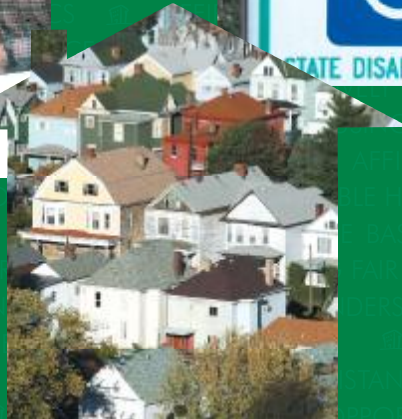




Fair Housing for HOME Participants





Understanding the Basics

“Fair Housing for HOME Program Participants: Understanding the Basics,” describes the Federal fair housing laws and regulations that apply to HOME participating jurisdictions (PJs), with an emphasis on those requirements that prohibit discrimination in housing based on a person’s race, color, religion, sex, familial status, national origin, age, or disability. This overview includes a discussion of the Fair Housing Act, which applies to housing and housing related programs regardless of whether or not they receive Federal financial assistance, and a discussion of the Federal civil rights laws which apply only to recipients of Federal financial assistance, including HOME PJs.

This publication is the first in the series “Fair Housing for HOME Program Participants.” The purpose of the series is to provide technical assistance to HOME PJs and their housing partners on the fair housing laws and regulations that apply to HOME Program activities. Specifically, this series reviews the applicable Federal fair housing requirements, illustrates best practices in promoting fair housing, and highlights PJ responsibilities for ensuring compliance with fair housing requirements. For purposes of this publication, the PJ’s “housing partners” include all persons and entities who use HOME Program funds, including, but not limited to, the PJ and its recipients, state recipients, contractors, subcontractors, developers (including community housing development organizations), owners, and management agents. Unless otherwise specified, the fair housing requirements extend to the PJ and all its housing partners.

Relevant Federal Fair Housing Requirements

Fair housing protections are guaranteed and regulated through a myriad of Federal, state, and local statutes, ordinances, regulations, guidelines, and executive orders. Yet, in spite of the complexity of the legal constructs established to guarantee the right to fair housing, this right itself is quite simple to understand and to implement: No person shall be subjected to discrimination because of race, color, religion, sex, disability, familial status, age, or national origin.¹

Title VI of the Civil Rights Act of 1964

One of the first civil rights laws applicable to recipients of U.S. Department of Housing and Urban Development (HUD) funding was Title VI of the Civil Rights Act of 1964. It

prohibits discrimination on the basis of race, color, and national origin in all Federally assisted programs. As recipients of HOME Program funding, PJs and their housing partners are subject to this landmark legislation, and subsequent civil rights legislation that expanded its coverage and remedies.² Title VI provides broad discretion to HUD to impose record-keeping and reporting requirements to effectuate its nondiscrimination mandate, and to terminate or suspend funding to recipients for failure to comply with Title VI requirements.

Fair Housing Act

The most commonly known of the fair housing laws is the Federal Fair Housing Act, or Title VIII of the Civil Rights Act of 1968. This Act, amended in 1988, prohibits discrimination against certain classes of people (“protected classes”). The

¹ The Fair Housing Act’s implementing regulation at 24 CFR Part 100 uses the term “handicap” when referring to persons with disabilities. This publication will use the term “persons with disabilities” to refer to this protected class and the word “disability” to refer to “handicap.”

² Recent HUD guidance interprets Title VI to include the possibility that recipients may, depending on circumstances, be required to provide language assistance to persons who, as a result of their national origin, are limited in their English proficiency in order to improve access to their programs and activities. For more information on this issue, see the proposed guidance, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” published in the *Federal Register* on December 19, 2003 (Volume 68, Number 244). This is available online at HUD’s Office of Fair Housing and Equal Opportunity website at www.hud.gov/offices/fheo/library/lepFRguidance1.pdf.

protected classes are: race, color, religion, sex, national origin, disability, and familial status.³ The Act and its implementing regulations at 24 CFR Part 100 define who is protected, what type of housing is covered by the law, and what types of actions constitute illegal discrimination. The requirements of the Fair Housing Act apply to housing regardless of whether or not it is developed or otherwise assisted with Federal funds.

Although the Fair Housing Act generally requires applicants and residents to be given equal treatment irrespective of membership in a protected class, there are certain circumstances when the Act may require a housing provider to treat persons with disabilities differently, to enable them to have equal access to or enjoyment of housing and other housing related programs. For example, the Fair Housing Act directs housing providers to provide “reasonable accommodations” to persons with disabilities. This means a housing provider may have to change its rules, policies, or procedures to allow persons with disabilities equal access to housing. In addition, the Fair Housing Act contains minimal accessibility requirements that apply to the design and construction of new multifamily housing built for first occupancy after March 13, 1991. These accessibility requirements are explained in detail in the companion publication of this series, *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects*.

Redress for victims of housing discrimination has been more meaningful and more consistent since the passage of the 1988 Amendments to the Fair Housing Act. These amendments significantly raise the consequences for violating the law by removing limits on the recovery of damages and permitting the recovery of attorney’s fees. As a result, damages and settlements have increased substantially, and in some cases have reached tens of thousands of dollars. Currently, under the law, a complainant or HUD itself can file a discrimination complaint. An aggrieved person has up to one year after an alleged discriminatory housing incident to file a complaint.

No person shall be subjected to discrimination because of race, color, religion, sex, disability, familial status, age, or national origin.

Section 808(e)(5) of the Fair Housing Act further requires HUD to “administer [its] programs and activities in a manner affirmatively to further the policies of [the Fair Housing Act].” HUD imposes this requirement on recipients of its funds, including HOME Program PJs. In addition to prohibiting discrimination in HOME-funded housing, PJs must analyze impediments to fair housing in their jurisdictions, and take action to address these impediments. PJs must certify that they will affirmatively further fair housing in their

Consolidated Plans in accordance with 24 CFR 91.225, 91.325, and 91.425 for local governments, states, and consortia, respectively.

The companion guide in this series, *Fair Housing for HOME Program Participants: Affirmatively Furthering Fair Housing*, explores these issues and requirements in detail.

Section 504 of the Rehabilitation Act of 1973

Section 504 prohibits discrimination based upon disability in all programs or activities operated by recipients of Federal financial assistance, including HOME PJs and their housing partners. This coverage extends to all aspects of program administration and implementation by PJs, as well as the actual housing programs that receive HOME funds.

Section 504 and its implementing regulations at 24 CFR Part 8 obligate recipients to make their programs accessible to persons with disabilities, including:

- Providing a policy, practice, or rule modification, or an accessible feature in a unit or common area, if needed as an accommodation by an applicant or tenant with a disability, unless doing so would result in a fundamental alteration in the nature of its program or an undue financial and administrative burden.⁴
- Providing auxiliary aids and services necessary for communication with persons with disabilities;
- Operating housing that is not segregated based upon disability or type of disability unless authorized by Federal statute or executive order or unless necessary to provide as effective housing, aid, benefit, or services as those provided to others;⁵ and

³ “Familial status” is defined in the section “Discriminatory Housing Practices and Prohibited Actions” on page 3 of this publication.

⁴ See 24 CFR 8.4, 8.20, 8.24, and 8.33 for further requirements and guidance.

⁵ See 24 CFR 8.4(b)(i)(iv), and 8.4(c)(1).



- Performing a self-evaluation of their programs and policies to ensure that they do not discriminate based on disability.

In addition, Section 504 regulations establish physical accessibility requirements when Federal financial assistance is used for new construction or rehabilitation of housing. The regulations require a minimum percentage of accessible units. In order for a unit to be considered accessible under Section 504, it must meet the requirements of the Uniform Federal Accessibility Standards (UFAS). The Section 504 accessibility requirements for HOME PJs are **in addition** to the requirements imposed by the Fair Housing Act for newly constructed multifamily housing. See the companion publication in this series, *Fair Housing for the HOME Program Participant: Promoting Fair and Accessible Housing Opportunities in HOME Projects*, for more information housing accessibility.

Americans with Disabilities Act (ADA)

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities in all programs, activities, and services of a public entity (i.e., state or local government; or department, agency, special purpose district, or other instrumentality of a state, or states, or local government). The prohibitions against discrimination under Title II of the ADA are essentially the same as those in Section 504, except they apply to all programs, activities, and services of a public entity, not just those funded with Federal financial assistance.

Title III of the ADA prohibits discrimination on the basis of disability in public accommodations and commercial facilities. These do not include housing, but do include the rental office or a facility (such as child care) located in the housing project that is open to the public. Note that HOME funds can be used for the development costs of the rental office, but not for costs of public facilities.

For more information about ADA and its requirements, see the Department of Justice website at www.usdoj.gov/crt/ada/adahom1.htm.

Age Discrimination Act of 1975

This Act prohibits discrimination based upon age in Federally assisted and funded programs or activities in limited circumstances. It is not a violation of the Act to use age distinctions if such distinctions are permitted by statute for particular programs or if they are a factor necessary for the

normal operation of the program or the achievement of a statutory objective of the program or activity. Thus, it is not a violation of the Act for a HOME PJ or its housing partner(s) to operate elderly-only housing since the HOME statute permits such housing.

State and Local Fair Housing Requirements

In addition to Federal legislation, many states and localities have enacted fair housing legislation. PJs and their housing partners should become familiar with their own state and local fair housing laws, in addition to the Federal requirements. PJs can identify state and local resources through the National Fair Housing Advocate Online website at www.fairhousing.com. In addition, on an annual basis, HUD prepares a list of all state and local jurisdictions whose fair housing laws are substantially equivalent to the Federal laws. This list is available from the HUD field offices.

Discriminatory Housing Practices and Prohibited Actions

PJs are responsible for ensuring that all housing assisted with HOME funds is made available on a nondiscriminatory basis, without regard to race, color, religion, sex, age, national origin, disability, or familial status.

Protected Classes

All participants in the HOME Program should become familiar with the protected classes under Federal, state, and local law. While most of these classes are self-explanatory, the definitions for two of the Federal protected classes, familial status and persons with disabilities, are defined with some specificity in the law.

Familial Status

In accordance with the Fair Housing Act, a family with children is a household that includes “one or more individuals who have not attained the age of 18 years domiciled with (a) a parent or another person having legal custody of such individual or individuals; or (b) the designee of such parent or other person having such custody, with the written permission of such parent or other person.” The protections on the basis of familial status also apply to any person who is pregnant, or is in the process of securing legal custody of any individual who

has not attained the age of 18 years.⁶ Discrimination against families with children is prohibited, regardless of the ages of the children, or the number of children in a household. Note, familial status is defined in terms of the presence or expected presence of children, and does not include marital status or sexual orientation.

Notwithstanding the prohibition against discrimination on the basis of familial status, state and local governments do have the right to apply reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. In general, absent special circumstances, HUD believes that a maximum of two persons in a bedroom is a reasonable occupancy standard. Bedroom size, unit size, age of children, and other circumstances might affect the reasonableness of a two person per bedroom occupancy rule. The following examples illustrate these circumstances:

- In a unit that has two very large bedrooms, and ample living space, it might be unreasonable to deny the unit to five persons;
- It might be reasonable to deny a one-bedroom unit to a couple with a teenage child; however, it might be unreasonable to deny the same unit to a couple with an infant child;
- An occupancy policy that limits the number of *children* per unit is less likely to be reasonable than one that limits the number of *persons* per unit.

