The Fair Housing Amendments Act of 1988: The Enforcement Report

September 1994

A Report of the United States Commission on Civil Rights

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *The Fair Housing Amendments Act of 1988: The Enforcement Report,* to you pursuant to P.L. 98–183, as amended.

Study after study has shown that barriers to fair housing continue to persist. On January 17, 1994, President Clinton emphasized the importance of affirmatively furthering fair housing by issuing Executive Order No. 12,892 to strengthen the coordination and implementation of fair housing policy in all Federal programs and activities. As President Clinton stated in his Memorandum on Fair Housing, "Americans of every income level seeking to live where they choose feel the weight of discrimination because of the color of their skin, their race, their religion, their gender, their country of origin, or because they are disabled or have children." Discrimination in housing perpetuates segregation which in turn results in diminished educational and economic opportunities for many of our fellow Americans. Housing discrimination deprives people of much more than shelter; it has a corrosive effect on the quality of life and dignity of every person.

This report stems from the Commission's commitment to furthering fair housing and its comprehensive evaluation of the implementation and enforcement of the Fair Housing Amendments Act of 1988. The report assesses the fair housing activities of the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice (DOJ), both of which have a major responsibility to combat housing discrimination.

Title VIII of the Civil Rights Act of 1968 charged HUD with the responsibility to affirmatively further fair housing. In 1988 Congress assigned additional enforcement powers to HUD to conciliate and resolve allegations of discrimination in their early stages.

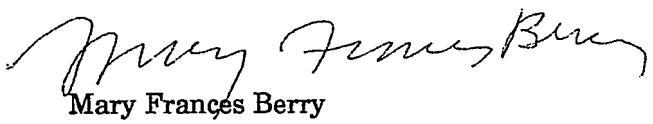
In the final pages of this report, we have described our 33 findings and recommendations in detail. Our recommendations are aimed at the elimination of problems associated with fair housing enforcement and implementation. The following highlights some of our key findings:

- Overall, the resources provided by Congress and the President have fallen well short of the funds needed by HUD and DOJ to implement their new responsibilities.
- In the vast majority of cases, HUD has not made a cause determination within the 100-day benchmark set by Congress. Congress clearly expected that HUD would reach a conclusion as to reasonable cause within 100 days in most complaints.
- Certification of substantially equivalent agencies still lags behind HUD's expectations when the FHAA was passed.
- HUD has been slow to distribute Federal grant funds to private nonprofit fair housing groups for private enforcement initiatives, testing, outreach, and education programs.
- With regard to the new jurisdictions, the Commission concludes that HUD and DOJ have failed to provide clarity through policy statements on novel and complex issues, such as occupancy codes and prohibited inquiries.
- HUD has lagged in using its ability to file Secretary-initiated complaints to attack unique or systemic discrimination and to break new ground in fair housing policy.

The Commission calls on Congress and the President, in their crucial leadership roles in Federal enforcement efforts, to adopt the Commission's recommendations and to encourage HUD and DOJ to implement the recommendations.

Respectfully,

For the Commissioners,



Mary Frances Berry
Chairperson

Acknowledgments

This report was prepared under the direction of Suzanne Crowell, and its principal authors were Suzanne Crowell, Wanda Johnson, and Tami Trost. Other staff contributing to the report included Florentine Calabia, Franklin Chow, Michael Fauntroy, Eric Mann, Susan Muskett,* Mark Regets,* and Eileen Rudert. The legal review was performed by Emma Monroig and Jeffrey O'Connell. Editorial review was provided by Ben F. Dixon,* Rosalind Gray, and Carol-Lee Hurley. Clerical support was provided by Clarence Gray,** Shirley McCoy, and Audrey Wright. Production was supervised by Gloria Hong Izumi. The report was prepared under the general supervision of James S. Cunningham, Acting Assistant Staff Director for Congressional Affairs, and Frederick D. Isler, Acting Assistant Staff Director for Civil Rights Evaluation.

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1. Introduction

More than 125 years after passage of Reconstruction laws giving African Americans the right to be free of discrimination in the possession and disposition of property, and more than 25 years after passage of the Federal Fair Housing Act of 1968,[1] discrimination continues to be a serious barrier to the full enjoyment of rights due to all persons who call our country their home.

The U.S. Commission on Civil Rights has monitored fair housing enforcement from its inception. In its report, *The Federal Fair Housing Enforcement Effort* (1979), the Commission advocated creation of an Equal Housing Administration within the U.S. Department of Housing and Urban Development (HUD), administered by the Assistant Secretary for Fair Housing and Equal Opportunity, to handle individual complaints of discrimination. The administration was intended to be autonomous in order to focus attention on fair housing. In addition, the Fair Housing Administration was designed to eliminate conflicts of interest resulting when HUD program officials, charged with assisting public housing authorities and the private housing industry, also supervised the fair housing staff charged with enforcing fair housing laws in those programs. In addition, the Commission urged the adoption of amendments to fair housing law that would enable the Secretary of HUD to initiate complaints; to accept third party complaints; and to hold hearings and issue cease and desist orders, including "the power to order all equitable relief, including affirmative action, goals and timetables, and such other remedial steps as are necessary for effectuation of the act."[2]

In the mid-1980s, the Commission held two consultations with various fair housing experts. These consultations are summarized in the reports, *Issues in Housing Discrimination* (1985) and *A Sheltered Crisis: The State of Fair Housing in the Eighties* (1983). The Commission also produced two directories of fair housing organizations, *Directory of Private Fair Housing Organizations* (1986) and *Directory of State and Local Fair Housing Agencies* (1985). Additionally, the Commission published *An Annotated Bibliography on Selected Fair Housing Issues.*

Most recently, the Commission issued the report *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System* in September 1992, which assessed the consequences of the failure of State and local jurisdictions to meet the requirements for processing fair housing complaints contained in the Fair Housing Amendments Act of 1988. Finally, the Commission's State Advisory Committees have published numerous reports on fair housing issues.

Measuring the Problem

The persistence of racial prejudice has been measured by a variety of studies in recent years that compare the treatment of prospective buyers and renters of different backgrounds. Such studies have shown substantial ongoing discrimination. According to one study performed for HUD, African Americans and Latino Americans have at least a 50 percent chance of facing discrimination in the

1 42 U.S.C. §§ 3601-3619 (1988). Also called Title VIII of the Civil Rights Act of 1968.

2 U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 235.

rental and sales markets. The likelihood that they will face discrimination in any given encounter ranges from 56 percent to 59 percent.[3]

Discrimination in mortgage lending markets has also been the subject of recent studies, most notably one conducted by the Federal Reserve Bank of Boston. In this study, an analysis of thousands of actual conventional mortgage applications concluded that:

> Even after controlling for financial, employment, and neighborhood characteristics, black and Hispanic mortgage applicants in the Boston metropolitan area are roughly 60 percent more likely to be turned down than whites. This discrepancy means that minority applicants with the same economic and property characteristics as white applicants would experience a denial rate of 17 percent rather than the actual white denial rate of 11 percent. Thus, in the end, a statistically significant gap remains, which is associated with race.[4]

A 1990 study by the Fair Housing Council of Greater Washington examined racial discrimination in the rental housing market. The study surveyed 200 rental properties in Washington, D.C., and its Maryland and Virginia suburbs, and found:

> 1)... black home seekers may expect to be treated less favorably than their white counterparts more than 60 percent of the time they visit apartment rental offices in certain neighborhoods in the Washington metropolitan area; and
>
> 2) the results of five years of testing studies conducted by the Fair Housing Council suggest little change in the opportunities for black home seekers in certain areas of the metropolitan area. While housing discrimination has become more subtle, unfortunately, it persists in all of the areas tested by the council.[5]

Given the audits and other study results, it is clear that invidious discrimination contributes heavily to housing segregation and racial isolation. Research from the 1980 census indicated that, among the 15 largest predominantly African American neighborhoods, the average degree of segregation was 78 percent.[6] In Chicago, for example, the amount of segregation was 88 percent for African Americans, 64 percent for Latinos, and 44 percent for Asians.[7] The percentage of blacks living in

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3 Margery Austin Turner, Raymond J. Struyk, and John Yinger, *Housing Discrimination Study—Synthesis,* (Washington, D.C.: U.S. Department of Housing and Urban Development, 1991), p. 36.

4 Alice H. Munnell, Lynn E. Brown, James McEneaney, and Geoffrey M.B. Tootell, "Mortgage Lending in Boston: Interpreting HMDA Data," *Working Paper Series No. 92-7* (Federal Reserve Bank of Boston: October 1992), p. 2. The Boston study has been criticized and defended by a variety of social scientists. For criticism, see Gary Becker, "The Evidence against Banks Doesn't Prove Bias," *Business Week,* Apr. 19, 1993, p. 18; Peter Brimelow and Leslie Spencer, "The Hidden Clue," *Forbes,* Jan. 4, 1993, p. 48; and Ted Day and S.J. Liebowitz, "Mortgages, Minorities, and Discrimination," unpublished paper, Dec. 15, 1993. For defenders, see George C. Galster, "The Facts of Lending Discrimination Cannot Be Argued Away by Examining Default Rates," *Housing Policy Debate,* vol. 4, no. 1, pp. 141–146; Stephen Cross, "Discrimination Studies: How Critical Are Default Rates?" paper delivered at Home Mortgage Lending and Discrimination: Research and Enforcement Conference, U.S. Department of Housing and Urban Development, Washington, D.C., May 18, 1993; and James H. Carr and Isaac F. Megbolugbe, "The Federal Reserve Bank of Boston Study on Mortgage Lending Revisited," *Journal of Housing Research,* vol. 4, Issue 2, pp. 277–313.

5 The Fair Housing Council of Greater Washington, *Race Discrimination in the Rental Housing Market: A Study of the Greater Washington Area, 1990,* (Washington, D.C.: Fair Housing Council of Greater Washington, 1990), p. 3.

6 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988,* 100th Cong., 2d sess., H. Rep. No. 100-711, p. 16, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2177 (hereafter cited as FHAA House Committee Report). The cited authors used the term "settlements" to refer to places where the largest absolute numbers of African Americans live (not necessarily places with the highest concentrations.)

7 Ibid.

areas where they made up 60 percent or more of the residents decreased from 57.9 percent in 1980 to 51 percent in 1990, according to one study.[8]

A study of selected metropolitan areas conducted for *USA Today* using 1990 census data shows that the majority of the Nation's 30 million African Americans are as segregated now as they were at the height of the civil rights movement in the 1960s.[9] Asian and Latino segregation also grew during the 1980s, although at considerably lower rates.[10]

Finally, a study covering the entire United States comparing racial and ethnic concentrations at the neighborhood level showed that 51 percent of blacks lived in areas with a 60 percent or higher concentration of blacks, down somewhat from 57.9 percent in 1980, and 33.9 percent of Hispanics lived in areas with a 60 percent or higher concentration of Hispanics, up slightly from 30 percent in 1980.[11] Conversely, 84.5 percent of nonblacks lived in neighborhoods less than 10 percent black in 1990, down from 87.5 percent in 1980, while 74.1 percent of non-Hispanics lived in neighborhoods less than 5 percent Hispanic in 1990, down from 81.1 percent in 1980.[12]

Study after study has shown that segregated, mostly low-income neighborhoods are far more likely to have below average educational, medical, and recreational facilities and poor public services, such as trash pickup, police and fire protection, and public transportation. These factors all exact enormous social costs in lost earnings and productivity, increased incarceration rates, greater reliance on government-funded welfare programs, and increased alienation from the political and cultural mainstream of the Nation.[13]

Housing discrimination and segregation distort the operation of urban housing markets, artificially inflating rents and house values in some neighborhoods while contributing to disinvestment and decline in others.[14] Further, evidence indicates that employment opportunities are expanding faster in the suburbs—which are predominantly white—than in central cities, where most African American and Latino neighborhoods are located.[15] In addition, public schools in affluent suburban jurisdictions offer substantially better

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8 David Judkins, James Massey, and Joseph Waksberg, "Patterns of Residential Concentrations by Race and Hispanic Origin," unpublished report dated December 8, 1992, p. 6. Judkins and Waksberg are with Westat, Inc., and Massey is with the National Center for Health Statistics. The views expressed are those of the authors.

9 *USA Today*, "Segregation: Walls Between Us," Nov. 11, 1991.

10 Ibid.

11 Judkins, et al., "Patterns of Residential Concentrations," p. 5.

12 Ibid., p. 8.

13 See, for example, Gunnar Myrdal, *An American Dilemma: the Negro Problem and Modern Democracy*, (New York: Harper, 1944); Jonathan Kozol, *Death at an Early Age: the Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools*, (Boston: Houghton Mifflin Company, 1967); William Julius Wilson, *The Declining Significance of Race: Blacks and Changing America*, (Chicago: University of Chicago Press, 1978); William Julius Wilson, *The Truly Disadvantaged: the Inner City, the Underclass, and Public Policy*, (Chicago: University of Chicago Press, 1987); Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal*, (New York: Charles Scribner's Sons Publishers, 1992); and William P. O'Hare, "America's Minorities—the Demographics of Diversity," *Population Bulletin*, vol. 47, no. 4, December 1992. See also, *Report of the National Advisory Commission on Civil Disorders* (Washington, D.C.: U.S. Government Printing Office, 1968).

14 Turner, "Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits," *Housing Policy Debate*, vol. 3, no. 2, p. 187.

15 Ibid.

education than many central-city schools.[16] In short, housing discrimination deprives people of much more than shelter. It has a corrosive effect on their quality of life and general well-being.

The Federal Role

The involvement of the Federal Government in housing discrimination has gone through a tremendous evolution over the course of the 20th century. The Government did not shift easily from active promotion of racial segregation and discrimination through the first half of the century to legislatively driven reversal of those positions beginning in the early 1960s.[17] It took place as a result of landmark legislation designed to end discrimination in the rental and purchase of housing. Executive Order 11,063 (signed by President John F. Kennedy in 1962), Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, section 109 of the Housing and Community Development Act of 1974, and the Equal Credit Opportunity Act of 1974 (amended in 1976) attempted to eradicate, with varying degrees of success, certain aspects of housing discrimination.

Executive Order 11,063 outlaws discrimination based upon race, color, religion, sex, or national origin with respect to the sale, leasing, rental, or other disposition of residential property in federally owned, operated, or assisted housing.[18] Title VI of the Civil Rights Act of 1964 prohibits discrimination in programs or activities receiving Federal financial assistance from a loan or grant, but expressly excludes from coverage financial assistance provided solely through insurance or guarantee.[19] As originally enacted, Title VIII of the Civil Rights Act of 1968 protected individuals from discrimination in the sale or rental of housing, with limited exceptions, on the basis of race, color, religion, national origin,[20] or by amendment in 1974, sex.[21] Section 109 of the Housing and Community Development Act of 1974 "prohibits discrimination in programs and activities funded under Title I of the act establishing the community development block grant program administered by the Department of Housing and Urban Development."[22] The Equal Credit Opportunity Act makes it unlawful for creditors to discriminate against any applicant with respect to any aspect of a credit transaction, including any mortgage transaction, on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), or because all or part of the applicant's income derives from any public assistance programs.[23]

These laws laid the foundation for an assault against housing discrimination in almost all of its forms. Putting laws on the books, however, is only the first step. Without

16 Ibid.

17 Martin F. Sloane, "Federal Housing Policy and Equal Opportunity," *A Sheltered Crisis: The State of Fair Housing in the Eighties* (U.S. Commission on Civil Rights: Washington, D.C., 1983), pp. 133–34.

18 Exec. Order No. 11,063, 3 C.F.R. 652 (1962), *as amended by* (among others) Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. § 3608 (1988).

19 42 U.S.C. § 2000d-4 (1988).

20 *Id.* § 3604.

21 *Id.* and Housing and Community Development Act Amendments to the Fair Housing Act of 1974, Pub. L. No. 93–383, § 808(b)(1), 88 Stat. 633, 729 (1974).

22 42 U.S.C. § 5309(a) (1988).

23 U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 2. The statute also proscribes discrimination based on the good faith exercise of rights provided under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)(3) (1988).

consistent, sustained enforcement, no law designed to overcome individual or group discrimination can work as created. However, over time civil rights enforcement weakened. Throughout the 1980s, HUD emphasized voluntary compliance as the principal mechanism for enforcing Title VIII.[24] Given the demonstrated persistence of the sociological and racial biases that underlay discrimination, relying primarily on voluntary compliance was doomed to fail.

To provide HUD with real enforcement power, Congress enacted the Fair Housing Amendments Act of 1988.[25] Prior to the 1988 amendments, HUD could only investigate and conciliate housing discrimination complaints. HUD had no power to enforce the law on behalf of individual complainants. The 1988 amendments changed that:

> If conciliation fails and HUD determines that reasonable cause exits to believe that a discriminatory housing practice has occurred or is about to occur, then HUD can bring the case to a hearing before an Administrative Law Judge. Because HUD can continue to enforce the law if the conciliation is unsuccessful, there is a real incentive for both parties to conciliate and resolve the complaint in the early stages.[26]

Coincidental with the renewal of interest in administrative enforcement as a means of ending housing discrimination against those groups protected by the Fair Housing Act of 1968, a national consensus was forming behind a new movement to reverse the isolation suffered in many areas of life by persons with mental or physical handicaps. The 1988 amendments made it illegal to discriminate against such persons in the housing market, requiring landlords to make reasonable accommodations to disabled persons seeking housing. The act also required new construction to meet minimum standards of accessibility for the disabled.

Finally, the Federal Government addressed, for the first time, the difficulty facing families with children in securing adequate housing in the face of restrictions or outright bans on minors as housing occupants. The amendments made discrimination against families with children illegal, except when housing complexes are restricted to older residents only, as defined in the new law.[27]

New Initiatives

Housing discrimination undermines a fundamental premise on which our free society rests: that every person, regardless of class or group background, should have the same right to the rewards of his or her work and enterprise. Housing discrimination has eliminated that possibility for untold numbers of Americans, denying them a chance at their American dream. Without strict enforcement of fair housing laws, those who suffer discrimination cannot be empowered to share fully in the opportunities that should be open to them as a matter of right.

