligations for fiscal 1993 were revised downward from $13.8 million to $7.9 to reflect the availability of the carryover money.[42] The 1993 appropriation of $10.6 million was expected to be obligated in fiscal 1994. The lag in spending the 1992 funds was expected to lower 1993 outlays from $6.8 million to $3.9 million.[43] The fiscal 1993 appropriation was $10.6 million, and the appropriation for fiscal 1994 was $16.9 million.[44]

The cumulative effect of the delays and carryover of funds resulted in a fiscal 1994 estimate that obligations would be $27.5 million, including the $10.6 million carried over from 1993.[45] If achieved, such an amount would represent an unprecedented improvement in HUD's capacity to dispense FHIP funds. Heretofore, FHIP obligations have never exceeded $8 million in a single year.

In the first 2 years, one of the main criticisms expressed by some of the FHIP participants was HUD's slowness in getting payment or awards to recipients. As a board member at the Delaware County (PA) Fair Housing Council explained:

> A year ago [1989], the council applied for the FHIP program so that it could have funds to conduct testing for other protected groups under the new law. Our application was accepted and the program was initiated; however, to date, the Council has not received any HUD monies. . . . We were told that

35 Ibid.

36 *FY 1991 Budget Hearings*, p. 634.

37 *FY 1993 Budget Hearings*, p. 659.

38 Ibid.

39 Ibid.

40 *FY 1994 Budget Hearings*, p. 457.

41 Ibid. The use of funds for the court order and settlement is discussed below.

42 Ibid.

43 Ibid.

44 Ibid. In its comments on this report, HUD revised the fiscal 1994 appropriation to $20.5 million. *See* "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 8 (hereafter cited as HUD Comments).

45 *FY 1994 Budget Hearings*, p. 457. In its comments on this report, HUD revised the fiscal 1994 estimated obligations to $31.0 million. *See* HUD Comments, p. 8.

we have not received any FHIP funds because of an address change, 'and the form is sitting on someone's desk.'. . . . I would not recommend applying or reapplying for HUD money. . . .[46]

HUD's 1994 Program and Management Plan includes two provisions to address the awards problem. By September 30, 1994, the agency plans to begin restructuring the FHIP funding cycle, to streamline the award process and to develop a procedure for "quick" disbursement of funds to FHIP recipients.[47]

At her confirmation hearing, the new Assistant Secretary for FHEO expressed her intention to establish FHIP as an "organizational function within FHEO . . . [with] an internal reassignment of additional staff to the new FHIP unit. . . ."[48] Subsequently, in its 1994 Program and Management Plan, HUD announced plans to establish FHIP as a "discrete organizational function" within FHEO and assign additional staff to run the program.[49] In addition, the Department wants to promote improved partnerships between HUD and FHIP recipients, as well as obtain "regular feedback and recommendations from eligible private fair housing organizations."[50]

HUD has begun to implement its plans to improve the FHIP structure. To accomplish these goals, HUD has established a separate unit devoted exclusively to administering FHIP grant funds.[51] In addition, FHIP was selected to serve as a pilot grant program in a Business Processing Reengineering (BPR) effort.[52] The FHIP BPR began in November 1993 and was aimed at redesigning the FHIP administration and to increase efficiency, decrease costs, and provide better service to the public. HUD used this project to examine all steps in the funding cycle and to identify areas requiring greater efficiency. HUD completed the first phase of the project which established the "redesigned environment," and the Assistant Secretary for FHEO approved the recommendations scheduled for implementation in May 1994.[53] According to HUD, the project has already resulted in a savings of time of approximately 9 months, down from 32.8 months, and a cost savings projected to exceed $1.9 million over the next 5 years. However, full implementation of the recommendations will take approximately one year.[54]

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46 Naomi Marcus, board member, Delaware County Fair Housing Council, interview in Media, Pa., Sept. 24, 1990 (hereafter cited as Marcus Interview).

47 U.S. Department of Housing and Urban Development, "Creating Communities of Opportunity, Priorities of U.S. Department of Housing and Urban Development, Program and Management Plan," Oct. 1993, pp. 16–17 (hereafter cited as "Creating Communities of Opportunity"). During FY 1994, HUD has begun to implement a new disbursement plan to disburse FHIP funds more quickly upon execution of the grant agreements. "Recent Fair Housing Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 4 (hereafter cited as HUD Initiatives).

48 Achtenberg Answers, pp. 15–17.

49 "Creating Communities of Opportunity," p. 16.

50 Ibid.

51 HUD Initiatives, p. 3.

52 Ibid., p. 4.

53 Ibid.

54 Ibid.

TABLE 7.1
FHIP Appropriations and Expenditures
(Millions of Dollars)

	Fiscal years 1989	1990	1991	1992	1993	1994
Appropriations	$5.0	$6.0	$5.81	$8.0	$10.6	$16.9
Outlays	—	—	4.464	4.635	5.344[1]	N/A

Source: HUD Budgets, FY 1989-1994.

[1] Henry G. Cisneros, Secretary, HUD, letter to Mary Frances Berry, Chairperson, USCCR, June 9, 1994, p. 8 (HUD Comments).

Appropriations and expenditure for FHIP programs are summarized in tables 7.1 and 7.2.[55]

FHIP Funds and HUD Litigation

The use of FHIP funds to provide relief through settlement of discrimination cases where HUD was named as a defendant is novel. In a suit filed in 1978, *NAACP Boston Chapter v. Kemp,* the local chapter of the NAACP in Boston alleged that HUD failed to carry out its mandate to promote fair housing within programs funded by a Housing and Community Development Block Grant.[56] On March 8, 1991, the court approved a consent decree stating that HUD, among other things, agrees to spend money on certain fair housing activities:

> Beginning in FY 1991, HUD shall provide the following amounts for use in the City of Boston, $325,000 in FY 91 and, subject to available appropriations by Congress, which may be used for this purpose, $125,000 in the subsequent three fiscal years (FY 92, FY 93, and FY 94), . . . to subsidize the unreimbursed legal assistance costs incurred by private attorneys pursuing judicial or administrative relief for fair housing violations. . . . This additional funding is subject to competitive bidding by eligible entities under applicable regulations or NOFAs and may be used independently or in connection with other grants. . . .[57]

55 Recently, the House of Representatives passed legislation authorizing appropriations for the FHIP program for FY 1995 and 1996. For FY 1995, the legislation authorizes an appropriation of $26 million for the entire FHIP program: $9 million for private enforcement initiatives; $3 million for qualified fair housing organizations; $7 million for the creation of new fair housing enforcement organizations; and $7 million for education and outreach programs. For FY 1996, the legislation authorizes an appropriation of $27 million to be divided in the same manner as the 1995 appropriation. *See* Housing and Community Development Act of 1994, H.R. 3838, 103d Cong., 2d Sess. (1994).

56 NAACP, Boston Chapter v. Kemp, 2 Fair Housing-Fair Lending (P-H) ¶ 19,374 (D. Mass. Mar. 8, 1991) (Consent decree) (effective upon termination of appeals).

57 NAACP, Boston Chapter v. Kemp, 2 Fair Housing-Fair Lending (P-H) ¶ 19,374, at 19,599 (D. Mass. Mar. 8, 1991). HUD was also required to grant the City of Boston $325,000 in FY 1991, and $125,000 in the subsequent 3 fiscal years, over and above HUD's annual Community Development Block Grant (CDBG) contributions to the city. The funds were designated for the operation of the Boston Housing Opportunity Center.

TABLE 7-2
FHIP Budget and Expenditures by Category
(Millions of Dollars)

Administrative enforcement [1]	1989	1990	1991	1992	1993	1994
Future estimate [2]						
Number of grants	—	—	—	—	28	35
$	—	—	—	—	2.1	3.3
Budget estimate						
Number of grants	—	—	—	32	28	—
$	—	—	—	1.6	2.1	—
Current estimate						
Number of grants	—	—	—	30	10	—
$	—	—	—	2.5	2.1	—
Education and outreach [3]						
Future estimate						
Number of grants	120	40	40	30	30	69
$	2.0	2.0	2.0	2.1	2.5	6.0
Budget estimate						
Number of grants	120	40	40	30	30	—
$	2.0	2.0	2.0	2.1	2.5	—
Current estimate						
Number of grants	10	35	58	69	31	—
$	2.0	4.0	3.4	4.5	2.8	—
Private enforcement [4]						
Future estimate						
Number of grants	60	40	40	40	25	88
$	3.0	4.0	3.6	4.3	3.0	10.0
Budget estimate						
Number of grants	60	40	40	40	—	
$	3.0	4.0	3.6	4.3	—	
Current estimate						
Number of grants	30	70	58	55	—	
$	3.0	6.8	8.2	6.8	—	

[1] In comments on this report, HUD revised the administrative enforcement figures. For FY 1991, HUD stated that the future estimate number of complaints was 32 and the budget estimate and current estimate for number of complaints was not available. For FY 1992, the future estimate cost of complaints was $2.1 million, the budget estimate number of complaints was 32, and the current estimate number of complaints was 3.0. For FY 1993, the future estimate cost of complaints was $3.3 million, the budget estimate number of complaints was 27, and the current estimate number of complaints was 1.0. For FY 1994, the future estimate number of complaints was 4.0 at a cost of $3.0 million; the budget estimate number of complaints was 3.5 at a cost of $3.3 million; and the current estimate complaints number was 2.8 at a cost of $2.5 million. *See* HUD Comments, attachment 3.

[2] The Federal fiscal year begins October 1 and ends September 30. In its annual budget prepared 1 year in advance and sent to Congress more than 6 months in advance, HUD prepared estimates for the complaints for the fiscal year underway and the next one. In effect, the workload for each year is estimated twice; for example, the fiscal 1989 budget would contain an estimate for fiscal 1988 already underway and fiscal 1989. The following year, the 1989 estimate would be revised and an estimate offered for fiscal 1990.

[3] In comments on this report, HUD revised the education and outreach figures. For FY 1989, HUD stated the future estimate was unavailable for number of complaints and cost. For FY 1991, the future estimate number of complaints was 30 at a cost of $2.1 million. For FY 1992, the future estimate cost of complaints was $2.5 million. For FY 1993, the future estimate number of complaints was 69 at a cost of $6.0 million. For FY 1994, the future estimate number of complaints was 52 at a cost of $7.0 million; the budget estimate number of complaints was 69 at a cost of $6.0 million; and the current estimate number of complaints was 66 at a cost of $6.0 million. *See* HUD Comments, attachment 3.

[4] In comments on this report, HUD revised the private enforcement figures. For FY 1989, HUD said the future estimate was unavailable for number of complaints and cost. For FY 1990, the future estimate cost of complaints was $3.6 million. For FY 1991, the future estimate cost of complaints was $4.3 million. For FY 1992, the future estimate number of complaints was 25 at a cost of $3.0 million. For FY 1993, the future estimate number of complaints was 88 at a cost of $12.0 million; the budget estimate number of complaints was 25 at a cost of $3.0 million; and the current estimate for number of complaints was 18 at a cost of $3.0 million. *See* HUD Comments, attachment 3.

The fiscal 1991 NOFA duly reserved $325,000 of $5.8 million for FHIP to implement the Boston settlement:

> In accordance with a settlement, effective March 11, 1991, in *NAACP Boston Chapter v. Kemp*, HUD is reserving $325,000 in non-testing funds to establish a single fund to subsidize the unreimbursed legal assistance costs (including administrative expenses) incurred following the award of funds for this purpose under this notice by private attorneys pursuing judicial or administrative relief for fair housing violations referred to them after the Boston Fair Housing Commission . . . investigated and found "probable cause" to believe a violation has been committed.[58]

The April 1991 NOFA also provided money to implement the requirements of *Young v. Kemp*, a fair housing case that involved 36 east Texas counties.[59] Originated as *Young v. Pierce*, the suit charged HUD with assisting county public housing authorities that maintained segregated housing.[60] A total of $200,000, of which $100,000 was earmarked by HUD from the education and outreach initiative and $100,000 from HUD's Housing Counseling Program,[61] was reserved for implementing the court order in *Young v. Kemp*.[62]

According to the notice of funding availability:

> This $200,000, to be awarded on the bases of FHIP criteria, is to be used to further fair housing in the East Texas class action counties through:
>
> 1. Monitoring the compliance of the providers of low-income housing in the 36 counties (including federally subsidized and assisted housing) with the fair housing laws and the requirements placed upon such providers as a consequence of the settlement order;
>
> 2. Providing counseling as to fair housing opportunities to the actual and potential consumers of this housing; and
>
> 3. Encouraging and assisting the development of desegregated opportunities.[63]

The solicitation of applications for projects pursuant to the resolutions of *Young v. Kemp* and *NAACP, Boston Chapter v. Kemp* represented the first time that fair housing funds intended for competitive distribution were utilized to implement the terms of lawsuits against HUD.[64]

In the fiscal 1992 NOFA, HUD also provided funds to implement activities related to *Young v. Kemp:*

> A total of $300,000 of which $200,000 is from the fund for regional, State, or local projects under the Education and Outreach Initiative of FHIP ($100,000 carried over from FY 1991 funds and $100,000 of FY 1992 funds), and $100,000 is funded from the Housing Counseling Program, is reserved

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58 56 Fed. Reg. 18,954 (Apr. 24, 1991).

59 *Id.*

60 822 F.2d 1368 (5th Cir. 1987), *later proceeding*, 822 F.2d 1376 (5th Cir. 1987). Pierce was Secretary of HUD when the complaint was served, and Kemp became a party of record when he succeeded Pierce as Secretary.

61 12 U.S.C.S. § 1701x (Law Co-op. Supp. 1993).

62 56 Fed. Reg. 18,954 (1991).

63 *Id.*

64 U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1993*, 102d Cong., 2d sess., 1992, pp. 659–60 (hereafter cited as *FY 1993 Budget Hearings*).

... FY 1992 for activities related to the case of *Young v. Kemp*.[65]

According to the NOFA, funds would be awarded:

... be used to further fair housing in the 36 East Texas counties included in the *Young v. Kemp* class action through:

Providing counseling as to fair housing opportunities to the actual and potential consumers of this housing; and

Encouraging and assisting the development of desegregated housing opportunities.[66]

This use of FHIP funds for implementing legal settlements in which HUD is the defendant thereby limits the amount available nationally for the original purposes of the Housing and Community Development Act. Nothing in the legislative history of the act indicates that Congress anticipated such use when FHIP was conceived.[67] Indeed, Congress restricted HUD from using funds in this way in the Housing and Community Development Act of 1992 after HUD's plans became known.[68] The act prohibits the use of FHIP funds "for purposes of settling claims, satisfying judgments or fulfilling court orders in any litigation involving either the Department or housing providers funded by the Department."[69]

Testing under FHIP

Testing to validate alleged fair housing discrimination is one of the newer components of HUD's enforcement activities. HUD awarded its first FHIP grants for testing in December 1990.[70] By 1993, testing programs constituted a third of the funds available for the private enforcement initiative.[71]

FHIP participants have conducted their own testing for research, private litigation, and precomplaint investigations of possible discrimination in various areas (sales, rentals, advertising, and mortgage lending) independent of HUD.[72] Indeed, many of the FHIP recipients used testing long before the passage of FHAA in order to validate alleged fair housing discrimination complaints, to research fair housing problems, and to investigate possible discrimination before a complaint has been filed.[73]

FHIP Testing Guidelines

Until passage of the 1992 Housing and Community Development Act, HUD testing guidelines governed the funded activities of FHIP recipients. With passage of the law removing the designation "demonstration project" from FHIP, HUD NOFAs no longer

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65 57 Fed. Reg. 37,646 (Aug. 19, 1992).

66 Id.

67 U.S. Congress, House, Committee on the Judiciary, *Housing and Community Development Act of 1988*, 100th Cong., 1st sess., 1987, H. Rep. No. 100–122(I), pp. 90–91 and 240 *reprinted in* 1987 U.S.C.C.A.N. 3317, 3406-07 and 3537.

68 HUD Comments, pp. 8–9.

69 Housing and Community Development Act of 1992, § 905(i), Pub. L. No. 102–550, 106 Stat. 3872 (codified as amended at 42 U.S.C.A. § 3616a (West Supp. 1993)).

70 55 Fed. Reg. 50,889 (Dec. 11, 1990).

71 FY 1993 *Budget Hearings*, p. 659.

72 For example, the Delaware County (Pa.) Fair Housing Council was founded in 1956. It started out as a "support" group for black families moving into the county, but later testing for racial discriminatory housing practices became its major focus. The council trained testers and brought suits in Federal and civil courts. Marcus Interview.

73 [illegible] and Kale Williams, executive director, Leadership Council for Metropolitan Open Communities, interview in Chicago, Ill., Nov. 27, 1990.

include adherence to the testing guidelines as a funding requirement.[74] Under the standard contractual agreement with HUD, eligible organizations can perform testing as part of complaint processing if they follow certain regulations and procedures. To implement the private enforcement initiative, HUD issued a draft technical guidance memorandum on the use of testing in Title VIII cases. The memorandum applies only to testing that is funded by HUD and does not limit or restrict other testing activities by FHIP participants in pursuing any right or remedy guaranteed by Federal law, or from the conduct of other testing or other investigative activities not funded under the private enforcement initiative.[75]

Testing for HUD must occur only in response to a "bona fide allegation," which means an assertion of a discriminatory housing practice unlawful under Federal fair housing law. According to HUD regulations, "an allegation by a person engaged as a tester, whether or not compensated, or by any organization, employee, or agent engaged directly in the initiation, administration, evaluation, or conduct of tests is not a bona fide allegation."[76]

The allegation must include a detailed description of the occurrences that are believed to comprise the discriminatory housing practice, such as date, time, and place (or an approximation thereof), and the name of each person or firm said to have or be engaged in discrimination.[77] In other words, to test for HUD and be compensated, a fair housing complaint must be made describing the alleged discriminatory practice with specificity. In HUD's view, "[T]esting is not enforcement. . . . it is a tool used as a part of an investigation."[78]

According to the regulations, the term "test" means "a method of gathering credible and objective evidence of whether a discriminatory housing practice has occurred. . . ."[79] The term "testers" means individuals posing as renters, purchasers, or borrowers in order to ascertain if a similarly situated member of a protected class has been subject to discrimination.[80]

The regulations contain specific "eligible activities" that must be conducted in accordance with HUD's testing procedures.[81] These include:

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74 *Compare* Housing and Community Development Act of 1987, § 561(c), Pub. L. No. 100–242, 101 Stat. 1943; *with* Housing and Community Development Act of 1992, § 905(b), Pub. L. No. 102–550, 106 Stat. 3869-70 (codified as amended at 42 U.S.C.A. § 3616a (West Supp. 1993). In its comments on this report, HUD stated that, although it has not yet issued revised FHIP regulations, all notices of funding availability since the passage of the Housing and Community Development Act of 1992 have eliminated the testing guideline requirement. HUD Comments, p. 9.

75 Memorandum for All Regional Directors, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Draft Technical Guidance Memorandum # __: Testing in Title VIII Cases from Gordon H. Mansfield, former Assistant Secretary for Fair Housing and Equal Opportunity, (undated), pp. 1–2.

76 24 C.F.R. § 125.405(b)(1) (1993). However, testers may be party to a private lawsuit. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1988); City of Chicago v. Matchmaker Real Estate Sales Ctr., 2 Fair Housing-Fair Lending (P-H) ¶ 15,663 (N.D. Ill. Nov. 7, 1990), *aff'd in part, rev'd in part*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied*, Ernst v. Leadership Council for Metro. Open Communities, 113 S. Ct. 2961 (1993).

77 24 C.F.R. § 125.405(b)(1) (1993).

78 Marcella Brown, Director, Funded Programs Division, Office of Fair Housing Assistance and Voluntary Programs, Office of Fair Housing and Equal Opportunity, at the Fair Housing Assistance Program Conference, Dallas, Tex., Apr. 29, 1991 (hereafter cited as Brown, Dallas FHAP Conference).

79 *Id.* § 125.405(b)(3).