For a detailed discussion on establishing lawful occupancy standards, see “Fair Housing Enforcement—Occupancy Standards Notice of Statement of Policy,” published in the *Federal Register* on December 18, 1998, Volume 63, Number 243.

Persons with Disabilities

Both the Fair Housing Act and Section 504 define a person with a disability as one who: (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. This does not include current, illegal drug users. Persons with drug addiction, other than addiction caused by current, illegal use of a controlled substance or alcohol, are considered to have a disability.⁷ In

other words, it may be lawful to discriminate against current drug abusers, but may not be lawful to discriminate against recovering drug abusers. Note, the Fair Housing Act does not require that a dwelling be made available to “an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”⁸

Persons with disabilities are protected against acts of discrimination in the same ways as other protected classes. In addition, they are entitled to equal access by the mitigation or elimination of barriers in the built environment, or through changes in policies, practices, or procedures so that they can make effective use of their housing. These issues are explored in detail in the *Fair Housing for HOME Program Participants* series in the publications *Promoting Fair and Accessible Housing Opportunities in HOME Projects* and *Tenant-Based Rental Assistance*.

Discriminatory Housing Practices Under the Fair Housing Act⁹

In general, unlawful discrimination might include any action in which an individual or class of individuals in a specific protected class is treated differently than others who are not in that protected class, when the result of that action denies that individual or class of individuals equal access to or benefit of a housing opportunity. The provisions of nondiscrimination reach far beyond the failure to rent or sell a housing unit based on the protected class status of an applicant. The Fair Housing Act prohibits discrimination in all types of housing related transactions, including standard real estate transactions, lending, financing, appraising, insuring, and advertising. There need not be *an intent* to discriminate; if an action, even if neutral on its face, is discriminatory *in effect and has a disparate impact on a protected class*, it may be unlawful. The person or entity undertaking the action should conduct further analysis to determine that the action is not unlawful. Regardless of a person’s status as a member of a protected class, however, the law does not exempt him or her from meeting lawful requirements and conditions that might be imposed in the operation of a housing program or facility.

⁶ See 24 CFR 100.20.

⁷ See 24 CFR 100.201.

⁸ See 24 CFR 100.202(d).

⁹ While the specific practices described in this section are based on the Fair Housing Act, note that these unlawful practices, in general, are also prohibited under the requirements of Title VI of the Civil Rights Act of 1964.



Discriminatory housing practices are prohibited in all housing—both publicly- and privately-owned or developed housing. HOME-assisted housing and all of its related transactions must be provided in a nondiscriminatory manner. HUD defines unlawful discriminatory actions at 24 CFR Part 100, including:

- Discrimination in the sale or rental of a dwelling;
- Discrimination in the terms and use of housing;
- Discriminatory conduct by members of the real estate industry;
- Discriminatory advertising; and
- Discrimination in residential real estate-related transactions.

These unlawful discriminatory practices are summarized as follows:

Discrimination in the sale or rental of a dwelling

Discrimination in the sale or rental of a dwelling includes any refusal to sell or rent a dwelling based on the fact that the applicant is a member of a protected class. This includes:

- Refusing to negotiate for the sale or rental of a unit;
- Failing to accept or consider an offer;
- Refusing to sell or rent a unit;
- Failing to process an offer for sale/rental of a unit;
- Imposing different sales or rental prices;
- Using different qualification procedures or criteria; and
- Evicting or using different eviction criteria.

Discrimination in the terms and use of the housing

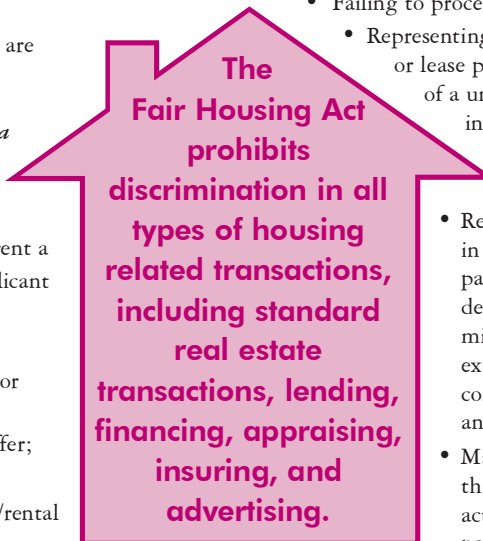
Discrimination in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the sale or rental includes:

- Using different lease provisions or terms of agreement of sale, such as security deposits, down payment requirements, or closing requirements;
- Failing or delaying maintenance or repairs;
- Limiting use of privileges, services, or facilities; and
- Denying or limiting services in connection with sale or rental of a unit because a person failed to provide sexual favors.

Discriminatory conduct by members of the real estate industry

It is unlawful for members of the real estate industry to try to influence housing related decisions of owners and buyers based on information or perceptions related to the residency of members of the protected classes, such as:

- Providing inaccurate or untrue information about the availability of dwellings for sale or rent to any person, including testers, regardless of whether that person is actually seeking a unit or not;
- Indicating through words or conduct that a unit is or is not available for inspection, sale, or rent;
- Failing to process an offer for sale or rental of a unit;
 - Representing that there are covenants, deeds, trusts, or lease provisions that restrict the sale or rental of a unit because of protected class, or enforcing such restrictions if they do exist;
 - Limiting information about available units for sale or rent;
- Restricting or attempting to restrict choice in order to perpetuate segregated housing patterns (steering) within a housing development or a neighborhood. This might involve withholding information, exaggerating information, or communicating assumptions about where an applicant might be “comfortable;”
- Making unavailable or denying a dwelling through practices, including taking adverse action against an employee who refuses to participate in discriminatory treatment;
- Employing codes and other devices to accept or reject applicants and limit options;
- Denying or delaying processing of an application; and
- Refusing to provide municipal services or insurance.



Discriminatory advertisements, statements, and notices

Owners must market available units in a nondiscriminatory manner. It is unlawful to make, print, or publish, or cause to be made, printed or published, any statement, notice, or advertisement that indicates a preference, limitation, or discrimination based on race, color, religion, sex, disability, familial status, or national origin, or an intention to make such a preference, limitation, or discrimination. This prohibition applies to all printed or published notices and statements, as well as any oral notices or statements. Written notices include any documents used with respect to the sale or

rental of a dwelling unit, such as applications, flyers, brochures, deeds, signs, banners, posters, or billboards.

Actions prohibited by this requirement include, but are not limited to, the following:

- Using words, phrases, photographs, illustrations, symbols, or forms that suggest that dwellings are available, or not available, to certain people based on race, color, religion, sex, disability, familial status, or national origin;
- Expressing to agents, brokers, employees, prospective sellers or renters, or any other person(s) a preference for or limitation on any purchaser or renter based on race, color, religion, sex, disability, familial status, or national origin;
- Selecting media or locations for advertising the sale or rental of dwellings that are unlikely to attract inquiries from particular segments of the housing market about the availability of or occupancy at a property because of race, color, religion, sex, disability, familial status, or national origin; and
- Refusing to advertise for the sale or rental of units or requiring different charges or terms for such advertising because of race, color, religion, sex, disability, familial status, or national origin.

Engaging in blockbusting practices

It is unlawful to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of members of a particular protected class, when motivated by profit (whether or not this profit is realized). This includes:

- Engaging in activity that conveys that a neighborhood is “changing;” and
- Encouraging a person(s) to sell or rent a dwelling through assertions that the entry of persons from a protected class into the neighborhood will result in undesirable consequences to the neighborhood such as the lowering of property values, increase in crime, or decline in quality of the schools.

Discrimination in the provision of brokerage services

It is unlawful to deny access to, or membership or participation in, any real estate-related service, such as the Multiple Listing Service (MLS). This includes:

- Setting different fees for access;
- Denying or limiting benefits to members;
- Imposing different standards or criteria for membership in a real estate sales or rental organization; and
- Establishing geographic boundaries or office location or

residence requirements for access to or membership or participation in MLS or other broker organization or service.

Discrimination in residential real estate-related transactions

In addition to the prohibitions against discrimination in the direct provision of housing, the Fair Housing Act specifically prohibits discrimination in the provision of any housing related service, including:

- The making or purchasing of loans and providing of financial assistance for the acquisition, rehabilitation, construction, maintenance, or repair of a dwelling based on an applicant’s protected class status;
- Discriminating in terms or conditions of the provision of loans secured by residential real estate;
- The selling, brokering, or appraising of residential real property in a discriminatory way; and
- For entities that are making loans or other financial assistance related to the purchase, rental, construction, or improvement of a dwelling, imposing different policies, practices, procedures, or qualification criteria on applicants based on protected class status.

PJs must also be certain that its housing partners are following the same procedures and applying the same standards to all applicants when determining creditworthiness. PJs who sell their loans on the secondary mortgage market should be aware that it is illegal to refuse to purchase a loan, or to set different terms or conditions for purchasing a loan, based on an individual’s membership in a protected class.

Retaliation and association

In addition to the forms of discriminatory behavior that are specified under the law, the law also deems the following as unlawful:

- It is illegal for anyone to threaten, coerce, intimidate or interfere with anyone exercising a fair housing right or assisting others who exercise that right; and
- It is illegal to discriminate against someone based on the fact that they associate with someone who is a member of a protected class, whether or not that person is a member of a protected class him or herself.

Special Considerations

The Fair Housing Act covers most private, public, and publicly funded housing. All participants in the HOME Program should be aware of the special circumstances and exceptions outlined in this section.



Affirmative Marketing

Advertising and marketing must be conducted in a manner that ensures equal access to housing opportunities generated by the use of HOME Program funds. In addition to the nondiscriminatory advertising guidelines that are imposed by the Fair Housing Act for all housing providers, public and private, the HOME Program imposes specific affirmative marketing requirements, designed to ensure that all HOME-funded developments are accessible to members of the protected classes. Effective affirmative marketing procedures specifically describe the steps that must be taken to advertise to those tenants who are not likely to apply for the housing without special outreach. Affirmative marketing may be part of a larger, more general marketing strategy focused on reaching all potential tenants.

Requirements

Every PJ and state recipient must adopt affirmative marketing procedures and requirements for rental and homebuyer projects containing five or more HOME-assisted units. The affirmative marketing procedures must be in place regardless of what specific activity the HOME funds will finance—acquisition, rehabilitation, and/or new construction. The PJ's marketing procedures must consist of actions to provide information and otherwise attract eligible persons in the housing market area to the available housing without regard to race, color, national origin, sex, religion, familial status, or disability. The affirmative marketing procedures need not apply to households with Housing Choice Vouchers or with tenant-based rental assistance provided with HOME funds.