This fundamental imperative has received new impetus in recent years. HUD has been the focus of the Federal Government's renewed interest in combating housing discrimination. Without an effective administrative enforcement mechanism until 1989, fair housing enforcement lagged behind the fight

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24 Sloane, "Federal Housing Policy," p. 140.

25 The Fair Housing Amendments Act of 1988 (FHAA) amended Title VIII of the Civil Rights Act of 1968, also called the Fair Housing Act of 1968. In this report, the terms Fair Housing Amendments Act and Title VIII are used interchangeably.

26 FHAA House Committee Report, p. 17, 1988 U.S.C.C.A.N. 2173, 2178.

27 42 U.S.C. § 3607(b) (1988).

against discrimination in education and employment. However, during the Bush Administration HUD began the task of constructing a system of enforcement accessible to individual complainants, and the U.S. Department of Justice (DOJ) launched new initiatives in pursuing major mortgage lending cases. On January 17, 1994, President Clinton gave new visibility to fair housing enforcement with the issuance of an executive order strengthening the coordination and implementation of Federal fair housing policy.[28] HUD announced its intention to issue new regulations on disparate impact, insurance redlining, and mortgage discrimination, and began implementing a reorganization plan on April 15, 1994, that will give greater authority to the Assistant Secretary for Fair Housing and Equal Opportunity in supervising the processing of complaints.

Scope and Methodology

This report examines the quality of the Federal Government's implementation of the 1988 Fair Housing Amendments, giving special attention to the system by which HUD and DOJ investigate and adjudicate individual complaints. The discussion focuses primarily on the new enforcement mechanisms created by the FHAA, rather than reexamining established enforcement methods that have existed since 1968, such as DOJ's testing and pattern or practice authorities. The report also examines recent policy issues regarding the definition of discrimination and the evolution of its interpretation since 1968. The report analyzes discrimination policy issues that are covered primarily by the FHAA, and only touches upon issues that are addressed by other statutes, such as segregation, insurance redlining, and discrimination in public housing and mortgage lending.

In creating a new administrative enforcement mechanism, the law imposed on HUD the responsibility of creating a new system of receiving, processing, investigating, evaluating, and litigating complaints. It also called upon the Secretary of HUD to initiate complaints on behalf of individuals and to combat systemic discrimination. And it anticipated that HUD would set the pace in enunciating government policy regarding housing discrimination.

At the same time, the law continued the role of DOJ in filing lawsuits of general public importance and those alleging a pattern or practice of discrimination, and in litigating challenges to State or local zoning ordinances or other land use laws.[29] In addition, the law mandated DOJ to prosecute complaints where HUD found reasonable cause and where either party elected to have the matter tried before a Federal jury.[30]

The issues arising from any examination of this process include how effectively HUD is carrying out its mandate, how well DOJ is executing its added responsibilities, and how well the two departments are coordinating their efforts. In addition, the report will examine the difficulties that have been encountered, if any, in applying and administering the statute.

To carry out this study, the Commission conducted numerous interviews with headquarters and regional staff at HUD, officials of State and local fair housing enforcement agencies, industry officials, and representatives of private housing enforcement and advocacy groups. Staff performed a statistical analysis of HUD's complaint database, which contains detailed information about more than 35,000 complaints filed under the new law, including the bases for allegations, timeframes for processing complaints, and

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28 Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 20, 1994).

29 *Id.* § 3610(g)(2)(C).

30 *Id.* § 3613(o).

outcomes. The Commission conducted an independent analysis of HUD administrative law judge decisions and decisions made in cases that reached the courts through the election process. The Commission also examined and evaluated numerous internal documents provided by HUD and DOJ. Finally, staff reviewed the literature that has accumulated on Title VIII since its effective date.

These activities have afforded the Commission a unique view of the initiation of an important new phase in fair housing enforcement. The findings and recommendations contained in the conclusion of this report are designed not merely to critique the efforts of those involved, but to strengthen the operation of the law with a view toward assisting all Americans in their efforts to secure housing free of the invidious and arbitrary discrimination that has stained the Nation's history and continues to tarnish its future.

2. Background

Fair Housing Law

The Civil Rights Act of 1968

After public accommodations, education, and employment, housing discrimination was one of the last major issues tackled by the President and Congress in the civil rights era of the 1960s. Pressures to act mounted as a result of several factors: the ongoing open housing movement, which entailed demonstrations in major American cities; the difficulties surrounding school desegregation in segregated neighborhoods; and the urban unrest that stemmed in part from perceived ghettoization.

In response came passage of the Civil Rights Act of 1968,[1] the passage of which was partially in memory of Dr. Martin Luther King, Jr., (Title VIII of which became known as the Fair Housing Act). The act banned discrimination on the basis of race, color, religion, and national origin in most housing transactions. Title VIII of the act enabled the U.S. Department of Housing and Urban Development (HUD) to investigate and conciliate complaints of housing discrimination and authorized the Department of Justice (DOJ) to file suit in cases of pattern and practice discrimination or in cases of public importance. Finally, it allowed State and local agencies to process individual complaints filed with HUD where the Secretary determined that the State or local law provided rights and remedies substantially equivalent to those provided by Title VIII.

Although Title VIII made housing discrimination unlawful, it fell short in many ways:

> [it] did not provide the Secretary [of HUD] with any administrative mechanism for redressing acts of discrimination against an individual. In addition, while the Secretary could refer a case involving a pattern or practice of discrimination to the Attorney General for the initiation of a civil action, Federal courts did not award individual relief to the victims of discrimination in such cases.[2]

Private Enforcement

Prior to the 1968 law, a Reconstruction-era statute was the only Federal law barring private and/or public discrimination in housing. The Civil Rights Act of 1866, as reconstituted and amended,[3] contains two major sections. Section 1981(a) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[4]

This provision was intended to guarantee equal rights under the law specifically for the newly freed slaves. It provided broad protection of contract rights and mandated equal legal protections and obligations for all regardless of race.

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1 Pub. L. No. 90–284, 82 Stat. 73.

2 24 C.F.R. Ch. I, Subch. A, App. I, 911, 912 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

3 42 U.S.C. § 1981 (1988).

4 *Id.* § 1981(a).

Section 1982 provides "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[5] This section was the first piece of legislation directed at property and, thereby, housing rights and clearly included the real and personal property rights of nonwhite citizens.

For over a century, the provisions of the Civil Rights Act of 1866 were the only Federal legislation that "protected" any property rights of nonwhites, but they pertained only to race discrimination and were applied only to governmental or public action.[6] In 1968 the Supreme Court in *Jones v. Alfred H. Mayer Co.*[7] ruled that section 1982 covered private discrimination, stating that it "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[8] In this ruling, the Supreme Court recognized that a "person's [in]ability to buy property" based on race was a "relic of slavery."[9]

The import of the passage of Title VIII, coupled with the Supreme Court's ruling in *Jones v. Mayer,* has been summarized as follows:

> . . . for the first time, the private housing market—and thereby the means by which most Americans secure housing—was subject to Federal laws that prohibited discrimination. Prior to 1968, the Constitution and other laws had banned certain forms of governmental housing discrimination, such as racial zoning, public housing segregation, and the enforcement of racially restrictive covenants. It was not until 1968, however, that the legal tools became available to attack all forms of housing discrimination and that the period of continuous, active fair housing litigation began.[10]

The legislative history of the Fair Housing Amendments Act of 1988, however, found the minimal Federal enforcement powers of the 1968 law inadequate:

> Existing law has been ineffective because it lacks an effective enforcement mechanism. Private persons and fair housing organizations are burdened with primary enforcement responsibility. Although private enforcement has achieved some success, it is restricted by the limited financial resources of litigants and the bar, and by disincentives in the law itself. The Federal enforcement role is severely limited.[11]

Congress noted that "HUD . . . lacks the power even to bring the parties to the conciliation table. HUD cannot sue violators to enforce the law, as in other civil rights laws."[12]

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5 *Id.* § 1982.

6 Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (New York: Clark Boardman and Callaghan, 1991), p. 27–3 (hereafter cited as *Law and Litigation).*

7 392 U.S. 409 (1968).

8 *Id.* at 413.

9 *Id.* at 443.

10 Schwemm, *Law and Litigation,* p. 1-1.

11 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988,* 100th Cong., 2d sess., 1988, H. Rep. No. 100–711, p. 16, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2177 (hereafter cited as FHAA House Committee Report).

12 Ibid.

The role of DOJ is limited. DOJ may file suit:

. . . but can do so only in cases of a "pattern or practice" of discrimination. In order to redress the ordinary individual case of discrimination, the victim of discrimination must bring a lawsuit in court.

Although private enforcement has achieved success in a limited number of cases, its impact is restricted by the lack of private resources, and is hampered by a short statute of limitations, and disadvantageous limitations on punitive damages and attorney's fees.[13]

The Fair Housing Amendments Act of 1988

Passage of a stronger fair housing law with broader coverage and enforcement and administrative mechanisms was largely due to the concerns raised by fair housing advocacy groups and HUD itself. In its 1979 report, *The Federal Fair Housing Enforcement Effort,* the Commission had also strongly criticized the weakness of the 1968 act.[14]

At the 1987 hearings, former HUD Secretary Samuel R. Pierce testified on the need for a stronger fair housing law:

The enforcement mechanism of [T]itle VIII has been criticized almost from the day of its enactment. Most of that criticism has been concentrated on Federal administrative enforcement and its limitation in individual cases to conciliation. If the parties are not willing to conciliate, the Secretary . . . has no authority to go elsewhere. This is an obvious weakness. . . .

I have been encouraged by the increasing role of State and local agencies . . . , but I recognize that there can never be true housing opportunity in this country until the Federal enforcement powers in Title VIII have been strengthened. . . . The most glaring deficiency in Title VIII is the inability of the Federal Government to move people toward conciliation and have the decision be binding. . . . I feel strongly that the Secretary . . . should be empowered to initiate complaints.[15]

Advocacy groups also voiced discontent with Title VIII and lobbied for a more effective fair housing law with a stronger Federal role in enforcement. Benjamin Hooks, executive director of the National Association for the Advancement of Colored People (NAACP), explained in his statement:

Many black Americans know that [Title VIII] has no teeth in it; therefore, although our NAACP branches receive a number of verbal complaints regarding discrimination because of race, most of them do not submit written complaints to our branches, HUD, or to a State or local agency. . . .

The chief defect in the existing fair housing law is its lack of an adequate enforcement mechanism . . . [O]ur nation must have a law which authorizes the Secretary of HUD to proceed administratively or refer the matter to the Attorney General for action in the courts. Under [Title VIII], the Secretary of HUD is virtually powerless to act against private discriminators . . . .[16]

Raul Yzaguirre, president of the National Council of La Raza, also testified that a stronger law with bilingual outreach was necessary:

[T]he weak enforcement mechanism in the present fair housing law may contribute to the low numbers of complaints filed by Hispanics. The lengthy period required to reach conciliation and the lack of any real redress to the victim may deter Hispanic

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13 Ibid.

14 U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* (Washington, D.C.: 1979), p. 230.

15 U.S. Congress, Senate, Subcommittee on the Constitution of the Judiciary Committee, *Hearings on the Fair Housing Amendments Act of 1987,* 100th Cong., 1st Sess., 1987, pp. 49–50; 52 (hereafter cited as *1987 Senate Subcommittee Hearing).*

16 Ibid., pp. 64–66.

victims from filing complaints. In addition, rental agents and realtors are aware that they are not likely to be penalized for practicing illegal housing discrimination, and therefore, are not deterred from discriminating. These factors may limit confidence within the Hispanic community towards the HUD conciliation process, thus reducing the number of complaints.[17]

In response to these concerns, Congress rewrote the Fair Housing Act and, in 1988, passed the Fair Housing Amendments Act (FHAA).[18] The FHAA established an administrative mechanism for enforcing the law, which could result in the award of damages and civil penalties for complaints filed with HUD and tried by an administrative law judge. In addition to other damages, civil penalties are also available to the Attorney General in cases involving a pattern or practice of discrimination, issues of public importance, zoning and land use, and conciliation breaches.[19] However, should the complainant, respondent, or aggrieved person on whose behalf the complaint was filed elect to have the charge decided in Federal district court, only compensatory and punitive damages may be awarded by that court. The Attorney General may not seek civil penalties in election cases.

The new law allows individuals to file complaints with HUD,[20] and where the Secretary determines that reasonable cause exists to believe that discrimination has occurred or is about to occur, he or she must immediately issue a charge on behalf of the complainant.[21] The case will be heard in a formal administrative proceeding before an administrative law judge,[22] unless the complainant or respondent (or an aggrieved person on whose behalf the complaint was filed) elects to move the case to an appropriate Federal district court.[23] The law also empowers the Secretary of HUD to authorize the Attorney General to file a civil action seeking appropriate preliminary or temporary relief, pending final disposition of a complaint.[24] Finally, the law authorizes the Secretary to file complaints of alleged discriminatory housing practices on his own initiative.[25]

In addition to the enforcement provisions, the FHAA expands coverage to two newly protected classes. Discrimination against handicapped persons is now prohibited,[26] as is discrimination against families with children.[27]

The FHAA specifies three important provisions regarding persons with disabilities. First, it is unlawful to refuse to permit "at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises. . . ."[28]

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17 Ibid., p. 81.

18 Pub. L. No. 100–430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (1988)).

19 42 U.S.C. § 3614(d)(1) (C) (1988).

20 *Id.* § 3610.

21 *Id.* § 3610(g)(2)(A).

22 *Id.* § 3612(b).

23 *Id.* § 3612(a).

24 *Id.* § 3610(e)(1).

25 *Id.* § 3610(a)(1)(A).

26 *Id.* § 3604(c)–(f). *See* chap. 8.

27 *Id.* § 3604(a)-(e). *See* chap. 9.

28 *Id.* § 3604(f)(3)(A).

Second, landlords must make "reasonable accommodations" in rules, policies, practices, or services to afford persons with disabilities equal opportunity to use and enjoy a dwelling. Finally, multifamily dwellings first occupied after March 13, 1991, must be constructed so as to accommodate persons with disabilities.[29]

Persons with disabilities have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973[30] and, in particular, section 504, as amended.[31] The FHAA, through its handicap provisions,[32] expresses a congressional commitment to end the exclusion and discrimination of disabled persons and ensure equal opportunity for such persons in all aspects of housing. As the legislative history of the FHAA notes:

> [P]eople who use wheelchairs have been denied the right to [have] simple ramps to provide access, or have been perceived as posing some threat to property maintenance. People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently. People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others. . . . Because persons with mobility impairments need to be able to get into and around a dwelling unit . . . the bill requires that in the future covered multifamily dwellings be accessible and adaptable.[33]

Discrimination against families with children, or as it is commonly termed, familial status discrimination, is also prohibited, with an exception for certain housing provided for senior citizens.[34] Familial status covers families with children younger than 18 years of age. Prior to the passage of the FHAA, 16 States did prohibit some form of discrimination against children in fair housing laws. However, these laws were limited and "varied tremendously."[35] A 1980 national survey sponsored by HUD showed that 25 percent of all rental units did not allow children; 50 percent were subject to some restrictive policy that limited the ability of families to live in those units; and almost 20 percent of families with children lived in dwellings considered less desirable because of restrictive practices.[36]

Other research showed that discrimination against families has a racially discriminatory

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29 *Id.* § 3604(f)(3)(C).

30 Pub. L. No. 93–112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq. (1973)).

31 29 U.S.C.A. § 794(a) (West Supp. 1993).

32 Although the phrases "handicap" and "handicapped persons" have fallen out of everyday usage, Congress has not yet amended the FHAA to replace the phrases with "disability" and "persons with disabilities." Therefore, throughout this report the older terms are used whenever discrimination against persons with disabilities is discussed in context of the FHAA statute or regulations.

33 FHAA House Committee Report, p. 18, 1988 U.S.C.C.A.N. 2173, 2179.

34 Familial status means "one or more individuals [not yet 18] being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee or such parent or other person having such custody, with the written permission of such parent or other person." Pregnant women or individuals in the process of securing custody are accorded familial status. 42 U.S.C. § 3602(k) (1988).

35 FHAA House Committee Report, p. 19, 1988 U.S.C.C.A.N. 2173, 2180.

36 Ibid.

effect because minority households are more likely to have children.[37] The FHAA legislative history highlighted the overlap in familial status and racial discrimination:

In addition, because predominantly white neighborhoods are more likely to have restrictive policies, racial segregation is exacerbated by the exclusion of children. For example, the national survey by HUD found that units in predominantly white neighborhoods restricted children at a rate of 28.9 percent compared with 17.5 percent in predominantly black neighborhoods, and also found that restrictions are greater in recently built units.[38]

Other Fair Housing Provisions

HUD is not only responsible for enforcing the FHAA, but it has responsibilities in safeguarding the rights of individuals under Title VI of the Civil Rights Act of 1964, as amended;[39] Section 504 of the Rehabilitation Act of 1973;[40] the Equal Credit Opportunity Act, as amended;[41] and the Housing and Community Development Act of 1974, as amended.[42] HUD also administers the Fair Housing Initiatives Program, first enacted in the Housing and Community Development Act of 1987.[43]

Title VI provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[44]

Title VI requires recipients of Federal funds to administer their programs and activities in a nondiscriminatory manner. The principal use of Title VI in the fair housing field has been to challenge discrimination in federally assisted public housing.[45] After the passage of the Fair Housing Act in 1968, the importance of Title VI as a fair housing tool "faded substantially."[46] Compared to Title VIII as amended by the FHAA, the Title VI provisions are of more limited use to complainants in the housing area. In essence, Title VIII became the "principal weapon" used by HUD and private parties to challenge public as well as private housing discrimination. After the 1988 amendments, HUD's regional offices focused staff and resources on training and implementing the provisions of the FHAA, sometimes detailing Title VI staff to work in the fair housing enforcement area.[47]

Section 504 of the Rehabilitation Act of 1973 provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or any

37 Ibid., p. 21, 1988 U.S.C.C.A.N. 2173, 2182.

38 Ibid.

39 42 U.S.C. §§ 2000d-1 to 2000d-7 (1988 and Supp. IV 1992); 24 C.F.R. §§ 1.1–1.12 (1993).