80 *Id.* § 125.405(b)(4).

81 *Id.* § 125.405(c).

(1) A formal recruitment process designed to obtain a pool of credible and objective persons to serve as testers. . . .

(2) A tester training program which will—

(i) Require the careful recordation of all relevant information on standardized forms, signed by the respective testers, following completion of the test;

(ii) Prohibit any communication between pairs of testers relating to the conduct of the test or to testing experiences or results until all information has been recorded and the testers debriefed by the testing coordinator;

(iii) Require that the same or substantially equivalent type of housing accommodations, financing, or service be requested; and

(iv) Require that, to the extent practicable, testers identify themselves as having the same or substantially equivalent housing needs and demographic profiles as the person who made the bona fide allegation, except for the person's race, color, sex, handicap, familial status, nationality, or other attribute which is the basis of the alleged discrimination. . . .[82]

In order to be funded for HUD testing activities, requirements include (but are not limited to):

Documentation that the applicant has at least 1 year of experience in carrying out a program to prevent or eliminate discriminatory housing practices and has sufficient knowledge of fair housing testing to enable the applicant to implement a testing program successfully.[83]

At an April 1991 conference in Dallas, the director of the Funded Programs Division of HUD's Office of Fair Housing Assistance and Voluntary Programs discussed the use of three types of testing sanctioned by HUD's program: the one-person test, the "paired" test, and the sandwich test.[84]

The one-person test should be executed where a two-person test cannot be arranged or is not feasible, or if a tester matching the complainant's protected class status would be likely to alert a respondent to the possibility that a test was occurring.

The paired test is when two testers visit the same respondent a short time apart, requesting similar housing needs and having similar qualifications, but differing in protected class status. In cases of testing for systemic discrimination, demographic profiles may vary from that of the person who made the allegation, as long as the test of each agent or owner is a paired test.[85]

In the sandwich test, a person matching the complainant in all respects is "sandwiched" between two testers with the same qualifications and housing needs, but for the protected class status (the variable being tested) of the complainant. Theoretically if the housing provider tells the first and third unprotected class testers that units are available only a short time after the protected class tester was not offered a unit, it would be difficult to justify the housing provider's actions as nondiscriminatory under the act. Conversely, if the test shows that the testers were treated the same, it would indicate that the housing provider did not discriminate under the act. Although the

82 *Id.*

83 *Id.* § 125.405(d)(1).

84 Brown, Dallas FHAP Conference.

85 24 C.F.R. § 125.405(c)(2)(iv) (1993).

sandwich test is considered the most reliable of three, it is more costly and complicated to administer because the respondent might be alerted to the test.[86]

The efficacy of testing as an enforcement tool has been recognized by HUD officials in the field as well as by administrators at headquarters. For example, an official in HUD's regional office in Chicago stated:

> When you show respondents a case [from] the Leadership Council for Metropolitan Open Communities . . . they will say "well, let's sit down and talk . . . ," because they know what is behind that. That's the kind of solid ground that we [HUD] have to walk on: evidence to deal with the case.[87]

Recognizing the importance of testing by FHIP grantees, HUD's fiscal 1994 Program and Management Plan includes a vital role for FHIP participants in the enforcement of the law. The plan echoes the Assistant Secretary's interest in using FHIP to expand testing activities in FY 1994, when she pledged to begin a testing program focused on homeowners insurance.[88] She also promised that:

> The Department will establish a pilot project to use FHIP-funded private fair housing organizations to conduct tests of housing discrimination complaints filed with the department. This approach will augment the Department's investigation process of housing discrimination complaints and will contribute to more effective utilization of FHIP funds toward improved enforcement of the Fair Housing Act. . . .[89]

Perspectives on Testing

Many of the organizations that participate in FHIP have conducted testing since the passage of Title VIII and have used testing as more than just a tool to gather evidence for complaints already filed. They also have used testing, for example, for research studies, to develop systemic cases, and to assess whether discrimination is occurring, without requiring a bona fide complaint. Some FHIP participants have used testing for lending and advertising complaints.

Many fair housing organizations participating in FHIP criticized HUD's interpretation and use of testing as too restrictive. The Leadership Council for Metropolitan Open Communities, a nonprofit organization begun in 1966, works toward eliminating racial discrimination and housing segregation throughout metropolitan Chicago.[90] The Leadership Council has had a "Legal Action Program" since 1970 that receives and investigates fair housing complaints and enforces the law through private civil suits in district court.

According to the executive director, the organization is very experienced in testing:

> We have litigated approximately 1,000 cases under the Federal fair housing law. Most cases are based on race, national origin, sexual harassment, and religion. In most of these cases we have used testing to support our evidence.[91]

From May 1990 to June 1991, the organization conducted 275 matched tests throughout the Chicago area—175 for FHIP enforcement

86 Brown, Dallas FHAP Conference, p. 1.

87 Juan Walker, Acting Title VIII Branch Chief and Director of the Program Operations Division, Region V, interview in Chicago, Ill., Nov. 30, 1990.

88 Achtenberg Testimony, pp. 15–17.

89 *Id.*

90 Kale Williams, executive director, Leadership Council for Metropolitan Open Communities, Chicago, Ill., interview, Nov. 27, 1990, p. 2 (hereafter cited as K. Williams Interview).

91 Ibid.

activity and 100 additional tests conducted under their regular program.[92]

Commenting on HUD's regulations, council officials said:

> HUD wants the complaint first [before testing]. This is an unfortunate situation. . . . The council's view is that there should be self-initiated testing.[93]

> We only report to HUD under the FHIP program. . . . In 1974, we started testing without an individual complaint. Usually, it was at the request of the municipality. If we believe that . . . discrimination is occurring, we will conduct tests. We try to identify violations. . . . We use testing for [evidence in] court cases. . . . We will test with individuals and couples. It is usually race cases [when testing is used]. . . .[94]

The executive director at a California FHIP participant, the Fair Housing Foundation, also responded to HUD's testing requirements:

> We have outreach testing that we do. . . . Any differential treatment as far as we are concerned is evidence of possible discriminatory behavior. . . . For FHIPs it is mostly paired testing. . . . and it has to have been a result of a bona fide complaint. . . .

> The resources that we have generally dictate the type of test that we do and we usually do paired tests. The State [California] Department of [Fair Employment and Housing] prefers sandwich tests, but it is more costly. [However], if we are doing a paired test and the . . . department wants another test, then we will conduct another test.[95]

The director of the Metro Fair Housing Services, a FHIP grantee located in Atlanta, Georgia, spoke of their own use of testing:

> We do systemic tests, tests of industry practices that we have a reason to believe may be discriminatory. We sometimes do that without a walk-in client that says "Hi, I want to complain about such and such a realtor.". . . . We'll get, typically, an anonymous complaint. Somebody from the state office, somebody from HUD in unofficial sorts of ways will call us up.[96]

He continued:

> The best example we have of those is someone called anonymously and said, "Hi, I'm a real estate agent in this county," a rural suburban county just beyond the suburbs, just beginning to be impacted by people from Atlanta, black folks moving down in that direction, and there was a meeting of real estate agents who were going to be selling property in major new subdivisions, three sections of 200 homes apiece—a meeting to figure out a way to exclude blacks from purchasing homes there.[97]

In his experience, the definition of "bona fide allegation" has evolved somewhat beyond an allegation by a named individual:

> In terms of analyzing . . . we used to use the term bona fide to refer to ones that were—had an actual active complainant, bona fide complainant . . . and now bona fide complaints are defined by FHIP somewhat differently. They include that anonymous kind of complaint that says as long as you have reasonable cause to assume a violation of the

92 Mary Davis, associate director and director of the Legal Action Program, Leadership Council for Metropolitan Open Communities, Chicago, IL, interview, Nov. 27, 1990 (hereafter cited as M. Davis Interview).

93 K. Williams Interview.

94 M. Davis Interview.

95 Ingrid Bullock, assistant director, Long Beach Fair Housing Foundation, interview in Long Beach, Calif., Jan. 22, 1991, p. 1 (hereafter cited as Bullock Interview).

96 Joseph Shifalo, director, Metro Fair Housing Services, interview in Atlanta, Ga., Mar. 7, 1991, pp. 13–14 (hereafter cited as Shifalo Interview).

97 Ibid. p. 16.

law has taken place you can target who can reasonably assume is violating the law for a test. . . . That becomes a bona fide.[98]

The Southern California Fair Housing Council also conducts racial and ethnic testing in sales, rentals, mortgage lending, and insurance, and for research studies on banking discrimination. The council plans to develop tests for discrimination by financial institutions and evaluate how testing procedures differ in different situations such as redlining.[99]

Mortgage Lending Testing

Mortgage lending discrimination is the latest target for testing programs utilized by fair housing enforcement agencies. Mortgage lending tests are usually conducted at the loan application or preapplication stage of the mortgage lending process.[100] Mortgage lending tests evaluate discrimination based on the race or another characteristic of the applicant or on the racial composition of the neighborhood in which a property is located. For example, loan originators may discourage applicants because they make assumptions about minority, female, or disabled applicants, or they may discourage applicants because they know their institution does not make loans in particular neighborhoods.[101] Tests designed to uncover a pattern or practice of discrimination are referred to as audits.

According to one HUD official, lending testing is difficult:

> Talk about lending testing . . . it really is hard testing, it is very difficult to do. . . . Before I came to HUD, I did some lending testing of 200 grants . . . in Los Angeles. . . . It is a different kind of testing . . . it takes about a day or two. . . . It is very intense training and takes a lot of practice. . . . To do mortgage lending testing you should have done testing [in general] for a long time.[102]

HUD was moving to support lending testing as early as 1991:

> When the Assistant Secretary [for Fair Housing and Equal Opportunity] attended lending discrimination hearings, he said that HUD would take an active role in lending discrimination cases. . . . And that is what we are doing now. . . . Under our Fair Housing Initiatives Program, we have funded some groups to do lending studies and testing in lending.[103]

In its 1992 NOFA for mortgage lending testing, HUD stated that:

> The Department anticipates that the results of this effort will reveal statistically valid measures of the differential treatment of racial and national origin minorities and will indicate areas for further fair lending enforcement investigation. HUD expects to use this information to further specific fair lending investigations. The data from this testing project should provide the Department with clear, reliable,

98 Ibid. pp. 75–76.

99 Michelle White, Esq., executive director, Southern California Fair Housing Council, interview in Los Angeles, Ca., Jan. 23, 1991, pp. 28–29.

100 Shanna L. Smith and Cathy Cloud, National Fair Housing Alliance, "The Role of Private, Non-Profit Fair Housing Enforcement Organizations in Lending Testing," (paper presented at the Home Mortgage Lending and Discrimination: Research and Enforcement Conference, sponsored by the Office of Policy Development and Research, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development and the Office of the Comptroller of the Currency, May 18–19, 1993), p. 2 (hereafter cited as Smith Paper, HUD Mortgage Lending Conference).

101 Ibid., p. 4.

102 Brown, Dallas FHAP Conference, p. 5.

103 Ibid., pp. 5 and 8.

and credible evidence of the extent and forms of lending disparities by race and national origin for the three testing locations.[104]

Testing by private fair housing groups is most often prompted by four factors.[105] First, testing may be prompted by information gleaned from bank reports required to be made public by the Home Mortgage Disclosure Act, as amended (HMDA).[106] Second, testing is sometimes prompted by allegations by real estate agents that lenders refuse to make loans in minority neighborhoods or discriminate against buyers in such neighborhoods in the terms and conditions of such loans.

Third, testing may follow allegations that lenders are utilizing policies or practices that have a disparate impact on protected classes or neighborhoods where members of protected classes predominate (e.g., redlining). Finally, testing occurs in response to requests from lenders wishing to evaluate their own internal compliance with fair housing law.[107]

Testing by FHIPs is also done in response to an individual complaint when a neighborhood organization or group identifies a policy or practice that has a negative effect on potential or current homeowners.[108] Individual lending discrimination includes not only loan denial, but also discriminatory changes in the terms and conditions of the loan by the lender.[109]

Audits in Chicago and Louisville provided the prototype for the ongoing audits now underway in a variety of locations.[110] In Chicago, for example, testers posed as married women with one or two children with employment and financial characteristics adequate for the loans sought. Two banks, three savings and loan institutions, and five mortgage companies were included. Although the audits were experimental, they documented differential treatment in three ways.

First, African American testers could not get bank officials to discuss prospective loans. Second, African American testers who did meet with a loan officer did not receive an assessment of their creditworthiness. Third, such testers were not given as much information as white testers as to how to apply and qualify for a loan.[111]

These conclusions were based on treatment such as the refusal of loan officers to meet with an applicant until the application was completed and the application fee paid; the assertion by one institution that it did not loan to first-time home buyers; and the assertion by an institution that it did not make loans under $40,000. That lender referred the tester to a mortgage company that handled FHA loans, although the daily rate sheet of the lender listed FHA loans as an available product.[112]

Complaint-based testing works best to identify discrimination in the prescreening process—requiring minimum mortgage

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104 57 Fed. Reg. 21,127 (May 18, 1992).

105 Smith Paper, HUD Mortgage Lending Conference, p. 5.

106 12 U.S.C.A. §§ 2801-2810 (1989 and West Supp. 1993).

107 Ibid.

108 Ibid.

109 Ibid.

110 Ibid., p. 9.

111 Ibid.

112 Ibid., pp. 9–10.

amounts, tiering of interest rates, and differential treatment based on race or gender or property location.[113]

The role of testing in proving discrimination need not be overly extensive or complicated. One test may be sufficient to prove discrimination in a given case, and three tests may be sufficient to demonstrate a pattern and practice to a finder of fact. In many cases, discrimination may be evident on its face without testing.

In particular, the law does not require that discrimination be "statistically significant." A single act of discrimination may be sufficient to require changes in bank policies and affirmative outreach to potential borrowers.[114] Furthermore, many lenders do not make enough loans to support proof of a pattern or practice. Advocates warn that fair housing groups assisting complainants should only use testing when it is necessary to make a case.[115] Others point out that, with the wealth of data available under HMDA, evidence produced by testing can be had through an analysis of existing information.

Two examples illustrate the current use of testing to identify the nature and extent of housing discrimination in the rental and sales markets. In Philadelphia, testing for preapplication mortgage bias was conducted under the aegis of the Philadelphia Commission on Human Relations. The program, which targeted banks, savings and loans, and private mortgage companies, had four goals: to determine whether black testers were treated differently from white testers when inquiring about mortgages, to identify discrimination based on property location, to initiate complaints as appropriate, and to require lenders to eliminate discrimination through affirmative action to promote fair lending policies and practices.[116]

The agency used four pairs of testers recruited from the ranks of middle-aged unemployed professionals. Each pair consisted of a black and white tester of the same sex. The program lasted 5 weeks during August and September 1992, including training conducted by the National Fair Housing Alliance.[117]

The Philadelphia effort produced 96 completed tests (using pairs) of 68 lenders. After 8 months, 11 complaints were dual filed with HUD and the Philadelphia Commission. Five have been resolved, either with publicized consent orders (three) or unpublicized settlement agreements (two).[118]

In 1992 the Fair Housing Council of Greater Washington (a FHIP grantee) released a study on rental discrimination in metropolitan Washington, D.C. As part of its research it conducted preapplication rental testing, and based on the results of 129 completed tests, concluded that in areas and neighborhoods where African Americans have been historically underrepresented, they encountered discrimination 44 percent of the time—the same figure reached in a similar testing program carried out 5 years earlier, at the time the Fair Housing Amendments were passed. The rate of discrimination measured by the council has fluctuated somewhat in the 6 years such testing has been undertaken. The current level of discrimination is a 23 percent

113 Ibid., p. 10.

114 Ibid., p. 13.

115 Ibid.

116 Rachel Newton, "Preapplication Mortgage Lending Testing Program: Lender Testing by a Local Agency," paper presented at HUD Mortgage Lending Conference, p. 2.

117 Ibid., pp. 2–3.

118 Ibid., p. 5.

improvement over 1991, and the lowest rate ever (while still only equaling the 1988 rate).[119]

The discrimination experienced by testers could be categorized as both preferential treatment of whites and, to a lesser extent, preferential treatment of blacks. Preferential treatment of whites consisted of telling the white tester that an apartment was available and the black tester that it was not, or showing more apartments to the white tester; charging different rates; or other differential treatment, such as sending followup solicitation letters to white testers and not to blacks.[120] Where discrimination occurred, on average black testers were asked to pay nearly $84 per month more in rent and nearly $112 more in security deposits and other fees.[121]

Community Housing Resource Boards

In 1976, well before passage of the Fair Housing Initiatives Program, HUD began a program of organizing community housing resource boards (CHRBs) composed of representatives of community organizations that provide technical assistance to local industry groups and promote voluntary compliance with fair housing laws.[122] Appropriations were first made for the CHRB program in 1982.[123] In 1988 over 1,500 local industry group agreements were in effect,[124] and by 1989 over 600 CHRBs had been organized.[125]

The primary task of the CHRBs was to promote cooperative agreements by housing industry businesses and associations to comply with the law and cooperate with HUD to assure that housing is marketed on a nondiscriminatory basis.[126] These agreements, called Voluntary Affirmative Marketing Agreements, or VAMAs, are signed with national organizations and subsequently signed and implemented by subsidiary organizations at the State and local levels. Major groups that have signed VAMAs include the National Association of Realtors, National Association of Home Builders, and the National Association of Real Estate Brokers.

The agreement between the National Association of Realtors and HUD, for example, is intended to create an environment where "individuals with similar financial resources and interest in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion, sex, or national origin."[127]

The signatories generally agree to such provisions as placing a public notice or advertisement concerning the agreement signed, displaying fair housing posters, and developing

119 Fair Housing Council of Greater Washington, "Race Discrimination in the Rental Housing Market: A Study of the Greater Washington, D.C., Area," (1992), p. 1.

120 Ibid., p. 2.

121 Ibid., p. 1.

122 HUD initiated the CHRBs program and the Voluntary Affirmative Marketing Agreements (VAMAs) pursuant to the Secretary's responsibilities under 42 U.S.C. §§ 3608(e)(3) and 3609.

123 U.S. Department of Housing and Urban Development, *1992 Programs of HUD*, p. 94.

124 *FY 1990 Budget Hearings*, p. 493.

125 U.S. Department of Housing and Urban Development, *1992 Programs of HUD*, p. 94.

126 *FY 1991 Budget Hearings*, p. 651.

127 U.S. Department of Housing and Urban Development and National Association of Realtors, *Affirmative Marketing Agreement For Voluntary Use By Boards of Realtors*, Effective June 10, 1987 through June 10, 1992, p. 2.

educational materials and training courses for members, associates, and new applicants for broker or associate membership.[128]

In addition, the signatories agree to establish an equal opportunity committee to explain and publicize the purposes and provisions of the agreement, to implement and monitor the success of the affirmative marketing program, and to receive and investigate complaints against member agents. They also agree to meet at least semiannually with representatives from HUD, the participating State or local human rights agency, and the CHRB, to monitor progress made under the agreement.[129]

To receive grants, CHRBs agree to work with local business and industry association members in promoting and implementing affirmative marketing programs and encouraging members to sign a VAMA.[130]

The work and responsibilities of a typical CHRB was described by the assistant director of a such a board located in Media, Pennsylvania:

> Our focus has been educating realtors [on the fair housing law].... We send out a quarterly newsletter to get the "word out" to Realtors.... We have had workshops ... training programs at universities and a survey at schools on fair housing. There are other programs on prejudice and attitudes.
>
> We are also trying to encourage minorities in the county to apply for real estate licenses. We distribute posters, brochures, and other materials to libraries.... However, the focus is on getting Delaware County Realtors to sign the voluntary agreements and to encourage them to implement affirmative fair housing practices. . . . The problems are racial steering and discrimination in the county. Our role is to conduct workshops, outreach ... so there will not be this concern.[131]

Another CHRB official, located in Kansas City, Missouri, described the CHRB's activities as a participant in the program:

> We have been a CHRB since 1981. As a CHRB, we work closely with the Realtors to get them to sign the VAMA which says they agree not to carry on discriminatory practices. The emphasis is to work with Realtors, to become a housing information center for them.... Whenever there is a program, we will invite all of the realtors. The Metropolitan Board of Realtors [in Kansas City] has been very responsive. Over 100 members attended last meeting....
>
> In addition to working with the Realtors, we provide posters on fair housing for schools, sponsor fair housing month, and do letter-writing on inquiries about the law.[132]

The major business or industry group participating in the program and networking with local CHRBs has been the national, State, and local boards of realtors. Encouraged by the national office, State and local boards of realtors have initiated programs and activities to encourage their members' participation in the CHRB program. For example, the California Association of Realtors, an affiliate chapter of the National Association of Realtors, has encouraged its members

128 Ibid., pp. 2–3.

129 Ibid., p. 5.

130 Ibid.

131 Renee Settles, assistant director, Delaware County Fair Housing Council, interview in Media, Pa., Sept. 24, 1990 (hereafter cited as Settles Interview).