Elements of Affirmative Marketing Procedures

PJs have an obligation to conduct their own outreach, specify additional outreach that they will require of owners, and evaluate the impact and success of their affirmative marketing program. The following elements of a PJ's or state recipient's affirmative marketing procedures are specifically required by the HOME rule:¹⁰

- A description of how the PJ informs, or plans to inform, the public, owners, and potential tenants about Federal fair housing laws and the PJ's affirmative marketing policy;
- The requirements and practices that each owner of HOME-funded housing must adhere to in order to carry out the PJ's affirmative marketing procedures and requirements;
- A statement of procedures to be used by owners to inform and solicit applications from persons in the housing market area who are not likely to apply for the housing without special outreach;
- A list of what records the PJ will keep, and what records the PJ will require owners to keep, regarding efforts made to affirmatively market HOME-assisted units, including the records required to assess the results of these actions; and
- A description of how the PJ will annually assess the success of affirmative marketing action(s) and what corrective actions will be taken where affirmative marketing requirements are not met.

Affirmative Marketing for Special Needs Housing

PJs may choose to invest HOME funds in a project(s) that serves targeted populations, in order to meet the special housing needs of certain groups of residents, such as persons with disabilities, large families, the elderly, farm workers, or participants in self-sufficiency programs. Using HOME funds to provide special needs housing is eligible when the PJ has specifically articulated its plans to develop special needs housing in its Consolidated Plan in order to address a gap in benefits and services to those persons. When HOME Program funds are used in conjunction with Supportive Housing Program funds for the development of permanent housing, however, only *homeless* persons with disabilities may be assisted, in accordance with the Supportive Housing Program rules found at 24 CFR Part 583. When HOME funds are used in special needs housing, access to this housing and/or assistance may not be denied on the basis of race, color, religion, gender, national origin, familial status, or age.

The HOME Program imposes specific affirmative marketing requirements, designed to ensure that all HOME-funded developments are accessible to members of the protected classes.

¹⁰ See 24 CFR 92.351(a)(2).

HOME-assisted special needs projects must meet all HOME Program requirements, including, for projects with five or more HOME-assisted units, the requirement to affirmatively market the project. Once developed, the HOME-assisted units in a special needs project must be affirmatively marketed to all persons with the special need. For housing that is developed for persons with disabilities, the housing must be marketed to all individuals with disabilities and cannot be restricted to persons with specific types of diagnoses or subclasses of persons with disabilities.¹¹ Advertisements for this type of housing must clearly state that the housing is open to any person with a disability; however, the advertisement can identify the specific services that are to be provided to residents. Further, a good faith effort must be made to inform and solicit applications from all members of the special needs group throughout the market area.

Housing for Older Persons

Certain housing that is designed and operated for older residents are exempt from the provisions the Fair Housing Act regarding familial status.¹² To qualify under this exemption, the housing must meet the requirements for housing that is operated for persons 62 and older, or those for housing that is operated for persons 55 and older.¹³

- *62 years of age and older.* Housing that is intended for, and solely occupied by persons that are 62 years of age and older is exempt from the prohibition against discrimination based on familial status. All household members must be age-eligible. “Underage” occupants are permitted only if they have occupied the housing since prior to September 13, 1988, or if they are employed by the housing provider and reside in the building in order to perform job functions, such as a live-in aide for a person with a disability.
- *55 years of age and older.* In order to qualify for an exemption from the prohibition against discrimination based on familial status for housing designed and

operated for persons who are 55 years of age or older, all three of the following conditions must be met:

- 80 percent occupancy by older persons. At least 80 percent of the occupied units in the housing facility or community for older persons must be occupied by at least one person who is 55 years of age or older;
- Intended and operated for older persons. The housing must be intended and operated for persons who are 55 years of age or older. In order to show this, the owner or manager of the housing must publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years of age or older. These written documents might include general rules, lease provisions, deed or other restrictions, and advertising; and
- Verification of occupancy. The housing provider must be able to verify the age of occupants of the building through reliable surveys and affidavits. The verification of age of occupants should be a part of the normal leasing or purchasing procedures. Verification can be based on a self-certification by an adult member of the household, or any state, local, or internationally issued document that contains current information about the age or birth of the possessor, such as a birth certificate, driver’s license, or passport.

If an occupant who is 55 years of age or older dies and leaves his or her property to a surviving spouse or heir(s) under the age of 55, and the surviving spouse or heir remains in the unit, that unit must be “counted” in the 20 percent of the occupied units that can be occupied by persons under age 55.¹⁴ Housing with occupants who are **not** over 55 and who first occupied the property prior to 1995 (the passage of HOPA) is not in violation of this rule, provided it was in compliance with the rule that was in effect at the time of occupancy.¹⁵

¹¹ Under HUD’s regulations implementing Section 504 of the Rehabilitation Act of 1973 a recipient is prohibited from providing individuals with disabilities or a class of individuals with disabilities different or separate housing, aid, benefits, or services from that provided to others unless such action is necessary to provide the individual with housing, aid, benefit, or services that is as effective as that provided to others. See 24 CFR 8.4(b)(1)(iv).

¹² These provisions are based on the Housing for Older Persons Act of 1995 (HOPA), which amended the Fair Housing Act provisions relating to housing for older persons. See 24 CFR Part 100 Subpart E.

¹³ The law also permits an exception for housing for older persons that is provided under a Federal or state program with approval by the Secretary of HUD.

¹⁴ Whether or not an underage heir or surviving spouse can occupy the unit upon the death of the 55 or older occupant is a matter of state or local law or custom and generally is governed by private contractual agreements between developers of housing for older persons and the individuals who purchased or rented the dwelling.

¹⁵ See 24 CFR Part 100 Subpart E for additional guidance on qualifying housing for older persons.



Housing that is eligible for the exemption for housing for older persons includes rental and homeownership housing facilities and communities that constitute a dwelling or group of dwellings governed by a common set of rules, such as a condominium development, mobile home park, or high-rise rental property, such as a HOME project. A portion of a single building or development does not constitute a housing facility or community. It is unlawful to operate a single building within a project as housing for older persons. The entire project must be designated as housing for older persons.

Newly constructed housing for first occupancy, or substantially rehabilitated property that was wholly unoccupied for at least 90 days prior to re-occupancy, need not comply with the 80-percent rule until at least 25 percent of its units are occupied.

Zoning and Occupancy Restrictions

State and local governments retain the right to impose reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling, as previously discussed in the definition of familial status.

Discrimination Based on Drug Use

Under the Fair Housing Act, it is lawful to refuse to sell or lease housing to a person who currently, and illegally, uses a controlled substance, or has an addiction caused by current, illegal use of a controlled substance. In addition, the Fair Housing Act does not protect a person from discrimination based on a conviction by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance.¹⁶

Single Family Housing that is Sold by an Owner

Single family housing that is sold by an owner is exempt from the Fair Housing Act when the owner:

- Does not have an interest in more than three single family houses at a time;
- Does not use a real estate broker to assist with the sale or rental of the property; and
- Does not publish, or cause to have published, any discriminatory advertisement(s).

Accessible Housing

Housing that is newly constructed and rehabilitated housing must be made accessible to persons with disabilities, in

accordance with Section 504, and newly constructed multifamily housing built for first occupancy after March 13, 1991, must meet certain minimal accessibility requirements in accordance with the Fair Housing Act. The applicability of the accessibility requirements, and the technical specifications that must be met to ensure accessibility, are discussed in more detail in the companion publication in this series, *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects*.

Inquiries About Disability¹⁷

Under the Fair Housing Act it is unlawful for a housing provider to inquire about:

- If an applicant for a dwelling has a disability or if a person intending to reside in a dwelling or anyone associated with an applicant or a resident has a disability, or
- The nature or severity of a disability of such persons.

Housing providers may make the following inquiries, provided these inquiries are made of all applicants, regardless of whether the applicant appears to have a disability or says he or she has a disability:

- An inquiry into an applicant's ability to meet the requirements of tenancy;
- An inquiry to determine if an applicant is a current, illegal drug abuser;
- An inquiry to determine if an applicant qualifies for a dwelling legally available only to persons with a disability or persons with a particular type of disability;
- An inquiry to determine if an applicant qualifies for housing that is legally available on a priority basis to persons with disabilities or to persons with a particular disability. For example, a HOME housing provider may ask applicants if they need units with accessible features.

Fair Housing Enforcement

Any person who believes he or she has been the victim of unlawful discrimination has the right to seek appropriate remedies under the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and/or Section 504.

For information about filing a complaint of discrimination, see the HUD Fair Housing and Equality Opportunity website at www.hud.gov/complaints/housediscrim.cfm.

¹⁶ See 24 CFR 100.10.

¹⁷ See 24 CFR 100.202.

Enforcement of the Fair Housing Act

The Fair Housing Act provides redress for discriminatory practices in any aspect of the rental, sales, or financing of housing; protects against pattern and practice of discrimination in any aspect of a housing related transaction; and protects against intimidation and coercion against a person for filing or cooperating in the investigation of a complaint of housing discrimination. Under the Fair Housing Act, any aggrieved person, including direct and indirect victims of discrimination,¹⁸ may seek remedy for unlawful discrimination by filing a complaint of discrimination with HUD, in Federal district court, or with a state and local agency where HUD has determined the state and local laws are substantially equivalent to the Fair Housing Act. HUD may also initiate a complaint itself.

HUD reviews and investigates complaints in a manner that provides all parties an opportunity to be heard and seeks voluntary and informal resolution to complaints, where possible. When conciliation cannot be reached, and HUD makes a determination that there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur, HUD issues a charge of discrimination. Each party is given an opportunity to have claims decided in a civil action brought by the Attorney General. If neither party elects to have the claims decided in Federal court, the case is referred to an Administrative Law Judge (ALJ). If an ALJ determines that there was, or is likely to be, an unlawful discriminatory housing practice, he or she issues an order for appropriate relief. This might include actual damages, injunctive relief, or other equitable relief. Civil penalties may be assessed in amounts up to \$60,000.

An aggrieved person can commence a private civil action in an appropriate United States district court or state court to obtain appropriate relief for a discriminatory housing practice.¹⁹ If the Federal or state court finds that a discriminatory housing practice has occurred, it can award the plaintiff actual and/or punitive damages, which are not limited in amount; or it may grant other types of relief to enjoin the defendant from engaging in such practice; or order affirmative action as may be appropriate.

Enforcement of Title VI of the Civil Rights Act of 1964

Recipients of Federal funds, including HOME PJs and their housing partners, are responsible for compliance with Title VI requirements that prohibit discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. In addition, Title VI protects those who file a complaint or cooperate in the investigation of a complaint from intimidation or retaliation. Victims of unlawful housing discrimination practices in housing that receives Federal assistance have the right to seek remedies under Title VI by filing a complaint with HUD.

In addition, HUD conducts periodic reviews to determine whether recipients are complying with Title VI and its implementing regulations at 24 CFR Part 1.

HUD encourages a voluntary resolution of complaints and instances of noncompliance, and seeks to resolve the issues through the signing of a voluntary compliance agreement (VCA) between HUD and the respondent. HUD's primary obligation is to ensure that any violations of Title VI are remedied and that actions are taken to ensure that the rights of other persons are not violated under Title VI.