40 29 U.S.C.A. § 794(a) (West Supp. 1993); 24 C.F.R. §§ 8.1–8.71 (1993).

41 15 U.S.C.A. §§ 1691–1691(e) (1982 and West Supp. 1993); 24 C.F.R. § 25.9 (1993).

42 Pub. L. No. 93–383, 88 Stat. 633 (1974) (codified in scattered sections of U.S.C.).

43 24 C.F.R. Part 125 (1993).

44 42 U.S.C. § 2000d (1988).

45 *See* Schwemm, *Law and Litigation,* pp. 29-1, 29-2.

46 *See* ibid., p. 29-4.

47 For a detailed discussion on the resources devoted to Title VIII enforcement, see chap. 5 of this report.

program or activity conducted by any Executive agency or by the United States Postal Service.[48]

Federally assisted housing programs are covered by section 504. However, after the 1988 amendments, section 504 "became relatively less important"[49] given the FHAA's broader definition of handicap and the FHAA requirement that certain dwellings meet accessibility standards set by HUD.[50]

The Equal Credit Opportunity Act (ECOA) makes it unlawful:

> . . . for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction"—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided that the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[51]

ECOA applies to housing in two ways: a) it covers applications for mortgages and other forms of credit in the housing area, and b) it provides a right of action for residents in segregated neighborhoods who are denied credit because of the racial makeup of their area.[52] ECOA authorizes various methods of enforcement, including pattern or practice suits by the Attorney General, upon referral of a matter to her, and private actions by persons aggrieved for actual damages, punitive damages of not more than $10,000, equitable and declaratory relief, and reasonable attorney's fees and costs.[53] Credit discrimination in the acquisition of housing is prohibited by the FHAA;[54] however, ECOA covers marital status and age (although not family status and handicap).

The Housing and Community Development Act of 1974[55] added "sex" to the protected groups covered under the 1968 Fair Housing Act. It also created new housing assistance programs for lower income families, commonly known as section 8.[56] The act also established the Community Development Block Grant (CDBG) program,[57] which authorized HUD to make public works funds available to local communities for use on a nondiscriminatory basis[58] if they are willing to undertake certain fair housing responsibilities.

The Fair Housing Initiatives Program,[59] first enacted as part of the Housing and Community Development Act of 1987,[60] provides grants for fair housing activities carried out by public agencies and private organizations. The money is granted in four categories: administrative enforcement, education and

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48 29 U.S.C.A. § 794(a) (West Supp. 1993).

49 Schwemm, *Law and Litigation,* p. 29-5.

50 Ibid. pp. 29-5 to 29-6.

51 15 U.S.C. § 1691(a) (1988).

52 Schwemm, *Law and Litigation,* p. 29-7.

53 15 U.S.C. § 1691e(b)–(d) (1982).

54 42 U.S.C. § 3605(a) (1988).

55 Pub. L. No. 93–383, Tit. V, § 109, 88 Stat. 633, 729 (codified, as amended, at 42 U.S.C.A. § 5309(a) (1988)).

56 It appears, as amended, at 42 U.S.C. § 1437f (1988 and Supp. IV 1992).

57 The CDBG program, as amended, appears at 42 U.S.C.A. §§ 5301–5317 (1983 and West Supp. 1993).

58 42 U.S.C. § 5309 (1988 and Supp. II 1990).

59 For a full discussion of this program, see chap. 7.

60 Pub. L. No. 100–242, tit. V, § 561, 101 Stat. 1942 (1988) (codified as amended at 42 U.S.C. § 3616a (Supp. IV 1992)).

outreach, private enforcement, and private organizations.

Administrative enforcement money is intended for State and local fair housing agencies who, by law and in operation, are deemed to be "substantially equivalent"—that is, they provide protection equal to that of HUD and Federal law.[61] Funds for education and outreach are available to public or private entities implementing programs to prevent or eliminate housing discrimination.[62] Money for enforcement efforts of private nonprofit groups only is awarded in the private enforcement category.[63] The Housing and Community Development Act of 1992[64] added funds specifically to help private fair housing enforcement groups in undeserved areas to carry out a national fair housing awareness media campaign and to designate national fair housing month.[65]

Fair Housing Enforcement

The Department of Housing and Urban Development (HUD)

HUD, under the Secretary for Housing and Urban Development, is by law and executive order the principal Federal agency responsible for the administration and enforcement of the Fair Housing Act, including the development of policies, procedures, regulations, standards, guidelines, and resources for the implementation of the act.[66] Three organizational elements of HUD have roles in fair housing enforcement that bear examination: the Office of Fair Housing and Equal Opportunity, the Office of General Counsel, and HUD's regional organization.

The Office of Fair Housing and Equal Opportunity

HUD's Office of Fair Housing and Equal Opportunity (FHEO) is headed by the Assistant Secretary for Fair Housing and Equal Opportunity, a post dating to the Fair Housing Act of 1968.[67] FHEO is comprised of seven offices, and is responsible for administering the FHAA and section 561 of the Housing and Community Development Act of 1987 that established the Fair Housing Initiatives Program.[68] In addition, the office also administers fair housing activities in connection with Title VI of the 1964 Civil Rights Act, as amended;[69] Title I, section 109 of the Housing and Community Development Act of 1974;[70]

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61 24 C.F.R. § 125.201 (1993).

62 *Id.* §§ 125.301–302.

63 *Id.* §§ 125.401–402.

64 Pub. L. No. 102–550, § 905(b), 106 Stat. 3672, 3869-72 (codified, as amended, at 42 U.S.C. § 3616a (Supp. IV 1992)).

65 42 U.S.C. § 3616a (Supp. IV 1992).

66 42 U.S.C. §§ 3601–3619 (1988); Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. § 3608 (1988).

67 42 U.S.C. § 3608(b) (1988).

68 This description of responsibilities of the Office of Fair Housing and Equal Opportunity (FHEO) relies on HUD's FY 1994 budget submission to Congress. See U.S. House of Representatives, Committee on Appropriations, *Hearings on Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1994,* 103d Cong., 1st Sess., 1993, part 6, pp. 461–64 (hereafter cited as *FY 1994 Budget Hearings).*

69 42 U.S.C. § 2000d (1988).

70 *Id.* § 5309.

section 504 of the Rehabilitation Act of 1973;[71] and the Age Discrimination Act of 1975.[72] Finally, the office administers internal HUD equal employment programs governed by Executive Order 11,478,[73] Title VII of the 1964 Civil Rights Act,[74] and the Age Discrimination in Employment Act.[75]

With respect to Title VIII, FHEO is charged with oversight of all aspects of the complaint process up to adjudication, including intake, investigations, and conciliations. In addition, FHEO maintains the Title VIII complaint database, administers the substantial equivalency certification program regarding State and local fair housing agencies, and formulates fair housing policy for the Secretary in conjunction with the Office of General Counsel. In so doing, FHEO oversees (but does not supervise) the regional offices, which actually receive and process individual complaints.[76] (Other fair housing functions are noted below by office.)[77]

Total fiscal year (FY) 1993 employment in FHEO for all these functions was 653 permanent positions and 729 full-time equivalents (FTEs).[78] Headquarters staff totaled 140 permanent positions and 146 FTEs, while field staff totaled 513 permanent positions and 583 FTEs.[79] Of these, a total of 28.7 FTEs (17 headquarters and 11.7 field FTEs) are devoted exclusively to HUD's equal employment (nonhousing-related) functions[80]; approximately 5 percent of the available work force.

Funding for FHEO activities in FY 1993 was $48.525 million and $47.964 million in FY 1994, representing a decrease of $561,000.[81]

Estimates of FHEO headquarters employment devoted to Title VIII versus other HUD fair housing duties are difficult because HUD has not published its headquarters employment by function, as it has field employment. Instead, headquarters employment is described by office, and most offices (except for the internal equal employment office referenced above) have responsibility for fair housing activities required by more than one statute—such as Title VIII and Title VI, etc.

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71 29 U.S.C. § 794 (1988).

72 42 U.S.C. §§ 6101–6107 (1988).

73 Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970 compilation); *see* 24 C.F.R. § 7.1 (1992).

74 42 U.S.C. § 2000d (1988).

75 29 U.S.C. §§ 621–634 (1988 and Supp. IV 1992).

76 U.S. Department of Housing and Urban Development, "Functional Statements re: Assistant Secretary for Fair Housing and Equal Opportunity and re: General Deputy Assistant Secretary for Fair Housing and Equal Opportunity" submitted to the U.S. Commission on Civil Rights, December 1992.

77 The organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under its reorganization, effective April 15, 1994, HUD eliminated the regional administrator positions and replaced them with Secretary's Representatives. The regional offices became area offices and the regional FHEO directors now report directly to the Assistant Secretary for Fair Housing and Equal Opportunity. *See* Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, Comments of the Department of Housing and Urban Development, p. 2 (hereafter cited as HUD Comments).

78 U.S. Department of Housing and Urban Development, *Congressional Justifications for 1995 Estimates,* Part 2 (March 1994), p. Q–1 (hereafter *HUD 1995 Budget, Part 2).*

79 Ibid., p. Q–2.

80 Ibid., p. Q–5.

81 *See* Theodore Daniels, Director, Office of management and Field Coordination, Office of Operations and Management, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, telephone interview, Aug. 15, 1994.

The seven offices in FHEO as constituted during most of the first 5 years of the FHAA are described below:

1) The Office of Investigations includes two divisions: HUD Program Investigations and Fair Housing Enforcement. It reviews complaint investigations conducted in HUD regions and conducts investigations in preparation for the filing of Secretary-initiated complaints. The FY 1993 staff was 32; the 1994 FTE total is projected at 41, and 62 FTEs are proposed for FY 1995.[82]

2) The Office of Program Training and Technical Assistance provides training and guidance to HUD fair housing staff and provides technical assistance to outside groups. The office has also been charged with developing an interagency training academy. Actual FY 1993 staff totaled 11; no change was projected for FY 1994. Twelve FTEs are proposed in FY 1995.[83]

3) The Office of Program Standards and Evaluation is charged with reviewing all legislative proposals and regulatory and other official guidance regarding HUD program administration. The office also:

> . . . develops long-range strategies; coordinates research programs and evaluation mechanisms with the Office of Policy Development and Research;[84] reviews policy and HUD programs; provides evaluation assistance to ongoing FHEO programs; conducts formal EO oriented evaluations of specifically identified HUD programs; implements activities to strengthen civil rights data collection and reporting throughout the Department and within FHEO, and provides feedback to management on necessary improvements and/or changes to programs; and prepares annual reports to Congress on the state of fair housing and on racial and ethnic participation in HUD programs.[85]

The FY 1993 staff was 19 FTEs. No increase was projected for FY 1994, but 24 FTEs are proposed for FY 1995.[86]

4) The Office of Fair Housing Assistance and Voluntary Programs administers the Fair Housing Assistance Program;[87] the Community Housing Resource Board Program;[88] Executive Order 12,259 prohibiting discrimination in housing programs;[89] section 3 of the Housing and Urban Development Act of 1968,[90] which authorizes programs to create employment and training opportunities for low-income persons; and voluntary compliance program agreements. The FTE total for FY 1993 is 20; no change was expected for FY 1994. The total proposed for FY 1995 is 25.[91]

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82 Ibid., p. Q–3.

83 Ibid., p. Q–3.

84 This office is headed by the Assistant Secretary for Policy Development and Research and derives its primary charge from Title V of the Housing and Urban Development Act of 1970, Pub. L. No. 91–609, 84 Stat. 1770 (codified as amended 42 U.S.C. § 3535(d) (1988)).

85 *FY 1994 Budget Hearings,* p. 463.

86 Ibid., p. Q–4.

87 *See* 42 U.S.C. § 3616a (1988 and Supp. IV 1992).

88 This program began in 1976 pursuant to the Fair Housing Act of 1968 (see chap. 7). *See* 24 C.F.R. Part 120 (1993).

89 Exec. Order No. 12,259, 3 C.F.R. 307 (1981), *reprinted in* 42 U.S.C. § 3608 (1988).

90 Pub. L. No. 90–448, 82 Stat. 476 (codified, as amended, at 12 U.S.C. § 1701u (Supp. IV 1992)).

91 *HUD 1995 Budget,* p. Q–4.

5) The Office of the Deputy Assistant Secretary for Operations and Management develops and oversees programs regarding HUD's internal equal opportunity goals; personnel functions, staff training and allocation; and technical and management evaluations of field operations. The Deputy Assistant Secretary's Office consisted of 4 FTEs in FY 1993. No change was projected for FY 1994–1995.

6) Located within the Deputy Assistant Secretary's Office is the Office of Affirmative Action and Equal Employment Opportunity, which oversees HUD's internal affirmative action programs and functions mandated by Executive Order 11,748, as amended;[92] Title VII of the 1964 Civil Rights Act, as amended; the Age Discrimination in Employment Act of 1967; and pertinent HUD regulations. The FTE total for FY 1993 was 17; no change was projected for FY 1994–1995.[93]

7) Also located within the Deputy Assistant Secretary's Office is the Office of Management and Field Coordination. This office incorporates the Budget, Performance Evaluation, Management Planning, and Administrative Divisions. It performs budget, personnel, and management functions for headquarters FHEO, and provides technical and management assistance to regional FHEO units. FTEs totaled 18 for FY 1993, with no change projected for FY 1994–1995.[94]

These offices are all supervised by the Office of the Assistant Secretary. The Assistant Secretary:

> ... serves as the principal advisor to the Secretary and principal source of advice and technical assistance to other Assistant Secretaries and to Regional Administrators on all matters relating to equal opportunity in housing and community development, facilities, employment, business opportunities, and other matters relating to civil rights. The Assistant Secretary also serves as the Director of Equal Employment Opportunity for the Department.[95]

The Office of the Assistant Secretary includes a quality assurance staff and a management information systems staff and is administered by the General Deputy Assistant Secretary. FTEs for the immediate Office of the Assistant Secretary were 25 in FY 1993; no increase was projected for FY 1994–1995.

The Office of General Counsel

The Office of General Counsel (OGC) incorporates seven legal offices, of which one is the Office of Equal Opportunity and Administrative Law.[96] FTEs for the entire Office of the General Counsel were 219 in FY 1993 and 214 in FY 1994.[97] The FY 1995 estimated FTEs for

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92 Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970 compilation).

93 HUD 1995 Budget, p. Q–5.

94 Ibid.

95 *FY 1994 Budget Hearings,* p. 462.

96 The explanation of OGC's structure offered here is based on the FY 1994 HUD budget submission reprinted in the *FY 1994 Budget Hearings,* pp. 483–86. HUD's organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under HUD's reorganization, effective April 15, 1994, there are eight Associate General Counsels in OGC, and the Associate General Counsel for Civil Rights and Litigation is responsible for fair housing. *See* HUD Comments, p. 2.

97 U.S. Department of Housing and Urban Development, *Congressional Justifications for 1995 Estimates,* Part 3 (March 1994), p. C–2 (hereafter *HUD 1995 Budget, Part 3). See also* Joy Herndon, Director, Administrative Services, Office of the General Counsel, U.S. Department of Housing and Urban Development, telephone interview, Aug. 15, 1994.

OGC are 233.[98] Actual FTEs for the Office of Equal Opportunity and Administrative Law were 46 in FY 1993 and 45 in FY 1994, increasing to 50 in FY 1995.[99] Expenditures were $18.044 million in FY 1993, $18.984 million in FY 1994 and $22.284 in FY 1995.[100]

The Office of Equal Opportunity and Administrative Law is comprised of the Administrative Law Division, the Fair Housing Division, and the Personnel and Ethics Law Division. The Administrative Law Division has a variety of responsibilities associated with the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; bodies created by the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA),[101] including the Federal Housing Finance Board, the Thrift Depositor Oversight Board and the Resolution Trust Corporation; HUD's Lead-Based Paint Office; HUD procurement and grants; and various contract disputes. In addition:

the division provides legal advice and assistance concerning the Real Estate Settlement Procedures Act (RESPA), the Davis-Bacon Act, the National Environmental Policy Act (NEPA), the Privacy Act of 1974, the Federal Managers' Financial Integrity Act (FMFIA), the Federal Tort Claims Act (FTCA), and the Military Personnel and Civilian Employees' Compensation Act (MPCEA). The Division is responsible also for all HUD delegations of authority, staff work for the Secretary's review of administrative law judge decisions, and general administrative law matters.[102]

This workload is intensified by the fact that much of the responsibility is new and concerns relatively uncharted legal waters. This division was allotted 10 FTEs in 1993. A budget breakdown by division of money appropriated is not available.[103]

The Fair Housing Division is responsible for a variety of civil rights matters. It advises the Secretary on the requirements of Title VIII and Title VI, section 504 of the Rehabilitation Act of 1974, the Americans with Disabilities Act, and the Age Discrimination Act, as they apply to HUD programs—an estimated 20 percent of its workload. It works on assuring that housing and community development activities promote fair housing (15 percent), and prosecutes Title VIII complaints in administrative law proceedings (45 percent). It also reviews State fair housing laws for substantial equivalency with Title VIII and reviews HUD regional counsel analyses of local fair housing ordinances (20 percent).[104] The division was allotted 17 FTEs in FY 1993 and FY 1994; of these, 13 are attorneys, including the assistant general counsel and 2 deputy assistant general counsels.[105]

98 Herndon interview, Aug. 15, 1994.

99 *HUD 1995 Budget, Part 3,* p. C–2.

100 Ibid., p. C–1. *See also* Herndon interview, Aug. 15, 1994.

101 Pub. L. No. 101–73, 103 Stat. 183 (1989).

102 *FY 1994 Budget Hearings,* p. 485.

103 Joy Herndon, Director of Administrative Services, Office of the General Counsel, U.S. Department of Housing and Urban Development, telephone interview, July 26, 1993.