132 Marlene Nagel, director of community development, Mid-America Regional Council, Kansas City, Mo., interview, Apr. 9, 1991. The Mid-America Regional Council is a nonprofit organization offering food, transportation, and other services throughout eight counties (approximately 100 cities located throughout Kansas and Missouri) as well as seminars in such areas as fair housing.

through education and outreach activities to involve themselves with the local CHRB and sign VAMAs. In a 1991 interview, one of the association's attorneys explained:

> We saw the need to involve and educate members in HUD's [VAMA] program. . . . Of the 182 realtor boards in California, 70 percent of them have signed VAMAs. These boards have promised to promote equal opportunity in fair housing. . . .
>
> We also have a real estate internship program whereby we work with the community colleges to encourage minority students to come into the real estate industry and work as interns . . . with the boards to see what we are about . . . [in order] to break racial and ethnic barriers. All of this is our attempt to promote equal opportunity in fair housing.[133]

Similar involvement was described by an official of the Texas Association of Realtors, "There are 120 local [Realtor] boards in Texas . . . 10,000 members just in Houston. . . . Ninety percent of our Texas members have signed VAMA agreements. There is an ongoing relationship with the CHRBs. . . . We have encouraged attendance of our members at their seminars. . . .[134]

Monitoring the CHRB Program

HUD provides technical assistance to CHRBs and monitors the implementation of the VAMA agreement through its Program Operations Division (POD) in the regional and field offices. This division monitors all HUD grant recipients, including CHRBs and the activities that support the VAMA program.[135] During fiscal 1990, some of the regional offices monitored VAMAs and offered technical assistance to the CHRBs, as well as coordinated outreach activities with the signatories or participating organizations.[136] According to the POD director in the Texas regional office:

> We are required to provide technical assistance to grant recipients. . . . Monitoring includes onsite visits, telephone calls . . . Most of the VAMA monitoring is done by the field offices. . . . It involves reviewing CHRB records, interviewing, evaluating agreements. . . . Annual reports on [CHRB] activities are sent directly to the FHEO director. . . .[137]

The associate director of the Pennsylvania CHRB explained her organization's work with HUD:

> We . . . receive technical assistance. Once a year HUD will review the minutes and the books. They will monitor the real estate board. The office will stay in touch and will conduct an evaluation of CHRB's activities. Our reporting requirements are about the same as with any other grant-funding agency. We receive funds for service. . . .

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133 Judy Hertzberg, attorney, California Association of Realtors, interview, Los Angeles, Calif., Jan. 22, 1991, pp. 3–4, 12–14, and 26 (hereafter cited as Hertzberg Interview).

134 Benny McMahan, executive vice president, Texas Association of Realtors, interview in Austin, Tex., Jan. 8, 1991.

135 Management Plan, Part B, 1990, pp. 96–97; Ernie Wilkinson, director, Program Operations Division, Region VI, Ft. Worth, Tex., interview, Jan. 9, 1991 (hereafter cited as Wilkinson Interview).

136 U.S. Department of Housing and Urban Development, Management Plan, Fiscal 1990, Secretary's Priorities, pp. 19 and 33; Office of Fair Housing and Urban Development, Management Plan, Part B, 1990 pp. 96–97; 104–105 (hereafter cited as Management Plan, Part B, 1990).

137 Ibid.

In the regional office, the contact is with one staff person. We provide assistance and education, as well as urge Realtors to sign the agreement. However, we do not know who signs the agreement. Only HUD has that information. It is private information. We try to solicit signatures but we can not assess its [the program's] success or lack of it. We primarily get the word out. We do not receive complaints. We do not do any testing. We educate and do outreach.[138]

Past emphasis has been on providing technical assistance to CHRBs and monitoring agreements; in fiscal 1992, one FHEO objective was to monitor all 48 CHRBs, onsite, once during the grant 18-month year.[139]

Funding for CHRBs

Although the first CHRBs were formed in 1976, money was not appropriated until fiscal year 1982.[140] Never a separate budget item, CHRB funding was included as such under the Fair Housing Assistance Program (FHAP) until 1991.[141]

In 1988 the distribution of funding to CHRBs was decentralized, and the review and awards process was transferred to HUD's regional offices;[142] that year the program's budget was $997,000 for 50 CHRBs.[143] In 1990 the budget request was $1 million, based on an estimate of 60 CHRBs.[144] In 1989 and 1990 the program emphasis began to shift to targeting resources to areas where the CHRB was the only fair housing organization, where there was a large minority population, or where particular situations required affirmative marketing program assistance.[145] Funds were also used for monitoring agreements and providing technical assistance to CHRBs.[146]

Actual obligations for State and local agencies and CHRBs in 1990 were $6.2 million. Of that total, $943,000 was obligated for CHRBs.[147]

Revamping the CHRB Program

Funding for the CHRB program ceased in fiscal year 1991. At that time, HUD decided it was no longer necessary to provide any financial support to assist CHRBs in implementing voluntary affirmative marketing programs. According to the 1991 budget report, local funding sources were deemed more appropriate for this purpose.[148] However, CHRBs that are otherwise eligible may apply for funding under the Fair Housing Initiatives Program (FHIP) in order to carry out education and outreach activities.[149]

The move away from CHRB funding reflected a shift within HUD from voluntary compliance to enforcement, in keeping with changes made by the FHAA from conciliation

138 Settles Interview.

139 U.S. Department of Housing and Urban Development, FY 1992 Field Management Plan, Fair Housing and Equal Opportunity, Part B-Regional Priority Plan, p. 3.

140 *1992 Programs of HUD*, p. 94.

141 *FY 1991 Budget Hearings*, p. 649.

142 *1990 HUD Budget Hearings*, p. 491.

143 Ibid., p. 488.

144 Ibid.

145 Ibid., p. 492.

146 Ibid.

147 *FY 1992 Budget Hearings*, p. 642.

148 Ibid., p. 649.

149 Ibid.

to adjudication. As early as 1990, HUD gave some indication that it might revamp the program. Field interviews revealed that for some of HUD's regional offices monitoring CHRBs and VAMAs was a low priority. A regional administrator expressed the view that monitoring CHRBs was not as critical as enforcing Title VIII and other fair housing activities:

> Without offending anybody... CHRBs do not need four or five [HUD] people in each field office monitoring their activities.... Is it more important to address people's needs through Title VIII or Title VI... or maintain good relationships with CHRBs and monitor them?
>
> I am not knocking the CHRBs' importance, but you have to make a decision or choice as to what you are going to do.... I would suggest that [HUD] staff go out and do compliance activities rather than monitoring voluntary compliance activities.[150]

A Texas HUD official reported that the monitoring of other grant recipients, such as those receiving Community Development Block Grants, and assisting in Title VIII complaints processing were priority assignments.[151] She explained that only two staff members were available to do monitoring and priorities had to be set. Her division was expected to perform "so many" monitoring activities, of which 40 percent were to be onsite,[152] to carry out headquarters priorities, and to provide assistance where it is most needed.[153]

By 1992 HUD had revamped the VAMA program, and in at least one agreement with a national association, almost eliminated CHRB involvement and annual review of the program. In 1992 the National Association of Realtors entered into a new 5-year VAMA with HUD that permits local Realtor groups more flexibility in their outreach activities. Instead of requiring them to work exclusively with designated CHRBs, as the old agreement required, the new VAMA encourages them to work with a variety of civil rights and housing groups. In addition, the local Realtor boards, under the new agreement, will do a "self-evaluation" of their VAMA efforts. Although HUD maintains its right to review any board, the department will no longer review all of them annually.[154]

150 Harry Staller, Assistant to the Acting Regional Administrator, Region III, Philadelphia, Pa., interview, Nov. 21, 1990.

151 Wilkinson Interview.

152 Ibid.

153 Ibid.

154 *HUD, Realtors Sign New Affirmative Marketing Pact*, 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 5., ¶ 5.17, p. 15 (Nov. 1, 1992).

INTENTION

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8. Handicap

The inclusion of two new protected classes, persons with disabilities and families with children, to the scope of Federal fair housing law has required special attention from HUD. Since discrimination against individual members of these groups is not entirely analogous to that experienced by already-protected classes, the law contains special provisions and protections geared to the unique circumstances of those newly covered by Title VIII.

In passing the handicap provision, Congress recognized that individuals with handicaps "have been denied housing because of misperceptions, ignorance, and outright prejudice."[1] The decision to add handicap discrimination to the Fair Housing Amendments Act (FHAA) was seen as a "clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[2] Although disabled persons are protected under other laws such as section 504 of the Rehabilitation Act of 1973,[3] by adding the handicap provisions to the FHAA, Congress sought to ensure similar and additional protections in housing.

Defining Handicap

The FHAA defines handicap as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[4] The regulations detail the types of disorders or conditions that qualify as physical or mental impairments under the definition of handicap.[5]

Discrimination is not only prohibited against persons with such impairments, but also against any person with "a history of, or [who] has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."[6] The preamble to the regulations published in the Code of Federal Register is also careful to

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1 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d sess., 1988, H. Rept. 100-711, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (hereafter cited as FHAA Committee Report).

2 Ibid.

3 29 U.S.C. § 794 (1988). Section 504 prohibits discrimination against disabled persons in any program or activity that receives Federal financial assistance. Federally assisted housing programs are included in this provision.

4 42 U.S.C. § 3602(h) (1988).

5 24 C.F.R. § 100.201(a) (1993). According to the regulations, "physical or mental impairment" includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus Infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

6 Id. § 100.201(c).

point out that popular attitudes or misconceptions about the abilities of disabled persons cannot be used to limit their housing options.[7]

Also protected are individuals who neither have an impairment nor are substantially limited by an impairment, but who are regarded as having an impairment by another person.[8] The regulations define "regarded as having an impairment" to include an individual who:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other [sic] toward such impairment; or

(3) Has none of the impairments defined ... [in the law] but is treated by another person as having such an impairment.[9]

In addition, the FHAA extends protection from certain forms of discrimination not only to persons who themselves satisfy the broad definition of handicap, but also anyone who lives with or intends to live with a handicapped person in a covered dwelling.[10] Thus, "the law prohibits denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities."[11] According to one fair housing expert:

The breadth of Title VIII's "handicap" definition means that it covers a large portion of the entire United States population. The number of Americans who suffer from such physical or mental disabilities was estimated in the congressional debates . . . to be between 30 million and 36 million people or one out of every six persons. . . .[12]

Prohibited Handicap Discrimination

Congress added discrimination against persons with handicaps to virtually all of the FHAA's existing prohibitions, and expanded or added provisions especially for the disabled. The ban on handicap discrimination was applied to advertising, misrepresentations of availability, blockbusting, financing, appraisals and other real estate related transactions, brokerage services, and civil and criminal intimidation and interference.[13]

The FHAA also prohibits housing providers from refusing to negotiate with people because they are disabled; evicting persons because they become impaired with a disability; and refusing access to recreational facilities, parking, and cleaning and janitorial services.[14] The FHAA prohibitions were also intended to curb land use restrictions on

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7 *Id.* Ch. I, Subch. A, App. I, at 929-30 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

8 *Id.* § 100.202(d).

9 *Id.*

10 42 U.S.C. § 3604(f)(1)(B)-(C) (1988).

11 Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (Deerfield, Ill., Clark, Boardman Callaghan, 1992) § 11.5(2), p. 11-49 (hereafter cited as *Law and Litigation*; *see also* 42 U.S.C. § 3604(f)(1)(B)-(C), (f)(2)(B)-(C)); FHAA Committee Report, p. 2185.

12 Schwemm, *Law and Litigation*, § 11.5(2), pp. 11-48 to 11-49; FHAA Committee Report, p. 2185.

13 42 U.S.C. §§ 3604(a)-(e), 3605, 3606, 3617, and 3631 (1988).

14 *See* FHAA Committee Report, p. 2,184.

community housing opportunities for handicapped persons.[15] Such community premises or dwellings are sometimes called "group homes."[16] Finally, housing providers for handicapped persons may sue to prevent discriminatory interference against prospective disabled residents, such as by hostile community groups or landlords.

The FHAA includes two separate provisions addressing discriminatory refusals to sell, rent, or negotiate with handicapped persons, and discrimination in the terms, conditions, privileges, services, and facilities available for handicapped persons.[17] According to one fair housing expert, the reason for treating handicap discrimination separately was apparently to make clear that the law does not bar housing restricted to handicapped persons and their associates.[18] The provisions banning discrimination are violated only if the discrimination is directed against handicapped buyers and renters or those who reside or are associated with the handicapped persons.[19] While the FHAA prohibits any inquiries into the nature or severity of a person's disability, it permits inquiries to determine whether an applicant is qualified for housing intended for the disabled, as long as the question is asked of all applicants.[20]

Illegal discrimination against the disabled also includes the refusal to permit a handicapped person to make reasonable modifications of the premises at his or her own expense if the modifications may be necessary to ensure full enjoyment of the premises.[21] Any refusal to make reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to guarantee that the handicapped person has an equal opportunity to use and enjoy the dwelling is also illegal.[22]

HUD's Enforcement Policy

HUD's legal interpretations and policies regarding enforcement of Title VIII as expressed in its memoranda and letters make several points about discrimination against the handicapped. For example, in December 1990 HUD warned regional staff that public housing authorities may not require housing applicants to "prove" they can live independently.[23] In a joint memorandum, the Assistant Secretary for Fair Housing and Equal Opportunity and the Assistant Secretary for Public and Indian Housing mandated that public housing authorities "should rescind policies which may treat handicapped applicants differently from others."[24] In reiterating

15 *Id.*, p. 2,185.

16 *See* Schwemm, *Law and Litigation*, § 11.5(3)(c), p. 11-54.

17 *Compare* 42 U.S.C. § 3604(a)-(b) (1988) *and id.* § 3604(f).

18 Schwemm, *Law and Litigation*, § 11.5(3)(a), p. 11-50.

19 42 U.S.C. § 3604(f)(1)-(2) (1988).

20 *Id.* § 100.202(c).

21 42 U.S.C. § 3604(f)(3)(A) (1988). In turn, the tenant may be required, when reasonable, to restore the property to its original condition, wear and tear excepted.

22 *Id.* § 3604(f)(3)(B); 24 C.F.R. § 100.204 (1993).

23 *HUD Memo Addresses Public Housing Screening of Handicapped Applicants*, 1 Fair Housing-Fair Lending (P-H) vol. 6, no. 10, ¶ 10.5, pp. 6-7 (Apr. 1, 1991).

24 Ibid., p. 7 (quoting the memorandum).

its policy, HUD urged the field staff to be alert to situations where applicants with disabilities "are held to a higher standard of behavior or subjected to more extensive investigations" than applicants without disabilities.[25] HUD followed up by meeting with public housing authority representatives to develop nondiscriminatory screening procedures for public housing applicants.[26]

For example in a complaint involving a person with cancer, the respondent delivered an eviction notice to the (tenant) complainant once she was advised of the complainant's cancer, an illness protected by the FHAA.[27] In an April 1992 memorandum, the Assistant General Counsel for Fair Housing noted that according to HUD's regulations, an impairment does not have to substantially limit one or more major life activities, but if treated as such by another person it constitutes such a limitation.[28]

Group Homes

The FHAA prohibitions against handicap discrimination were intended to "curb" land use restrictions preventing group homes for the disabled in many neighborhoods.[29] Under the FHAA, Congress intended to bar local governments from applying their laws and regulations in a discriminatory manner against "congregate living arrangements among nonrelated persons with disabilities."[30] Congress also recognized that group homes could be blocked by private restrictive covenants or by discriminatory terms or conditions having the effect of excluding or restricting congregate living conditions for the disabled.[31] The FHAA was "intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of disabled individuals to live in a residence of their choice in the community."[32]

The case law concerning group homes is still developing and has constituted a large share of FHAA litigation on handicap discrimination.[33] While the FHAA requires HUD to refer zoning and land use cases to the Department of Justice,[34] HUD is free to pursue cases involving private acts that discriminate against group homes for the disabled. In correspondence with various constituents, HUD has refined its interpretation of the law's intent concerning the establishment of group homes for the disabled.

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25 Ibid. (quoting the memorandum).

26 Ibid.

27 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development memorandum to George Weidenfeller, Deputy General Counsel of Operations, U.S. Department of Housing and Urban Development, Apr. 23, 1992, p. 2 (hereafter cited as Weidenfeller Memorandum).

28 24 C.F.R. § 100.201 (1993); Weidenfeller Memorandum, p. 2.

29 *See* Schwemm, *Law and Litigation*, § 11.5(3)(c), p. 11-54; FHAA Committee Report, p. 2,185.

30 FHAA Committee Report, p. 2,185.

31 *Id.*; *see* Schwemm, *Law and Litigation*, § 11.5(3)(c), p. 11-54.

32 FHAA Committee Report, p. 2,185.

33 *See* Schwemm, *Law and Litigation*, § 11.5(3)(c), p. 11-56.

34 42 U.S.C. § 3610(g)(2)(c) (1988). For a further discussion on the disposition of zoning and land use cases, see chaps. 10 and 11.

In April 1992 a HUD memo highlighted a U.S. district court case as guidance to staff.[35] In *U.S. v. Scott*, the court found that residents of a subdivision had interfered with the complainants' ability to sell their house to a nonprofit organization intending to use the house as a group home for physically and mentally handicapped persons.[36] The basic facts in the case were uncontroverted, and the court found, "That the defendants interfered with the sale to prevent disabled individuals from residing in the home is the only reasonable conclusion that can be drawn."[37]

The court rejected the defense that the defendants did not act in bad faith or out of malice, stating that:

> such an argument is untenable. In establishing intentional discrimination under the Fair Housing Act, it is not necessary to demonstrate malice or ill will towards handicapped individuals. Nor is it necessary to show that the defendants' actions were solely motivated by the handicap of the prospective residents. Whether motivated by animus, paternalism, or economic considerations, intentional handicap discrimination is prohibited by the Act.[38]

The case was noteworthy in that it addressed whether the definition of the term "intentional discrimination" would be applied in a handicap discrimination case in the same manner as it has been in race-based cases. The court clearly answered in the affirmative.

HUD specifically took note of a somewhat more obscure point. An implicit issue in some fair housing cases involving opposition to the sale or rental of property to members of a protected class is the legality of opposition activities that might otherwise fall under the first amendment to the Constitution. Although not at issue in the Federal case, the respondents had filed a lawsuit in State court to enforce a restrictive covenant, and while they lost the State case, the State judge refused to rule that the suit was frivolous. In its memorandum, OGC noted that the filing of lawsuits that have a discriminatory motive or that are frivolous have not been protected by the first amendment in "somewhat analogous circumstances," but that "there is no firm case authority adopting this standard for Fair Housing Act suits where the underlying violation is a civil suit. There is, however, some support for this approach in the Department of Justice's Housing and Civil Enforcement Section."[39]

More recently, in response to controversies arising from complaints filed with HUD and subsequently investigated by HUD staff, the Assistant Secretary for Fair Housing and Equal Opportunity has issued guidance covering cases where first amendment rights may be affected by fair housing law enforcement investigations.[40] The guidance declared that HUD would "not accept for filing or investigate any complaint under Section 818 that involves public activities that: are directed toward achieving action by a governmental entity or official; and do not involve force, physical harm, or a clear threat of force or

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35 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, Memorandum for Gordon Mansfield, former Assistant Secretary for Fair Housing and Equal Opportunity and All Regional Directors of Fair Housing and Equal Opportunity, HUD, April 16, 1992, p. 1 (hereafter cited as U.S. v. Scott Memorandum).