VCAs are used to resolve individual issues as well as compliance issues relating to how the recipient conducts its program. If a recipient does not comply with a signed VCA, then HUD may refer the case to the Department of Justice for enforcement. When investigating a complaint, the recipient of the Federal funds (for the HOME Program, this is the PJ) is provided a number of opportunities to respond to the issues, and/or take corrective action to comply. In cases of a determination of noncompliance, HUD issues a formal Letter of Determination. Again, the recipient is provided an opportunity to comment and come into voluntary compliance. If, upon notice of the finding of noncompliance, the recipient fails to come into compliance voluntarily, HUD may suspend, terminate, or refuse to grant or to continue Federal financial assistance, or seek redress through other means. Affected funding is limited to the program in which noncompliance is documented.

¹⁸ An indirect victim of discrimination may, for instance, be a resident of a neighborhood or apartment building that remains segregated due to the unlawful discriminatory practices of a real estate or rental management agent.

¹⁹ A private civil action can also be brought if there is a breach of a conciliation agreement in connection with a discriminatory housing practice.



Enforcement of Section of 504

Section 504 provides redress for any individual who is discriminated against on the basis of disability by a recipient of Federal financial assistance. Any aggrieved person can file a complaint with HUD. In addition, HUD conducts periodic reviews to determine whether recipients are complying with Section 504.

HUD encourages a voluntary resolution of complaints and instances of noncompliance, and seeks to resolve the issues through the signing of a voluntary compliance agreement (VCA) between HUD and the respondent. HUD's primary obligation is to ensure that any violations of Section 504 are remedied and that actions are taken to ensure that the rights of other persons are not violated under Section 504.

VCAs are used to resolve individual issues as well as compliance issues relating to how the recipient conducts its program. If a recipient does not comply with the VCA, then HUD may refer the case to the Department of Justice for enforcement. When investigating a complaint, the recipient of Federal funds (for the HOME Program, that is the PJ) is provided a number of opportunities to respond to the issues and/or take corrective action to comply. In cases of a determination of noncompliance, HUD issues a formal Letter of Determination. Again, the recipient is provided an opportunity to comment and come into voluntary compliance. If, upon notice of the finding of noncompliance, the recipient fails to come into compliance voluntarily, HUD may suspend, terminate, or refuse to grant or continue Federal financial assistance, or seek redress through other means. Affected funding is limited to the program in which noncompliance is documented.

Monitoring and Ongoing Obligations

Recipients must maintain records that demonstrate its compliance with Section 504. In general, these records should include data showing the extent to which persons with disabilities are beneficiaries of the program(s). These records must be made available to HUD, as well as to participants, beneficiaries, and other interested persons.

Conclusion

In order to ensure that all people in the United States have equal access to housing opportunities, Federal law prohibits discrimination in housing based on a person's race, color, religion, sex, familial status, national origin, or disability. This right is protected by a number of civil rights laws, the most

significant of which are the Fair Housing Act, Title VI, and Section 504. This publication has reviewed in detail the most fundamental of the provisions in the fair housing regulations—that discriminatory housing practices are prohibited in all housing—both publicly- and privately-owned or developed housing, and in all housing related transactions, particularly in housing that is assisted with Federal funds, such as HOME funds. Under certain circumstances specified in the Fair Housing Act, PJs and their housing partners can develop and manage housing for older persons without violating the prohibition against discrimination based on familial status. In addition, the Fair Housing Act generally requires applicants and residents to be given equal treatment irrespective of membership in a protected class, however, in some circumstances, the Act may require a housing provider to treat persons with disabilities differently, for the express purpose of creating for them equal access to or enjoyment of housing and other housing related programs.

Additional Resources

The regulations governing the HOME Program can be found at 24 CFR Part 92. The home page for the HOME Program is www.hud.gov/offices/cpd/affordablehousing/programs/home/. From this site, one can access the statute, regulations, technical guidance, training opportunities, and a wealth of resources that facilitate the administration of the HOME Program.

The Fair Housing Act can be found online at www.usdoj.gov/crt/housing/title8.htm. Its implementing regulations are at 24 CFR Part 100, et. al., and can be found online at www.archives.gov/federal_register/index.html.

HUD's Office of Fair Housing and Equal Opportunity (FHEO) provides ample guidance on the requirements of the Fair Housing Act. This information can be accessed from its homepage at www.hud.gov/offices/fheo/index.cfm or its library listing at www.hud.gov/library/bookshelf09/.

For guidance on the requirements related to providing reasonable accommodations, see the Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice entitled *Reasonable Accommodations Under the Fair Housing Act*, May 14, 2004. This document can be accessed from the FHEO website at <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>.

See the proposed guidance entitled "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition

Against National Origin Discrimination Affecting Limited English Proficient Persons” *Federal Register*, December 19, 2003 (Volume 68, Number 244).

For an overview and link to each of the relevant fair housing laws, regulations, and executive orders, see HUD’s FHEO website at: www.hud.gov/offices/fheo/FHLaws/index.cfm.

The National Fair Housing Advocate Online homepage is at www.fairhousing.com/. This site provides an overview of fair housing issues, including an extensive listing of and links to, legal resources and other fair housing sites. The Tennessee Fair Housing Council maintains this site.

About the Series: Fair Housing for HOME Program Participants

The *Fair Housing for HOME Program Participants* series is designed to help PJs and their housing partners understand and comply with Federal fair housing laws and regulations in the implementation of their HOME Program activities. In general, these laws:

- Prohibit discrimination in housing and housing related transactions by PJs and their housing partners;
- Require PJs to affirmatively further fair housing;
- Prescribe design and construction standards to ensure equal access to housing by persons with disabilities;
- Promote the use of minorities and women, and minority and women business enterprises in Federally funded contracting opportunities;
- Encourage the creation of employment opportunities for low-income residents of neighborhoods where HOME Program activities are undertaken; and
- Require the implementation of affirmative marketing strategies and outreach to those segments of the populations identified as least likely to apply for the housing without such outreach.

The *Fair Housing for HOME Program Participants* series contains the following publications:

- *Fair Housing for HOME Program Participants: Understanding the Basics*. This publication identifies the protected classes, describes the nondiscrimination provisions of the fair housing laws, and defines prohibited discriminatory actions. In addition, it briefly discusses issues related to affirmatively furthering fair housing and the provision of housing for persons with disabilities. (These topics are explored in greater detail in subsequent publications of the series.) All subsequent

publications are based on the assumption that the reader is familiar with the fundamental requirements outlined in this publication.

- *Fair Housing for HOME Program Participants: Affirmatively Furthering Fair Housing* describes a PJ’s obligation to affirmatively further fair housing and reviews eligible uses of HOME Program funds to promote fair housing.
- *Fair Housing for HOME Program Participants: Creating Economic Opportunity* reviews the requirements designed to create economic opportunities for minorities and women, minority and women business enterprises, and low- and very low-income residents living in HOME project areas.
- *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects* describes the applicability of fair housing laws to rental and homeownership housing development, new construction, and rehabilitation. This publication provides guidance on site and neighborhood standards, record-keeping, and design and construction requirements to ensure accessibility.
- *Fair Housing for HOME Program Participants: Tenant-Based Rental Assistance* discusses tenant selection criteria and procedures and reasonable accommodations and modifications under the Fair Housing Act and program accessibility under Section 504.

The *Fair Housing for HOME Program Participants* series will help managers, program staff, and procurement staff of the PJ and its housing partners. These entities must comply with fair housing requirements when administering programs and developing projects to be funded by the HOME Program.

The *Fair Housing for HOME Program Participants* series focuses on Federal fair housing laws related to housing development and management that are implemented and monitored by HUD. It provides guidance on how PJs and their housing partners can comply with (1) the nondiscrimination mandates of the civil rights laws (focusing primarily on the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973), and Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990; and (2) the affirmatively furthering fair housing mandate of Section 808(e)(5) of the Fair Housing Act. The HOME Program is also subject to Title VI of the Civil Rights Act of 1964 and its implementing regulations at 24 CFR Part 1, which prohibit recipients of Federal assistance from discriminating on the basis of race, color and national origin.

The series does not provide guidance on state and local fair housing requirements, which may differ from Federal laws.



PJs and their housing partners that are unfamiliar with state and local requirements can identify resources through the National Fair Housing Advocate Online agency finder at www.fairhousing.com. Likewise, the series does not provide guidance on the Americans with Disabilities Act of 1990 (ADA) requirements, which are administered by the Department of Justice (DOJ). PJs are subject to ADA requirements, and can get more information about their obligations from the DOJ website at www.usdoj.gov/crt/ada/adahom1.htm.

Readers that have specific questions about interpretation of civil rights or fair housing laws are encouraged to seek the advice of legal counsel.

HOME Model Program Guides

Fair Housing for HOME Program Participants is a HOME model program guide published by HUD's Office of Affordable Housing Programs. The HOME model program guides provide technical assistance to jurisdictions that are implementing HOME Program activities. Additional copies of any of the publications in the *Fair Housing for HOME Program Participants* series, as well as other HOME model program guides, can be obtained from Community Connections Information Center at 1-800-998-9999. For a list of available model program guides, visit the HOME Program web site at www.hud.gov/offices/cpd/affordablehousing/library/modelguides/index.cfm.

For more information about the HOME Program, visit www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm.





Affirmatively Furthering Fair Housing

When a participating jurisdiction (PJ) of the HOME Program prepares its Consolidated Plan, it must certify that it will affirmatively further fair housing. This certification is an acknowledgement by the PJ that it accepts the obligation to promote fair housing when it accepts U.S. Department of Housing and Urban Development (HUD) funds. The PJ carries out this certification by implementing a series of steps that address the three components of the certification. This publication, “Affirmatively Furthering Fair Housing,” describes the meaning of the certification and provides guidance on (a) preparing an Analysis of Impediments, (b) taking appropriate actions to overcome the effects of impediments to fair housing choice in the jurisdiction that are identified in the analysis, and (c) maintaining records.¹ This publication also explains how a PJ can use HOME funds to support general fair housing efforts.

This publication is part of the series “Fair Housing for HOME Program Participants.” The purpose of the series is to provide technical assistance to HOME PJs and their housing partners on the fair housing laws and regulations that apply to HOME Program activities. Specifically, the series reviews the applicable Federal fair housing laws and regulations, illustrates best practices in promoting fair housing, and highlights PJ responsibilities for ensuring compliance with fair housing requirements. For purposes of this publication, the PJ’s “housing partners” include all persons and entities who use HOME Program funds, including, but not limited to, the PJ and its recipients, state recipients, contractors, subcontractors, developers (including community housing development organizations), owners, and management agents.