104 *FY 1994 Budget Hearings,* p. 486.

105 "Office of Equal Opportunity and Administrative Law," staff list supplied by HUD July 22, 1993, and Herndon interview, July 26, 1993.

The Personnel and Ethics Law Division deals with all litigation matters concerning the Merit Systems Protection Board, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission. It also provides policy and legal guidance regarding standards of conduct and other ethical questions, the Freedom of Information Act, and the correct use of appropriated funds. It was allotted nine FTEs in 1993.

HUD's Regional Structure

HUD's regional structure[106] incorporates fair housing enforcement in its 10 regional offices and in a few field offices. Under HUD's model for regional operations, a regional office is headed by a regional administrator who supervises all regional staff. Each regional office includes a director of fair housing and equal opportunity, who reports to a regional administrator and in turn supervises a program compliance division, a fair housing enforcement division, and a program operations division. In addition, a model office includes an intake/conciliation coordinator and management liaison officer.[107]

In reality, regional office organization varies, with some fair housing directors overseeing only two divisions and a management liaison officer, and others having the full complement of organizational positions.[108] The offices vary in size from 29 to 82, with fair housing enforcement divisions ranging widely as well. The FHEO divisions include intake staff, investigators, and liaison personnel with State and local fair housing agencies that process HUD complaints.

The relationship of headquarters FHEO to the regions is one of guidance and oversight; actual supervision of regional FHEO activities rests with the appropriate regional administrator. Regional FHEO staff are expected to coordinate their activities as necessary with the regional counsel and field legal services located in each regional office.[109]

Total FHEO field employment was estimated at 543 for FY 1993 and 531 for FY 1994. Title VIII FTEs for FY 1993 were estimated at 269, and at 273 in FY 1994.

All HUD regional offices contain, in addition to an office of fair housing and equal opportunity, a regional counsel, deputy

106 As a result of reorganization efforts, as of April 15, 1994, HUD eliminated its regional administrators and established a more direct chain of command between the former regional offices (now called Enforcement Centers) and the Assistant Secretary. "Because the investigative function will now report directly to the Assistant Secretary, more accountability and better communication of information should enhance enforcement efforts, as well as ensure that enforcement efforts are made more consistent nationally." According to HUD, the Assistant Secretary is already using this new chain of command as a mechanism to disseminate information and direction to the Enforcement Centers. In addition, HUD anticipates that the new chain of command will also result in more efficient case processing. *See* "Recent Fair Housing Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives). *See also* HUD Comments, p. 7. *See also* National Academy of Public Administration, *Renewing HUD: A Long-Term Agenda for Effective Performance* (August 1994), for an exhaustive analysis of HUD's overall mission and organization.

107 "Model Regional Office of Fair Housing and Equal Opportunity," organization chart supplied by HUD, December 1992.

108 HUD regional office organization charts, supplied by HUD in December 1992.

109 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1989*, p. 7.

regional counsel, associate regional counsels, and attorney-advisors.[110] The regional counsels "receive operational direction and administrative support from their Regional Administrators and Managers, but on legal matters, they receive professional advice and direction from the General Counsel, the chief legal officer of the Department."[111]

Regional counsels review all local (but not State) statutes submitted to HUD for certification as substantially equivalent to Title VIII.[112] In addition, regional counsels review some no-cause determinations. However, pursuant to internal FHEO procedures, "regional FHEO sends some no cause determinations involving novel or complex issues directly to FHEO headquarters for concurrence, such as determinations involving lending and insurance discrimination, zoning cases, applications of reasonable accommodations standards, and retaliation issues."[113] Those determinations are then reviewed by OGC headquarters.[114] A breakdown of staff time or FTEs spent on fair housing activities is not available, but the total actual employment for all field legal services in FY 1993 was estimated at 302; projected employment in FY 1994 was 299. FY 1993 estimated expenditures totaled $19.165 million; for FY 1994 the figure is $20.327 million.[115]

The Department of Justice (DOJ)

Primary responsibility for litigating Title VIII matters in court rests with the Housing and Civil Enforcement Section located within the Civil Rights Division of DOJ. The Attorney General has authority to file suit in Federal district court whenever:

> any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by [Title VIII] and such denial raises an issue of general public importance . . . [116]

The Attorney General is also authorized to pursue cases referred by HUD where "the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance."[117] Furthermore, the Attorney General may file suit where the Secretary refers to her a breach of a conciliation agreement.[118] In these cases only, the Attorney General may seek civil penalties to vindicate the public interest.[119]

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110 The explanation of HUD's field legal services offered here is based on the FY 1994 budget submission reprinted in the *FY 1994 Budget Hearings,* pp. 492–95. The regional organization described here and elsewhere in the report prevailed throughout the period covered by the Commission. Under its reorganization, effective April 15, 1994, HUD redesignated the ten regional counsels as assistant general counsels. *See* HUD Comments, p. 2.

111 *FY 1994 Budget Hearings,* p. 492.

112 *FY 1994 Budget Hearings,* p. 493.

113 HUD Comments, p. 2.

114 Ibid.

115 *FY 1994 Budget Hearings,* p. 492.

116 42 U.S.C. § 3614(a) (1988).

117 *Id.* §§ 3610(g)(2)(C) and 3614(b)(1)(A).

118 *Id.* § 3614(b).

119 *Id.* § 3614(d)(1)(C).

Civil penalties in these cases may include up to $50,000 for a first violation,[120] and up to $100,000 "for any subsequent violation."[121]

The Attorney General also must seek "prompt" judicial action when the Secretary determines immediate intervention is necessary involving a complaint and authorizes a civil action,[122] and may sue to enforce subpoenas.[123] HUD, through the Attorney General, may bring suits to enforce administrative orders.[124] In addition, the Attorney General is required to file suit when the Secretary of HUD finds reasonable cause[125] and the complainant, respondent, or aggrieved person on whose behalf the complaint was filed elects a trial in U.S. district court.[126] Finally, the Attorney General may prosecute "Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with"[127] persons exercising their fair housing rights under Title VIII.

These responsibilities are delegated within the department to the Assistant Attorney General for Civil Rights and, in turn, are carried out by the Housing and Civil Enforcement Section. In addition to housing enforcement, this section is responsible for enforcement of the public accommodations provisions of the 1964 Civil Rights Act.[128]

Actual staff for the section in FY 1993 totaled 58, including 33 attorneys.[129] Three or four additional attorneys were expected in FY 1994.[130]

The Civil Rights Division budget for FY 1993 was $52.7 million, of which $6.415 million was devoted to housing and civil enforcement. The FY 1994 overall budget was $59.956 million, with fair housing receiving $9.283 million.[131]

To ensure coordination, consistency, and cooperation between HUD and DOJ in the enforcement of the Fair Housing Amendments Act, both departments have executed a "Memorandum of Understanding."[132] The memorandum outlines the roles and responsibilities of each department with regard to prompt judicial action; election of civil action; pattern or practice, land use and zoning cases;

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120 *Id.* § 3614(d)(1)(C)(i).

121 *Id.* § 3614(d)(1)(C)(ii).

122 *Id.* § 3610(e)(1).

123 *Id.* § 3614(c).

124 *Id.* § 3612(j) and (m).

125 *Id.* § 3614(b)(1)(A).

126 *Id.* § 3612(a) and (o). Civil penalties are not available in election cases.

127 *Id.* § 3631.

128 Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., June 24, 1993.

129 Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, letter to Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, Apr. 1, 1993.

130 Hancock interview, June 24, 1993. In FY 1994, the section received 89 FTEs and 101 actual positions according to the Civil Rights Division's Budget Office. *See* Jean Chipouras, Budget Analyst, Budget Office, Civil Rights Division, U.S. Department of Justice, telephone interview, Aug. 15, 1994.

131 "Civil Rights Division Fund Tracking Chart Enacted Levels," supplied by the Department of Justice, July 1, 1993.

132 "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988," Dec. 7, 1990.

breach of conciliation agreements and enforcement of subpoenas; judicial review and enforcement of orders by administrative law judges; referral of matters from DOJ to HUD; situations involving interference, coercion, or intimidation; press relations; resolution of differences; and exchange of information.[133]

State and Local Human Rights/Relations Agencies

In both 1968 and 1988, Congress recognized the importance of including State and local agencies in the enforcement of the law. According to the Commission's 1992 report on the certification of State and local agencies, "the 1988 Amendments reaffirmed and further codified the Federal Government's commitment to using State and local agencies in the enforcement of the Federal fair housing law."[134]

In order to continue processing fair housing complaints under the amendments, State and local agencies must have laws and ordinances that are "substantially equivalent" to the Federal law. State or local law must substantially conform, "on its face," to the rights, remedies, judicial protection, and enforcement of such rights and remedies as are available under the FHAA.[135] An agency's "current practices and past performance [must] demonstrate that, in operation, the law provides substantially equivalent rights and remedies.[136] If an agency, after meeting the facial determination, does not have an adequate record to permit HUD to reach a conclusion on the adequacy of the current practices, HUD may enter into an interim referral agreement" for a period of up to 2 years. During this time, HUD may refer complaints to the agency to allow it to build a performance record that HUD will monitor and assess before granting full certification.[137]

As of May 1, 1993, HUD had signed interim agreements to enforce Title VIII with 22 States and 17 local agencies. The Texas Human Relations Commission, certified in October 1992, was the first and only agency fully certified as of May 1, 1993.[138] However, North Carolina's State agency achieved full certification later in 1993.[139]

Upwards of 70 percent of all complaints received by HUD were processed by State and local agencies following the 1988 amendments,[140] until the agency certification requirement under the new law took effect in September 1992. On that date, HUD took back, in effect, 1,520 complaints,[141] increasing its own caseload by approximately 75 percent to 3,709.[142]

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133 Ibid.

134 *Prospects and Impact,* p. 8; and 42 U.S.C. § 3610(f)(3)(a) (1988).

135 24 C.F.R. § 115.2(a) (1993). This is frequently called the facial determination.

136 *Id.* § 115.2(b).

137 *Id.* § 115.11.

138 57 Fed Reg. 48,803 (Oct. 28, 1992).

139 "In Brief," *Fair Housing-Fair Lending,* vol. VIII, no. 12, June 1, 1993, p. 14. HUD published its proposal to certify North Carolina Dec. 18, 1992 (57 Fed. Reg. 60,220), and the public comment period ended Jan. 19, 1993.

140 *Prospects and Impact,* p. 6.

141 "FHAP Cases Open in Agencies as of Sept. 13, 1992," list of cases supplied by HUD, dated Sept. 29, 1992.

142 For a full discussion of reactivated cases, see chapter 6, Fair Housing Assistance Program.

Fair Housing and Other Advocacy Groups

Other major players in the processing of complaints include local fair housing organizations and civil rights advocacy groups. Local fair housing organizations have operated for the most part using HUD funds provided through the Fair Housing Initiatives Program. The fair housing groups conduct testing, assist individual complainants, and file lawsuits of public importance, often winning substantial money damages to be used in furthering fair housing work.[143] Many of the fair housing organizations operate under an umbrella group, the Fair Housing Alliance, which serves as a clearinghouse and resource center.[144] Other civil rights groups, such as the NAACP, NAACP Legal Defense and Education Fund, Inc., and the Lawyers' Committee for Civil Rights Under Law are also active in fair housing litigation.

143 Shanna Smith, executive director, Fair Housing Alliance, interview in Washington, D.C., June 14, 1993.

144 Smith interview, June 14, 1993.

3. Processing Complaints

The lack of government protection against housing discrimination was the principal motivating factor in the struggle for a new fair housing law for a decade before passage of the 1988 Fair Housing Amendments Act (FHAA). This chapter examines the implementation of the new law by the administrative structure created by the U.S. Department of Housing and Urban Development (HUD) to process complaints pursuant to the FHAA. The analysis below includes the intake, conciliation, and investigation of complaints; and the determination of no cause or reasonable cause to believe discrimination has occurred.

Intake

Intake, often regarded in complaint systems as a clerical function, is in fact critically important in screening out cases that do not fall within HUD's jurisdiction, in establishing the basic framework as much as possible for conciliation and investigation, and in determining if the complainant requires any immediate relief.[1]

Legal Framework

The intake function is governed primarily by HUD regulations; only minimal requirements are spelled out in the law. Under the FHAA, complaints may be filed with the Secretary of HUD within 1 year of the date "an alleged discriminatory housing practice has occurred or terminated."[2] HUD regulations state that such complaints may be filed in person or in writing with HUD headquarters, regional, or field offices,[3] or may be initiated by telephone with HUD regional and field offices.[4] Complaints may also be filed with State or local agencies certified as substantially equivalent by HUD.[5] Generally, the appropriate regional administrator will process the complaints.[6]

The Assistant Secretary may require that the aggrieved person or HUD file complaints on HUD forms or on a form containing substantially the same information as the HUD forms require.[7] The complainant must sign the complaint and affirm the truth of its content.[8] If a complaint is made by telephone, HUD will write out the complaint using the

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1 Kathleen Coughlin, Director of Fair Housing Employment Opportunity, HUD Region IV (Atlanta), interview in Atlanta, Ga., Mar. 6, 1991 (hereafter cited as Coughlin, 1991 interview), and Shanna Smith, executive director, Fair Housing Alliance, interview in Washington, D.C., June 14, 1993 (hereafter cited as Smith interview).

2 42 U.S.C. § 3610(a)(1)(A)(i) (1988). (For a discussion of FHAA's retroactive application, see below.)

3 24 C.F.R. § 103.25(a)(1) (1993).

4 *Id.* § 103.25(a)(2).

5 *Id.* § 103.25(a)(3).

6 *Id.* § 103.25(b).

7 *Id.* § 103.30(b).

8 Id. § 103.30(a).

HUD complaint form and send it to the aggrieved person for signature.[9] Each complaint must contain the following:

(1) The name and address of the aggrieved person.
(2) The name and address of the respondent.[10]
(3) A description and the address of the dwelling which is involved, if appropriate.
(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.[11]

Complaints may be amended "to cure technical defects or omissions, including failure to sign or affirm a complaint, to clarify or amplify the allegations in a complaint, or to join additional or substitute respondents."[12]

The Assistant Secretary is required to advise the aggrieved person that the complaint has been received, what the time limits are, and what forums he or she may use to pursue the complaint.[13] The Assistant Secretary must use certified mail or personal service to notify the aggrieved person.[14] The acknowledgment will include a notice of the right of the aggrieved party to file a civil suit in U.S. district court within 2 years of when the discriminatory act occurred or terminated, not including the time consumed by an administrative proceeding under the act.[15]

Within 10 days of when the complaint is filed, the Secretary must notify the respondent as well, "identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this title, together with a copy of the original complaint."[16] The notice will advise the respondent of his or her right to submit an answer to the complaint within 10 days of receiving HUD's notice of the complaint.[17] The answer must be signed and affirmed in the same manner as a complaint, may be based on any defense that might be used in court,[18] and may be "reasonably and fairly amended at any time with the consent of the Assistant Secretary."[19] Finally, notice to the respondent must include a warning that retaliation against any person because of their participation in the complaint process is itself a discriminatory housing practice under the act.[20]

A complaint filed regarding a discriminatory practice that occurred within the jurisdiction of a State or local agency certified to

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9 *Id.* § 103.25(a)(2). An aggrieved person is one who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i) (1988).

10 "Respondent" is defined as "(a) The person or other entity accused in a complaint of a discriminatory housing practice; and (b) any other person or entity identified in the course of investigation and notified as required under [C.F.R.] § 103.50." 24 C.F.R. § 103.9 (1993).

11 *Id.* § 103.30(c).

12 *Id.* § 103.42.

13 42 U.S.C. § 3610(a)(1)(B)(i) (1988); 24 C.F.R. § 103.45 (1993).

14 24 C.F.R. § 103.45 (1993).

15 *Id.* § 103.45(a) and (d). However, the period for filing is extended to include "the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending."

16 42 U.S.C. § 3610(a)(1)(B)(ii) (1988).

17 24 C.F.R. § 103.50(b)(3) (1993).

18 *Id.* § 103.55(a).

19 *Id.* § 103.55(b).

20 *Id.* § 103.50(b)(6).

handle HUD complaints will be referred to such agency for processing.[21] In such cases, both the complainant and the respondent will be notified of their rights as above.[22] The Assistant Secretary will take no further action under Title VIII while the complaint is pending with the certified agency,[23] but may take action under other civil rights statutes.[24] Under certain circumstances, HUD may reactivate the complaint.[25]

Retroactivity of Complaints

The complaint processing procedures found in part 103 of HUD's regulations apply to all complaints alleging discriminatory housing practices based on race, color, religion, sex, or national origin pending on March 12, 1989, or filed after that date.[26] However, the procedures apply to complaints based on family status or handicap only if the alleged discriminatory practice occurred on or after the March 12, 1989, effective date.[27] Thus, any complaint alleging discrimination on the traditional bases is processed under the amended procedures even if the practice occurred before the effective date of the FHAA.

HUD rejected proposed rules that would have restricted the scope of the new remedies in order to avoid the appearance of retroactive application.[28] The proposed rules would have applied the new procedures only to complaints involving either alleged discriminatory practices occurring on or after the effective date, or complaints filed after the effective date that alleged discrimination based on practices occurring continuously before and after the effective date.[29]

Although the final rule effectively applies the new procedures to certain categories of complaints older than the effective date of the FHAA, HUD's comments refute any retroactivity problems.[30] According to HUD, the 1988 amendments, except the provisions creating new categories of prohibited discrimination, "merely provide a new process" rather than "affect substantive rights."[31] Therefore, following a general rule of statutory construction, legislation that is merely procedural may be applied to any pending claim as long as it does not affect any vested rights.[32] Application of this rule depends upon the assumption that the FHAA affects only procedural rights.

The Intake Process

As noted above, Title VIII and HUD's formal regulations offer little insight into the conduct of intake as such. Although HUD provided the Commission with a draft technical guidance memorandum (TGM) on intake, it appears that HUD never circulated the

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21 *Id.* § 103.100(a).