36 788 F. Supp. 1555 (D. Kan. 1992)

37 *Id.* at 1560.

38 *Id.* at 1562 (citations omitted).

39 U.S. v. Scott Memorandum, p. 3.

40 Memorandum to FHEO Directors, et al., from Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, re: Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints that May Implicate the First Amendment, September 2, 1994.

physical harm, to one or more individuals."[41] Activities such as passing out fliers, holding public meetings, writing letters to the editor, demonstrating, testifying, or communicating with a governmental body are specifically protected by the HUD guidance. The guidance goes on to point out that the mere investigation by the federal government of such matters may have a chilling effect on first amendment rights. The guidance stresses that HUD takes no position on the validity of private lawsuits alleging discrimination in cases with first amendment implications. Further, the guidance notes that the filing of a frivolous lawsuit in and of itself can be a discriminatory act in violation of the law, and concludes that "given the sensitivity and complexity of the issues relating to such litigation, all situations involving claims that litigation amounts to a violation of Section 818 must be cleared with Headquarters before the complaint is filed." Finally, the guidance requires HUD staff to submit investigative plans for cases with first amendment implications to department headquarters.

In June 1991 OGC responded to an inquiry from the Maine State Housing Authority on the extent to which individuals can be required to "engage in ongoing treatment based on their individual needs, as a condition to their admission and continuing participation in" a State-funded program for persons with mental disabilities.[42] HUD's response cited provisions of the law barring inquiries about a prospective renter's handicap, but went on to state that:

> [I]t is permissible for a housing program . . . to specify that the housing is available only to persons with mental illness. . . . You offer a comprehensive program which includes treatment of the individual as an essential component of eligibility. . . . As a result, in our opinion, imposing a requirement that *all* residents enrolled in your program must engage in the comprehensive treatment does not seem unlawful under these limited circumstances.[43]

The Assistant General Counsel concluded by comparing this situation to a university setting whereby housing is restricted to those who are currently enrolled as students.[44]

HIV Infection and AIDS

The FHAA also extends handicap protections to persons with Human Acquired Immunodeficiency Virus infection (HIV infection) or Acquired Immunodeficiency Syndrome (AIDS).[45] Congress found that individuals with HIV infection or AIDS were being denied equal housing opportunities because of the erroneous belief that they pose a health risk to others.[46] Although the FHAA requires housing providers to treat those afflicted with HIV infection or AIDS the same as other disabled persons, issues peculiar to HIV infection and AIDS do arise.

In 1990 HUD received an inquiry about the FHAA coverage of persons with AIDS or HIV infection who might be owners or occupants of a house or rental unit. In a response to the National Association of Realtors, HUD's General Counsel made it clear that an "unsolicited" statement by a real estate broker or agent about a current or previous occupant of

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41 Ibid., p. 2.

42 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Gwendolyn D. Thomas, Assistant General Counsel, Maine, June 5, 1991, p. 1 (hereafter cited as Thomas Letter).

43 Ibid. (emphasis in the original); 24 C.F.R. 100.202(c) (1993).

44 Thomas Letter.

45 24 C.F.R. § 100.201 (1993). *See also id.* Ch. I, Subch. A, App. I, at 930 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

46 FHAA Committee Report, p. 2,179.

a property who has AIDS would violate the act.[47] HUD's letter also addressed an issue raised by the attorney general of Texas concerning proposed State legislation that would require a real estate agent to inform a potential buyer or lessee, when asked, that the current or previous occupant has AIDS or the HIV infection, if the agent has "actual knowledge" of the condition.[48] The Texas attorney general had concluded the legislative proposal would violate the FHAA, but inquired as to whether a broker who answered a question about the health status of the occupant would thus violate the act.

HUD agreed that a broker's unsolicited statements to a prospective buyer or renter would indicate a discriminatory preference based on handicap.[49] HUD went on to suggest that if asked about the AIDS status of a current or previous occupant:

> A real estate broker is under no duty to respond to such an inquiry and the broker may decline to respond. . . . If the broker chooses to respond [to an unsolicited inquiry], he may or may not violate the act.[50]

He went on to note:

> For example, a prospective purchaser may ask a broker whether the current owner or occupant is black in a context that makes it clear that the client would prefer not to purchase a dwelling owned or occupied by a black person. If the broker responds to a question made in this context . . . the broker is catering to the prejudice of the client and helping that client steer clear of black people.[51]

Thus, a response by an agent or broker in a similar context regarding HIV infection or AIDS would constitute a discriminatory steering practice based on handicap status.

Multiple Chemical Sensitivity Disorder

In response to an increase in housing discrimination complaints from people with Multiple Chemical Sensitivity Disorder (MCSD), also referred to as "environmental illness" or "immune dysfunction syndrome," HUD recognized MCSD and chronic fatigue syndrome as "handicaps" under the FHAA.[52] HUD issued two draft technical guidance memoranda (TGMs) to familiarize its investigators with these disabilities as they are covered under the FHAA.

The most common substances believed to cause adverse reactions in people with MCSD are "solvents and other volatile compounds, pesticides, formaldehyde, natural gas, disinfectants, detergents, plastics, tobacco smoke and perfumes."[53] According to the memorandum, the adverse reactions of MCSD and chronic fatigue syndrome include "extreme tiredness and inability to carry out major life activities such as manual tasks and walking."[54]

47 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, letter to Robert D. Butters, National Association of Realtors, May 9, 1990, p. 1.

48 Ibid.

49 Ibid.

50 Ibid., p. 1.

51 Ibid., p. 3.

52 Leonora L. Guarraia, General Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Memorandum for All Regional FHEO Directors, Technical Guidance Memorandum 91-2: Multiple Chemical Sensitivity Disorder, (no date), p. 1 (hereafter cited as TGM 91-2 Memorandum).

53 Ibid.

54 Ibid.

The draft TGM covering MCSD noted that:

> ... acts which are everyday occurrences for housing providers and are necessary and accepted business practices, such as cleaning, painting, or exterminating the building, or fertilizing the lawn, can be threatening events to such persons since exposure can cause severe consequences or even death.[55]

In June 1991 HUD prepared another memorandum on MCSD that set forth what would be considered "reasonable accommodations" in addressing MCSD.[56] Examples of such accommodations include:

> —A tenant with MCSD has a sensitivity to chemical pesticides. He requests that the housing provider notify him in advance before fumigating the apartment building and substitute boric acid for the chemicals normally used to spray his apartment.
>
> —An applicant with MCSD has a sensitivity to the chemicals found in certain types of carpeting. She inquires about an available apartment located in a building in which all the apartments have wall-to-wall carpeting. She requests that the housing provider inform her as to the type of carpeting used throughout the building so that she may determine whether the apartment would suit her needs before renting it.[57]

Subsequently HUD issued two charges of discrimination based on MCSD in 1992 and one in 1994.[58]

In October 1992 HUD received an inquiry concerning the protections for individuals with MCSD under the FHAA. The Assistant General Counsel for Fair Housing responded by noting that no cases had reached a hearing before an administrative law judge at that time, and, therefore, it was difficult to predict what would be considered acceptable evidence of a handicap. However, the memo continued:

> Some types of evidence . . . that HUD would consider in determining whether a person is disabled by MCS[D] . . . include (1) reports, notes, and interview statements of treating physicians; (2) extrinsic evidence of the existence of the condition, such as a receipt of Social Security disability benefits; (3) the complainant's own statements about his or her condition, and the statements of those who know the complainant regarding their observations of the complainant's condition; and (4) treatises, articles, and statements of medical experts the complainant or physicians submitted, or that HUD otherwise obtained.[59]

In 1993 correspondence to a regional counsel, OGC reopened an MCSD-based complaint. According to the memorandum explaining the case, the complainant alleged her condition makes certain substances, such as

55 Ibid.

56 Leonora L. Guarraia, General Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Memorandum for All Regional FHEO Directors, Technical Guidance Memorandum 91-3: Multiple Chemical Sensitivity Disorder, (Draft), June 6, 1991.

57 Ibid., p. 2.

58 HUD v. Country Creek Associations, Inc., HUDALJ No. 03-93-0002-1 (Mar. 7, 1994); HUD v. Association of Apartment Owners of Dominis West, et al., HUDALJ No. 09-91-1195-1 (Aug. 10, 1992); and HUD v. Tibbetts, HUDALJ No. 08-91-0024-1 (May 15, 1992).

59 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Joseph O. Fix, Dec. 3, 1992, p. 1. For a complete analysis of HUD's determination that MCSD is covered under the handicap provision, *see*, Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, memorandum to Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Subject: Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicaps, Mar. 5, 1992.

pesticides and natural gas and petroleum products, toxic to her system and potentially life-threatening.[60] Although the former building superintendent made some accommodations for her, the building management company and the new superintendent had failed to notify her of a planned or scheduled use of chemicals in the building. She had requested enough notification to "allow her more time to locate a place to stay and to store her personal property" until after the spraying was complete. Notice was not given, and she was thus constructively evicted since she could no longer occupy the apartment. She then asked the respondents to release her from the lease, and to return her deposit and a portion of her last month's rent.[61] The Assistant General Counsel for Fair Housing advised the regional counsel to reopen the complaint and investigate it as potential discrimination against the handicapped.[62]

HUD's position that MCSD is a handicap may be clear, but what constitutes reasonable accommodation for such illnesses has not been resolved or fully tested. In a Virginia case filed with HUD (*HUD v. Country Creek Association, Inc.)*, the complainant asked that "pesticides and nonorganic fertilizers [be] banned in the development" in lieu of simply spraying the area around her dwelling with an alternative nontoxic substance.[63]

Accessibility Requirements

The FHAA also requires that all newly constructed covered multifamily dwellings[64] ready for first occupancy after March 13, 1991, must be accessible to people with disabilities.[65] "First occupancy" is judged on a building by building basis. A covered multifamily dwelling must contain the accessibility features required by the FHAA unless occupied by at least one person on or before March 13, 1991, or the last building permit or renewal for the dwelling was issued on or before June 15, 1990.[66]

To implement the statutory requirement for accessibility, HUD issued fair housing accessibility guidelines based on the standards created by the American National Standards Institute (ANSI). The guidelines address primarily the accessibility of public and common use areas, routes and doorways, environmental controls, kitchens, and bathrooms.[67] According to HUD, the FHAA accessibility guidelines were designed to address four components of accessibility: 1) full accessibility; 2) adaptability; 3) usability with minor modifications; and 4) personal modifications.[68]

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60 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, Memorandum for John P. Dellera, Regional Counsel 2G, Jan. 29, 1993 (hereafter cited as Bauerle Case Memorandum); Virginia Bauerle v. Fred Krinsky, HUD Case No. 02-92-0594-1 (administrative closure).

61 Bauerle Case Memorandum, p. 3.

62 Ibid.

63 "Sensitivity to Chemicals Pits Woman Against Lawn Care Practices", *The Washington Post*, Nov. 15, 1993, pp. D1 and D7.

64 "Covered multifamily dwellings" means: "(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and (B) ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7) (1988).

65 42 U.S.C. § 3604(f)(3)(C) (1988).

66 24 C.F.R. § 100.205(a) (1993).

67 *Id.*, Ch. I, Subch. A, App. II, at 976 (table of contents).

68 Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Sept. 13, 1990.

HUD also has responsibility for providing technical assistance to home builders and developers on how to construct covered multifamily buildings so they meet the requirements of the law. Although Congress provided some guidance in the FHAA statute,[69] the major responsibility for formulating and implementing the accessibility guidelines remained with HUD.

HUD engaged in a lengthy process seeking proposals and suggestions before and after issuing its proposed rule. In August 1989, HUD issued a notice of its intention to publish proposed accessibility guidelines at a future date.[70] HUD then met with and received written comments and suggestions from a variety of interested parties.[71]

According to HUD, these consultations produced three distinct approaches to formulating accessibility guidelines, which HUD labeled options one, two, and three.[72] Subsequently, HUD published a notice of proposed accessibility guidelines June 15, 1990, with a deadline for further comments of September 13, 1990.[73] The final Fair Housing Accessibility Guidelines were issued in March 1991.[74]

HUD described option one as providing technical guidance to builders and developers that would meet the seven requirements of FHAA:

(1) an accessible entrance on an accessible route;
(2) accessible and usable public and common use areas;
(3) doors usable by a person in a wheelchair;
(4) accessible route into and through the covered dwelling unit;
(5) light switches, electrical outlets and environmental controls in accessible locations;
(6) bathroom walls reinforced for grab bars; and
(7) usable kitchens and bathrooms.[75]

Option two contained the recommendations of a voluntary task force organized by the National Association of Home Builders (NAHB) and the National Coordinating Council on Spinal Cord Injury (NCCSCI)[76] that would have given the builder slightly more discretion in deciding whether some requirements could be made or substituted. For example, the option two proposal called for any building on an accessible route to have an accessible entrance; however, it would permit the developer to decide whether to provide an accessible route or incorporate one or two steps into the walkway. According to HUD, allowing such steps would exempt the building from accessibility requirements, presumably in violation of law.[77]

Option three proposed "adaptable accommodations" whereby a feature, such as a sunken living room, could be adapted on a

69 According to the law, compliance with the accommodations requirement could satisfy 42 U.S.C. § 3604(f)(3)(C)(iii) if the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically disabled persons are met. This is commonly cited as ANSI A117.1. 42 U.S.C. § 3604(f)(4) (1988).

70 24 C.F.R. Ch. I, Subch. A, App. III, at 996 (Preamble to the Final Housing Accessibility Guidelines).

71 55 Fed. Reg. 24,730, 24,731 (1990).

72 *Id.*

73 *Id.* at 24,370.

74 56 Fed. Reg. 9,472 (1991).

75 *See* 56 Fed. Reg. 9472-74 (1991), *reprinted in* 24 C.F.R. Ch.I, Subch. A, App. II, at 980-988. The text here repeats the headings used in Section 5 of the Fair Housing Accessibility Guidelines.

76 55 Fed. Reg. 24,371 (1990).

77 *Id.* at 24,377.

case-by case, as-needed basis. Thus features would be adapted to the needs of handicapped residents only in dwelling units where they lived, in lieu of providing the adaptive features for all covered dwelling units at the time of construction. This option would have reduced costs for tenants who do not need special access and allowed for temporary rather than permanent modifications.[78]

According to HUD, supporters for option one believed it provided a "faithful and clearly stated interpretation of the act's intent."[79] Opponents of option one stated that its design standards would increase housing costs significantly for everyone.[80] Supporters of option two asserted that it was a "reasonable" compromise between options one and three, and would allow builders to deliver accessibility features at a lower cost. Opponents of option two stated that it allowed builders "to circumvent the act's intent with respect to several essential accessibility features."[81] Option three's supporters argued that it was the best approach at the lowest possible cost. However, since modifications would only be made to those units actually occupied by a disabled resident, opponents of this measure felt that the "add-on" approach would be contrary to the intent of the FHAA.[82]

The Final Accessibility Gu[illegible]elines

In March 1991 HUD issued its final guidelines for implementing the accessibility requirements of the law, after evaluating 563 comments. The comments came from disability advocacy organizations, State and local government agencies, members and workers in the disability community, and members of the building industry, including architects, developers, and rental managers.[83]

In addition to the comments on the three options, one of the issues most widely cited was the cost of compliance with the act's accessibility requirements. This concern, mainly expressed by the building industry, could explain some of the latter's support and opposition for certain options. However, HUD's research did not show that the costs to modify buildings are high enough to warrant disregarding or minimizing the accessibility requirements.[84]

In the final guidelines, HUD chose option one as best considering three criteria. Option one is consistent with congressional intent; it simplifies compliance with FHAA by defining what is acceptable; and it would preserve affordable housing, according to HUD.[85] The guidelines are not mandatory and do not prescribe specific requirements to be met. In the preamble to the guidelines themselves, HUD characterized them as:

> [providing] technical guidance to builders and developers in complying with the specific accessibility requirements of the Fair Housing Amendments Act of 1988. . . . [and] a safe harbor for compliance with the accessibility requirements for the Fair Housing Amendments Act. . . .

78 *Id.* at 24,383. HUD did not attribute this option to any named group.

79 24 C.F.R. Ch. I, Subch. A, App. III, 993, 998 (1993) (Preamble to Final Housing Accessibility Guidelines).

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 997.

84 *Id.* at 998; "Report on Disabled Access is Criticized," *The Washington Post*, Oct. 2, 1993, pp. F-1 and F-11. A report by Stephen Winter Associates, funded by HUD, estimated that only 0.3 percent of the total project cost would be required to comply with the guideline requiring wheelchair mobility in new apartments and condominiums, or roughly $150 per unit.

85 24 C.F.R. Ch. I, Subch. A, App. III, at 993 (Preamble to Final Housing Accessibility Guidelines).

Builders and developers may choose to depart from the Guidelines, and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act.[86]

Applying the Accessibility Guidelines

The accessibility guidelines were the subject of the first Secretary-initiated complaint that resulted in a reasonable cause finding. In September 1991 HUD's Assistant Secretary for Fair Housing and Equal Opportunity filed a complaint alleging that a California housing development violated the FHAA by "failing to design and construct multifamily dwellings in accordance with the act's accessibility requirements."[87]

According to HUD's regulations, "Unless a covered multifamily dwelling is either occupied by March 13, 1991, or constructed under a building permit (or renewal thereof) issued on or before June 15, 1990, it must meet the requirements of subsection 804(f)(3) of the act."[88]

In March 1989 the respondents had begun developing a housing project in Orange County, California, consisting of 192 dwelling units located in 25 two-story buildings, a swimming pool, spa, and cabana. In May 1990 the respondents obtained building permits for 2 buildings, consisting of 6 ground-floor and 10 second-floor units. The first two buildings to be constructed, the model units, were not designed for first occupancy after March 13, 1991, and, therefore, were not subject to the accessibility requirements under the FHAA.[89]

In July 1990 the respondent obtained permits to construct 7 more buildings with 22 ground floor and 36 second-floor units. Each building consisted of more than four units and none had an elevator. These units were designed and constructed for first occupancy after March 13, 1991. HUD found that these buildings were designed and constructed such that:

> (i) the public and common use portions of such dwellings are not readily accessible to and usable by handicapped persons;
>
> (ii) all doors designed to allow passage into and within all premises within such dwellings are not sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings do not contain the following features of adaptive design; an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair could maneuver about the space.[90]

The developers also proposed constructing 8 more buildings comprising 62 dwelling units for first occupancy after March 13, 1991. The proposed design showed, among other things,

86 *Id.* at 9473.

87 HUD v. Hansen, HUD ALJ 09-91-2048-3 (Dec. 5, 1991) (determination of reasonable cause and charge of discrimination) (hereafter cited as Hansen Charge). The Secretary of HUD has standing to file complaints under the FHAA, 42 U.S.C. § 3610(a)(1)(A)(i) (1988). The Secretary delegated the authority to file such complaints to the Assistant Secretary for Fair Housing and Equal Opportunity. 54 Fed. Reg. 13,121-22 (1989). For a further discussion of Secretary-initiated complaints see chap. 10.

88 24 C.F.R. § 100.205 (a) (1993).