Certification to Affirmatively Further Fair Housing: Fair Housing Planning

As a condition of receiving HOME and other HUD formula-based funding, a participating jurisdiction must submit a Consolidated Plan that analyzes the jurisdiction’s housing market conditions, assesses the housing needs of its lower-income families and other groups within the eligible population, describes a strategy for addressing the identified needs, and articulates an action plan for investing Federal affordable housing dollars. As a part of this plan, which is subject to HUD approval, a PJ certifies that it will affirmatively further fair housing. In order to affirmatively further fair housing, the PJ is required to:

- Conduct an analysis to identify impediments to fair housing choice within the jurisdiction (an “Analysis of Impediments,” or “AI”);

- Take appropriate actions to overcome the effects of any impediments identified through that analysis; and
- Maintain records reflecting the analysis and actions in this regard.²

PJs are not required to submit their analyses to HUD, but they must conduct and maintain them. In the event HUD receives a complaint, it will require submission of an AI, or it may request its submission as part of monitoring. If HUD believes that a jurisdiction has provided an inaccurate certification as part of its Consolidated Plan, it must notify the PJ that it believes the certification to be inaccurate and provide the PJ an opportunity to provide supporting evidence to demonstrate its accuracy. HUD may reject a certification if, after inspecting the jurisdiction’s documentation supporting the certification and providing the jurisdiction notice and opportunity to comment, HUD determines the certification to be inaccurate. Rejection of the certification provides the basis for HUD to disapprove the jurisdiction’s Consolidated Plan.

¹ These three activities are often referred to as “fair housing planning.”

² See 24 CFR 91.225, 91.325 and 91.425 for the Consolidated Plan requirements related to affirmatively furthering fair housing certifications for local governments, states, and consortia respectively.



The Analysis of Impediments

In its simplest form, an Analysis of Impediments addresses the question: “Do all residents and potential residents of this jurisdiction have equal access to housing regardless of their race, color, religion, sex, national origin, disability, or familial status? If not, why not?”

HUD has defined “impediments to fair housing choice” to include specific actions as well as the lack of action(s), as follows:

- Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices; and
- Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.

The Fair Housing Planning Guide, published by HUD in 1996,³ provides comprehensive guidance on how to develop an AI and a plan to overcome the identified impediments. This section summarizes some of the most relevant information from that guide. The complete guide is available online at HUD’s Fair Housing and Equal Opportunity Library at www.hud.gov/offices/fheo/images/fhpg.pdf.

Preparing the Analysis of Impediments

The AI is an analysis of a wide range of actions, existing conditions, and policies that affect housing choice, in both the public and private housing sectors and markets, and non-housing issues that affect housing choice and opportunity. It is not restricted to the design and operation of HUD-funded programs within a PJ’s jurisdiction. The analysis should involve:

- A comprehensive review of a state or local jurisdiction’s laws, regulations, and administrative policies, procedures, and practices; and, for local jurisdictions, those of the state to which the jurisdiction belongs;
- An assessment of how these laws, regulations, policies, and procedures effect the location, availability, and accessibility of housing in the jurisdiction;
- An assessment of conditions, both private and public, affecting fair housing choice for all protected classes;
- An assessment of the availability of affordable, accessible housing in a range of unit sizes; and
- An analysis of whether or not the PJ has sufficient, accurate, and current information and data to understand and document all of its fair housing impediments.

PJs have considerable discretion in determining the process by which they will develop an AI, what is included in the AI, how they define fair housing and its impediments, and what actions they will undertake to overcome the effects of those impediments. To prepare a comprehensive analysis, HUD recommends that PJs undertake this effort, and make these decisions, in a thoughtful and intentional way.

When Must the AI Be Prepared?

HUD requires each new PJ to conduct an AI. There is no requirement regarding the timing of updates to the AI. In general, a PJ should update its AI on an as-needed basis. When a PJ is developing a new complete Consolidated Plan (required every three to five years), it examines its housing needs, including any demographic changes in the jurisdiction. This, or other changes in the jurisdiction, may result in a need to make revisions to the AI. Generally, if the original analysis is thorough, these revisions should be able to be accomplished by addenda to the original document.

Who Should Undertake the AI?

PJs can use their own staff or contract the work to a third party to complete the AI. Since developing an AI and taking actions to overcome the effects of impediments are ongoing responsibilities, developing in-house expertise has advantages in the long run. If, however, the PJ does not have staff with time and/or expertise in fair housing issues, securing a competent third party to undertake the AI might make sense.

PJs should establish an inclusive process to help avoid the perception of bias, particularly when securing an industry group or advocacy group to undertake the writing of the AI. The perspectives of the public sector, affected industry professionals, and members of each protected class must be considered during the development of the AI if a PJ wants the AI to be, and be perceived as, fair and unbiased.

What is Included in the AI?

The impediments to fair housing choice can include a wide range of actions, existing conditions, and policies that affect housing choice, in both the public and private housing sectors and markets, and non-housing issues that affect housing choice and opportunity. For instance, pervasive discrimination in the housing market and insurance industry are unlawful actions that clearly constitute impediments to housing choice. In addition, while economic and transportation issues may not appear to be directly related, they frequently do impact

³ U.S. Department of Housing and Urban Development. *Fair Housing Planning Guide*. Third reprint. HUD-1582B-FHEO. March, 1996.



housing choice. Likewise, in some jurisdictions, residents with limited English proficiency based on their national origin might experience difficulty accessing the housing market. PJs might choose to include this in their AIs.

PJs will find that the parties involved in the AI process may disagree about what constitutes an impediment to fair housing choice. For instance, while most people agree that unlawful acts of discrimination in the housing market are an impediment to fair housing, there might not be agreement about whether general attitudes and perceptions about others are an impediment. The PJ determines how those differences of opinion will be handled in the context of the AI.

In preparing the AI, there may be areas where a PJ has limited information, such as the rate of discriminatory practices in the mortgage lending market. The AI should note these areas of deficiency, and the PJ should consider steps to obtain more information so it is able to fully understand the impediments to fair housing choice in the jurisdiction.

What Kind of Process Should the PJ Undertake?

From a practical perspective, PJs should make decisions about

who undertakes the AI, how it is undertaken, and what the AI will include in anticipation of the need to take actions to overcome these impediments. PJs should consider a process that is as inclusive as possible to bolster support for the resulting action plan. PJs might also consider staffing the AI, so that those who will be responsible for implementing the subsequent actions are able to develop the expertise they will need to address the identified impediments.

Elements of the Analysis of Impediments




PJs must make a good faith effort to review and document their fair housing needs. This analysis should include data about the housing needs of each of the protected classes. For many communities, existing data can be used effectively and obtaining new data may not be necessary.

It is useful to start the AI process by looking closely at the PJ’s Consolidated Plan, since it requires the presentation of specific data that might help the PJ understand its fair housing needs. Exhibit 1 provides a list of data elements that are required in the Consolidated Plan that should be helpful in the AI development.




Exhibit 1

Consolidated Plan Elements to Consider in the Development of the AI


The housing and homeless needs assessment of the Consolidated Plan must include:

-  An estimate of the number and type of families in need of housing assistance for persons with disabilities;
-  A description of the extent to which any racial or ethnic group and persons with disabilities have disproportionately greater need in comparison to the needs of that category as a whole, and an assessment of that specific need; and
-  An estimate of the number of persons with special needs who are not homeless, and a description of their supportive housing needs.



The housing market analysis of the Consolidated Plan must include:

-  A definition of “area of minority concentration” and locations identified by narrative or map;
-  A description of the condition, cost of housing, and the housing stock available to serve persons with disabilities; and
-  A description of the special needs facilities and services available in the jurisdiction.

The Strategic Plan must include:

-  Supportive housing needs of special needs populations in the jurisdiction.

The Action Plan must include:

-  A description of the geographic distribution of the housing assistance for the program year, including whether or not funds will be provided in areas of minority concentration; and
-  Activities that will be undertaken to address special needs of persons identified in Strategic Plan.



Each PJ can determine the types of data that must be collected and included in the AI; HUD does not prescribe these elements. In general, a comprehensive AI would include a review of the following:

- Demographic data regarding the jurisdiction's population and housing. Most of this data is included in U.S. Census data provided to the PJ by HUD for preparation and completion of the Consolidated Plan.
- Home Mortgage Disclosure Act reports to illustrate mortgage and rehabilitation lending patterns by race and ethnic group.
- Availability of accessible housing stock for residents with disabilities.
- Findings resulting from complaints and fair housing litigation in the jurisdiction.
 - In some jurisdictions, there are several types of agencies that investigate fair housing complaints, such as a local fair housing organization, a state or local human relations commission, or the HUD field office. Effort should be made to understand the data generated by all such entities.
 - PJs are cautioned to interpret complaints data with care. A large number of complaints that result in findings of discrimination might readily be interpreted to mean that the jurisdiction has a problem with discrimination in the housing market. However, a lack of complaints might be explained by a number of different factors, such as: (1) the jurisdiction may lack an investigative entity; (2) the general public may be unaware of its fair housing rights or available recourse; or (3) members of the protected classes may lack confidence in the investigative entity. Any of these conditions might be considered an impediment to fair housing choice.
- Results of any fair housing testing activity in the jurisdiction, if any are available. Because discriminatory behavior in the housing market is often very subtle, testing is one of the most reliable means of determining the extent and type of discrimination that occurs in the housing market.
- Occupancy requirements that might unlawfully limit group homes for persons with disabilities or families with children.
- Geographic patterns related to the use of Housing Choice Vouchers and the siting of assisted housing.
- Efforts to assist and serve persons who have limited proficiency in the English language to function more effectively in the housing market and assert their rights under civil rights laws such as the Fair Housing Act.

In many jurisdictions there is a distinct correlation between fair housing and affordable housing because the jurisdiction's low-income population is disproportionately represented by

members of the protected classes, particularly by racial and ethnic minorities, large families, and persons with disabilities. The information in the Consolidated Plan regarding the barriers to affordable housing may be particularly significant to the AI. While there may be overlap, however, the provision of affordable housing in and of itself does not necessarily remedy a lack of fair housing choice, nor is the lack of affordable housing typically the *sole* impediment to fair housing choice. Any affordable housing strategy developed by the PJ should be reviewed from the perspective of promoting fair housing prior to implementation.

Exhibit 2 provides a list of issues that a comprehensive AI would address, although not all of these elements are required.

Taking Actions to Overcome the Effects of Impediments

Once the impediments to fair housing choice are identified in the AI, PJs must take actions to overcome the effects of these impediments. To meet this requirement, HUD *strongly* recommends that PJs develop a plan of action that is derived from the specific issues identified in the AI. Many communities will find that there are far more impediments to fair housing than they are able to address in a single year. Similarly, there are many, many possible activities they could undertake to support and promote fair housing. A plan of action, with a defined fair housing objective, will make the task of establishing priorities, taking actions, and evaluating results far easier for PJs.

A thorough plan of action will specify what actions will be taken to overcome the impediments identified in the AI, what resources are available to undertake each activity, who will undertake each activity, and the timeframe for each action. By developing a plan in a thoughtful way, the PJ will have a tool by which it can (a) measure the success of its actions to overcome the effects of the impediments identified in the AI; and (b) identify new impediments as they are recognized as problems. Ideally, the plan would include a methodology for ongoing review to measure progress.

A PJ should undertake actions to overcome the effects of the impediments it identifies, whether or not the PJ itself may have caused or contributed to them. In fact, PJs should consider all actions it might take to overcome impediments that might have been caused by actions, omissions, decisions, or lack thereof by the public and the private sector. HUD does not hold PJs accountable for the impediments themselves, but it will hold PJs accountable for what actions they choose to undertake to lessen or eliminate the effects of the impediments.