22 *Id.* § 103.100(b).

23 *Id.* § 103.105(a).

24 *Id.* § 103.105(b).

25 42 U.S.C. § 3610(f)(2)(A)-(C) (1988); 24 C.F.R. § 103.110 (1993).

26 24 C.F.R. § 103.1 (1993).

27 *Id.*

28 24 C.F.R. Ch. I, Subch. A, App. I, 911, 948-949 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

TGM, even in draft form, to HUD staff for use as guidance.[33]

Currently, HUD no longer uses the draft TGM form for issuing guidance, but rather issues technical guidance materials in a memorandum format. In addition, HUD is actively developing new systems for providing information to investigative staff, such as a written compliance manual and a formal notice form for issuance of such instructions.[34]

According to HUD, subjects of recent memoranda issuances include:

> the intake process, the applicability of the disparate impact theory to Fair Housing Act cases, and the application of the First Amendment to certain actions under the act. Guidance in active preparation include subjects such as administrative closures, concurrent case processing (that is, the processing of complaints which are covered by more than one civil rights law enforced by the Department), . . . and identification and investigation of systemic and pattern and practice cases.[35]

As anticipated by HUD regulations, fair housing complaints are filed with HUD in several ways. Some are made over the telephone; others are filed in writing. Very few are "walk-ins," that is, made in person.[36] The predominant means of filing complaints appears to vary by region. One HUD intake specialist in Philadelphia told the Commission that most complaints are received in writing or transferred to HUD by State and local civil rights agencies. Walk-ins are rare because most complainants do not live within commuting distance of the regional office.[37] On the other hand, a Kansas City HUD staffer thought 75-80 percent of the complaints filed came in over the phone, with 10-15 percent referred by local agencies and the rest walk-ins.[38] One Fort Worth investigator said 95 percent were telephone complaints,[39] although another asserted that 60 percent come in the mail and 38 percent over the telephone.[40]

HUD maintains a tollfree number exclusively for Title VIII complaints. Callers who

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33 During the period covered by this report, HUD issued specific instructions in its internal system of TGMs. Beginning with TGM-12 in May 1991, HUD disseminated all subsequent TGMs in draft form only. HUD supplied the U.S. Commission on Civil Rights with the TGMs in response to a request for "Any technical materials (e.g. manuals, technical guidance memoranda) issued by headquarters to regional offices concerning compliance and case handling procedures and standards of performance specifically relating to intake, investigation, conciliation, reasonable cause determinations." *See* U.S. Commission on Civil Rights, Request for Information and Materials, Oct. 2, 1990. HUD supplied updates in response to a later request for "Current compliance manual/s, including draft manuals now used as guidance," and, "Any other relevant current documents outlining HUD procedures and directives on fair housing enforcement." *See* U.S. Commission on Civil Rights, Documents Update Request, Dec. 22, 1992.

34 *See* "Recent Fair Housing Enforcement Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development, to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives).

35 Ibid.

36 Vicki Gums, HUD intake analyst, interview in San Francisco, CA, Jan. 30, 1991 (hereafter cited as Gums 1991 interview).

37 Cheryl Burrichter, equal opportunity specialist, FHEO, Region III (Philadelphia) telephone interview, July 9, 1993 (hereafter cited as Burrichter 1993 interview). Complainants can, however, file a complaint at a HUD field office.

38 Edward Johnson, investigator, FHEO, Region VII (Kansas City), telephone interview, July 15, 1993 (hereafter cited as Edward Johnson, 1993 interview).

39 Thurman Miles, investigator, FHEO, Region VI (Ft. Worth), telephone interview, July 20, 1993 (hereafter cited as Miles 1993 interview).

40 Richard Redmon, intake specialist, FHEO, Region VI (Fort Worth), telephone interview, July 20, 1993 (hereafter cited as Redmon 1993 interview).

use the number will hear a menu of three selections. The first is for general information about fair housing and refers the caller to HUD's information clearinghouse service. The second is for complaints; the caller is asked to enter the area code and the call is forwarded to the appropriate HUD regional office, where it is answered by HUD staff. The third option directs the caller looking for general HUD program information to consult the telephone book for the nearest local HUD office.[41]

Many complaints are made on HUD forms: "We get people that go to other agencies that have our 903 [complaint] forms. They're easy to pick up. They can go to the Fair Housing Council . . . they have our forms. So, we get form 903s from all over."[42]

One office responds to telephone complaints by mailing the aggrieved person a form 903 with a hotline to call upon receipt. HUD staff then "walks" the complainant through the process of filling it out. The result of such assistance is a nearly 100 percent return rate of blank forms mailed out.[43]

Since HUD must mail the aggrieved and the respondent a notice of the complaint 10 days after it is filed, intake staff must act quickly to perfect the complaint; that is, to record essential information, gather as much information as possible to assist the investigator, and determine whether the complaint is within HUD's jurisdiction.[44] As one intake specialist reported, "When the form 903s come in, I have to make sure that they've got names, phone numbers, addresses, and respondents. I get as much information as I can before I give it to the investigator because this cuts down on their time."[45]

Although HUD has employed intake procedures since the 1968 law took effect, in the last 2 years several offices have instituted more rigorous procedures, which they call "scrubbing."[46] Scrubbing the complaint requires intake staff to ascertain and verify basic information about the allegations, to call the complainant and respondent to clarify their accounts of the circumstances surrounding the complaint, and prepare a memorandum recording such discussions for the record.[47]

Intake staff must conduct a property search to determine if the respondent owns or manages multiple properties, and if other complaints have been filed against the respondent.[48] Access to an online database of property ownership similar to that used by HUD's valuation offices would be helpful, according to one intake staff.[49] One intake

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41 Goldia Hodgdon, Director, Housing Enforcement Division, Office of Investigations, HUD, telephone interview, Sept. 3, 1993.

42 Kay Chandler, intake specialist, FHEO, Region IX (San Francisco), interview in San Francisco, Calif., Jan. 28, 1991 (hereafter cited as Chandler 1991 interview).

43 Don Johnson, intake specialist, FHEO, Region IV (Atlanta), telephone interview July 13, 1993 (hereafter cited as Don Johnson 1993 interview). It would appear this method means the intake process is essentially over before the complaint is logged and the 100-day period for investigation begins.

44 Chandler 1991 interview, and Andrew Quint, complaint intake analyst, FHEO, Region IX (San Francisco), interview in Los Angeles, Calif., Jan. 28, 1991 (hereafter cited as Quint 1991 interview).

45 Gums 1991 interview.

46 Burrichter 1993 interview; Edward Johnson, investigator, FHEO, Region VII (Kansas City), telephone interview, July 15, 1993 (hereafter cited as Edward Johnson 1993 interview); and Julius McMillen, conciliator, FHEO, Region V (Chicago), telephone interview, July 13, 1993 (hereafter cited as McMillen 1993 interview).

47 Burrichter 1993 interview.

48 Quint 1991 interview.

49 Cheryl Burrichter, equal opportunity specialist, FHEO, Region III (Philadelphia) telephone interview, 1991 (here-

specialist noted that a list of complaints filed, including the names and addresses of the parties and the properties involved, is distributed weekly in her office.[50]

Although 10 days is the statutory standard, it may take up to 30 days to determine jurisdiction and obtain complete information from the complainant to frame the allegation,[51] depending upon the complexity of the case and the ease of ascertaining the identity of the respondent. If the allegations do not constitute a violation of Title VIII, some HUD offices try to refer the aggrieved person to another agency.[52]

Screening out nonjurisdictional complaints can be the most problematic part of the intake process. In HUD's TGM on maintaining case files, investigators are instructed that "if jurisdiction does not exist, administratively close the complaint,"[53] yet no instructions on determining jurisdiction or on assisting complainants to frame their allegations to meet jurisdictional requirements are given.[54] According to one intake specialist, most complaints received over the telephone do not fall within HUD's jurisdiction.[55] A regional director observed that a large portion of HUD's old (backlogged) cases should not have been accepted as fair housing complaints.[56] Several offices reported that effective "scrubbing" weeds out nonjurisdictional cases.[57] Others note that nonjurisdictional cases are not "weeded out" in intake, but are recorded as bona fide complaints in HUD's database and then closed, if appropriate.[58]

Staff also reported that informal conciliation efforts by intake staff are another way in which they dispose of nonjurisdictional complaints. In the course of contacting the parties for clarification, intake staff may facilitate a "withdrawal with resolution" whereby complainants withdraw their complainants as part of an informal settlement (see below).[59]

Staff must refer certain complaints for special attention. First are cases where the aggrieved will suffer irreparable harm unless the respondent is prevented from going forward. In such instances, HUD may seek "prompt judicial action"[60] (a temporary restraining order) through the Attorney General to preserve the status quo pending an investigation of the complaint. Cases involving mortgage lending, redlining, and insurance discrimination are presumed to involve systemic violations and are referred to the region's systemic unit, or to designated staff

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after cited as Burrichter 1991 interview).

50 Chandler 1991 interview,

51 Quint 1991 interview.

52 Redmon 1993 interview.

53 HUD TGM-2, p. 11.

54 Vicki Gums, intake specialist, FHEO, Region IX (San Francisco), telephone interview, July 13, 1993 (hereafter cited as Gums 1993 interview).

55 Quint 1991 interview.

56 Coughlin 1991 interview.

57 Don Johnson 1993 interview; Edward Johnson 1993 interview; and Cheryl Burrichter 1993 interview.

58 Frank Riley, investigator, FHEO, Region IX field office (Orange County, Calif.), telephone interview, July 12, 1993 (hereafter cited as Riley 1993 interview), and Cheryl Burrichter 1993 interview.

59 Cheryl Burrichter 1993 interview, and Edward Johnson 1993 interview.

60 42 U.S.C. § 3610(e)(1) (1988).

in the absence of such a unit, for investigation.[61] Intake staff should identify cases that lend themselves to the use of testing as an investigative tool.[62] Finally, intake staff must also refer all cases eligible for handling by a HUD-certified State or local agency.[63] To speed such referral, one office reported faxing complaints to the agency involved and following up with mail delivery.[64]

Although the 10-day deadline for notification of the respondent sets the parameter for intake processing, staff reported widely varying average timeframes. The shortest turnaround cited was 2 days,[65] with 20 days the outside limit.[66] In one case, the initial 10-day period was said to include any efforts at conciliation.[67]

The organization and assignment of work in HUD regional offices also varies. Some offices have intake units of up to three staff;[68] others use only one person[69] or have no formal unit.[70] In some cases intake staff are expected to be generalists familiar with other tasks such as investigation;[71] elsewhere intake staff also carry out formal conciliation.[72] One region experimented with asking field staff to carry out intake and investigations, but without direct accountability to regional FHEO, the experiment was judged a failure.[73]

Caseloads also seem to vary widely. In one office, an intake specialist handled 50 cases a month;[74] in another, fewer than 20.[75] In the first, however, intake was the sole assignment, while in the second, 35 to 40 were successfully conciliated by the intake specialist.[76]

Inexperienced intake specialists received 1 week of formal civil rights training prior to or soon after they were selected for an intake

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61 Burrichter 1993 interview. According to HUD, the Secretary plans to establish a separate organizational unit within FHEO to address mortgage lending and insurance discrimination in a policy context. HUD has already begun to develop regulations which will define and describe discrimination in mortgage lending and insurance activities. *See* HUD Initiatives, p. 3.

62 Ibid.

63 42 U.S.C. § 3610(f) (1988). It appears the law contemplates that HUD will officially receive the complaint prior to its referral, and not that complaints made to State or local agencies will be investigated by them first and then filed with HUD.

64 Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993 (hereafter cited as King 1993 interview).

65 Edward Johnson 1993 interview. Staff at other offices said 3 days was average. See Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993, and Redmon 1991 interview.

66 Burrichter 1993 interview.

67 Don Johnson 1993 interview.

68 Gums 1993 interview, and Miles 1993 interview.

69 Myrtle Wilson, chief, program services branch, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993.

70 Burrichter 1993 interview.

71 Redmon 1993 interview.

72 Don Johnson 1993 interview.

73 Coughlin 1993 interview.

74 Burrichter 1993 interview.

75 Don Johnson 1993 interview.

76 Don Johnson 1993 interview.

position,[77] but the training was not directly related to intake.[78] One specialist reported regularly receiving decisions made in HUD cases and the housing information service *Fair Housing-Fair Lending;*[79] however, another relied on her branch chief for new procedures and other relevant information.[80] Intake staff interviewed often recommended training specifically directed at intake procedures and definitive (not draft) instruction from headquarters, as well as updated telephone systems and adequate staffing levels.

Conciliations

Conciliation was for many years HUD's only means of resolving fair housing complaints, and it retains an important role under the new enforcement mechanism established by FHAA. However, conciliation as a means of dispute resolution has certain inherently problematic characteristics. Whether the techniques used to bring about agreement are fair and whether the results are just have been perennial concerns of complainants and respondents alike.

Legal Framework

According to Title VIII, "During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint."[81] In its regulations governing conciliations, HUD proposes:

> ... to achieve a just resolution of the complaint and to obtain assurances that the respondent will satisfactorily remedy any violations of the rights of the aggrieved person, and take such action as will assure the elimination of discriminatory housing practices, or the prevention of their occurrence, in the future.[82]

Such a resolution takes the form of a conciliation agreement,[83] defined by Title VIII as an agreement between the complainant and the respondent, subject to the approval of the Secretary (of HUD).[84] The Secretary has, by regulation, delegated such authority to the Assistant Secretary for Fair Housing and Equal Opportunity.[85] (If the agreement is not approved by the Assistant Secretary, HUD's general counsel may still issue a charge of discrimination regardless of the parties' wishes.)[86]

The relief obtained for a complainant as a result of conciliation may include:

> (1) monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;
> (2) other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief; or

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77 Chandler interview and Quint 1991 interview.

78 Chandler interview, and Gums 1993 interview.

79 Chandler interview.

80 Vicki Gums, intake specialist, FHEO, Region IX (San Francisco), interview in San Francisco, Calif., Jan. 30, 1991.

81 42 U.S.C. § 3610(b)(1) (1988).

82 24 C.F.R. § 103.300(b) (1993).

83 Agreements reached after a cause finding has been issued are called settlements, and may be submitted to the administrative law judge (ALJ) any time prior to the issuance of a final decision. *Id.* § 104.925.

84 42 U.S.C. § 3610(b)(2) (1988).

85 24 C.F.R. § 103.310(b)(1) (1993).

86 *Id.* § 103.310(b)(2).

(3) injunctive relief appropriate to the elimination of discriminatory practices affecting the aggrieved person or other persons.[87]

HUD regulations provide that a conciliation agreement shall not only be satisfactory to the parties, but shall "adequately vindicate the public interest."[88] In this regard, relief obtained may include:

(a) Elimination of discriminatory housing practices.
(b) Prevention of future discriminatory housing practices.
(c) Remedial affirmative activities to overcome discriminatory housing practices.
(d) Reporting requirements.
(e) Monitoring and enforcement activities.[89]

Conciliation agreements may also provide for binding arbitration of any or all aspects of the complaint.[90] Although arbitration may occur only as part of a conciliation agreement approved by the Secretary, the arbitrator's binding decision is not subject to the approval of the Assistant Secretary, and might not necessarily vindicate the public interest.[91] Thus, it appears that while the Assistant Secretary may determine that the binding arbitration process may vindicate the public interest in any given complaint, the Assistant Secretary has no authority to determine whether the resulting binding arbitration agreement serves the public interest. This apparent statutory contradiction is not addressed by HUD regulations nor discussed in HUD's commentary provided at the time the regulations were issued.[92] However, HUD maintains that the public interest is protected sufficiently because the parties would have to enter into a conciliation agreement before the complaint could be brought to binding arbitration.[93] In any event, according to one senior HUD legal official, use of binding arbitration is rare or nonexistent.[94]

HUD is required to make conciliation agreements public unless the parties request nondisclosure, and "the Assistant Secretary determines that disclosure is not required to further the purposes" of the law.[95]

After an agreement is reached and approved by the Secretary, the respondent's failure to comply with its terms will cause the Secretary to refer the matter to the Attorney General "with a recommendation that a civil action be filed under section 814[96] for the enforcement of such agreement."[97] HUD regulations foresee periodic review of compliance

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87 *Id.* § 103.315(a).

88 *Id.* § 103.310(b)(1)(ii).

89 *Id.* § 103.320.

90 42 U.S.C. § 3610(b)(3) (1988).

91 *Compare* 42 U.S.C. § 3610(b)(2) (1988) *and* 24 C.F.R. § 103.310(b)(1) (1993) *with* 42 U.S.C. § 3610(b)(3) (1988) *and* 24 C.F.R. § 103.315(b) (1993).

92 *See* 24 C.F.R. Ch. I, Subch. A, App. I at 957-58 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

93 "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development, to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 3 (hereafter cited as HUD Comments).

94 Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, telephone interview, July 14, 1993.

95 42 U.S.C. § 3610(b)(4) (1988); 24 C.F.R. § 103.330(b) (1993).

96 42 U.S.C. § 3614 (1988).

97 *Id.* § 3610(c).

with conciliation agreements, with the general counsel responsible for referral to the U.S. Department of Justice (DOJ) when he or she has reasonable cause to believe a respondent has breached the agreement.[98]

HUD may suspend conciliation efforts "if the respondent fails or refuses to confer with HUD; the aggrieved person or the respondent fail to make a good faith effort to resolve any dispute; or HUD finds, for any reason, that voluntary agreement is not likely to result."[99]

Finally, the law provides for confidentiality regarding conciliation attempts and protects the respondent from use of information against him or her: "Nothing that is said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned."[100]

In the commentary accompanying the published regulations, HUD noted that information disclosed during failed conciliation attempts could be used in the course of a subsequent investigation:

> Although it is fairly obvious that statements made during conciliation might prove useful investigative leads, Congress did not preclude the use of such statements. . . .
>
> HUD notes that the use of such information in administrative hearings and civil actions will be governed by Rule 408 of the Federal Rules of Evidence. . . .
>
> Rule 408 makes inadmissible at trial "evidence of conduct or statements made in compromise negotiations" but "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."[101]

HUD published an extensive draft technical guidance memorandum on conciliation on August 11, 1992. According to the TGM, HUD "is obligated to pursue conciliation while the investigation is active, and possibly for a time thereafter."[102] Indeed, "Prior to forwarding the case with a reasonable cause recommendation to Headquarters, it is mandatory that another conciliation attempt be made with the parties."[103]

If, in the course of conciliation or investigation, it becomes clear the complaint is nonjurisdictional, "the conciliator must break off conciliation and initiate dismissal of the complaint. . . ."[104] The TGM stresses the need for HUD staff to remain impartial in appearance and in fact.[105] For that reason, conciliation agreements may not include compensation to a fair housing group that has assisted the complainant but is not a party, lest it appear HUD and the fair housing group have colluded.[106] Nevertheless, HUD points out that a fair housing group may be compensated for

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98 24 C.F.R. § 103.335 (1993).