89 Hansen Charge at 6.

90 *Id.* at 5.

that the dwellings would not be readily accessible to and usable by handicapped persons.[91]

In the determination of reasonable cause, the Secretary charged that "the discriminatory housing practices . . . violate the Act,"[92] and called for a judgment that would enjoin the respondents "from discriminating against any person based on handicap in any aspect of the sale of a dwelling;" award "such compensatory damages as will ensure that accessible units will be provided . . . ;" assess a civil penalty against each respondent; and award "such other relief as may be appropriate. . . ."[93]

The parties agreed to settle the case without a hearing, and the chief administrative law judge appointed himself to be settlement judge.[94] The settlement included several provisions for affirmative relief, such as informing all employees and contractors of their obligations under the FHAA; notifying unit owners of the terms of the consent decree; posting the decree in the sales offices; and advertising the units as accessible to the handicapped.[95]

The respondents were also ordered to pay a civil penalty to HUD of $5,000. In addition, they were ordered to establish an escrow account of $17,000 to pay for modifications to the development that would make it accessible to the handicapped as prescribed by law.[96] Finally, the respondents agreed to reporting and recordkeeping requirements that would enable HUD to monitor its compliance for up to 8 years.[97]

By initiating its own complaint and not waiting for private parties to act, HUD sent a strong message of its intent to enforce the accessibility guidelines through its investigation and enforcement powers.

In its letters and memoranda, HUD also expressed its intentions regarding enforcement of the accessibility guidelines. Indeed, most of the inquiries to HUD concerning the handicap provision have concerned the applicability of the accessibility guidelines to newly constructed "covered multifamily dwellings." In two 1990 letters HUD reiterated its definition of covered multifamily dwellings. The first letter explained the applicability of the law to a multifamily, three-story building with no terrain or unusual access characteristics. The buildings in question are townhouses with one apartment utilizing the first and second floors, and a single-floor apartment on the third story. The General Counsel explained that under these circumstances, the units would not be considered covered multiple family dwellings. According to HUD, the units do not contain elevators, nor are there any "ground floor" dwelling units. Thus, the builder is not required to adhere to HUD's guidelines.[98]

The second letter responded to an inquiry regarding applicability of the design and construction requirements for covered multifamily dwellings intended for first occupancy after March 13, 1991. In the letter, the General Counsel explained the difference between a "building" and a "project" as each is viewed

91 *Id.* at 2-7.

92 *Id.* at 7.

93 *Id.* at 7-8.

94 HUD v. Hansen, HUDALJ No. 09-91-2048-3 (HUD ALJ Apr. 28, 1993) (consent order).

95 *Id.* at 7-9.

96 *Id.* at 10-11.

97 *Id.* at 13-14.

98 David Enzel, Acting Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Robert M. Allen, Clements, Allen and Warren, Nov. 19, 1990. *See* note 65 above.

under the FHAA. The FHAA regulations define a "building" as a structure containing or servicing one or more dwelling units. According to the General Counsel, the law did not intend for modifications to be made on a project-by-project basis but on a building-by-building assessment.[99] Each building within the project has to be evaluated and modified according to the law's requirements.[100]

In a 1991 letter answering an inquiry, OGC explained the law's applicability to a three-story apartment building. According to the letter, covered multifamily dwellings must have at least one building entrance on an accessible route, unless this is impractical because of the terrain or unusual site characteristic (e.g., a slope). The subject in question involved a parking garage on the first floor. HUD wrote that:

> it appears that unless the [parking] garage is moved from its planned location on the first floor, the dwelling units on the second floor will need to comply with the act's accessibility requirements. . . . The act [does] not require units on the third floor to be made accessible unless (1) the third floor becomes a ground floor . . . or (2) an elevator is installed in the building as a means of providing access to dwelling units other than units on the ground floor.[101]

In another accessibility inquiry, OGC responded to an inquiry on whether the law required a homeowner who is mobility impaired to obtain the condominium board's approval before adding another room to his or her condominium. According to the letter:

> The answer to this question would depend largely on the applicable State or local law and the governing documents of the complex. However, the Fair Housing Act would come into play if the board refused to permit the handicapped owner to make a "reasonable modification" to his house or refused to make a "reasonable accommodation" for him in a rule, policy, or practice which would otherwise prevent him from making the proposed addition . . . and, . . . if the proposed modifications may be necessary to afford the handicapped full enjoyment of the premises of a building.[102]

In 1992 an internal OGC memorandum expanded on the interpretation of covered multifamily dwellings, stating that regardless of whether these units are rental or single family homes, they must meet the FHAA's minimal accessibility requirements when one of two factors apply. First, if a building with four or more units has an elevator, all units must comply with the requirements; and, second, if the building lacks an elevator, only the ground floor units are required to be accessible. The note continued:

> Under the language of the law and the HUD regulation, units in a covered multifamily dwelling must meet the accessibility standards, regardless of whether they are located on individual lots. As a result, the act would apply to situations in which units were separately owned [or] if they were located in the same building. . . . Further, . . . dwelling

99 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, letter to John J. Knapp, Powell Goldstein, Frazier & Murphy, Dec. 18, 1990. In the letter, the word "project" was not used in the context of determining whether a building-by-building approach or project-by-project approach was intended. According to the general counsel, "the preamble specifically states that if a developer obtains a building permit on or before January 13, 1990, and completes construction under that permit, the building in question need not comply with the accessibility requirements. Also *see* 52 Fed. Reg. 3253 (Jan. 23, 1989).

100 Ibid., p. 2.

101 42 U.S.C. § 3604(f)(3)(C) (1988); and Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Robert J. Mills, Mar. 26, 1991, pp. 1-2.

102 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Walter F. Miozza, Mar. 25, 1991, p. 3.

units within a single structure separated by firewalls do not constitute separate buildings.[103]

The issues surrounding the implementation of the accessibility guidelines (i.e., when they apply, the cost and the degree of the modifications) require continuing clarification. However, HUD's correspondence indicates its intention to interpret and enforce the intent of the law broadly as it applies to the disabled.

Complaints Processed

Approximately 1 year after the passage of the amendments, the number of complaints based on handicap received by HUD and Fair Housing Assistance Program agencies was relatively small in comparison with the total number of complaints.[104] In 1989, for example, HUD received 3,248[106] complaints, of which 484 were based on handicap, or 14.9 percent of its total caseload. From 1990 to 1992 the number of complaints based on handicap received by HUD grew from 1,059 to 1,608, but in fiscal 1993 they fell to 1,490. Throughout this period, however, handicap complaints remained a remarkably steady fraction of all complaints at just under 23 percent.

In 1990 HUD administratively closed 219 or 30.7 percent of these complaints, 357 or 29.1 percent of the cases in 1991, 576 or 33.5 percent in 1992, and 481 or 34.3 percent in 1993. In 1990, 54 percent of handicap cases were closed after 100 days. However, by 1993 the percentage of handicap cases closed in over 100 days decreased to 30 percent. The increase in caseload and administrative closures and the decrease in the amount of time it takes to close such cases may be attributed to the education and outreach efforts in publicizing the new provision, interim agreements with FHAP agencies, and HUD's growing experience in handling handicap complaints.

Based on cases closed in fiscal 1993, it appears that handicap cases generally fall into the broad closure categories of administrative, cause determination, conciliation, etc., at roughly the same rates as all other cases. Although roughly of the same order of magnitude, significant differences exist for conciliation agreements and withdrawals with resolution: rates for both of these categories are higher (18.6 and 18.3 percent, respectively) for handicap cases than for all cases taken as a whole (16.5 and 15.5 percent, respectively). Withdrawals of complaints without resolution occur somewhat less frequently in handicap cases (8.8 vs. 10.3 percent).

103 Carrie W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, note to Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, June 4, 1992; and 24 C.F.R. § 100.201 (1993).

104 Complaints data based on handicap were derived from data provided by the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Washington, D.C. (hereafter cited as HUD Title VIII Database).

106 For fiscal years 1989-1992, the figures include a small number of complaints received by HUD, but processed by FHAP agencies under contract. All such contract cases were based on either handicap or familial status.

9. Familial Status

The family status provisions of the FHAA are designed to protect families with children from housing discrimination in the same manner that other groups are protected by the Fair Housing Act. Specifically, the act prohibits such discrimination in all aspects of the sale or rental of housing.[1] "Familial status" (generally, the presence of children under 18 in a family) applies to individuals under 18 years of age who are domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.[2]

The familial status protections apply to pregnant women and to persons in the process of gaining legal custody of a minor,[3] and include single persons. The law makes certain exceptions for housing intended for older persons.[4]

In its 1989 regulation implementing the act, HUD interpreted the antidiscrimination provision broadly:

families with children are entitled to the same protections as other classes of persons. For example, "dual housing" facilities segregated by race, color or religion clearly would violate the Fair Housing Act. Similarly, the Department believes that it is unlawful for a housing facility to segregate because of familial status.[5]

HUD reiterated this interpretation in a letter written to a California State official in 1992, "Just as the act prohibits restricting members of protected classes, including families with children, to certain dwellings, it also prohibits restricting them to certain facilities associated with the dwellings."[6]

Including families with children (or familial status) as a protected class under the FHAA was not an easy task for members of Congress. The legislative history shows that opposition to the inclusion of families with children under the fair housing law was widespread. However, Congress' concern was that discrimination against such families was pervasive, and even in those States with some protections, the State laws were not effective in protecting their rights.[7]

In its national survey of discrimination based on familial status, HUD found that 25

1 42 U.S.C. § 3604(a)-(e) (1988).

2 *Id.* § 3602(k)(1)(2).

3 *Id.*

4 *Id.* § 3607(b).

5 24 C.F.R. Ch. I, Subch. A, App. I, Subpart E, at 940 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

6 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, letter to Rodney O. Lilyquist, California Department of Justice, July 20, 1992, p. 2.; 42 U.S.C. § 3604(b) (1988).

7 U.S. Congress, House Committee on the Judiciary, *Fair Housing Amendments Act of 1988*, 100th Cong., 2d Sess., 1988, H. Rept. 100–711, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180, (hereafter cited as *FHAA Committee Report).* Sixteen States had prohibited discrimination against families, but the laws' coverage varied. For example, some States exempted all-adult housing communities from coverage, others allowed segregation based on age within a complex and others had limited protections (e.g., rental but not sale).

percent of all rental units did not allow children; 50 percent were subject to restrictive policies that limited the ability of families to live in those units, and almost 20 percent of families with children were living in homes they considered less desirable because of restrictive practices.[8]

Some research on familial status showed that discrimination against families with children affected minority persons disproportionately because minority households are more likely to have children. In addition, the studies showed that because predominantly white neighborhoods "are more likely to have restrictive policies, racial segregation is exacerbated by the exclusion of children."[9]

With respect to this provision, Congress' intent was clear:

> Both the Congress and the courts have a long tradition of defining and protecting families as "perhaps the most fundamental social institution of our society." The Congress has consistently stressed the importance of the family in numerous social welfare programs intended to support children and their parents. In 1949, the Federal government made a commitment to "provide a decent home and suitable living environment for every American family." Nearly 40 years after this commitment, however, discrimination against families with children prevents millions of American families from realizing this goal.[10]

In an August 1992 memorandum, HUD's General Counsel reviewed the legislative history of the Fair Housing Act and case law on the issues of safety and waivers of liability in fair housing cases and other areas.[11] In the analysis, HUD examined testimony presenting a rationale for the exclusion of children. Some landlords contended that renting to families with children would mean "greater maintenance costs, noise, and higher expenses for utilities and insurance."[12] HUD's analysis did not find that the admission of such families would have these effects. According to HUD, the legislative history shows that the insurance industry did not consider the presence of children a significant factor in setting rates for apartment buildings, and that despite safety concerns, Congress made clear its intent to prohibit segregation of families with children on certain floors in a building or in certain buildings in a complex or development. Congress also concluded that extending equal housing opportunities to individuals with handicaps and/or families with children would not increase owners "vicarious liability."[13]

Enforcement of Familial Status Provisions

Immediately after the passage of the 1988 amendments, HUD began to receive inquiries from constituents concerning the interpretation and implementation of the many provisions under familial status. Many of the later OGC memoranda and FHEO's technical guidance memoranda were generated based on the Department's early positions on the issue.

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8 *See* "Measuring Restrictive Rental Practices Affecting Families with Children; A National Survey," Office of Policy Planning and Research, Department of Housing and Urban Development, 1980, as cited in *House Report*, p. 19.

9 *FHAA Committee Report* at 2182.

10 *Id.*

11 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Subject: Fair Housing Act Enforcement: Safety Issues as Defenses Familial Status Discrimination, Aug. 26, 1992, p. 1 (hereafter cited as Wilson Familial Status Memorandum).

12 U.S. Congress, Senate, Committee on the Judiciary, *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcommittee on the Constitution* at 86 (1987) as cited in Wilson Familial Status Memorandum, p. 4.

13 Wilson Familial Status Memorandum, pp. 4–5.

HUD has also received inquiries concerning the segregation of facilities by age or family status or the use of facilities by children. HUD's position is clear that segregation violates the intent of the law; however, several issues have surfaced concerning the use of facilities.

In a 1989 response to a constituent concerning "adults only" and "children only" swimming pools, the Assistant General Counsel for General Law wrote that:

> segregating pools as "adult only" or as "children only" would be in violation of the Fair Housing Act ... [HUD's] regulations implementing the amended Fair Housing Act makes it unlawful to deny or limit services or facilities in connection with the sale or rental of a dwelling because of, among other things, familial status. . . . Under the Fair Housing Act, families with children must be afforded the same rights to use the various building facilities as are families without children.[14]

In March 1990 HUD continued to maintain that the familial status provisions make it unlawful for an apartment complex to have two swimming pools open to families with children and one swimming pool that is not.[15] However, in an internal memorandum, the Assistant General Counsel added that:

> the prohibition is not total and uncompromising *where health and safety issues are involved*. Thus, landlords are not prohibited from developing and implementing reasonable rules relating to the use of the facilities based on health and safety concerns.[16]

In June 1990 HUD responded to an inquiry on the use of separate pools at a condominium complex:

> The Department of Housing and Urban Development has not promulgated specific rules addressing what pool rules violate the Fair Housing Act. Generally, however, it is unlawful, because of familial status, to impose different terms, conditions, or privileges relating to the sale or rental of a dwelling or to limit services or facilities in connection with the sale or rental of a dwelling.[17]

He continued:

> Limitations on the number of guests brought to the pool and the number of times guests can be brought to the pool, generally would not violate the Fair Housing Act . . . rules regulating excessive noise, or rules with a demonstrable safety purpose, generally would also not violate the Fair Housing Act. Of course, the rules must be neutrally applied to and enforced against both children and adults."[18]

In its 1992 analysis of the legislative history and intent of the law with respect to family status, HUD found no basis to exclude children because of safety concerns:

> review of the legislative history shows that Congress heard testimony that some housing providers believed that some housing was not safe for children and that it would be expensive to house families with children safely in such housing. Congress did not limit in any way the protections afforded to families with children based on that testimony, nor did it grant HUD authority to limit those protections. Accordingly, the legislative history of the

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14 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Tony Conte, Arizona, June 7, 1989; and 24 C.F.R. 100.65(b)(4) (1993).

15 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, note to Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, "Fair Housing Act—Use of Facilities," Mar. 6, 1990, p. 1.

16 Ibid., pp. 1–2 (emphasis in the original).

17 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, letter to Phyllis Nightingale, June 27, 1990 (hereafter cited as Nightingale Letter).

18 Ibid.

amendments supports HUD's rejections of an "unsafe for children" exemption.[19]

Nevertheless, HUD did not rule out all reference to safety concerns. In 1992 the General Counsel responded to an inquiry concerning permissible restrictions for the use of facilities such as swimming pools and recreation rooms:

> the Department does not believe that Congress intended the act to preclude housing providers from implementing reasonable health and safety rules. Accordingly, if an individual were to file a complaint [citation omitted] alleging that 'rules limit the ability of families with children to use the common facilities of a mobile home park, the Department would consider the facts of the specific case, including the rationale for the rules, the breadth of the limitations the rules place on families with children, and whether the rules are mandated pursuant to a state or local requirements, and, if so, whether those State or local requirements are reasonable.[20]

He added that rules restricting children from using swimming pools during certain hours could prevent families with children from having full use and enjoyment of the premises. "To be lawful, a housing provider must have a health or safety reason for excluding families with children from using a pool during certain hours,"[21] and suggested that "with respect to rules requiring supervision, you consider less discriminatory alternatives such as revising the policy to require [all] nonswimmers to be accompanied by a responsible swimmer."[22]

In answer to the question of whether it is unlawful to restrict the use of game and recreation rooms and equipment by age, "as long as all age groups have access to similar game/recreation rooms and equipment," the General Counsel reiterated that, "To be lawful, the housing provider must have a health or safety reason for excluding families with children from using those facilities."[23]

The inquiry also asked if the complex can require adult supervision of children. In this particular case, the constituent alleged that the equipment in the game room was being "trashed by the young people."[24] The General Counsel responded that:

> [t]here is no reason under the act why individuals who damage recreation room property may not be excluded from such facilities, pursuant to a general policy applicable to all persons regardless of age.... Furthermore, a policy which would require a responsible adult to supervise children in game or recreation room facilities would appear more tailored to protect legitimate health and safety interests....[25]

The safety and health issue with respect to familial status is still problematic at best. In an OGC memorandum, HUD addressed a complaint whereby respondents refused to

19 Wilson Familial Status Memorandum, p. 6.

20 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, letter to David Gillespie, Sept. 29, 1992, pp. 1–2 (hereafter cited as Gillespie Letter).

21 Ibid., p. 2.

22 Ibid., p. 2.

23 Ibid., p. 3.

24 Ibid.

25 Ibid.

rent apartments on the second or third floors of a three-story building to families with children, allegedly because respondents were concerned that children would be unsafe playing on balconies or climbing stairs.[26]

The Associate General Counsel wrote:

> except where specific exemptions apply, the Fair Housing Act requires housing providers to make all units including units on upper floors and units with balconies, available to families with children, and it prohibits housing providers from requiring families with children to sign waivers of liability which the providers do not require of others.[27]

On the other hand, she noted that the law did not bar "reasonable" rules to protect minor children, and that:

> under some circumstances, property owners' factual statements about perceived hazards of their property are not prohibited by the act, as long as they are not misleading or discouraging, and do not steer families with children away from the property.[28]

The Older Persons Exemption

The FHAA exempts "housing for older persons" from the prohibitions against discrimination because of familial status. Housing for older persons means housing intended only for residents 62 years or older, or housing where at least one person 55 years of age or older resides in each unit. In the latter case, HUD is required to publish regulations defining such housing based on three factors.[29]

First, at least 80 percent of the occupied units in the housing facility must be occupied by at least one person 55 years of age or older per unit.[30] Second, the housing facility must publish and adhere to policies and procedures demonstrating an intent to provide housing for persons 55 years or older.[31] Third, the housing facility must maintain significant facilities and services designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, then the housing must be necessary to provide important opportunities for older persons.[32] Housing for older persons also includes housing provided through a State or Federal program deemed by HUD to be designed and operated for the elderly (as specified in the State or Federal program).[33]

In the legislative history of the act, Congress recognized that "some older Americans have chosen to live together with fellow senior citizen in retirement-type communities."[34] The House Committee in its report appreciated the "interest and expectation these individuals have in living in environments tailored to their specific needs."[35]

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26 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, memorandum for Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Subject: Fair Housing Act: Alleged Hazards to Children as a Defense in Familial Status Cases, July 23, 1992, p. 1.

27 Ibid., p. ii.

28 Ibid.

29 42 U.S.C. § 3607(b)(2)(C)(i)-(iii) (1988).

30 *Id.* § 3607(b)(2)(C)(ii).

31 *Id.* § 3607(b)(2)(C)(iii).

32 *Id.* § 3607(b)(2)(C)(i).

33 *Id.* § 3607(b)(2)(A).

34 *FHAA Committee Report* at 2182.

35 *Id.*

Indeed, numerous questions and concerns have been raised about the exemptions in the familial status provision, particularly regarding the protection of older persons and children. HUD, in its correspondence, has indicated that some points do need clarification about the application of this exemption provision.