Exhibit 2

Sample Elements of a Comprehensive Analysis of Impediments

Introduction and Executive Summary of the Analysis

- 🏠 Statement of the purpose of the AI;
- 🏠 Description of the process undertaken to develop the AI, including who led the process, the participants involved, the methodology used, and the funding source(s); and
- 🏠 Conclusions of the AI, including the impediments found, and a summary of the actions planned to address these impediments.

Background Data about the Jurisdiction

- 🏠 Demographic data, including population by race, ethnicity, and limited English proficiency; income; and employment;
- 🏠 Housing market profile, including rent profile, homeownership profile, residential development activity, affordable housing needs, housing costs, vacancy rates, public housing, availability of accessible housing, and level of accessibility;
- 🏠 Maps showing areas of minority concentration, location of assisted housing, and concentrations of low- and very low-income residents; and
- 🏠 Other relevant data, such as employment or transportation data that might affect fair housing choice.

Evaluation of Jurisdiction's Current Fair Housing Status

- 🏠 Description of information gathered about discriminatory behaviors in the jurisdiction, including information about fair housing complaints; compliance reviews where HUD has issued a charge or made a finding of discrimination; and fair housing discrimination suits filed by the Department of Justice or private plaintiffs;
- 🏠 Assessment of current public and private fair housing programs and activities in jurisdiction;
- 🏠 Explanation of reasons for any trends or patterns identified in the review of data, including discussion of fair housing issues facing each of the protected classes in real estate and real estate related transactions (sale and rental of housing, appraisal, insurance, and lending activities); and
- 🏠 Discussion of other fair housing concerns or problems.

Identification of Impediments to Fair Housing Choice

- 🏠 Impediments in the public sector
 - Description and analysis of zoning, site selection, and property tax policies and practices;
 - Description of building codes and analysis of how they impact accessibility;
 - Review and analysis of neighborhood revitalization strategies and relationships to the delivery of municipal and other services;
 - Analysis of the impact of (1) tenant selection issues by the local public housing authority and other assisted or insured housing providers, and (2) the sale of subsidized housing and possible displacement; and
 - Where there has been a determination of unlawful segregation or other housing discrimination by a court or by HUD, an analysis of the actions that can be taken by the recipient to help remedy the discriminatory or segregated condition.
- 🏠 Impediments in the private sector
 - Description and analysis of policies and practices related to real estate transactions, including appraisals, insurance, and lending activities.
- 🏠 Impediments in the public and private sectors
 - Fair housing enforcement in the public and private sectors;
 - Informational programs by the public and private sectors; and
 - Visitability in housing.

Conclusions and Recommendations



PJs also should choose action items that correlate to, and directly impact, the impediments identified in the AI. For example, a fair housing month poster contest would be an inappropriate and insufficient action to overcome the effects of pervasive discrimination in the housing market. PJs may want to use one or more of the following strategies to guide their decisions in choosing actions to undertake. These options are not necessarily compatible.

- **Target high visibility action items.** Identify the issues that are most visible to the general public or to a targeted group within the housing industry, and address those first to raise awareness about the fair housing impediments.
- **Target high impact action items.** Identify the most problematic issues, and those that will have the greatest impact on the fair housing environment. These will not always be the most politically feasible options.
- **Build support.** Tackle issues that have wide support from the diverse constituencies involved in the fair housing arena. By tackling some of the less controversial action items first, a PJ can develop relationships with affected parties, create a successful track record, and position itself to move on to more controversial action items.

Regardless of which strategy the PJ undertakes, it will be helpful to:

- **Establish priorities and develop a realistic time-frame for action.** Delineate several steps to address impediments identified in the AI and prioritize those steps for immediate action and others to be undertaken at a later date.
- **Commit sufficient resources and involve others.** As with all else, adequate staff time and funding will be important considerations. PJs should, wherever possible, involve the private and nonprofit sectors.

Common Impediments to Fair Housing and Appropriate Actions

The same impediments to fair housing choice are evident to greater or lesser degrees in many jurisdictions. Below are some examples of common impediments PJs find and steps to consider when determining what actions to undertake.

Impediments

Impediments are defined in the *Fair Housing Planning Guide*⁴ as “Any actions, omissions, or decisions taken because of race,

color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices, or which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.” These might include:

- Discrimination based on racial or ethnic background in sales and rental housing markets;
- Lending discrimination or lack of information about lending practices;
- Insurance and appraisal policies that reinforce segregated housing patterns or lack of information about insurance and appraisal policies;
- Discrimination against families with children;
- Discrimination against persons with disabilities;
- Insufficient multi-lingual marketing efforts targeted to those who have limited English proficiency;
- Zoning requirements limiting use or size of group homes, without exceptions for persons with disabilities; and
- Resistance by neighbors to development of housing for persons with disabilities (Not In My Back Yard).

Existing conditions can effectively limit housing choices as well and thereby also constitute impediments to fair housing.

Some common examples include:

- Geographic concentration of racial and ethnic minorities;
- Geographic concentration of low- and very low-income persons, and of assisted housing;
- Lack of large rental units to accommodate families with children;
- Lack of public transportation in suburban areas that serves to limit access of households without automobiles from residential opportunities in those areas. For some regions, these households may be primarily minority households. This type of problem can be exacerbated by the fact that, in many regions, employment opportunities are also expanding in suburban areas.
- Insufficient number of curb cuts in the jurisdiction to make housing accessible to those with mobility impairments; and
- Lack of accessible housing in the existing housing inventory of the jurisdiction.

Appropriate Actions

There are many appropriate actions that a PJ can take to overcome the effects of impediments identified in the AI. The

⁴ U.S. Department of Housing and Urban Development. *Fair Housing Planning Guide*. Third reprint. HUD-1582B-FHEO. March, 1996. Available online at www.hud.gov/offices/fheo/images/fhpg.pdf.



following list provides some common examples:

- Select sites (or provide an incentive for developers to select sites) for affordable housing that increase opportunities outside existing areas of minority and ethnic concentration.
- Use testing in the housing market to uncover unlawful discrimination. Testing can uncover many different types and forms of discrimination, such as:
 - Outright denial of any available housing when housing is, in fact, available;
 - Acts of racial, ethnic, or religious steering;
 - Denial of reasonable modifications for persons with disabilities;
 - Differential rental or security deposit requirements for families with children; and
 - Unreasonable unit-size or unit-configuration occupancy requirements.
- Increase or standardize testing procedures used to determine discrimination against all protected classes. Where there are no private fair housing agencies, or state or local governmental agencies that conduct testing, a PJ might create a system for uncovering housing discrimination and referring complaints. Taking and publicizing legal action and settling discrimination cases generally prove to be strong deterrents to unlawful behavior.
- Modify land use requirements to facilitate development of group homes. Typical modifications might include addressing the number of unrelated persons who can reside in one household; the number of group homes that can be operated in certain residential areas; and special accommodations or special use provisions for group housing.
- Use Federal funds for affordable housing to increase the supply of accessible units and large rental units for families with children.
- Adopt design standards that embrace the principles of universal design and visitability. These concepts are discussed in detail in the companion publication *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects*.
- Promote the importance of exercising fair housing choice to all members of the public, particularly members of the protected classes.
- Educate professionals in the housing and related industries whose members have the greatest impact on fair housing, such as:
 - Real estate professionals, to ensure they fully understand their requirements and liabilities under the fair housing laws.
 - Providers of homeowner insurance, to ensure their underwriting standards do not discriminate against certain neighborhoods. For example, in some

regions, racial and ethnic minorities tend to reside in older neighborhoods. Policies that limit the availability of insurance to older neighborhoods might have a disparate impact on these protected classes.

- Members of the appraisal industry, to ensure that they are certified and that professional appraisal standards expressly prohibit consideration of the racial or ethnic composition of a neighborhood on value estimates.
- Educate the public on fair housing issues.
- Develop partnerships with other organizations that have a common goal of reducing discrimination in housing. Partnerships can help reduce duplication of effort, stretch small budgets, and help ensure the consistency of efforts to overcome fair housing impediments.

Record-keeping

The PJ is required to maintain records that demonstrate that it has met its obligation to affirmatively further fair housing, as certified in its Consolidated Plan. To meet this requirement, the PJ must, *at a minimum*, maintain in its files:

- A copy of its AI; and
- Records that show the PJ has taken actions to overcome the effects of impediments identified in the AI.

In addition, HUD recommends that PJs maintain the following information:

- A copy of its fair housing action plan, if developed;
- A description of the process undertaken to carry out the AI, and a summary or transcript of all public meetings, hearings, and citizen comments or other public input;
- A summary report of all activities related to the AI, including: a summary of the AI, a list of the actions taken in the previous program year, and an analysis of the impact of those actions on eliminating discrimination and providing for fair housing choice; and
- Studies evaluating the effectiveness of the actions, if undertaken.

The PJ is required to report annually on these efforts as part of its Comprehensive Annual Performance and Evaluation Report (CAPER) to HUD on its Consolidated Plan.

Using HOME Funds to Affirmatively Further Fair Housing

HOME Program administrative funds can be used to support (a) a wide range of activities that are designed to affirmatively further fair housing, in accordance with the PJ's certification



in its Consolidated Plan; and (b) any of the costs of complying with the other Federal requirements applicable to the HOME Program, including promoting fair housing. This means that HOME funds may be used for undertaking the AI and its related plan of action, or for the implementation of *any* of the recommended action items articulated in the plan, even if they are neither directly related to HOME-assisted housing, nor do they address HOME-specific “deficiencies.”

Funds used for fair housing activities are subject to the cap on administrative funds. This means that no more than ten percent of the PJ’s annual HOME Program allocation plus ten percent of the program income deposited in the local HOME Program account during the program year may be used for reasonable administrative and planning costs, including those funds used for fair housing-related activities.

The *Fair Housing and the HOME Program Participant* series explores specific obligations of the PJ to (a) pass fair housing requirements on to its housing partners, and (b) to monitor compliance. Costs related to educating housing partners and monitoring these obligations are eligible administrative costs as well.

Some fair housing-related costs may be eligible project soft costs when the fair housing activities are directly associated with the financing or development of new construction, rehabilitation, or acquisition of housing assisted with HOME Program funds. To be an eligible project cost, the activities must be for providing information services in relation to a specific HOME-funded project. This might include (a) providing fair housing information, (b) counseling homeowners or tenants who (will) occupy HOME-assisted housing, or (c) conducting affirmative marketing or outreach for specific HOME-funded project(s), as required by 24 CFR 92.351.

Conclusion

Every HOME PJ is required to certify in its Consolidated Plan that it will affirmatively further fair housing. This means that it will:

- Conduct an analysis of impediments to fair housing choice within the jurisdiction;
- Take appropriate actions to overcome the effects of any impediments identified through that analysis; and
- Maintain records reflecting the analysis and actions.