99 *Id.* § 103.325.

100 42 U.S.C. § 3610(d) (1988).

101 24 C.F.R. Ch. I, Subch. A, App. I at 958 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

102 Draft TGM-16, p. 6.

103 Draft TGM-16, p. 24.

104 Draft TGM-16, p. 7.

105 Draft TGM-16, pp. 12-13.

106 Draft TGM-16, p. 21. The TGM refers to the commentary accompanying issuance of the Final Rule (54 Fed. Reg. 3265-66) in which HUD expresses this concern. Compensation to fair housing groups assisting complainants is common in private lawsuits.

injuries suffered due to respondent's discrimination and provided an opportunity to become a complainant or aggrieved person and thus participate in conciliation or adjudication.[107] Also, fair housing groups may be compensated in conciliation agreements with attorney's fees for providing legal representation to complainants.[108] In addition, conciliation agreements often arrange for fair housing groups to provide training or testing services to respondents who are required to provide training for their employees or who agree to ongoing testing.[109]

The TGM also stresses the need to separate conciliation and investigation functions, and contemplates that, ordinarily, individual HUD staff may not play both roles in one case. However, the TGM also instructs investigators how to shift from investigation to conciliation, and even how to shift back again, although the latter is not recommended in a single interview.[110] In order to safeguard the rights of participants, a factsheet, "Conciliation under the Fair Housing Act," must be given to all parties to a complaint.[111]

The Conciliation Process

In practice, complaints that survive the intake screening process are sometimes assigned first to a conciliator,[112] and sometimes sent simultaneously to a conciliator and an investigator,[113] depending on office procedures. In some offices, the conciliator has 5 to 10 days to attempt to achieve an informal settlement while the investigator proceeds with factfinding.[114] In others, conciliation is attempted throughout the complaint process.[115]

HUD's database indicates that conciliations continue to be achieved well into the complaint process. Of the 923 successful conciliations achieved in fiscal 1990 (the first full year of operation), 61 percent were closed after 100 days. In 1991, the figure remained steady at 62 percent; it improved dramatically to 46 percent in 1992 and 39 percent in fiscal 1993.[116]

In a typical situation, the conciliator contacts the complainant and respondent by telephone to determine if both are interested in participating in the conciliation process and what resolution might be acceptable.[117] If they agree to attempt conciliation, the two parties are brought together in an informal, confidential meeting to work out an agreement.[118]

The goal of a conciliation agreement is usually to achieve the original objective of the aggrieved, such as the next available apart-

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107 *See* HUD Comments, p. 3.

108 Ibid.

109 Ibid.

110 Draft TGM-16, pp. 10-11.

111 Draft TGM-16, p. 28, Exhibit 1.

112 Elaine Spina, investigator, FHEO, Region III (Philadelphia) telephone interview, July 20, 1993.

113 Burrichter 1993 interview, and Gums 1993 interview.

114 Lettie Barber, equal opportunity specialist/investigator, HUD, FHEO, San Francisco, CA., Region IX, interview in San Francisco, Jan. 30, 1991, (hereafter cited as Barber interview).

115 Kelsy Leon, investigator/conciliator and acting branch chief, Region IV (Atlanta), telephone interview, July 21, 1993.

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

117 McMillen 1993 interview.

118 Julius McMillen, conciliator, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

ment.[119] The regulatory requirement that the agreement must serve the public interest is most commonly met by the inclusion of affirmative action and reporting requirements.[120] A conciliation agreement may also require respondent training.[121] Although creativity is sometimes encouraged,[122] "boiler plate" language is common.[123]

Monitoring of conciliation agreements occurs primarily through the review of reports submitted pursuant to the agreement.[124] On-site monitoring was rarely reported. At least in one region, monitoring is inhibited by lack of staff and funds for staff travel;[125] in others, staff from other regional office units are assigned to monitor agreements when needed.[126]

In some offices, staff serve as both investigators and conciliators,[127] while in others conciliators specialize as such.[128] Caseloads vary from 40 or 50[129] to 82[130] in a year, but staff may have other assignments.[131] Although well-received, the first national training on conciliation was not held until March 1993.[132] Staff networking remains an important source of information and instruction.[133] Staff evaluations include both quantitative and qualitative criteria,[134] with recent revision of

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119 William Fitzgerald, conciliator, FHEO Region V, telephone interview, July 13, 1993.

120 Coughlin 1993 interview.

121 Kelsy Leon, investigator/conciliator and acting branch chief, Region IV (Atlanta), telephone interview, July 21, 1993 (hereafter cited as Leon 1993 interview).

122 Edward Johnson 1993 interview.

123 Don Johnson 1993 interview, and Yvonne Poindexter, investigator, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

124 Gregory King, Director, FHEO, Region VII (Kansas City), telephone interview, July 16, 1993, and Leon 1993 interview, among others.

125 John Eubanks, Director of FHEO, Region VI (Ft. Worth), telephone interview, July 19, 1993.

126 Laura Pelzer, conciliator, FHEO, Region III (Philadelphia) telephone interview, July 20, 1993 (hereafter cited as Pelzer 1993 interview).

127 Although staff may serve as both investigators and conciliators, generally, they do not perform both tasks with respect to a single complaint. However, an investigator may suspend factfinding and engage in conciliation if the rights of the aggrieved party and the respondent can be protected and the prohibitions on disclosure of information can be observed. 24 C.F.R. § 103.300(c) (1993). Despite the fact that HUD's regulations permit investigators to conciliate complaints in limited circumstances, the sixth circuit recently emphasized the rule rather than its exception, "... the failure to follow the general requirement that an investigator not be involved in conciliation of a complaint he has processed nullified any real possibility of resolving it by conciliation." Kelly v. Secretary of HUD, 3 F.3d 951, 957 (6th Cir. 1993).

128 Carolyn El-Amin, Branch Chief, FHEO, Region III, telephone interview, July 9, 1993, and McMillen 1993 interview.

129 Fitzgerald 1993 interview.

130 McMillen 1993 interview.

131 Pelzer 1993 interview.

132 Pelzer 1993 interview, and Gary Sweeny, Branch Chief, FHEO, Region VI (Ft. Worth), telephone interview, July 20, 1993.

133 Frank Riley, investigator, FHEO, Region IX field office (Orange County, Calif.), telephone interview, July 12, 1993, and Pelzer 1993 interview.

134 Pelzer 1993 interview.

expectations to include credit for more "significant and creative relief," including affirmative action and reporting requirements.[135]

Conciliation Data

Analyzing HUD's complaint data yields some insights into the success of its conciliation efforts. From March 1989 through September 1993, HUD approved 4,461 conciliation agreements. Of these, 1,690 cases resulted in monetary relief, and 1,015 cases resulted in housing units for the complainants, including cases where both money and housing were obtained.[136]

In FY 1989 HUD closed 1,503 complaints, of which 345 or 23 percent were conciliated. In FY 1990 HUD closed 3,489 complaints and conciliated 923 or 26 percent; in FY 1991, of 5,232 complaints closed, 1,002 or 19 percent were conciliated; in FY 1992, of 6,400 complaints closed, 1,141 or 18 percent were conciliated; and in FY 1993, 6,377 cases were closed, of which 1,050, or 16 percent, were conciliated. Although conciliations fell in 1991 and 1992, the decline reflects a rapid increase in the proportion of administrative closings during the period.[137]

The number of cases with housing units obtained through conciliation numbered 132 (38 percent of cases conciliated) in FY 1989; 313 (35 percent) in FY 1990; 254 (25 percent) in FY 1991; 331 (29 percent) in FY 1992; and 273 (26 percent) in FY 1993.

Total monetary relief in FY 1989 was $284,515; the average case that year yielded $1,910 (the median award was $545). In FY 1990 relief totaled $1,235,820, for an average of $2,704 and a median of $800. In FY 1991 total relief amounted to $1,340,281, with an average of $2,607 and a median amount of $600; in FY 1992, relief totaled $1,479,008, for an average of $2,599 and a median amount of $750; and in FY 1993, relief totaled $1,521,870, for an average of $2,866 and a median figure of $775.

Withdrawal with Resolution

The only instruction that appears to apply to complaints withdrawn with resolution is contained in the technical guidance memoranda on conciliations. There the subject appears to be covered under a paragraph headed "private settlements," which states that "There is not successful conciliation when the parties execute an agreement that HUD has not approved."[138]

The memoranda goes on to point out that:

> Even if the non-HUD agreement provides for withdrawal of the complaint, the complaint remains open until the complainant formally files a request with HUD to withdraw it.
>
> Moreover, even after such withdrawal, HUD may pursue enforcement by a Secretary-initiated complaint, or referral of evidence to the Department of Justice, a regulatory or supervisory agency, etc.[139]

Thus the instruction generally appears to look with disfavor on such withdrawals, but they nevertheless constitute a significant portion of complaints resolved. Although the process may eliminate less weighty complaints, leaving HUD staff able to focus on matters of broader import, fair housing advocates see two problems. First, informal resolutions may

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135 Maurice McGough, Deputy Director and Chief, Systemic Unit, FHEO, Region V (Chicago), telephone interview, July 13, 1993.

136 HUD Title VIII Database. In analyzing HUD's complaint data, a small number of complaints filed prior to October 1, 1987, were excluded, which affects some of the Commission's calculations, albeit in a minor way.

137 Administrative closures more than doubled between 1990 and 1992, rising from 1,047 to 2,268. This growth increased the proportion of administrative closures from 30 percent in 1990 to 35 percent in 1992.

138 TGM # 16, p. 7.

139 Ibid.

allow repeat offenders to escape scrutiny.[140] Second, aggrieved persons may not receive the remedies or compensation their complaints merit,[141] particularly since HUD plays only a mediating role and does not approve the agreements. (As noted above, HUD does not represent complainants until it finds reasonable cause to believe discrimination occurred after a full investigation.)

Median relief obtained in complaints withdrawn with resolution was $510 in 1990 (with an average of $1,465); $543 in 1991 (with an average of $2,357); $566 in 1992 (with an average of $3,300) and $500 in 1993 (compared to an average of $3,007). In general, relief obtained through withdrawal was less than relief obtained through formal conciliation.

Investigations

The FHAA prescribes very little regarding the conduct of investigations. The law does establish a timeframe:

> (iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint . . . unless it is impracticable to do so.[142]

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint . . . the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.[143]

The timeframe also applies if the complaint has been referred to a certified State or local agency for processing.[144]

In addition, the law provides that:

> At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing—
>
> (i) the names and dates of contacts with witnesses;
> (ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;
> (iii) a summary description of other pertinent records;
> (iv) a summary of witness statements; and
> (v) answers to interrogatories.[145]

The Secretary may amend the final investigative report (FIR) if HUD discovers additional evidence.[146] HUD must provide information derived from an investigation, and the final report itself, to the complainant and the respondent upon request.[147]

HUD regulations spell out the purposes of an investigation as obtaining information on events related to the alleged discrimination, documenting related policies or practices, and developing factual data to permit the Assistant Secretary and General Counsel to determine, as described below, whether there is

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140 Smith interview.

141 Ibid.

142 42 U.S.C. § 3610(a)(1)(B)(iv) (1988); 24 C.F.R. § 103.225 (1993). The investigation is to include a determination of whether there is reasonable cause to believe a violation of Title VIII has occurred.

143 42 U.S.C. § 3610(a)(1)(C) (1988); 24 C.F.R. § 103.225 (1993). Currently, HUD is revising the letter which is issued to the aggrieved person and the respondent when HUD determines that completion of an investigation within 100 days is impracticable. HUD intends for the letter to serve as a "more substantive and effective communication to the parties to a complaint." *See* HUD Initiatives, p. 2.

144 42 U.S.C. § 3610(a)(1)(B)(iv) and (C) (1988).

145 *Id.* § 3610(b)(5)(A).

146 *Id.* § 3610(b)(5)(B).

147 *Id.* § 3610(d)(2).

reasonable cause to believe that a violation of the fair housing law occurred.[148] The Assistant Secretary is charged with seeking voluntary cooperation "to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take and record testimony or statements of persons reasonably necessary for the furtherance of the investigation."[149] Nevertheless, the Assistant Secretary may conduct discovery and issue subpoenas as necessary and as is authorized for administrative proceedings.[150]

The normal duties and functions of an investigator are established largely through standard practice and internal rules, including technical guidance memoranda. As noted above, in addition to the existing TGMs, TGMs dating from mid-1991 have only been circulated in draft form. The draft status of these memoranda significantly circumscribes the ability to review the investigatory process.

Although little documentation exists on the investigation process itself, a draft instruction, entitled *Efficient Investigative Techniques,* (92-2-ECIF) proposed methods to improve the quality of investigation. The techniques include written interrogatories to obtain, for example, clarification of ownership of the dwelling at issue; lists of tenants and witnesses; sales, rental, or loan records by relevant classification; and accounts of what transpired. Investigators may obtain statements by telephone, to the extent possible, with accompanying legible notes of the interview retained in the files (where testimony is critical, HUD should obtain an affidavit).[151] The text of the draft ECIF suggests that the pressures in timely completing the workload result in attempts to avoid onsite interviews whenever possible.

The results of an investigation are placed in a file, the primary sections of which are the final investigative report, which summarizes factual data gained during the investigation; the evidentiary section, containing all testimonial and documentary evidence; and the deliberative section, containing all privileged and confidential data, personal impressions of the investigator, the reasonable cause memorandum,[152] and any other deliberative or internal memorandum.[153] The file is then forwarded for cause/no cause determination, as described below.

If the case appears to involve pervasive or institutional discrimination, complex issues, or "novel questions of fact or law, or will affect a large number of persons," the Assistant Secretary may process the complaint as a "systemic" one. In that case, the investigation may involve a review of policies and procedures of the respondent for adherence to FHAA, as well as an inquiry into the facts surrounding an individual allegation.[154]

Where the Secretary decides that a complaint challenges the legality of any State or local zoning or land use law or policy, the

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148 24 C.F.R. §§ 103.200-103.230 (1993).

149 *Id.* § 103.215(a).

150 *Id.* § 103.215(b). The General Counsel must approve the legality of the subpoena prior to its issuance.

151 *Efficient Investigative Techniques* (draft 92-2-ECIF), draft memorandum from Leonora Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development.

152 The recommendation of HUD staff regarding whether a charge of discrimination should be issued by the general counsel.

153 *File Format for Title VIII Cases* (TGM 2, Rev. 1, Jan. 31, 1990) (the TGM was subsequently amended in other respects).

154 24 C.F.R. § 103.205 (1993).

Secretary must refer the complaint immediately for action by the Attorney General.[155] HUD's regulations provide that the General Counsel decide whether such a challenge exists after the complaint has been investigated, and "in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action . . . ."[156]

HUD staff rely on TGMs and agency training for guidance on how to conduct investigations. The shortcomings of TGMs for this purpose have been described above. Most staff interviewed reported receiving basic and advanced investigative training in 1989 and 1991, respectively. Some also reported in-house training and some training from outside experts. Those with prior investigatory experience in other civil rights areas relied heavily on that experience to guide them. Nearly everyone advocated annual training to keep current with developments in fair housing law and HUD policies, and many advocated that HUD issue a manual on complaints processing.

Staff uniformly reported that mortgage lending and zoning cases were the most complex and time consuming. Cases involving mentally handicapped complainants were also considered difficult.

Complaint Processing Deadlines

Much has been made of the 100-day milestone. HUD itself has classified cases older than 100 days as "aged," and critics have assessed HUD's performance as if it were a deadline for issuance of determination.[157] Indeed, respondents have argued, largely unsuccessfully, that the failure to complete the investigation within the 100 days or to provide the written response destroyed the jurisdiction of the court.[158]

Although the courts have found that HUD's delays have neither destroyed the jurisdiction of the court nor unduly prejudiced the respondents, the delays are affecting the amount of damages and penalties awarded. In *HUD v. Kelly,* the administrative law judge (ALJ) found that HUD's unexplained 17-month delay between the initial complaint and the issuance of the charge caused the complainant to suffer damages more than double the loss she would have suffered if HUD had acted within the statutory timeframe.[159] Thus,

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155 42 U.S.C. § 3610(g)(2)(C) (1988).

156 24 C.F.R. § 103.400(a)(2)(ii) (1993).

157 Leland Ware, "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act," report prepared for the Administrative Conference of the United States (January 1992), pp. 70-73; 75 (hereafter cited as Ware, "New Weapons").

158 Baumgardner v. Secretary of HUD, 960 F.2d 572 (6th Cir. 1992) (notice submitted within a reasonable time; delay in investigation was not a statutory violation); United States v. Scott, 788 F. Supp. 1555 (D. Kan. 1992) (failure to give notice for approximately 120 days and failure to make cause determination for over 300 days was not jurisdictional limitation); United States v. Curlee, 792 F. Supp. 699 (C.D. Cal. 1992) (congressional authorization to continue investigation when impracticable to make determination within 100 days removes 100 day period as a mandatory requirement); *Contra* United States v. Aspen Square Management Co., 817 F. Supp. 707 (N.D. Ill. 1993) (failure to make a cause determination or provide an explanatory letter for over 350 days deprived the court of jurisdiction). *Aspen Square* was vacated pursuant to a settlement between the parties, as observed in *United States v. Beethoven Assoc. Ltd. Partnership,* 843 F. Supp. 1257, 1260 (N.D. Ill. 1994). *See* HUD Comments, p. 4; Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, July 13, 1994, attachment, p. 1 (hereafter cited as DOJ Comments, attachment). HUD notes that the same district court in *Aspen Square* held in *Beethoven* that the court's jurisdiction was not destroyed by HUD's failure to meet the FHAA notice requirement regarding investigation and determination delays.