In a letter to a member of Congress, HUD explained why it could not "precertify" every housing facility nationwide that seeks to qualify for the housing for older persons exemption.[36] An investigation to determine if the three requirements have been met at the time of the "precertification" review would be a major undertaking, and could not be predictive of compliance at a later date.[37] HUD Secretary Jack Kemp explained that:

> if the requirements are met at the time of the review, it is quite possible, . . . that the requirements will not be satisfied at some point in the future. . . . Consequently, even with a certification procedure in place anytime a complaint is filed with the Department . . . involving a facility that claiming to be exempt . . . it would nonetheless have to be investigated to determine whether the housing facility met the statutory requirements of the exception *at the time of the alleged discriminatory practice.*
>
> Thus, a certification procedure would be costly to the government without serving to insulate those certified from being the subject of housing discrimination complaints that . . . would have to be investigated to ensure that the complainant's civil rights were not violated at the time of the alleged discrimination.[38]

In addition, the letter noted, "a HUD certification procedure would not preclude individuals from filing civil actions directly in U.S. District Court" in any case, as the law does not mandate that persons file with HUD before filing suit in Federal district court.[39]

In a 1989 letter HUD made it clear that to qualify as housing for older persons, a complex must fulfill all three legal requirements to be exempt and cannot assign any person to a particular section of a community, neighborhood, or development because of familial status. In the same letter, HUD stated that "nothing in the Fair Housing Act prohibits the operation of two geographically separate and independently run condominium communities, one for older persons and one for general occupancy, on adjacent tracts of land."[40]

In February 1991 HUD issued a technical guidance memorandum concerning program exemptions for older persons[41] when housing for older persons is "provided under a State or Federal Program that the Secretary determines is specifically designed and operated to assist elderly persons. . . ."[42] According to the TGM, it is not necessary for HUD to respond

36 Jack Kemp, Secretary of the U.S. Department of Housing and Urban Development, letter to Rep. E. Clay Shaw, Jr., U. S. House of Representatives, May 30, 1989, (hereafter cited as Shaw Letter).

37 Ibid., p. 2.

38 Ibid.

39 Ibid.

40 Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, letter to Herbert L. Gildan, Esq., Florida, Nov. 13, 1989.

41 Leonora L. Guarraia, Deputy Assistant Secretary for Enforcement and Compliance, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Memorandum for All Regional Directors, FHEO, and All Regional Compliance Directors, Subject: Technical Guidance Memorandum #4, Feb. 14, 1991 (hereafter cited as TGM #4).

42 42 U.S.C. § 3607(b)(2)(A) (1988).

to requests for exemption from individual project owners or managers. Once a program is certified, all projects within the parameters of the program are exempt.[43] Owners and managers of projects under such programs should ask the State or Federal government agency that administers the program to seek a status determination.[44]

The status of children within an "adults only" building has also been a subject of controversy. One of HUD's regional counsel requested an opinion on the "eviction of, or denial of housing to families with children by a housing facility that qualifies as housing for older persons."[45] The focus of the inquiry was whether or not a housing facility that meets all three requirements and is exempted from the familial status provision can evict families with children who were residents of the facility prior to September 13, 1988. OGC's position was that once a housing facility qualifies for the exemption, there is no protection against eviction provided under the FHAA for families with children who were residents before or after September 12, 1988 (when the act was passed.)[46]

It appears that HUD continues to review exemption requests for the elderly on a case-by-case basis to determine whether a given facility is specifically designed and operated to assist elderly persons.[47]

Occupancy Standards

The FHAA specifically permits "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[48] After the passage of the amendments, members of the business community recommended that HUD develop "occupancy" guidelines or standards to be implemented nationwide. Real estate agents, for example, were "concerned that the absence of local and State standards in some communities exposes realtors in those areas to a risk of complaints from families with children not faced by realtors in areas where strict adherence to local or State occupancy standards insulates them."[49]

Although some commentators to HUD's proposed regulations suggested that the department develop occupancy standards, HUD did not see a statutory requirement to do so. In its final regulations, HUD noted:

> there is no support in the statute or its legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. . . . Further, while the Department has developed occupancy guidelines for use by participants in HUD housing programs, these guidelines are designed to apply to the types and sizes of dwellings in HUD programs and they may not be reasonable for dwellings with more

43 TGM #4.

44 Ibid.

45 Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum for Beverly D. Agee, Regional Counsel, 9G, Subject: Housing for Older Persons—Eviction of Families with Children, pp. 1–2.

46 Ibid., p. 1.

47 *See, e.g.*, Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, letter to Ralph C. Dell, Sept. 29, 1992.

48 42 U.S.C. § 3607(b)(1) (1988).

49 Carolyn Lieberman, Acting General Counsel, U.S. Department of Housing and Urban Development, letter to Dennis M. McDermott, executive vice president, Missouri Association of Realtors, June 6, 1989 (hereafter cited as McDermott Letter).

available space and other dwelling configurations than those found in HUD-assisted housing.[50]

HUD went on to conclude that Congress had not intended to bar any reasonable limitation on occupancy, but that it would "carefully examine any such . . . restriction to determine whether it operates unreasonably to limit or exclude families with children."[51]

HUD received numerous inquiries about the exemption, especially concerns about how and when the exemption should be applied. From 1989 until 1991, HUD refrained from issuing "guidelines," and instead relied on the act, congressional intent, and the agency's regulations to implement an informal policy for its staff. That policy consisted of assessing occupancy standards based on a number of factors, including number and size of bedrooms, configuration of bedrooms and unit, and the overall size of the unit.[52] The investigation of an alleged complaint would help HUD determine if the standards applied were reasonable and did not discriminate against protected groups.[53]

New issues also surfaced during this period, including the applicability of the exemption to university housing, exemptions in HUD-assisted programs such as public housing, and exemptions in dwellings for "legitimate health or safety" reasons.[54]

In February 1991 HUD's General Counsel issued a memorandum to regional counsel based upon a review of a "significant number" of fair housing cases involving challenges to occupancy standards. He concluded that an occupancy standard no more restrictive than "one person per bedroom plus one" is reasonable and should be "presumed lawful, absent special circumstances."[55] He added that HUD "recognizes that owners and managers can, and in many cases, must develop and implement occupancy standards based on factors such as the number and size of the bedrooms and the overall size of the dwelling unit."[56]

Although the memorandum was an internal document for regional counsel, the reaction to HUD's policy was mostly negative. The concern was expressed by numerous children's advocacy groups that HUD would use bedroom size as the major indicator for restricting children from housing.[57] One representative felt that in at least one case, HUD should not have based its decision on the size

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50 24 C.F.R. Ch. I, subch. A, App. I, 918-19 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

51 *Id.*

52 McDermott Letter, p. 2; Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum for Joyce C. Johnson, Indianapolis Office, Director, Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Subject: Occupancy Standards for Federally Assisted Housing, Dec. 19, 1989, p. 2 (J. Johnson Memorandum).

53 J. Johnson Memorandum, p. 2.

54 *See* Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum for Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Subject: Application of Familial Status Provisions to University Housing, Dec. 22, 1989; Harry L. Carey, memorandum for Keith W. Lerch, Chief Counsel, Indianapolis Office, Subject: Occupancy Requirements in Public Housing, Dec. 20, 1990; and Harry L. Carey, memorandum to Carole W. Wilson, Associate General Counsel for Fair Housing and Administrative Law, Subject: Follow-up question regarding Esquivel v. Bearcreek, Jan. 22, 1991.

55 Frank Keating, General Counsel, memorandum for All Regional Counsel, Subject: Fair Housing Enforcement Policy: Occupancy Standards, Feb. 21, 1991.

56 Ibid., p. 1.

57 *Mobile Home Case Indicates HUD Stance on Occupancy Limits, FHAP Agency Standing*, 1 Fair Housing-Fair Lending (P-H), vol. 6, no. 9, ¶ 9.10, p. 11 (Mar. 1, 1991).

of the bedroom but on the entire "square footage of the home."[58]

In March 1991 the General Counsel rescinded his February memorandum and issued a new directive to the regional counsel. He wrote:

> On February 21, 1991, I issued a memorandum . . . intended to constitute internal guidance to be used by Regional Counsel in reviewing cases involving occupancy restrictions. It was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for a particular type of housing. . . . [I]t is clear that the February 21 memorandum has resulted in a significant misunderstanding of the Department's position. . . .[59]

He continued that HUD believes an occupancy policy of two persons in a bedroom, as a general rule, is reasonable, and that HUD will consider the size and number of bedrooms and other special circumstances to determine reasonable occupancy policy. Some of the circumstances to be considered were size of bedrooms, age of the children, configuration of unit, other physical limitations of housing (e.g., septic and sewer systems), State and local law, and factors such as discriminatory statements and rules. He included in the memorandum hypothetical situations describing when an occupancy policy is reasonable or unreasonable.[60]

Although the General Counsel made it clear that the March memorandum superseded the February memorandum,[61] HUD's "internal guidance" continued to trouble civil rights and children advocacy groups.[62] One representative of the Children's Defense Fund said:

> Keating's first standard could have hurt millions of families. Many American families include four or more people-particularly low-income minority families—and the vast majority of housing units have two or less bedrooms."[63]

Although she stated that she is relieved that HUD adopted the two-per-bedroom standard, she would have preferred it if the memorandum contained no numbers at all.[64] Most of the critics of HUD's occupancy policy felt that there should be no "reasonable" limitations on restricting housing for children, and there should be no distinction between children and adults in dwellings.[65]

In May 1991 the General Counsel wrote to the NAACP Legal Defense and Educational Fund, Inc., concerning points that the fund raised about HUD's occupancy directive, and

58 Ibid.

59 Frank Keating, General Counsel, Memorandum for All Regional Counsel, "Fair Housing Enforcement Policy: Occupancy Standards," Mar. 20, 1991.

60 Ibid., pp. 2–4.

61 Frank Keating, General Counsel, Memorandum for All Regional Counsel, "fair Housing Enforcement: Memorandum on Occupancy Cases," Mar. 25, 1991.

62 *HUD Internal Guidance on Occupancy Standards Draws Concern from Rights Groups*, 1 Fair Housing-Fair Lending (P-H), vol. 6, no. 11, ¶ 11.6, p. 6 (May 1, 1991).

63 Lisa Mihaly, Children's Defense Fund, as cited in *HUD Internal Guidance on Occupancy Standards Draws Concern from Rights Groups*, 1 Fair Housing-Fair Lending (P-H), vol. 6, no. 11, ¶ 11.6, p. 7 (May 1, 1991).

64 Ibid.

65 Ibid.

sent copies to seven other civil rights and housing organizations.[66] He stated that the memorandum was designed to "facilitate Regional Counsel review" involving occupancy policies and the approach to use in investigations of such cases, and not to set nationwide occupancy standards or to create a definitive test for determining liability in a particular case. The two person per bedroom guideline was to provide a general rule of thumb for HUD attorneys and to assist in the review of cases, and would not limit the nature or scope of an inquiry. Furthermore, he declared that the guideline would not shift the burden of proof to the complainant (so that the complainant would have to prove that a given occupancy policy was not reasonable).[67]

He wrote in the letter:

> Let me assure you that HUD will continue to take the same approach to investigate familial status cases involving occupancy issues as other fair housing cases. That approach is to seek information from the respondents and complainants, and to gather information independently. Assessing all information obtained, HUD makes a determination based on the particular facts and circumstances....[68]

In 1992 HUD continued to receive inquires about its occupancy policies. The Department further clarified its position, and in at least one letter, urged a congressman's constituent to find guidance on reasonable occupancy policy from court cases and ALJ decisions.[69] Most recently, occupancy codes have commanded the Secretary's attention in two cases where he has remanded or reversed the finding of an administrative law judge.[70]

Permitted Inquiries

A frequent issue is the extent to which inquiries involving protected status may be discriminatory. In one complaint, a HUD administrative law judge dismissed a charge of family status discrimination against a real estate broker who asked prospective apartment tenants about the age of their children and whether they were quiet.[71] In concluding that HUD had failed to demonstrate that the respondents intentionally discriminated, the ALJ stated that the respondents were entitled to ask questions designed to locate quiet tenants for the apartment.[72] The case was identified as the first of its kind:

> This is the first case in which an administrative law judge has ruled on the issue of noise in the context of families with children as potential tenants. As a result of the ruling, landlords may be able to inquire about the behavior of children without running afoul of the Fair Housing Act.[73]

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66 Frank Keating, General Counsel, letter to Julius L. Chambers, director-counsel, NAACP Legal Defense and Education Fund, Inc., May 6, 1991. The other organizations included the National Council of La Raza, the Children's Defense Fund, and the National Fair Housing Alliance.

67 Ibid., pp. 1–2.

68 Ibid., p. 3.

69 Russell K. Paul, Assistant Secretary, Office of the Assistant Secretary for Congressional and Intergovernmental Relations, U.S. Department of Housing and Urban Development, letter to the Honorable Bill Richardson, U.S. House of Representatives, Oct. 22, 1992.

70 See discussion of *Mountainside* and *Denton* in chapter 10.

71 HUD v. Downs, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011, 25,173-74 (HUD ALJ Sept. 20, 1991).

72 *Id.* at 25,180. After stating that the reason for the questions was to locate quiet tenants, the complainant would then be required to prove that this claim was a mere pretext to avoid renting to families with children. *Id.*

73 *ALJ Holds Prohibition On 'Noisy' Children Legal Under Fair Housing Act*, 1 Fair Housing-Fair Lending (P-H) Vol. 7, no. 5, ¶ 5.2, pp. 3–4 (Nov. 1, 1991).

Advocates for children's groups were alarmed about the ruling and some asked for an appeal.[74] A housing specialist with the Children's Defense Fund observed that the decision "'interpret[s] the protections for families with children extremely narrowly' and 'shows a willingness to ignore what could very easily be interpreted as discriminatory behavior toward children.'"[75]

She criticized "the presumption that only children can cause noise and bother people, citing as an example college students who play loud music."[76] Also, the ruling left open other related questions, such as whether landlords will be allowed to assume that a child is "noisy" and how "noisy" is defined.[77]

Although housing discrimination against families with children is clearly now prohibited under Federal law, the law regarding exempted housing and familial status discrimination and its implementation is still evolving. Future complaints and case law will have to address the many questions and concerns generated by attempts to carry out the provision.

Complaints Processed

Familial status complaints constituted a large proportion of complaints immediately after passage of FHAA. In 1989, HUD received 3,248 complaints, of which 1,486, or 45.8 percent of the total, were based on familial status.[78] In 1990, the number of familial status complaints increased to 1,971, but the proportion of such cases remained constant at 45.8 percent. After 1990, however, the proportion of familial status complaint declined steadily to just 26.3 percent in 1993.

Cases closed in fiscal 1993 reveal several striking differences in how familial status are closed compared to other types of cases. On the whole, familial status complaints are more likely to be resolved in the complainants' favor than other types of complaints. Cause determinations are made in 8.5 percent of familial status complaints versus 3.3 percent of all complaints, and only 2.6 percent of handicap complaints. A higher percentage of familial status cases are conciliated: 20.6 percent vs. 16.5 percent. Conversely, no cause determinations, withdrawals with resolution, and withdrawals without resolution are all less common among familial status complaints. These patterns are consistent with other evidence indicating that housing providers, particularly owners and managers of mobile home parks and housing complexes for seniors, have resisted the FHAA's protection of families with children.

Familial status cases unresolved after 100 days totaled 60.9 percent in 1990; 61.1 percent in 1991; 43.0 percent in 1992; and 34.1 percent in 1993.

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74 Ibid., p. 3.

75 Ibid, p. 4.

76 Ibid.

77 Ibid., p. 4.

78 For fiscal years 1989–1992, these figures include a small number of complaints received by HUD, but processed by FHAP agencies under contract. All such cases were based on either handicap or familial status.

10. HUD Policy and Implementation

Leadership in fair housing policy was delegated to the Secretary of Housing and Urban Development by President Carter in 1980,[1] and strengthened in 1994 by President Clinton.[2] The Fair Housing Amendments Act confers authority on the HUD Secretary for the administrative processing of complaints and for the issuance of rules to implement Title VIII as amended by the FHAA.

HUD's approach to fair housing policy is evinced in a variety of ways in addition to rulemaking. It asserts its legal interpretations through advisory opinions and letters, determinations of cause in complaint proceedings, legal presentations in cases brought before the administrative law judges, filing its own Secretary-initiated complaints, and in the Secretary's broad power to review decisions made by administrative law judges. This chapter examines all of these approaches to a greater or lesser degree.

Discriminatory Housing Practices

The FHAA is designed to prevent various forms of housing discrimination based on race, color, religion, sex, familial status, handicap, or national origin. The prohibited activities under the FHAA relate generally to the sale or rental of dwellings. A dwelling is defined as:

> any building or structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.[3]

Under the statute, discriminatory housing practices are divided into three categories: sale or rental of dwellings, residential real estate-related transactions, and brokerage services.

The FHAA prohibits the refusal to sell, rent, negotiate, or otherwise deny a dwelling to a prospective purchaser or tenant specifically protected by the act.[4] Under the FHAA it

1 Exec. Order No. 12,259, 3 C.F.R. § 307 (1980), *reprinted in* 42 U.S.C. § 3608 note (1988).

2 Exec. Order No. 12,892, 59 Fed. Reg. 2939. The order also created the Fair Housing Council headed by the HUD Secretary "to review the design and delivery of Federal programs and activities to ensure that they support a coordinated strategy to affirmatively further fair housing." *Id.* at 2940. The council's membership consists of the Secretaries of Health and Human Services, Transportation, Education, Labor, Defense, Agriculture, Veterans Affairs, Treasury, and Interior; the Attorney General, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Chair of the Federal Deposit Insurance Corporation. *Id.*

3 42 U.S.C. § 3602(b) (1988).

4 *Id.* § 3604(a); 24 C.F.R. § 100.50(b)(1) (1993). As applied to disabled persons, 42 U.S.C. § 3604(f)(1) (1988). The language of section 3604(f)(1) does vary from the prohibitions for the other protected classes in section 3604(a), although the distinctions, if any, should not be significant. *See* Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (New York: Clark Boardman and Callaghan, 1991), § 11.5(3)(a) (hereafter cited as Schwemm, *Law and Litigation*). The regulations do not contain any distinction in application between the disabled and other protected classes.

is also unlawful to discriminate in the terms, conditions, services, facilities, or privileges associated with a dwelling.[5] In addition, the FHAA prevents discrimination, or any indication of preference or limitation, in any notice, statement, or advertisement regarding the sale or rental of a housing unit.[6] The FHAA also forbids false representations regarding a unit's availability for inspection, sale, or rental.[7]

In an effort to cover all possible activities involved in the sale or rental of dwellings, the regulations include provisions that address activities before, during, and after a *bona fide* offer is made by a prospective buyer or tenant.[8] The regulations also give specific examples of prohibited activities, such as imposing different sale prices or rental charges;[9] using different criteria, standards, or procedures to evaluate members of the protected classes;[10] or evicting tenants or guests of tenants because of their race, color, religion, sex, familial status, handicap, or national origin.[11]

The regulations prohibit imposing different conditions or privileges on any aspect of the sale or rental of a dwelling based on membership in a protected class.[12] Under the regulations, it is unlawful to use different terms in leases or contracts of sale, such as terms relating to security deposits or down payments,[13] and to deny or delay maintenance or repairs of sale or rental dwellings.[14]

The regulations detail other prohibited activities known as discriminatory steering practices. Unlawful steering practices include discouraging the purchase or rental of a dwelling, exaggerating the drawbacks or underestimating the desirability of a dwelling, communicating to a potential buyer or renter that he or she would not be comfortable or compatible in the existing community, or assigning a person to a particular neighborhood or floor of a building because of their race, color, religion, sex, handicap, familial status, or national origin.[15]

The FHAA also makes it unlawful: "For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin."[16] Such a practice is commonly known as blockbusting.[17]

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5 42 U.S.C. § 3604(b) (1988); 24 C.F.R. § 100.50(b)(2) (1993). As applied to discrimination based on handicap, 42 U.S.C. § 3604(f)(2) (1988).

6 42 U.S.C. § 3604(c) (1988); 24 C.F.R. § 100.50(b)(4) (1993).