The PJ has the discretion to determine who conducts the AI, how it is conducted, what it will include, and what actions that it will take to overcome the effects of the impediments identified. This publication reviewed the choices PJs face in

carrying out this obligation to affirmatively further fair housing, and provided recommendations for actions that might address typical impediments to fair housing choice.

Additional Resources

Consolidated Submissions for Community Planning and Development Programs, 24 CFR Part 91, available online at www.archives.gov/federal_register/index.html. This regulation contains the requirement that PJs certify that they will affirmatively further fair housing.

U.S. Department of Housing and Urban Development. *Consolidated Plan: Questions and Answers*. July 2004. Available online at www.hud.gov/offices/cpd/about/conplan.

HUD. *Fair Housing Planning Guide*. Third reprint. HUD-1582B-FHEO. March, 1996. Available online at www.hud.gov/offices/fheo/images/fhpg.pdf.

HUD. Memorandum from Assistant Secretary for CPD Cardell Cooper and Assistant Secretary for FHEO Eva Plaza. Available online at <http://www.hud.gov/offices/fheo/library/AFFHnotice.pdf>. This Memorandum provides guidance on affirmatively furthering fair housing and the accessibility requirements of the Fair Housing Act.

HUD. Memorandum from General Deputy Assistant Secretary for CPD Nelson Bregon and Assistant Secretary for FHEO Carolyn Peoples. Available online at www.hud.gov/offices/fheo/library/finaljointletter.pdf. This Memorandum discusses how to conduct an analysis of impediments to fair housing choice. It supersedes previous guidance issued by Assistant Secretaries Cooper and Plaza on February 14, 2000.

About the Series: Fair Housing for HOME Program Participants

The *Fair Housing for HOME Program Participants* series is designed to help PJs and their housing partners understand and comply with Federal fair housing laws and regulations in the implementation of their HOME Program activities. In general, these laws:

- Prohibit discrimination in housing and housing-related transactions by PJs and their housing partners;
- Require PJs to affirmatively further fair housing;
- Prescribe design and construction standards to ensure equal access to housing by persons with disabilities;



- Promote the use of minorities and women, and minority and women business enterprises in Federally funded contracting opportunities;
- Encourage the creation of employment opportunities for low-income residents of neighborhoods where HOME Program activities are undertaken; and
- Require the implementation of affirmative marketing strategies and outreach to those segments of the populations identified as least likely to apply for the housing without such outreach.

The *Fair Housing for HOME Program Participants* series contains the following publications:

- *Fair Housing for HOME Program Participants: Understanding the Basics*. This publication identifies the protected classes, describes the nondiscrimination provisions of the fair housing laws, and defines prohibited discriminatory actions. In addition, it briefly discusses issues related to affirmatively furthering fair housing and the provision of housing for persons with disabilities. (These topics are explored in detail in subsequent publications of this series). All subsequent publications are based on the assumption that the reader is familiar with the fundamental requirements outlined in this publication.
- *Fair Housing for HOME Program Participants: Affirmatively Furthering Fair Housing* describes a PJ's obligation to affirmatively further fair housing and reviews eligible uses of HOME Program funds to promote fair housing.
- *Fair Housing for HOME Program Participants: Creating Economic Opportunity* reviews the requirements designed to create economic opportunities for minorities and women, minority and women business enterprises, and low- and very low-income residents living in HOME project areas.
- *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects* describes the applicability of fair housing laws to rental and homeownership housing development, new construction, and rehabilitation. This publication provides guidance on site and neighborhood standards, record-keeping, and design and construction requirements to ensure accessibility.
- *Fair Housing for HOME Program Participants: Tenant-Based Rental Assistance* discusses tenant selection criteria and procedures and reasonable accommodations and modifications under the Fair Housing Act and program accessibility under Section 504.

The *Fair Housing for HOME Program Participants* series will help managers, program staff, and procurement staff of the PJ and its housing partners. These entities must comply with fair housing requirements when administering programs and developing projects to be funded by the HOME Program.

The *Fair Housing for HOME Program Participants* series focuses on Federal fair housing laws related to housing development and management that are implemented and monitored by HUD. It provides guidance on how PJs and their housing partners can comply with (1) the nondiscrimination mandates of the civil rights laws (focusing primarily on the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973), and Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990; and (2) the affirmatively furthering fair housing mandate of Section 808(e)(5) of the Fair Housing Act. The HOME Program is also subject to Title VI of the Civil Rights Act of 1964 and its implementing regulations at 24 CFR Part 1, which prohibit recipients of Federal assistance from discriminating on the basis of race, color, and national origin.

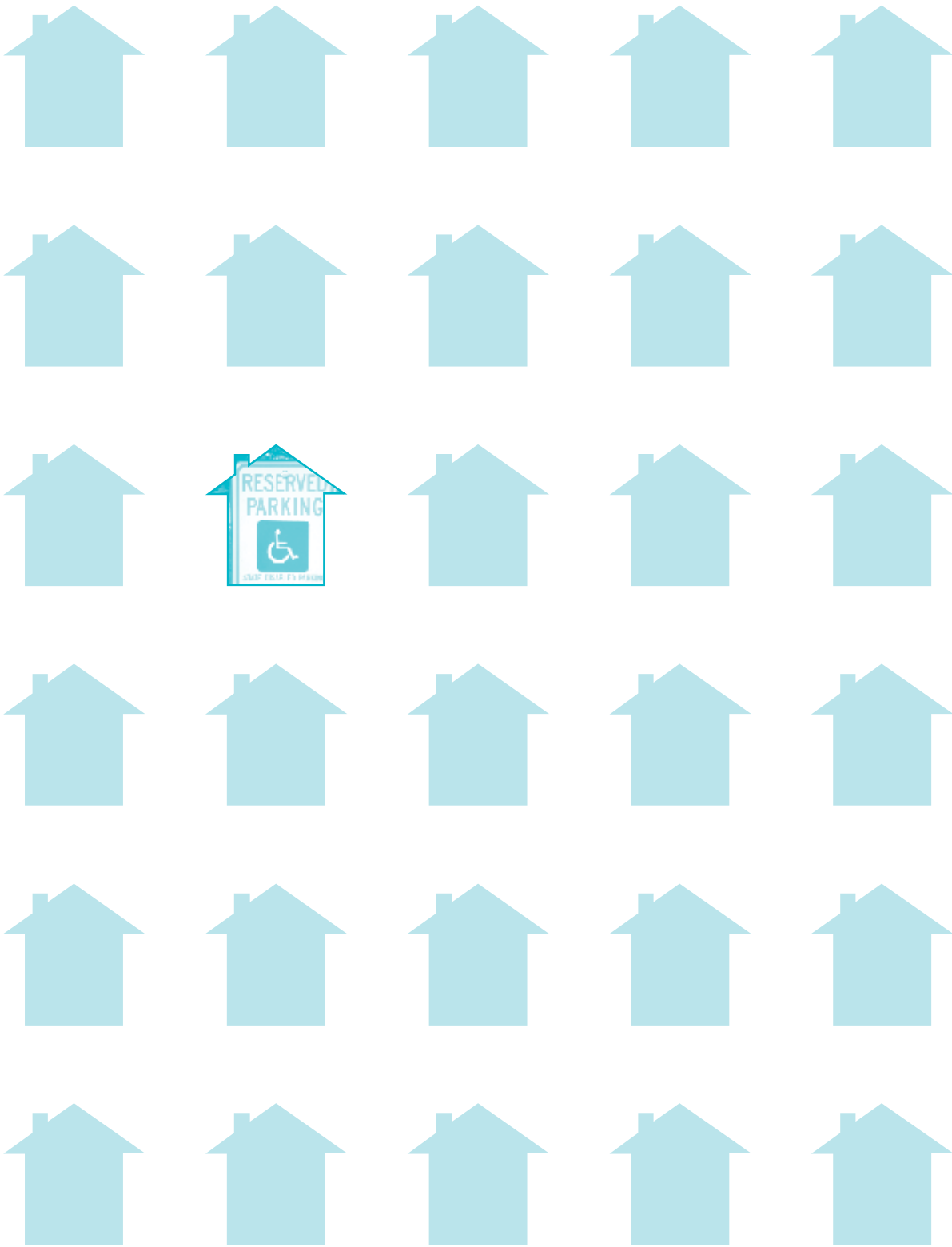
The series does not provide guidance on state and local fair housing requirements, which may differ from Federal laws. PJs and their housing partners that are unfamiliar with state and local requirements can identify resources through the National Fair Housing Advocate OnLine agency finder at www.fairhousing.com. Likewise, the series does not provide guidance on the Americans with Disabilities Act of 1990 (ADA) requirements, which are administered by the Department of Justice (DOJ). State and local governments are subject to ADA requirements. PJs can get more information about their obligations from the DOJ website at www.usdoj.gov/crt/ada/adahom1.htm.

Readers that have specific questions about interpretation of civil rights or fair housing laws are encouraged to seek the advice of legal counsel.

HOME Model Program Guides

Fair Housing for HOME Program Participants is a HOME model program guide published by HUD's Office of Affordable Housing Programs. The HOME model program guides provide technical assistance to jurisdictions that are implementing HOME Program activities. Additional copies of any of the publications in the *Fair Housing for HOME Program Participants* series, as well as other HOME model program guides, can be obtained from Community Connections Information Center at 1-800-998-9999. For a list of available model program guides, visit the HOME Program web site at www.hud.gov/offices/cpd/affordablehousing/library/modelguides/index.cfm.

For more information about the HOME Program, visit www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm.





Administering Tenant-Based Rental Assistance

“Fair Housing for HOME Program Participants: Administering Tenant-Based Rental Assistance” explores the fair housing-related circumstances that affect housing providers that house tenants receiving HOME-funded tenant-based rental assistance (TBRA), but who do not receive any other HOME Program funds. This publication highlights fair housing issues that arise when HOME funds are used to administer TBRA programs. The publication covers applicant selection criteria; establishing preferences for persons with disabilities; and understanding the reasonable accommodations and modifications requirements that apply to housing occupied by persons receiving HOME Program TBRA. This publication does not provide a full overview of the requirements of the Fair Housing Act and other civil rights laws affecting the HOME Program.

This publication is part of the series “Fair Housing for HOME Program Participants.” The purpose of the series is to provide technical assistance to participating jurisdictions (PJs) and their housing partners on the fair housing laws and regulations that apply to HOME Program activities. Specifically, the series reviews the applicable Federal fair housing laws and regulations, illustrates best practices in promoting fair housing, and highlights PJ responsibilities for ensuring compliance with fair housing requirements. For purposes of this publication, “housing providers” refer to those who house tenants receiving HOME assistance, but who otherwise do not receive HOME Program funds or other Federal assistance. The PJ’s “housing partners” include all persons and entities who use HOME Program funds, including the PJ and its recipients, state recipients, contractors, subcontractors, developers (including community housing development organizations), owners, and management agents.

Fair Housing in Tenant-Based Rental Assistance Programs

Private landlords who house tenants receiving HOME Program tenant-based rental assistance (TBRA), but who do not receive any other HOME Program assistance, are subject to the requirements of the Fair Housing Act, as well as the requirements of the HOME Program. In general, these requirements ensure that housing and housing-related services are provided in a manner that does not discriminate against persons based on race, color, religion, sex, familial status, national origin, age, or disability.