159 HUD v. Kelly, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,363 (HUD ALJ Aug. 26, 1992), *aff'd in part, vacated in part, and remanded in part,* Kelly v. Secretary of HUD, 3 F.3d 951 (6th Cir. 1993).

TABLE 3.1
Case Processing Times

FY	Avg. no. of days	*Percent closed in more than:* 100 days	150 days	200 days	Cases closed
1989	118	48	25	13	1,503
1990	184	64	48	36	3,489
1991	206	62	48	38	5,238
1992	140	40	27	19	6,400
1993	151	39	28	22	6,377

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

because HUD was responsible in part for the complainant's excessive loss, the ALJ did not impose a civil penalty in addition to the compensatory damage award.[160]

On appeal the sixth circuit in *Kelly* remanded the case to HUD to allow for a proper conciliation effort.[161] The court agreed with the ALJ's liability finding, but stated that even if conciliation fails, damages should not be assessed for the period in which HUD completely neglected the case.[162]

Most staff agreed it was unrealistic to expect all cases to be investigated and a determination made within 100 days, for several reasons. First, since cases are investigated by regional staff, they must allot travel time for personal interviews. Second, cases involving larger institutions as respondents and complex issues require more interviews and research. Third, a shortage of staff, staff freezes, and the reactivation of upwards of 1,400 complaints from State and local agencies not certified by September 13, 1992, has greatly increased the burden on staff. Anecdotal remarks about caseloads bear out the observation that under current circumstances, HUD will not be able to close complaints or make determinations in 100 days. For example, one investigator reported a caseload of 60 investigations and a closure rate of 6 per month; another reported 55 cases total, and 4 closed per month. Caseloads seemed to vary considerably, from a high of 75 a year to a low of 32.[163] In some cases, investigators also were assigned a large number of State and local cases to review, or additional special projects and systemic investigations.

HUD's own complaint database reveals that from 1989 to 1993, cases exceeding 100 days to close ranged from a low of 39 percent in 1993 to a high of 64 percent in 1990; cases exceeding 150 days ranged from 25 (1989) to 48 percent (1990 and 1991), and cases exceeding 200 days ranged from 13 percent in 1989 to 38 percent in 1991. (See table 3.1.) During this time period, the number of complaints filed rose from 3,034 in 1989 to 4,075 in 1990; 5,720 in 1991, and 6,521 in 1992. Against the backdrop of a rising caseload, HUD made progress in 1992, but lost ground again in 1993.

160 ¶ 25,034 at 25,363.

161 3 F.3d at 957.

162 *Id.*

163 However, the complexity of the cases assigned could not be weighed.

The ratio of complaints closed to complaints received over time gives another indication that HUD still struggled to keep abreast of complaints filed. In 1989 the ratio was 50 percent; in 1990, 86 percent; in 1991, 91 percent; in 1992, 98 percent; and in 1993, 105 percent—not enough to overcome the backlog.

The database also yields some insights into overall case management. The average number of days from the date of filing to the date a case was assigned to an investigator was 23 in 1989; 26 in 1990; 58 in 1991; 33 in 1992; and 35 in 1993. The average number of days from assignment of a case to an investigator and the start of the investigation was 17 in 1989; 14 in 1990; 11 in 1991; 5 in 1992; and 23 in 1993. Finally, the average number of days from the start of the investigation to closure of the case was 76 in 1989; 160 in 1990; 179 in 1991; 136 in 1992; and 126 in 1993.

Determinations and Closures

Cases are closed through conciliation, administrative closure, or issuance of a "no cause" determination. Issuance of a cause determination means the case will advance to the adjudicatory stage. To find cause, HUD must decide "whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court."[164]

Administrative Closures

Neither Title VIII nor HUD regulations appear to contemplate, much less define, administrative closure of complaints. In HUD's TGM on maintaining case files, investigators are instructed that "if jurisdiction does not exist, administratively close the complaint."[165] Instructions for maintenance of the Title VIII database include case classification codes covering various reasons for closure, such as "untimely filed, dismissed for lack of jurisdiction, unable to locate complainant, complainant failed to cooperate, unable to identify respondent, and complaint withdrawn by complainant without resolution."[166] HUD staff confirmed that cases closed for these reasons fell into the category of "administrative closures."[167]

From 1989 to 1992, administrative closure was the most frequent means of complaint disposition, totaling 5,377 (28 percent) of all complaints. In 1989 HUD administratively closed 402 complaints, or 27 percent of total complaints closed;[168] in 1990, 1,047 or 30 percent; in 1991, 1,716 or 33 percent; and in 1992, 2,268 or 35 percent.

Finally, in some regions, complaints that are determined to be nonjurisdictional upon receipt are nevertheless entered into the database and then closed. In other regions, such complaints are never counted at all. Thus, the data reveal substantial differences in the rate of administrative closures among regions. Administrative closures accounted for 13 percent of the total number of complaints received from 1989 through 1992 in Region I, while 50 percent of Region III cases were closed administratively. Other regions fell between: Regions II and IV administratively closed 44 and 45 percent of their cases; Regions IX and X closed 35 and 36 percent; Regions VI and VII

164 24 C.F.R § 103.400(a) (1993). HUD emphasizes that "the prime focus of the reasonable cause determination is on the facts determined during investigation." *See* HUD Comments, p. 4. HUD observes that "reasonable cause determinations tend to be fact specific." Ibid.

165 TGM-2 (Rev. 1, Jan. 31, 1990) (subsequently amended in other respects), p. 11.

166 Integrated Title VIII Data Dictionary, pp. 39-40.

167 Albert Mundy, Acting Director, Management Information Systems Staff, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, June 18, 1993.

168 The complaints closed were not necessarily received that year; the percentages only offer a rough indication of closures compared to caseload.

closed 32 and 31 percent; Regions V and VIII closed 22 and 21 percent, respectively.

Determinations

The law provides that when the Secretary "determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur," he or she "shall immediately issue a charge on behalf of the aggrieved person. . . ."[169] The charge:

> (i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred is about to occur;
>
> (ii) shall be based on the final investigative report; and,
>
> (iii) need not be limited to the facts or grounds alleged in the complaint . . . .[170]

Effective March 21, 1989, the Secretary of HUD delegated the authority vested in him essentially to three officials—the Assistant Secretary for Fair Housing and Equal Opportunity, the General Counsel, and the Chief Administrative Law Judge.[171] The Secretary delegated to the General Counsel the power to decide whether a facility met the statutory definition of "housing for older persons"; to pursue failures to comply with a conciliation agreement arising from a complaint; to seek prompt judicial action to protect a complainant prior to issuance of a charge and a decision; to determine whether or not reasonable cause exists to issue a charge of discrimination; to serve copies of such charge; to seek judicial review; and to seek court enforcement of an administrative order.[172]

In addition, the General Counsel was empowered "to approve or disapprove the legality of subpoenas and interrogatories before their issuance by the Assistant Secretary . . . " during investigations and "to litigate claims asserted in charges in administrative hearings conducted by the Administrative Law Judge . . . ," that is, to present cases on behalf of complainants when a charge has been issued.[173]

The Chief Administrative Law Judge is empowered to conduct administrative hearings on charges of discrimination.[174] All of the other powers of the Secretary under the law are delegated to the Assistant Secretary for Fair Housing and Equal Opportunity except the power to sue and be sued.[175] The Secretary also permitted the General Counsel and Assistant Secretary to redelegate most functions in turn.[176]

Effective March 24, 1989, the Assistant Secretary for Fair Housing redelegated all of his powers to the regional administrators and regional housing commissioners and to the regional directors of fair housing and equal opportunity (who report to the regional administrators), except the responsibility of issuing HUD's annual fair housing report; promulgating rules, regulations, and

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169 42 U.S.C. § 3610(g)(2)(A) (1988).

170 *Id.* § 3610(g)(2)(B).

171 54 Fed. Reg. 13,121 (1989).

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

guidelines; filing and investigating Secretary-initiated complaints; issuing notices (not decisions) regarding reasonable cause; and certifying State and local agencies as substantially equivalent, on either an interim or permanent basis.[177]

Effective July 1, 1990, the General Counsel redelegated the power to make no cause determinations regarding most complaints of discrimination to the regional counsels.[178] Regional counsels were to review complaints for no cause findings, determine if a no cause finding is warranted, issue the required summary of the case for a no cause finding, notify the parties of dismissal and make the dismissal public, and refer complex cases to the General Counsel.[179] Although this delegation provided authority to the regional counsels to make no cause determinations in most cases, the General Counsel retained his authority to make no reasonable cause determinations in all cases, and he retained the sole authority to act in the types of cases over which he did not delegate authority to the regional counsel.[180] In addition, the General Counsel retained the sole authority to determine if a facility qualified as "housing for older persons," where a reasonable cause determination would require a conclusion whether the housing would be exempt as housing for older persons. The General Counsel also had the exclusive authority to make determinations in cases where occupancy codes were at issue, determine if reasonable accommodations or modifications for handicapped persons had been made in a particular case, refer zoning and land use cases to DOJ, handle cases in which HUD was the respondent, and handle Secretary-initiated cases.[181]

Six months later, the Secretary changed the delegation of authority to permit the Assistant Secretary to make the initial no cause determination, effective January 28, 1991.[182] Pursuant to the new redelegation, the Assistant Secretary would review all case files.[183] The Assistant Secretary was required to make findings of no cause as warranted.[184] Where the Assistant Secretary believed a cause finding was warranted, he would forward the case to the General Counsel for review, who would make the final cause/no cause determination.[185] Effective on the same date, the General Counsel redelegated the power to make cause determinations to regional counsel, except in complex or novel cases or in cases involving the legality of local zoning or land use laws.[186] The General Counsel also redelegated to the Associate General Counsel for Equal Opportunity and Administrative Law (and the Assistant General Counsel for Fair Housing) the authority to determine whether a case involved complex facts or novel

177 54 Fed. Reg. 13,122 (1989).

178 55 Fed. Reg. 23,301 (1990).

179 *Id.*

180 HUD Comments, p. 4.

181 55 Fed. Reg. 23,301 (1990).

182 *Id.* at 53,293 (1990).

183 *Id.*

184 *Id.*

185 *Id.*

186 56 Fed. Reg. 2931 (1991).

questions of law or the legality of local zoning or land use laws.[187] However, the General Counsel retained the sole authority to make cause determinations in cases involving complex facts or novel issues of law.[188]

Effective December 13, 1991, the power to make no cause determinations that had been transferred from the General Counsel and regional counsel to the Assistant Secretary was redelegated to the regional directors of fair housing and equal opportunity.[189] Thus HUD assigned the concurrent authority to find no cause to the regional fair housing directors, while the power to find cause (or no cause) rested largely with the regional counsels. Under HUD's reorganization effective April 15, 1994, "Reasonable cause determinations in all cases referred to the assistant general counsels [formerly regional counsels] in field location, including determinations in handicap and familial status cases, no longer require approval from the General Counsel."[190] The assistant general counsels have the authority to issue reasonable cause determinations in all cases, except those involving complex or novel issues, or complaints involving the legality of local zoning or land use ordinances.[191] Therefore, while a complaint could be found to be meritless at any point, a decision to find cause underwent added scrutiny. It is also important to note that, despite the broad authority delegated to the regional counsels, the General Counsel always retains the authority to make determinations should he choose to do so.[192]

Apparently to establish parallel checks on both cause and no cause determinations, the General Counsel subsequently affirmed the inherent right to reopen no cause determinations made by regional counsels;[193] the Assistant Secretary affirmed the inherent right to reopen no cause findings by the regional directors;[194] and the Secretary delegated to the General Counsel the authority to reopen no cause determinations made by the Assistant Secretary.[195] Effective September 30, 1992, the regulatory changes were accompanied by a memorandum jointly issued the same day by the General Counsel and the Assistant Secretary that further clarified the delegations of authority.[196] According to the memorandum:

> Effective immediately, all Determinations of No Reasonable Cause must receive the concurrence of counsel prior to issuance. Regional Office Determinations of No Reasonable Cause will be reviewed by Regional Counsel and Headquarters Determinations of No Reasonable Cause will be reviewed by the Office of the Assistant General Counsel for Fair Housing.

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187 *Id.* Cases involving the legality of local zoning or land use laws are referred by HUD to DOJ without a determination of whether reasonable cause exists, pursuant to 42 U.S.C. § 3610(g)(2)(C) (1988) and 24 C.F.R. § 103.400(a)(2) (1993).

188 56 Fed. Reg. 2931 (1991).

189 57 Fed. Reg. 296 (1992).

190 HUD Comments, p. 4.

191 *See* Ibid., p. 5.

192 Ibid., p. 5.

193 57 Fed. Reg. 45,066 (1992).

194 *Id.* at 45,066.

195 *Id.* at 46,398.

196 Frank Keating, General Counsel, and Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Memorandum to All Regional Counsel[s] and All Regional Directors of FHEO, RE: No Reasonable Cause Determinations under the Fair Housing Act, Sept. 30, 1992.

In all cases in which the Regional Director of FHEO or the Director of Investigations in Headquarters FHEO proposes to make a determination of No Reasonable Cause, the determination and the investigatory record will be submitted to the Regional Counsel or the Office of General Counsel for review and concurrence.

The memorandum states that counsel has 5 working days to concur in or reject a determination, and that failure to provide comments will be deemed as concurrence. When FHEO officials disagree with counsel, the Assistant Secretary and the General Counsel will resolve the matter.

On August 5, 1994, several months after the reorganization of HUD, the Secretary transferred the authority to find cause from the General Counsel (and the deputy general counsel) or his designee to the Assistant Secretary for Fair Housing and Equal Opportunity and the Deputy Assistant Secretary for Investigations and Enforcement, effective immediately.[197] This change was modified on September 12, 1994, when the Secretary issued a technical correction requiring the concurrence of the General Counsel in the Assistatn Secretary's decision.[198]

However, HUD still did not make provisions for formal appeals to the General Counsel by complainants dissatisfied with a no cause finding. In issuing the original regulations in January 1989, HUD observed that:

> The statute does not contemplate a review of the reasonable cause determination. . . .HUD believes that it is significant that the Act does not specifically provide for an appeal of the reasonable cause determination, particularly where such procedures are specified within other sections. (See section 812(h), which provides for Secretarial review of the ALJ's initial decision.) Moreover, HUD believes that appeals of the determination of reasonable cause would be contrary to the legislative history of the 1988 Amendments, which supports the expeditious resolution of complaints.
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> * * *
>
> HUD notes that the failure to provide for the review of the reasonable cause determination will not preclude an aggrieved person from filing a civil action under section 813 of the Act.[199]

No doubt the low number of cause findings gave rise to the concerns about how decisions were made within HUD. In 1990 HUD issued 67 cause determinations, or 1.9 percent of the complaints closed; in 1991, 149 cause letters were issued, or 2.9 percent; in 1992, 156 cause letters were issued, or 2.4 percent; and 1993, 211 cause letters were issued, or 3.3 percent of complaints closed.[200] If the administrative closures are subtracted from the total received, the figures increase somewhat as time goes on. In 1990, the rate is 2.7 percent; in 1991, 4.2 percent; in 1992, 3.8 percent; and in 1993, 5.2 percent. (See table 3.2.)

The figures for no cause findings are higher. In 1990 no cause findings were issued in 364 cases, or 10.4 percent of all closed cases and 14.9 percent of cases not closed administratively. In 1991, 930 no cause letters were issued, representing 17.8 percent and 26.5 percent of all closed cases and cases not closed administratively; in 1992, 1,278 no cause letters were issued, or 20.9 percent and 30.9 percent; and in 1993, 1024 no cause letters were issued, or 16.1 percent of all closed cases and 25.3 percent of cases closed administratively. (Many cases were carried over; see below.) (See table 3.3.)

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197 59 Fed Reg. 39,955-56 (amending 24 C.F.R. § 103.335, §103.400, and §103.405).

198 *Id.* at 46,759-60 (amending 24 C.F.R. §103.400 and §103.405).

199 24 C.F.R. Ch. I, Subch. A, App. I at 961 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

200 All complaint statistics are derived from the HUD Title VIII Database.

Another way to examine closures is to see how long they take. Administrative closures of cases filed in 1990 took an average of 170 days to process; 148 days for 1991 cases; 69 days for 1992 cases; and 94 days for 1993. In contrast, cause determinations took an average of 368 days for 1990 cases; 537 days for 1991 cases; 604 days for 1992 cases; and 592 days for 1993 cases. No cause findings were reached after an average of 174 days for 1989 cases; 377 days for 1990 cases; 386 days for 1991 cases; 260 days for 1992 cases; and 203 days for 1993 cases. (See table 3.4.)

TABLE 3.2
Complaints Closed with Cause Findings

Year	Cause findings	% of all cases closed	% of cases closed excluding admin. closures
1990	67	1.9	2.7
1991	149	2.9	4.2
1992	156	2.4	3.8
1993	211	3.3	5.2

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

TABLE 3.3
Complaints Closed with No Cause Findings

Year	No cause findings	% of all cases closed	% of cases closed excluding admin. closures
1990	364	10.4	14.9
1991	930	17.8	26.5
1992	1278	20.9	30.9
1993	1024	16.1	25.3

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

TABLE 3.4
Timeliness of Case Processing by Closing Category (Average Number of Days)

Year	Administrative closures	Cause findings	No cause findings
1990	170	368	377
1991	148	537	386
1992	69	604	260
1993	94	592	203

Source: U.S. Department of Housing and Urban Development, Title VIII Database.