7 42 U.S.C. § 3604(d) (1988); 24 C.F.R. § 100.50(b)(5) (1993).

8 24 C.F.R. §§ 100.50, 100.60 (1993).

9 *Id.* § 100.60(b)(2).

10 *Id.* § 100.60(b)(4).

11 *Id.* § 100.60(b)(5).

12 *Id.* § 100.65(a).

13 *Id.* § 100.65(b)(1).

14 *Id.* § 100.65(b)(2).

15 *Id.* § 100.70(c).

16 42 U.S.C. § 3604(e) (1988).

17 *See* 24 C.F.R. § 100.50(b)(6) (1993).

The regulations clarify that a discriminatory blockbusting practice may still be established even if there is no actual profit, as long as profit was a factor motivating the blockbusting activity.[18] Under the regulations, blockbusting activities for profit include conduct such as uninvited solicitations for listings that convey the idea that a neighborhood is changing and assertions that entry of prospective persons will result in undesirable consequences for the community (such as lower property values, increase in criminal activity, or a decline in the quality of the schools).[19]

The regulations include a variety of prohibited advertising activities. Discriminatory notices, statements, and advertisements include, among others: using words, phrases, illustrations, or symbols to convey that dwellings are available or unavailable to a particular group of persons, and expressing a preference for or limitation on any purchaser or renter because of his or her membership in a protected class.[20] In addition, the regulations also prohibit selecting media or locations for advertising that deny information to particular segments of the housing market because of race, color, religion, sex, handicap, familial status, or national origin.[21]

The FHAA prevents discrimination by any person or other entity engaged in residential real estate-related transaction. As defined by statute, residential real estate-related transactions include making or purchasing loans; selling, brokering, or appraising residential real property; providing financial assistance for purchasing or improving a dwelling; and providing financial assistance secured by residential real estate.[22] Under the statute, it is unlawful to discriminate in the availability or terms or conditions of a real estate-related transaction.[23] The statute does allow persons engaged in property appraisals to take into considerations any factors other than race, color, religion, national origin, sex, handicap, or familial status.[24]

The statute also prohibits discrimination in the access to or membership in any multiple listing services, real estate brokers' organizations, or other services related to the business of selling or renting dwellings.[25] It is also impermissible to discriminate in the terms or conditions of access or membership in any of these organizations or services.[26]

The FHAA makes it unlawful for any person to interfere in another person's rights under the statute:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [provisions of the FHAA].[27]

[illegible]

[illegible]

[illegible] and 2.

[illegible]

[illegible] 24 C.F.R. § 100.115 (1993).

[illegible]

[illegible]

[illegible] 24 C.F.R. § [illegible] (1993).

[illegible] 24 C.F.R. § [illegible] (1993).

[illegible]

As with violations of other FHAA provisions, a violation of this section may be brought as a HUD complaint or as a private lawsuit.[28]

The FHAA creates exemptions for certain policies and types of housing and excludes certain classes of persons from the protections of the statute. In particular, Congress exempted housing providers who adhere to any reasonable governmental restrictions on maximum dwelling occupancy.[29] Thus a private housing provider's occupancy code is not automatically enforceable merely because it complies with a governmental ordinance; the ordinance itself must be reasonable.

The FHAA also exempts two types of housing from some of the responsibilities and limitations of the statute.[30] First, the FHAA exempts single-family homes sold or rented by an owner without the use of any brokering or agent services or the use of any form of discriminatory advertisement.[31] This exemption only applies to an owner who does not own more than three single-family houses at one time,[32] and it only applies to one house per owner sold within a 2-year (24-month) period if the house is not owner occupied.[33] The FHAA also exempts units in buildings that are occupied or intended to be occupied by no more than four families living independently of each other, as long as the owner uses the building as a residence.[34]

The FHAA provides limited exemptions for religious organizations, private clubs, and housing for older persons.[35] Religious organizations and any organizations supervised by or controlled in conjunction with a religious organization may limit the sale, rental, or occupancy of noncommercial dwellings to persons of the same religion, as long as membership in that religion is not restricted because of race, color, or national origin.[36] Additionally, private clubs that own or operate noncommercial lodgings incident to their primary purposes may limit, or give preference in, the rental or occupancy of such lodgings to its members.[37]

The FHAA prohibits housing communities from excluding families with children under the age of 18, unless the community qualifies as exempt housing for older persons. A community may qualify as exempt housing for persons age 55 and older if it meets each of the following requirements: (a) it has significant facilities and services for the physical or social needs of older individuals, or if it is not practicable to furnish such facilities and services, it provides important housing opportunities for older persons; (b) at least 80 percent of the units are occupied by at least one person age

28 A complaint alleging interference may be brought to HUD pursuant to 42 U.S.C. § 3610(a)(1)(A)(i) (1988) or filed as a private civil action pursuant to § 3613(a)(1)(A). In addition, the Attorney General may prosecute criminal violations under § 3631 or file a civil suit under § 3617.

29 *Id.* § 3607(b)(1); 24 C.F.R. § 100.10(a)(3) (1993).

30 The exemptions in 42 U.S.C. § 3603(b) apply only to the discrimination prohibited in § 3604 (general sale or rental prohibitions), except for § 3604(c) (advertisements or other practices).

31 *Id.* § 3603(b)(1).

32 *Id.* § 3603(b)(1); 24 C.F.R. § 100.10(c)(1)(i) (1993).

33 42 U.S.C. § 3603(b)(1) (1988); 24 C.F.R. § 100.10(c)(1)(ii) (1993). The owner may not be the current or most recent resident of the house at the time of the sale.

34 42 U.S.C. § 3603(b)(2) (1988).

35 *Id.* § 3607.

36 *Id.* § 3607(a); 24 C.F.R. § 100.10(a)(1) (1993).

37 42 U.S.C. § 3607(a) (1988); 24 C.F.R. § 100.10(a)(2) (1993).

55 years or older; and (c) the owner or manager publishes and adheres to policies and procedures evidencing the intent to house persons age 55 or older.[38]

Proving Discrimination

The Title VII Analogy

Generally, FHAA complaints, like Title VII claims, may be pursued based on three categories of discrimination: intentional discrimination, mixed-motive discrimination, and disparate impact. Historically, courts and ALJs have applied the burden of proof tests developed under Title VII to Title VIII cases.[39] Intentional discrimination, also known as disparate treatment, occurs when the reason for a respondent's adverse action against the complainant is based on the protected status of the complainant.[40] Mixed-motive discrimination is a form of disparate treatment in which the respondent takes adverse action against the complainant for both permissible and impermissible reasons.[41] Disparate impact occurs when a respondent's facially neutral policy adversely affects one protected group more than another, or a protected group more than a nonprotected group, without a business necessity justification.[42] Disparate impact cases, unlike intentional or mixed-motive discrimination, do not require proof of the respondent's discriminatory motive.[43] A complaint alleging discrimination may be investigated and litigated based on any combination of these theories.[44] It is HUD's responsibility to develop the investigation and analysis of the case based on these theories.[45]

Disparate Treatment or Intentional Discrimination

FHAA disparate treatment case law has evolved parallel to Title VII intentional discrimination claims.[46] While it is clear that, in order to maintain a disparate treatment claim, the complainant must prove that the respondent intentionally discriminated, the law remains uncertain regarding the extent of

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38 42 U.S.C. § 3607(b)(2)(C) (1988); 24 C.F.R. § 100.304 (1993).

39 *Id.* §§ 2000e-17 (1988 and Supp. III 1991). *See, e.g.*, Selden Apts. v. HUD, 785 F.2d 152, 159 (6th Cir. 1986) (adopting the burden of proof test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Despite the pervasive use of the Title VII analogy, the application of Title VII case law to Title VIII remains controversial. *See* McCormack, Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 Fordham L. Rev. 563 (1986).
HUD's OGC also finds the application of Title VII case law, developed prior to the Civil Rights Act of 1991, problematic in certain types of housing cases. For this reason, OGC deemphasizes the application of Title VII case law in certain types of Title VIII cases. Jonathan Strong, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Dec. 15, 1993 (hereafter cited as Strong, HUD OGC December 1993 interview).

40 International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977).

41 *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

42 International Bhd. of Teamsters v. United States, 431 U.S. at 335-36.

43 *Id.* at 335-36, n.15.

44 Schwemm, *Law and Litigation* § 10.1, p. 10-3.

45 "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 10 (hereafter cited as HUD Comments).

46 Ibid., p. 10-2. Showing intent is not required in Title VII class action cases.

the complainant's burden and the type of evidence required to support the claim.[47]

Under Title VIII, a plaintiff who alleges intentional housing discrimination may initially establish a prima facie case of discrimination by demonstrating the following: (1) membership in a protected class; (2) application and qualification to rent or purchase the unit involved; (3) rejection by the defendant; and (4) continued availability of the housing unit.[48] While the complainant's initial burden in disparate treatment cases under both Title VII and the FHAA has remained consistent, the courts have continued to debate what role the initial burden has in ultimately proving intentional discrimination.

Recently, in a Title VII case, the Supreme Court clarified the respective burdens of complainants and respondents once the prima facie case is established. In *St. Mary's Honor Center v. Hicks*,[49] the Supreme Court revisited the precedents established in *McDonnell Douglas Corp. v. Green* and *Texas Dept. of Community Affairs v. Burdine*.

Justice Scalia, writing for the five-justice majority in *Hicks*, held that if the complainant successfully demonstrates a prima facie case of intentional discrimination by direct or circumstantial evidence, a rebuttable presumption of intentional discrimination is created.[50] According to the Court, the presumption is merely a court-created procedural device that allows a conclusion to be drawn from the asserted facts and shifts the burden of producing evidence to the respondent.[51] However, the complainant always maintains the ultimate burden of persuading the trier of fact that the respondent intentionally discriminated.[52]

Once the presumption of intentional discrimination is established, the respondent must produce evidence of a legitimate, nondiscriminatory explanation for the adverse action, and that evidence must rebut the presumption.[53] The respondent need only present evidence of a legitimate reason, and need not demonstrate that he or she was actually motivated by the nondiscriminatory reasons offered.[54] If the respondent produces such evidence, then the complainant must be able to show that the nondiscriminatory reasons offered by the respondent were merely a pretext for intentional discrimination.[55] According to

47 For disparate treatment cases relying on direct evidence, see Dothard v. Rawlinson, 433 U.S. 321 (1977); and International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). For disparate treatment cases relying on indirect and circumstantial evidence, see McDonnell Douglas v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); and Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742 (1993). For a mixed-motive disparate treatment case, see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

48 *See, e.g.*, Selden Apts. v. HUD, 785 F.2d 152, 159 (6th Cir. 1986). "The criteria for establishing a prima facie case are not set in stone, and may differ depending on the facts and circumstances of a particular case (e.g., sales versus rental, refusal to rent versus discouragement, making unavailable versus interference, state of application process when discrimination occurred). Indeed, this four part *McDonnell Douglas* adaptation need not be satisfied when you have direct evidence of intent." Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, July 13, 1994, attachment, p. 1 (hereafter cited as DOJ comments, attachment).

49 Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742 (1993).

50 *Id.* at 2747.

51 *Id.*

52 *Id.* at 2747-48.

53 *Id.* at 2747.

54 *Id.* at 2749.

55 *Id.* at 2747.

a majority of the Supreme Court, a complainant cannot demonstrate that the nondiscriminatory reasons were mere pretext unless he or she proves "both that the reason was false, *and* that discrimination was the real reason" for the adverse action.[56]

To date, it appears that the Federal courts have not cited *Hicks* in a fair housing case.[57] However, because the earlier disparate treatment cases have been applied consistently to the FHAA, it appears that the Federal courts will likely follow the recent clarifications. Currently, only one ALJ decision has mentioned the *Hicks* decision.[58] Notwithstanding the ALJ's citation, HUD has never applied *Hicks* in a final decision, and OGC and FHEO maintain that *Hicks* does not apply to FHAA cases.[59]

Mixed Motive Disparate Treatment

A number of cases, in both administrative and judicial forums, have involved "mixed-motive" situations in which adverse action was taken for both discriminatory and permissible reasons. In most such cases, ALJs have applied a *Price Waterhouse* analysis.[60]

While applying the basic disparate treatment framework discussed above, in *Price Waterhouse* the Supreme Court held by plurality opinion that for purposes of Title VII "mixed motive" disparate treatment cases, the complaining party must show that a discriminatory factor "played a motivating part in an employment decision."[61] Once the plaintiff establishes the prima facie case, the employer may avoid "liability only by proving that it would have made the same decision even if it had not allowed [the discriminatory motive] to play such a role."[62] As in pretextual disparate treatment cases, the Court stated that the burden of persuasion remains with the plaintiff.[63]

However, the 1991 Civil Rights Act negated the *Price Waterhouse* decision as it applies to Title VII cases. Under the new statutory provisions, an unlawful employment practice is established when the plaintiff demonstrates that an impermissible motivating factor was involved, even if other motivating factors were present.[64] The employer's argument that the same employment decision would have been made absent the discrimination may be used

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56 *Id.* at 2752 (emphasis deleted).

57 As of December 22, 1993, there have been no reported applications of *Hicks* to any fair housing cases in the Federal courts.

58 HUD noted in its comments that only one ALJ has cited the *Hicks* decision; however, this ALJ decision was superseded by the Secretary's final order. *See* HUD Comments, p. 8. *See HUD v. Mountain Side Mobile Estates*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 at 25,559 n.10 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,064 (HUD Secretary Oct. 20, 1993).

59 HUD Comments, p. 10.

60 For cases in which ALJs have applied *Price Waterhouse*, see HUD v. Denton, 2 Fair Housing-Fair Lending (P-H) ¶ 25,014 (HUD ALJ Nov. 12, 1991); HUD v. Rollhaus, 2 Fair Housing-Fair Lending (P-H) ¶ 25,019 (HUD ALJ Dec. 9, 1991). *But see* HUD v. Hacker, 2 Fair Housing-Fair Lending (P-H) ¶ 25,038 (HUD ALJ Dec. 2, 1992). *See also* Selected Issues in the Enforcement of HUD Charges under the Fair Housing Amendments Act: A Report for the United States Commission on Civil Rights (Contract No. 40-3JJM-3-00175) (U.S. Commission on Civil Rights files).

61 Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989) (Brennan, J., plurality). However, because Justice Brennan's opinion represents only a plurality, it is important to consider that Justices White and O'Connor in their concurrences require the plaintiff to demonstrate that the discriminatory motive was a "substantial factor" in the decision. *Id.* at 259 (White, J., concurring); *id.* at 276 (O'Connor, J., concurring).

62 490 U.S. at 244-45.

63 490 U.S. at 246.

64 42 U.S.C. § 2000e-2(m) (Supp. III 1991).

only to mitigate damages. If the defense successfully argues this point, the plaintiff may only receive a declaratory judgment, limited injunctive relief, attorneys' fees, costs of the litigation, and backpay. However, the plaintiff will not receive damages or an order for an admission, reinstatement, hiring, promotion, or backpay.[65]

ALJs consistently applied Title VII analysis to fair housing cases prior to the Civil Rights Act of 1991.[66] It remains unclear whether or not the statutory revisions affecting Title VII should be interpreted to apply to Title VIII in mixed motive cases.[67] Federal courts and ALJs have continued to apply the *Price Waterhouse* analysis, despite the 1991 revisions in the Civil Rights Act.[68] However, HUD Secretary Cisneros has begun to argue that *Price Waterhouse* is no longer applicable to the FHAA because of the congressional action.[69] Instead, the Secretary argues that ALJs should follow "Title VIII law which allows a plaintiff to prevail by showing that a discriminatory motive was one of the factors motivating a defendant's actions."[70]

Disparate Impact

Disparate impact cases involve facially neutral policies that, either intentionally or unintentionally, have an adverse effect on a protected class.[71] By analogy from the Supreme Court's decision in *Griggs*, a complainant established a prima facie case of disparate impact by showing that a neutral policy caused a disproportionate exclusion of a protected class.[72] This prima facie case created an inference of discrimination that shifted the burden of persuasion to the respondent to show that the discrimination was justified by a business necessity.

In *Wards Cove* the Supreme Court clarified the balance of burdens by indicating that the complainant carried the ultimate burden of persuasion throughout the case as in disparate treatment cases.[73] In the 1991 Civil Rights Act, Congress overruled much of the Court's decision in *Wards Cove*.[74] One housing expert concludes it is unclear from the legislative history whether or not Congress intended the reversal to apply to the FHAA in

65 *Id.* § 2000e-5(g).

66 *See* Secretary of HUD v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

67 *See* Schwemm, *Law and Litigation*, § 10.3, p. 10-16.

68 Blaz v. Barberton Garden Apt., 2 Fair Housing-Fair Lending (P-H) ¶ 15,776 (6th Cir. July 29, 1992) (per curiam); Cato v. Jilek, 779 F. Supp. 937, 943-44 & n. 19 (N.D. Ill. 1991) (the case was decided contemporaneous with the passage of the Civil Rights Act of 1991, and acknowledges that, despite the statute's effect on Title VII, *Price Waterhouse* still controls in Title VIII cases.); HUD v. Rollhaus, 2 Fair Housing-Fair Lending (P-H) ¶ 25,019 (HUD ALJ Dec. 9, 1991); HUD v. Denton, 2 Fair Housing-Fair Lending (P-H) ¶ 25,014 at 25,197 (HUD ALJ Nov. 12, 1991). But, see, HUD v. Hacker, 2 Fair Housing-Fair Lending (P-H) ¶ 25,038 (HUD ALJ Dec. 2, 1992) (the ALJ neither applied a *Price Waterhouse* analysis nor explained why he did not follow the precedent).

69 *See* HUD v. Sams, HUDALJ No. 03-92-0245-1 (Dec. 3, 1993) (Secretary's Post-Hearing Brief) at 27, n.14. The Secretary maintains that *Price Waterhouse* was never applicable to mixed motive cases under Title VIII. *See also* Strong, HUD OGC December 1993 interview.

70 HUD v. Sams, HUDALJ No. 03-92-0245-1 (Dec. 3, 1993) (Secretary's Post-Hearing Brief) at 28, n.14.

71 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

72 Griggs v. Duke Power, 401 U.S. at 431.

73 490 U.S. at 659-60. *See also* Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: *Semantics as Substance*, 39 AM. U. L. REV. 615 (1990).

74 42 U.S.C. § 2000e (Supp. III 1991).

disparate impact cases.[75] The legislative history notes that "a number of other laws banning discrimination. . . are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act."[76] As examples of laws affected, the committee cited the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act and specifically referenced both disparate impact claims and mixed motive cases.

In *HUD v. Mountain Side Mobile Estates*, the Secretary remanded ALJ Cregar's initial decision three times.[77] Secretary Cisneros and ALJ Cregar disagreed over the application of the business necessity justification in Title VIII disparate impact cases. ALJ Cregar asserts that, by analogy to the decision in *Wards Cove*, the respondent has only a burden of production to demonstrate that the challenged practice has a manifest relationship to and serves a legitimate business interest, and that the ultimate burden of persuasion always remains with the complaining party.[78] The Secretary asserts that *Wards Cove* does not apply to Title VIII, and, even if one interprets *Wards Cove* as applying to Title VIII, the Civil Rights Act of 1991 overruled *Wards Cove*.[79] According to the Secretary, once the complaining party asserts a prima facie case of discrimination, the burden of persuasion shifts to the respondent to show that the challenged practice is a sufficiently compelling business necessity.[80]

By requiring a compelling business necessity, the Secretary's position indicates an interest in providing closer scrutiny for the business necessity justification. The Secretary's order is important to future cases, because his position appears to balance the ultimate burden of persuasion for a case on both parties, rather than requiring the complaining party ultimately to convince the adjudicator. By remanding the initial decision three times, the Secretary indicated a strong interest in using his review process to set agency policy.

Additionally, HUD has indicated its intent to develop regulations clarifying "that a violation of the Fair Housing Act may be proven under either a disparate treatment standard

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75 *See* Schwemm, *Law and Litigation*, § 10.4(2)(a), p. 10-26.