When administering a HOME tenant-based rental assistance program, PJs should be sure that participating housing providers understand their fair housing obligations and comply with fair housing laws. The companion publication, *Fair Housing for HOME Program Participants: Understanding the Basics*, provides a fuller discussion of these issues in general terms. This publication explores these fair housing requirements as they apply specifically to private rental housing providers. This publication includes a discussion of:

- Selecting tenants based on standard, written criteria;

- Providing preferences for persons with disabilities in a manner consistent with fair housing laws and regulations; and
- Reasonable modifications and accommodations.

In addition, although private housing providers participating in a HOME-funded TBRA program are not subject to the requirements of Section 504 of the Rehabilitation Act of 1973, the PJ and its recipients and subrecipients are. This publication discusses how to administer a TBRA in a manner that is accessible to persons with disabilities, in accordance with that law.

Applicant Selection Criteria

When implementing tenant-based rental assistance programs, the HOME Program laws and regulations require the PJ or its state recipient, subrecipient, or contractor (the “TBRA administrator”) to establish written tenant selection criteria. The primary purpose of the written criteria is to establish a sound basis for tenant selection, and an accompanying process that is nondiscriminatory in effect. This helps to ensure that the distribution of this scarce resource is fair and equitable and comports with the requirements of the Fair Housing Act,

Title VI of the Civil Rights Act, and Section 504 of the Rehabilitation Act of 1973.

Although generally, PJs must treat all income-eligible persons equally in administering their TBRA programs, the HOME statute and regulations permit PJs to target their TBRA resources in order to address the housing needs of specific populations, such as large families or persons with disabilities. When a PJ chooses to implement preferences for certain groups, this must be articulated in the PJ's Consolidated Plan.

Generally, applicant selection procedures that promote fair treatment of all applicants will:

- Clearly articulate any locally established preferences;
- Identify applicants who meet the selection criteria on a lottery or a "first come, first served" basis in accordance with preference policies;
- Provide for the selection of TBRA recipients from a written waiting list in the chronological order of application, insofar as is practicable;
- Provide immediate written notification to any rejected applicant of the specific grounds for rejection and maintain records of the rejection; and
- Provide for reasonable accommodations for persons with disabilities to ensure they have equal access to the selection process.

Preferences for Persons with Disabilities

In developing selection criteria for TBRA, the HOME Program permits PJs to establish a preference for persons with special needs. In addition, it may offer, in conjunction with TBRA, *non-mandatory* services that may be appropriate for persons with a special need or a particular disability. The PJ may design its program so that it serves the entire community but gives a preference for persons with a special need(s), or it may limit its program to serve only special purpose or specific housing need(s), such as elderly tenants, large families, or a special needs population that has been identified in the PJ's Consolidated Plan. A PJ's special needs preferences may target a specific category of individuals with disabilities (e.g., persons with HIV/AIDS or chronic mental illness) if the specific category is identified in the PJ's Consolidated Plan as having unmet housing needs and the preference is required to narrow the gap in benefits and services received by such persons. The PJ's written selection criteria should explain what the preferences are and how the preferences will be implemented.

HOME TBRA is subject to the provisions of certain fair housing requirements, and preferences must be administered in a nondiscriminatory manner. This means that if a special needs preference is established, affirmative marketing of the availability of TBRA across all protected classes within the preference should be carried out. The selection of TBRA recipients is **not** subject to the HOME Program affirmative marketing procedures that must be adopted by the PJ for projects with five or more HOME-assisted units.

When a PJ chooses to serve a particular group of persons with specialized housing needs in its TBRA program, the PJ cannot then restrict access to its other programs for the identified group. For example, a PJ may not determine that since it will provide a preference to persons with special needs under its TBRA program, it will therefore limit participation by those special needs persons in its homeownership or other affordable housing programs or forms of assistance. In addition, if a PJ has a TBRA preference for persons within a class or category of disability (such as persons with HIV/AIDS or chronic mental illness), the PJ cannot discriminate against persons who fall within that class based on the presence of other disabilities.

Reasonable Modifications and Accommodations

In a TBRA program, the **tenant** is the beneficiary of HOME Program assistance, not the housing provider. When a tenant chooses to use his or her HOME TBRA in a privately-owned unit that has *not* received any other HOME funds, or any other Federal assistance, the provisions of the Fair Housing Act apply to the housing provider; however, the additional requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) do not apply to the housing provider. If the tenant chooses to use his or her TBRA in a unit that is HOME-funded, or one that receives other Federal assistance, then the additional requirements of Section 504 also apply to the housing provider.

Under the Fair Housing Act, housing providers must make reasonable accommodations for applicants or residents with disabilities to enable them to fully enjoy or use their dwelling and any related amenities afforded to other residents, in accordance with 24 CFR 100.203 and 100.204. In addition, housing providers must permit tenants to make and pay for structural modifications to units or common areas that are needed to allow them to have effective use of the housing program.



What is a Reasonable Accommodation?

A reasonable accommodation is a change, exception, or adjustment to rules, policies, practices, or services, when such changes may be necessary to allow a person with a disability to have equal opportunity to enjoy or use a dwelling, including public and common use areas. The use and enjoyment of the dwelling would include the person’s right to:

- Participate fully in a program;
- Take advantage of a service;
- Live in a dwelling; or
- Perform a job.

Each accommodation request must be assessed on a case-by-case basis to determine if it is reasonable. (This will be discussed further in the section of this publication entitled *Can an Accommodation or Modification Request Be Denied?*) The

following examples illustrate some of the types of accommodations that generally are required:

- A building owner has a “no animals” policy. She cannot deny the use of an assistance animal to an applicant or tenant with a disability, because the applicant would be unable to use or enjoy the dwelling unit without the assistance animal. See Exhibit 1 for a detailed discussion of assistance animals.
- A large multifamily rental development has a parking lot that is available on a “first come, first served” basis. There are a limited number of parking spaces near the entrance. Due to a mobility impairment, an applicant cannot walk more than a short distance and requests a reserved spot near the entrance. The housing provider must honor this request, since without a parking space within close walking distance to his unit, the applicant would not be able to reside in the building.

Exhibit 1

Assistance Animals as a Reasonable Accommodation

Assistance animals are not pets. They are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability. Assistance animals—also referred to as “service animals,” “assistive animals,” “support animals,” or “therapy animals”—perform many disability-related functions, including but not limited to guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing minimal protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.

A housing provider may not refuse to allow a person with a disability to have an assistance animal merely because the animal does not have formal training. Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, no special training is required. The question is whether or not the animal performs the disability-related assistance or provides the disability-related benefit needed by the person with the disability.

A housing provider’s refusal to modify or provide an exception to a “no pets” rule or policy to permit a person with a disability to use and live with an assistance animal would violate Section 504 of the Rehabilitation Act and the Fair Housing Act unless (1) the animal poses a direct threat to the health or safety of others that cannot be reduced or eliminated by a reasonable accommodation, (2) the animal would cause substantial physical damage to the property of others, (3) the presence of the assistance animal would pose an undue financial and administrative burden to the provider, or (4) the presence of the assistance animal would fundamentally alter the nature of the provider’s services. The fact that a person has a disability does not automatically entitle him or her to an assistance animal. There must be a relationship between the person’s disability and his or her need for the animal.

A housing provider may not require an applicant or tenant to pay a fee or a security deposit as a condition of allowing the applicant or tenant to keep the assistance animal. However, if the individual’s assistance animal causes damage to the unit or the common areas of the dwelling, at that time, the housing provider may charge the individual for the cost of repairing the damage if the provider regularly charges tenants for any damage they cause to the premises.



- A rental management firm typically posts building-related notices on a bulletin board in the elevator bay, but the notices are not readily visible to a tenant who uses a wheelchair. A reasonable accommodation might be to either lower the bulletin board, or to mail the tenant a copy of all posted notices.

What is a Modification?

Under the Fair Housing Act, a modification is any structural change to the unit that is necessary to allow a person with a disability equal opportunity to enjoy or use a dwelling, including public and common use areas. The use and enjoyment of the dwelling would include the person's right to:

- Participate fully in a program;
- Take advantage of a service;
- Live in a dwelling; or
- Perform a job.

Modifications might include:

- Access ramps for a person who uses a wheelchair;
- Grab bars in a bathroom;
- Visual doorbells and fire alarms;
- Widening doorways for wheelchair access; and
- Altering a walkway to provide access to a public or common area.

Who Pays for an Accommodation or Modification?

Under the Fair Housing Act, a housing provider is required to provide and pay for accommodations, but is not required to pay for modifications, or structural changes to the development.¹

Accommodations

Typically, an accommodation can be made with little or no cost to the housing provider. However, in some circumstances an applicant or resident will require an accommodation that has a cost and is necessary to the full use and enjoyment of the property by the tenant. These examples illustrate some accommodations that might have a cost:

- A person who uses a wheelchair requires a handicapped parking space, including curb cuts, painting, and signage. Parking arrangements are generally considered accommodations, not structural changes.

- A person with limited use of her arms is unable to use the dumpster provided by the housing provider and requires assistance with disposing of trash. Depending upon the circumstances, it may be a reasonable accommodation for the housing provider to provide trash pick-up service, even if there is some cost for maintenance staff time.

In these cases, the housing provider is obligated to bear the cost of the accommodation, provided it does not impose an undue financial and administrative burden on the housing provider. (This will be discussed further in the section of this publication entitled *Can an Accommodation or Modification Request Be Denied?*)

Modifications

Housing providers must allow reasonable modifications to a property, including the interior and exterior of the dwelling and public and common use areas, to enable a person with a disability to have full use and enjoyment of the premises. The housing provider is not required to pay for the modification(s). If the housing provider wishes to make these modifications on behalf of the tenant, the cost of these modifications can be passed on to the tenant, either as a direct payment to the housing provider, or in a series of payments over time. The tenant can also arrange to have these modifications made on his or her own.

Prior to granting a request to make a modification, a housing provider can impose certain conditions on the tenant:

Satisfactory work. A housing provider may condition permission for a modification on the tenant or applicant providing a description of the proposed work, as well as reasonable assurances that the work will be done in a workmanlike manner, and that required building permits will be obtained.

Restoration of unit. If the modification might interfere with a subsequent tenant's use and enjoyment of the unit, approval can be conditioned on the tenant or applicant agreeing to restore the interior of the unit to its original condition (normal wear and tear excepted) prior to moving out.

In general, the cost of this "restoration" can be passed on to the tenant. In some cases, it is reasonable for the housing

¹ Section 504 and its implementing regulations at 24 CFR Part 8 obligate recipients of Federal financial assistance to make their programs accessible to persons with disabilities, including providing a policy, practice, or rule modification, or an accessible feature in a unit or common area, if needed as an accommodation by an applicant or tenant with a disability, unless doing so would result in a fundamental alteration in the nature of its program or an undue financial and administrative burden. See 24 CFR 8.4, 8.20, 8.24, and 8.33 for further requirements and guidance.