76 U.S. Congress, House, Committee on the Judiciary, *Civil Rights Act of 1991*, 102d Cong., 1st sess., 1991, H. Rept. 102-40(II), p. 4, *reprinted in* U.S.C.C.A.N. 549, 696-697.

77 HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 (HUD Secretary July 19, 1993) (disparate impact, if proven, violates act), *rev'g and remanding*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,048 (HUD ALJ June 18, 1993) (initial decision on remand), *on second remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,064 (HUD Secretary Oct. 20, 1993) (reversing ALJ's disparate impact analysis, and entering judgment for charging party), *on third remand*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD ALJ Dec. 17, 1993) (third initial decision on remand).

78 *See* HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,048, at 25,465-66 (HUD ALJ June 18, 1993) (initial decision on remand).

79 HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 at 25,493.

80 HUD v. Mountain Side Mobile Estates, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1, at 9-10 (HUD Secretary Oct. 20, 1993) (decision and order).

or under an effects test or disparate impact standard."[81]

The Secretary's Role in Litigating Complaints

Secretary-Initiated Complaints

In addition to providing an administrative mechanism for individual's complaints, the FHAA also empowered the Secretary of Housing and Urban Development to file a complaint on his own behalf.[82] The filing of such complaints has been delegated to the Assistant Secretary for Fair Housing and Equal Opportunity.[83] Although it appears that the FHAA does not require Secretary-initiated complaints to be filed within a specified statutory period, HUD regulations require the Assistant Secretary to file a complaint within 1 year of the occurrence or termination of the alleged discriminatory housing practice.[84]

Under the regulations, HUD may investigate instances of suspected housing discrimination without first receiving a specific complaint.[85] Such an investigation may eventually lead to the filing of a Secretary-initiated complaint.[86] Commenters on HUD's proposed regulations objected to the provision requiring written authorization of such investigations by the Assistant Secretary, arguing that it was impracticable and would cause delays. The commenters advocated delegation of the authorization to regional offices. HUD responded that in the absence of a complaint, the involvement of the Assistant Secretary would work "to ensure that sufficient grounds for investigation exist and to ensure the efficient utilization of resources,"[87] while stating that eventually such delegations to regional offices would take place "as the Department develops uniform internal standards to govern the initiation of investigations and gains experience with HUD-initiated investigations. . . ."[88]

Such delegations have not yet taken place, nor has HUD published any guidance as to what is properly the subject of a Secretary-initiated complaint. What instruction exists on the topic is in the form of directions to the regional offices to forward suggested complaints to headquarters, with very modest results.[89]

The regulations also state that the Assistant Secretary may employ systemic processing for any complaint whenever she "determines that the alleged discriminatory practices contained in the complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or

81 HUD Unified Agenda for FHEO, #1621 Discriminatory Conduct Under the Fair Housing Act (FR-3534), 58 Fed. Reg. 56,445 (1993). Although OGC could not reveal the details of the proposed regulations, Associate General Counsel Carole Wilson indicated that she believes the regulations will merely codify the position that HUD has advanced since the inception of the FHA amendments. *See* Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Dec. 15, 1993 (hereafter cited as Wilson, HUD OGC December 1993 interview).

82 42 U.S.C. § 3610(a)(i) (1988).

83 54 Fed. Reg. 13,121 (1989); *see* 24 C.F.R. § 103.15 (1993).

84 24 C.F.R. § 103.15 (1993). *See also* Schwemm, *Law and Litigation*, § 24.4(1), p. 24-9.

85 24 C.F.R. § 103.200(b) (1993).

86 *Id.*

87 24 C.F.R. Ch. I, Subch. A, App. I, p. 953 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

88 *Id.* at 954.

89 *See* chap. 5.

will affect a large number of persons."[90] This determination may:

> be based on the face of the complaint or on information gathered in connection with the investigation. Systemic investigations may focus not only on documenting facts involved in the alleged discriminatory housing practice that is the subject of the complaint, but also on review of other policies and procedures related to matters under investigation, to make sure that they also comply with the nondiscrimination requirements of the FHAA.[91]

The provision for Secretary-initiated complaints apparently has been little used to date. In fact, only eight such complaints have been filed since March 1989, when the act took effect.[92] Of these, five were allegations of discriminatory advertising against families with children; one was an allegation of race discrimination; and two involved the construction of buildings inaccessible to the handicapped.

The allegation of race discrimination was referred to the Justice Department as a pattern and practice case, and subsequently resolved through a consent decree.[93]

Of the five advertising cases, two allege discriminatory advertising by the publishers of telephone yellow pages.[94] The first, against Southwestern Bell, was filed January 15, 1993, and has not been resolved; according to HUD's database, it is open in the regional FHEO office.[95] The other, against US West, was filed and conciliated virtually simultaneously in November 1993, but the terms of the conciliation agreement have been kept secret by the parties.[96] Conciliation agreements are to be made public except when the parties request nondisclosure and when the "Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act."[97]

Of the remaining three advertising cases, one was filed against a real estate firm,[98] one against a tricounty multiple listing service and its member real estate associations,[99] and one against a condominium development.[100] The two real estate cases, filed in March 1993, are also reported as open in regional FHEO. Only the condominium case, filed in September 1992, has been charged, and the charge was issued in December 1993. The portion of the complaint involving the condominium homeowners association was conciliated in

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90 24 C.F.R. § 103.205 (1993).

91 *Id.*

92 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Suzanne Crowell, U.S. Commission on Civil Rights, Dec. 21, 1993 (hereafter cited as Pratt letter).

93 U.S. v. Arizona Oddfellow-Rebekah Hous., No. Civ 91-802 PHX WPC (D. Ariz. Mar. 2, 1992).

94 Mansfield v. Geschwind, et al. (Southwestern Bell Yellow Pages, Inc.) (HUD No. 07-93-0205-8) and Achtenberg v. US West Marketing Resources Group, Inc. (HUD No. 08-94-0046-8).

95 Pratt letter.

96 Ibid.

97 24 C.F.R. § 103.330(b) (1993).

98 Guarraia v. Lange, HUD No. 03-93-0429-8, (HUD Secretary Mar. 9, 1993) (HUD-903 Complaint).

99 Guarraia v. Koerner, HUD No. 03-93-0430-8, (HUD Secretary Mar. 9, 1993) (HUD-903 Complaint).

100 Mansfield v. Indian Summer Homeowners Ass'n, HUD No. 09-92-1797-8, (HUD Secretary July 20, 1992) (HUD 903 Complaint).

January 1993, prior to the charge.[101] The conciliation agreement provided that the homeowners association would carry out a variety of affirmative marketing activities and place $5,000 in escrow to be used to construct a children's playground and swimming pool, with any excess to be contributed to a nonprofit organization serving children's needs. The remaining portion against the development company and its owners is the subject of the charge and is now in Federal district court[102] as a result of an election.

The remaining two Secretary-initiated cases concern application of the accessibility guidelines to new construction. The first such complaint was filed in May 1992,[103] and is reported open in FHEO headquarters.[104] It alleges that new construction covered by FHAA violates the law by failing to provide wheelchair accessibility and grab bars in bathrooms.

The second accessibility complaint is the only case to date to be charged and completely resolved through the administrative process.[105] The complaint was filed September 26, 1991;[106] a charge was issued December 5, 1991;[107] and a consent decree was issued April 28, 1992.[108]

In all, only one of three cases resolved can be said to demonstrate HUD's determination to use the secretarial complaint process to send a signal about its commitment to enforce Title VIII, because it is the only case to be publicly resolved with HUD's participation. Of the other two cases, as noted above, one (Oddfellows) was referred to the Justice Department and the other one (US West) privately conciliated. The latter is particularly troubling, since US West is a large corporation whose activities are closely monitored by others in the telecommunications industry as well as by the investment community, and its acquiescence to a given remedy could send a strong signal to other companies similarly situated.

Secretarial Review

The FHAA allows the Secretary to review initial decisions of ALJs with respect to all findings of fact and conclusions of law, and to issue final decisions.[109] In issuing a final decision, the Secretary has great latitude to affirm, modify, or set aside, in whole or in part, the initial decision of the ALJ.[110] In addition, the Secretary may send the initial decision

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101 Mansfield v. Indian Summer Homeowners Ass'n, HUD No. 09-92-1797-3, (HUD Secretary Apr. 20, 1993) (conciliation agreement). The agreement was signed by the respondent Jan. 6, 1993, and by Leonora Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity Apr. 20, 1993.

102 U.S. v. Brigley (D.Az.); *see* DOJ comments, attachment, p. 2.

103 Mansfield v. Sundial Apts, HUD No. 10-92-0340-8, (HUD Secretary May 19, 1992) (HUD-903 complaint).

104 Pratt letter.

105 Mansfield v. Shawntana Development Corp., HUD No. 09-91-2048-3, (HUD Secretary Sept. 26, 1991) (HUD 903 complaint).

106 *Id.*

107 Mansfield v. Hansen, HUD ALJ No. 09-91-2048-3, (HUD Secretary Dec. 5, 1991) (determination of reasonable cause and charge of discrimination).

108 Mansfield v. Hansen, HUD ALJ No. 09-91-2048-3 (HUD ALJ Apr. 28, 1992) (consent order). The substance of this case is discussed in chap. 8.

109 42 U.S.C § 3612(h)(1) (1988); 24 C.F.R. § 104.930(a) (1993). The ALJ decisions are issued after an administrative hearing in accordance with 42 U.S.C § 3612(g) (1988). For a discussion of the administrative hearing process, *see* chap. 4.

110 24 C.F.R. § 104.930(a) (1993).

back to the ALJ on remand for further proceedings.[111]

On December 9, 1991, the Secretary delegated the authority to review and remand ALJ decisions under the FHAA to the Executive Officer for Administrative Operations and Management.[112] In practice, the Executive Officer for Administrative Operations and Management signs the order returning the initial decision back to the ALJ on remand.[113] However, when the Secretary issues a final decision, the opinion is written and signed by the Secretary's Chief of Staff. Although the FHAA regulations and delegations do not contain an official designation of authority to the Chief of Staff, the designation appears under the general provision for Secretary review found in the Department of Housing and Urban Development Act (HUD Act).[114] Associate General Counsel Carole Wilson surmised that the Secretary delegated the FHAA review authority to the executive officer simply to maintain procedural continuity through a nonpolitical career position, while designating to the Chief of Staff all of the Secretary's authority under the HUD act to write and issue the substantive policies of the agency.[115]

The FHAA Secretary review process is consistent with the agency review process contemplated by the Administrative Procedures

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111 *Id.* The Secretary, or his designee, is required to serve the final order on all parties and aggrieved persons within 30 days of the date of the initial ALJ decision. 24 C.F.R. § 104.930(a) (1993). If the Secretary does not issue a final decision within the 30-day time period, the initial decision of the ALJ shall be deemed the final decision effective as of 30 days after the issuance of the ALJ's initial decision. 24 C.F.R. § 104.930(b) (1993).
If the Secretary remands the initial decision, the ALJ has up to 60 days from the date of the Secretary's remand order to issue another decision on remand. 24 C.F.R. § 104.930(d) (1993). However, in the event that it is impractical for an ALJ to issue a decision on remand within 60 days, the ALJ may delay the decision after notifying all the parties, the aggrieved persons, and the Assistant Secretary of the reasons for the delay. *Id.*

112 56 Fed. Reg. 65,740 (1991).

113 *See, e.g.*, HUD v. Holiday Manor Estates Club, Inc., HUDALJ No. 05-89-0533-1 (HUD Secretary Dec. 23, 1991) (remand order).

114 The HUD act includes a general provision for secretarial review of all determinations, orders, or interim rulings of HUD hearing officers. 42 U.S.C. § 3535(d) (1988). Under the HUD act regulations, any party may request review of determinations or orders of HUD hearing officers by filing a written petition with the Secretary within 15 days of receipt of the determination or ruling. 24 C.F.R. § 26.25(a) (1993). The Secretary, or the Secretary's designee, has discretion to grant or deny the petition for review, which is limited to review of the factual record produced before the hearing officer. *Id.* § 26.25(c). Certain interlocutory rulings may also be petitioned within 10 days of their issuance. *Id.* § 26.26. Pursuant to the HUD act regulations, the Secretary designated the counselor to the Secretary, and subsequently the Chief of Staff, to exercise all review powers under the HUD act. *See* 57 Fed. Reg. 9426 (1992) and 57 Fed. Reg. 20,125 (1992). To date, Secretary Cisneros has continued the designation of the review authority to his Chief of Staff, Bruce Katz.
In the delegation of authority to the chief of staff, HUD indicated that the delegation applied, in addition to named hearings, to other hearings required by statute or regulation, to the extent the rules are not inconsistent with the rules under the HUD act. 57 Fed. Reg. 20,125 (1992). Thus, a party affected by a HUD ALJ decision may petition for review of that decision under the FHAA, as long as the FHAA secretarial review process is not inconsistent with the HUD act process.
Despite the apparent crossover in delegations and designations, HUD stated in its comments that neither the General Counsel nor the ALJs thus far have looked to the Part 26 regulations as governing Part 104 hearings. According to OGC, "the assumption has been that the Part 104 regulations are the only regulations that directly apply to such hearings, though other Departmental regulations may be looked to for nonbinding guidance. . . . Thus, the General Counsel's office would consider it an open question that has yet to be reached whether the Part 26 regulation on interlocutory appeals applies to proceedings under Part 104." HUD Comments, p. 11. This issue may require recognition from OGC because the FHAA appears to permit broader secretarial review than the HUD act's factual record limitations.

115 Wilson, HUD OGC December 1993 interview.

Act (APA).[116] Under the APA, agency heads are not required to defer to the factual findings of the ALJ in the same way that an appellate court must defer to a trial judge's factual determinations. In fact, the APA states that "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[117] Thus, the HUD Secretary may overturn an ALJ's factual and/or legal determinations.

In practice, the Secretary reviews both the factual record and issues of law.[118] This broad power to review ALJ decisions is particularly significant because it allows HUD greater latitude in setting policy through the administrative adjudicative process. In addition, the Secretary review process, unlike judicial review, does not require the involvement of DOJ.[119] To date, the Secretary has remanded six ALJ initial decisions and issued final decisions in four of them.[120] In all six cases, OGC, serving as both the charging party on behalf of the

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116 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1988).

117 *Id.* § 557(b).

118 *Compare In re* Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (remanded ordering record reopened), *rev'g and remanding*, HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *on remand*, HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,060 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded*, HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19 1993) (decision), *on second remand*, HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd*, HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994); *with*

HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 (HUD Secretary July 19, 1993), *rev'g and remanding*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,048 (HUD ALJ June 18, 1993) (initial decision on remand), *on second remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD Secretary Oct. 20, 1993) (reversing ALJ's disparate impact analysis, and entering judgment for charging party), *on third remand*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD ALJ Dec. 17, 1993) (third initial decision on remand).

119 24 C.F.R. § 104.950 (1993); "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988," Dec. 7, 1990, p. 8 (hereafter cited as Memorandum of Understanding). For a discussion of DOJ's role in the judicial review process, *see* chap. 11.

120 HUD v. Ocean Sands, Inc., 2 Fair Housing-Fair Lending (P-H) ¶ 25,055 (HUD ALJ Sept. 3, 1993) (initial decision), *aff'd in part, modified in part, remanded in part*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,056 (HUD Secretary Oct. 4, 1993), *on remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,061 (HUD ALJ Nov. 15, 1993) (initial decision on remand);

In re Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (remanded ordering record reopened), *rev'g and remanding*, HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *on remand*, HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,060 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded*, HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19, 1993) (decision), *on second remand*, HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd*, HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994);

HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 (HUD Secretary July 19, 1993), *rev'g and remanding*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,048 (HUD ALJ June 18, 1993) (initial decision on remand), *on second remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD Secretary Oct. 20, 1993) (reversing ALJ's disparate impact analysis, and entering judgment for charging party), *on third remand*, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD ALJ Dec. 17, 1993) (third initial decision on remand).

HUD v. Holiday Manor Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,016 (HUD ALJ Nov. 26, 1991) (initial decision); *remanded*, HUDALJ No. 05-89-0533-1 (HUD Secretary Dec. 23, 1991) (remand order), *motion to intervene* complainant and HUD, and as the counsel for the Secretary, believed that the ALJs decided incorrectly the cases as a matter of law and/or fact. Based on the procedures followed in these six cases, it appears that OGC simultaneously files a motion for reconsideration or partial reconsideration with the ALJ, a memorandum in support of the motion for reconsideration, and a motion for remand with the Secretary.[121] The motions for remand, signed by OGC staff, state:

> Counsel for the Secretary hereby moves the Secretary, pursuant to 42 U.S.C. § 3612(h) and 24 C.F.R. § 104.930(a) and (d), to remand the initial decision for 45 days so that the ALJ may fully and fairly consider the matters raised in the motion to reconsider.[122]

Because OGC serves as counsel for the Secretary, it appears that the motion, on its face, has the Secretary, in his adversarial capacity, requesting a remand from himself, in his adjudicative capacity. HUD asserts that, "When the Secretary grants a motion for remand of an ALJ decision, the Secretary is not requesting a remand from himself in his adjudicative capacity. Rather, the Secretary, as the agency head, is exercising his review authority under 24 C.F.R. § 104.930 (1993), to remand the ALJ's initial decision for further proceedings."[123]

The language of each remand order signed by the Executive Officer for Administrative Operations and Management states:

> In making this remand, the Secretary makes no determination on the merits of either the initial decision or the motion for reconsideration. This remand is to allow Respondents the opportunity, as provided by 24 C.F.R. § 104.450(b), to answer the motion for reconsideration, and also to allow the ALJ an opportunity to decide the motion fully and fairly before his initial decision would become final pursuant to 42 U.S.C. § 3612(h) (1) and 24 C.F.R. § 104.930(b).[124]

It appears that rather than allowing the ALJ to rule on the motion to reconsider, the Secretary requires the ALJ to reconsider the initial decision by remand. The practical consideration appears to be that before issuing a final

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denied, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022 (HUD ALJ Jan. 21, 1992), *on remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,025 (HUD ALJ Feb. 21, 1992) (initial decision on remand), *aff'd in part, remanded in part*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992) (final decision);

HUD v. Dedham Hous. Auth., 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUD ALJ Nov. 15, 1991) (initial decision), *remanded*, HUDALJ No. 01-90-0424-1 (HUD Secretary Dec. 13, 1991) (remand order), *on remand*, 2 Fair Housing-Fair Lending ¶ 25,023 (HUD ALJ Feb. 4, 1992) (initial decision on remand); and

HUD v. Denton, 2 Fair Housing-Fair Lending (P-H) ¶ 25,014 (HUD ALJ Nov. 12, 1991) (initial decision), *remanded*, HUDALJ Nos. 05-90-0012-1 and 05-90-0406-1 (HUD Secretary Dec. 12, 1991), *on remand*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,024 (HUD ALJ Feb. 7, 1992) (initial decision on remand).

121 *See, e.g.*, HUD v. Holiday Manor Estates Club, Inc., HUD ALJ No. 05-89-0533-1 (Dec. 23, 1991) (motion for remand of the administrative law judge's initial decision, motion for partial reconsideration of initial decision and order, and memorandum in support of motion for partial reconsideration).

122 *See, e.g.*, HUD v. Denton, HUD ALJ Nos. 05-90-0012-1 and 05-90-0406-1 (Dec. 11, 1991) (HUD's motion for remand of the administrative law judge's initial decision).

123 HUD Comments, p. 11.

124 *See, e.g.*, HUD v. Holiday Manor Estates Club, Inc., HUD ALJ No. 05-89-0533-1 (Dec. 23, 1991) (order). Although the regulations permit a 60-day remand period, the Secretary, to date, has given the ALJs 45 days to reconsider their initial decisions. According to OGC staff, the remand period allows OGC more time to formulate its arguments on appeal, and can "stop the clock" for up to 60 days. Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Wilson, HUD OGC July 1993 interview).

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