4. Administrative Adjudication

Prior to the Fair Housing Amendments Act of 1988 (FHAA), an individual complainant suffering from housing discrimination that could not be conciliated by the U.S. Department of Housing and Urban Development (HUD) and was not litigated by the Attorney General had no option but a private civil suit in U.S. district court. The 1968 Fair Housing Act restricted monetary recovery to actual damages, capped punitive damages at $1,000, and permitted an award of attorney's fees only to plaintiffs not able to bear the cost themselves. These limitations discouraged private parties or private counsel from investing in a civil suit except in cases of egregious discrimination.

To strengthen fair housing enforcement, Congress, through the FHAA, created the framework for an administrative adjudicatory process in addition to the private right of action already available to aggrieved parties.[1] The FHAA also removed the limit on punitive damages and provided for attorneys' fees to the prevailing party, at the court's discretion. More important, it expanded the investigative powers of the Secretary of HUD and created a two-pronged mechanism for the governmental enforcement of fair housing rights.

Legal Framework

Once the Secretary issues a charge of housing discrimination based on a cause determination,[2] a complainant, a respondent, or an aggrieved person on behalf of whom the complaint was filed may elect to have the case decided in a civil action in U.S. district court.[3] If no party elects to transfer the case to district court, the General Counsel will maintain an administrative proceeding[4] before an administrative law judge (ALJ) designated by the chief ALJ.[5] The responsibilities of the ALJ include conducting hearings, supervising all prehearing activities including discovery, disposing of motions, and making initial decisions.[6] Although the HUD Office of Administrative Law Judges (OALJ) is administratively a part of HUD, it is functionally autonomous.[7]

Once a charge is brought by the Secretary, the FHAA requires the ALJ to commence a

1 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988,* 100th Cong., 2d sess., 1988, H. Rep. No. 100-711, p. 13, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174 (hereafter cited as FHAA House Committee Report).

2 42 U.S.C. § 3610(g)(2)(A) (1988).

3 *Id.* § 3612(a). For a further discussion of the elections process, see chap. 11.

4 24 C.F.R. § 103.410(c) (1993).

5 42 U.S.C. § 3612(b) (1988); 24 C.F.R. § 104.100 (1993).

6 24 C.F.R. § 104.110(a)-(j) (1993).

7 *Id.* § 104.140.

hearing within 120 days, unless it is impracticable.[8] Under the FHAA, the prehearing discovery must be conducted as "expeditiously" as possible within the 120-day time period, and must be completed 15 days prior to the hearing date.[9] However, discovery also must be "consistent with the needs of all parties to obtain relevant evidence."[10]

In addition to the time restraints, the hearing must be "conducted at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or about to occur."[11] The conduct of the hearing must follow the Administrative Procedure Act (APA),[12] and the presentation of evidence must be in accord with the Federal Rules of Evidence.[13] Each party has the right to "appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas."[14] The ALJ may decide a case based only on the submissions of written evidence, if all of the parties waive their right to appear before the ALJ.[15]

A settlement agreement resolving the charge may be submitted to the ALJ at any time prior to HUD's final decision in the administrative proceeding.[16] A settlement agreement must be signed by the parties, including the aggrieved person and the General Counsel, and then serves as the basis for an ALJ decision based on the agreed findings.[17]

In addition, during the course of the ALJ proceeding, the ALJ, upon request of either party or on the ALJ's own initiative, may request that the chief ALJ appoint another ALJ to conduct settlement negotiations.[18] The settlement ALJ may be ordered to preside over the negotiation of all of the issues in the case, or the order may limit the scope of the negotiations to specified issues.[19] The regulations do not stipulate the precise timeframe in which the settlement ALJ must conduct the negotiations, but do state that the order appointing the ALJ will specify when the settlement ALJ must report to the chief ALJ.[20] In addition, the negotiations may not unduly delay the commencement of the hearing.[21]

Under the regulations, the settlement ALJ convenes and presides over conferences and negotiations between the parties, and assesses the practicality of a potential

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8 42 U.S.C. § 3612(g)(1) (1988). If the hearing cannot begin on time, the ALJ is statutorily required to notify all the parties in writing as to the reason for the delay.

9 *Id.* § 3612(d)(1) (1988); 24 C.F.R. § 104.500(b) and (e) (1993).

10 42 U.S.C. § 3612(d)(1) (1988).

11 24 C.F.R. § 104.700(b) (1993).

12 *Id.* § 104.710.

13 *Id.* § 104.730.

14 42 U.S.C. § 3612(c) (1988).

15 24 C.F.R. § 104.720 (1993).

16 *Id.* § 104.925.

17 *Id.*

18 *Id.* § 104.620.

19 *Id.*

20 *Id.* § 104.620(a).

21 *Id.* § 104.620(c).

settlement.[22] The settlement ALJ must report to the chief ALJ describing the status of the settlement, assessing the likelihood of agreement, and recommending termination or continuation of the negotiations.[23] However, the chief ALJ must make the ultimate decision to terminate negotiations after consultation with the settlement ALJ.[24]

Once a hearing is completed, the ALJ is statutorily directed to issue findings of fact and conclusions of law within 60 days unless it is impracticable.[25] This initial decision is subject to review by the Secretary before it may be considered the final decision. If the ALJ finds in favor of the respondent, the ALJ's initial decision dismisses the charge, and HUD must publicly disclose the dismissal.[26] However, if the ALJ finds in favor of the aggrieved party, he or she may award compensatory damages, injunctive relief, civil penalties, and/or any other appropriate relief.[27] Civil penalties are limited to $10,000 per respondent for a first offense,[28] $25,000 for a second offense,[29] and up to $50,000 for a repeat offender.[30] ALJs have no authority to award punitive damages, and attorney's fees may only be awarded to the prevailing party (other than the United States) after the initial decision becomes final.[31]

The Secretary may review any initial decision of an ALJ and serve a final decision within 30 days of the issuance of the initial ALJ decision; otherwise the initial order becomes the final and enforceable decision of the agency.[32] This process provides the Office of General Counsel (OGC) with its only opportunity to appeal an adverse initial ALJ decision.[33] Under the APA the Secretary on review has broad discretion to take any action supported by the record, and is not bound by any finding or conclusion of the ALJ.[34] HUD is required to make public disclosure of each final decision.[35]

Any party aggrieved by a final order in an administrative proceeding may obtain judicial review of that order by filing a petition for

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22 *Id.* § 104.620(b)(1).

23 *Id.* § 104.620(b)(2).

24 *Id.* § 104.620(c).

25 42 U.S.C. § 3612(g)(2) (1988). If the decision cannot be made within this time period, the ALJ is statutorily required to notify all the parties in writing as to the reason for the delay.

26 *Id.* § 3612(g)(7).

27 24 C.F.R. § 104.910(b) (1993).

28 *Id.* § 104.910(b)(3)(i)(A).

29 *Id.* § 104.910(b)(3)(i)(B). The previous offense must have been adjudicated during the 5-year period preceding the filing of the current charge.

30 *Id.* § 104.910(b)(3)(i)(C). The prior offenses must have been adjudicated during the 7-year period preceding the filing of the current charge.

31 42 U.S.C. § 3612(p) (1988); 24 C.F.R. § 104.940 (1993).

32 42 U.S.C. § 3612(h)(1) (1988); 24 C.F.R. § 104.930(a) and (b) (1993). For a further discussion of the Secretary review process, see chap. 10.

33 "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 5 (hereafter cited as HUD Comments).

34 5 U.S.C. § 557 (1988).

35 24 C.F.R. § 104.930(c) (1993).

review in an appropriate U.S. court of appeals within 30 days after the order is entered.[36] Although HUD serves as a party to the administrative proceeding,[37] the General Counsel may only appeal an adverse initial decision of an ALJ to the Secretary.[38] Once an initial ALJ decision becomes the final decision of the Secretary, the General Counsel must defend that position, even where the final decision is adverse to the complainant and contrary to the litigation position taken by HUD's OGC at the hearing.[39] The final decision becomes the position of the agency which the Federal Government, represented by the U.S. Department of Justice (DOJ), must defend in any subsequent appeal.[40]

If no petition for judicial review is filed within 45 days, the ALJ's decision will be conclusive in any future enforcement proceedings.[41] The final order may be enforced either through a petition by HUD to the appropriate U.S. court of appeals for appropriate temporary relief or restraining order,[42] or through a private proceeding initiated by anyone entitled to relief under the order.[43]

Interventions

If the complaint proceeds in the administrative forum, HUD files a charge seeking relief from the respondent for the aggrieved party and vindicating the public interest.[44] Because HUD is responsible for representing the interests of both the aggrieved party and the Federal Government, the FHAA allows any aggrieved person to intervene as a party to the proceeding.[45] The legislative history indicates that Congress intended for the parties to a HUD proceeding to have all of the rights granted under the APA and added the right of intervention as an additional procedural safeguard for aggrieved persons.[46] According to the preamble to the regulations, HUD did not expand the classes of persons permitted to intervene beyond aggrieved persons primarily because of the statutory time limits on the issuance of administrative decisions.[47] However, other persons who are not parties to the proceedings may file *amicus curiae* briefs at the discretion of the ALJ.[48]

The regulations provide that the ALJ shall permit an intervention if the intervenor is either the aggrieved person on whose behalf the charge is issued, or an aggrieved person

36 42 U.S.C. § 3612(i) (1988); 24 C.F.R. § 104.950(a) (1993).

37 24 C.F.R. § 104.200(a)(1) (1993).

38 HUD Comments, p. 5.

39 Ibid.

40 Ibid.

41 42 U.S.C. § 3613(l) (1988); 24 C.F.R. § 104.950(b) (1993).

42 42 U.S.C. § 3612(j)(1) (1988); 24 C.F.R. § 104.955(a) (1993).

43 42 U.S.C. § 3612(m) (1988); 24 C.F.R. § 104.955(b) (1993).

44 24 C.F.R. § 104.200(a)(1) (1993).

45 42 U.S.C. § 3612(c) (1988).

46 FHAA House Committee Report, p. 36, 1988 U.S.C.C.A.N 2197.

47 24 C.F.R. Ch. I, Subch. A, App. I, 911, 965 (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

48 *Id.* § 104.200(c).

with an interest in the property or transaction involved in the charge.[49] If the charge was not filed on behalf of the aggrieved person seeking intervention, then the intervenor must demonstrate that the disposition of the charge may impair or impede his or her ability to protect that interest.[50] If the aggrieved person's interests are adequately represented by the existing parties, then the ALJ will deny the intervention request.[51]

Although the statute places no time constraints on the filing of an intervention, HUD requires an aggrieved person to file a timely request.[52] A request will be considered timely if filed within 30 days after the date the charge was filed by HUD.[53] In response to suggestions from commenters, the HUD regulations do not impose an absolute deadline for interventions. HUD allows aggrieved persons to file after the 30-day period "to ensure that aggrieved persons will not be unnecessarily excluded from a proceeding."[54] In determining whether or not to permit an intervention, the ALJ may consider the stage and progress of the litigation, when litigation is sought, the reasons for any delay in seeking intervention, and the prejudice to the other parties if intervention is permitted.[55]

The right to request an intervention in an administrative proceeding beyond the 30-day limitation is significant because it may allow aggrieved persons who are not parties to the proceeding to intervene and appeal the final decision of the agency.[56] Under the regulations, aggrieved persons who are not parties may not appeal the final decision of the agency, even if they are adversely affected by it.[57] Further, an aggrieved person who is not a party to the proceeding cannot rely on HUD attorneys to appeal an adverse final decision of the agency, since that decision by definition is the final decision of the Secretary, and, therefore, of HUD itself. The Secretary cannot be aggrieved by his own final decision.[58]

In one case, *HUD v. Downs,* ALJ Cregar permitted an intervention after the initial administrative decision became final.[59] Although the intervention was filed far beyond the 30-day threshold, the ALJ stated that the intervention was still timely and necessary to avoid prejudicing the public interest.[60] ALJ Cregar found that the complainants both met the threshold requirements of having an

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49 *Id.* § 104.200(a)(3).

50 *Id.* § 104.200(a)(3)(ii).

51 *Id.*

52 *Id.* § 104.430.

53 *Id.*

54 *Id.; see id.* Ch. I, Subch. A, App. I at 966 (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

55 *Id.* Ch. I, Subch. A, App. I at 966 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

56 *See Aggrieved Parties Allowed to Intervene After ALJ's Decision Becomes Final,* 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 8, ¶ 8.1, p. 2 (Feb. 1, 1992).

57 24 C.F.R. § 104.950(a) (1993).

58 HUD Comments, p. 5.

59 HUD v. Downs, 2 Fair Housing-Fair Lending (P-H) ¶ 25,017 (HUD ALJ Nov. 22, 1991).

60 *Id.* at 25,235.

interest in the transaction and claiming to have been injured by the respondent's allegedly discriminatory actions.[61]

ALJ Cregar found that the intervenors' interests diverged from the Secretary's when the General Counsel declined to appeal the adverse initial decision of the ALJ to the Secretary.[62] ALJ Cregar emphasized that aggrieved persons should not be required to intervene at an earlier stage in the proceeding simply to preserve a right to appeal which they may not need.[63] Instead, representation by HUD adequately protects the rights of aggrieved persons and keeps the costs of litigation low for the complainant, unless HUD takes a position with which the aggrieved persons do not agree, such as deciding not to appeal the initial decision.[64]

Two months after *Downs,* ALJ Andretta denied a motion to intervene that was filed before the Secretary finalized the ALJ's initial decision.[65] Although this motion to intervene occurred at an earlier stage in the process than the motion in *Downs,* ALJ Andretta found that the request was not timely, stating that the complainant had ample time to retain private counsel earlier in the proceedings.[66] Furthermore, although the complainant stated that her interests may diverge from the government's, ALJ Andretta stated that "Not only does she fail to state what this diversion of interest is, but she also fails to state what may cause such a diversion at some later date."[67] However, the Secretary did grant the intervention upon review.[68]

Since only two fair housing cases have addressed the issue, it may be premature to determine whether the ALJs will permissively allow interventions, as in *Downs,* or will require a more definitive showing of timeliness and divergence.[69] However, according to some advocacy groups, the mere existence of OGC's discretion to appeal an adverse initial ALJ decision to the Secretary, and HUD's simultaneous representation of both the complainant and the public interest appear problematic for complainants.[70] Furthermore, as noted above, HUD cannot appeal adverse final agency decisions to Federal court.

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61 *Id.*

62 *Id.*

63 *Id.* at 25,236.

64 *Id.*

65 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022 (HUD ALJ Jan. 21, 1992), *modified, set aside, and intervention granted,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992) (final decision).

66 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022, at 25,271 (order denying motion to intervene).

67 *Id.*

68 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,297-98 (final decision).

69 ALJ Andretta did note that in interpreting "rules of procedure for application to a given case, where there is little or no precedent yet established, guidance is provided by the corresponding section of the Federal Rules of Civil Procedure and [F]ederal case law." *Id.* at 25,271.

70 *HUD Complainants Cover Uncertain Legal Terrain with Intervention Efforts* 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 9, ¶ 9.2, p. 4 (Mar. 1, 1992). According to HUD, OGC has become more aggressive in using the Secretary review process to prevent ALJ initial decisions that are adverse to complainants from becoming the final decision of HUD. HUD Comments, pp. 5-6.

Shortly after both decisions, HUD issued two model letters for use by the regional offices informing complainants of their right to intervene in the administrative proceeding.[71] One letter informing complainants of their right to intervene is mailed after the initial ALJ decision, but before the Secretary review period has expired.[72] More recently, HUD designed another model informational letter which is issued to complainants at the end of the election period and prior to the commencement of the ALJ hearing. This model letter explains that the HUD trial attorney will "fully represent your interests and the government's interests, unless they conflict with each other. Therefore, you may wish to intervene to enable you to assert your interests in the event of such a conflict."[73]

Appointment of ALJs

Administrative law judges are appointed by HUD pursuant to the APA.[74] Unlike district court judges who are presidentially appointed with the advice and consent of the Senate, administrative law judges are competitively selected by the Office of Personnel Management (OPM) based on their writing ability and experience in administrative litigation, together with such factors as veteran's preferences.[75] OPM evaluates and ranks candidates for a general pool of ALJs, regardless of their experiences in particular fields of law.[76] Agencies, such as HUD, may appoint as many ALJs from OPM's list of "eligibles" as are necessary to conduct proceedings for the department.[77]

To limit undue agency influence, ALJs are assigned cases in rotation[78] and cannot "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions of the agency."[79] Additionally, ALJs generally cannot "perform duties inconsistent with their duties and responsibilities as administrative law judges."[80] OPM is responsible for establishing the qualifications, pay, and removal (in most cases) of ALJs,[81] and sets the salaries for ALJs irrespective of any agency ratings or standards.[82] ALJs are tenured employees who may be removed or disciplined only for good cause established

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71 *HUD to Notify Parties of Intervention Rights in Administrative Cases,* 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 2, ¶ 2.7, p. 8 (Aug. 1, 1992).

72 Ibid.

73 Ibid., pp. 8-9; HUD Comments, attachment 1.

74 5 U.S.C. § 3105 (1988).

75 *Id.* § 1305; 5 C.F.R. §§ 930.203(f) and 930.203a (1993).

76 With OPM approval, agencies may also select ALJs by a process known as "selective certification." 5 C.F.R. § 930.203a (1993). Selective certification allows the agency to select ALJs who possess specialized experience without regard to their rank in the general pool of OPM eligibles. *See* L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence versus Employee Accountability,* 54 Geo. Wash. L. Rev. 591, 593 n.9 (1986).

77 5 U.S.C. § 3105 (1988).

78 *Id.*

79 *Id.* § 554(d)(2).

80 *Id.* § 3105.

81 *Id.* §§ 3105, 7521.

82 *Id.* § 5372.

and determined by the Merit Systems Protection Board.[83] Agencies are explicitly precluded from either rating the performance of the ALJ or implementing any performance-based removal actions.[84]

Implementation

Nature of Cases Reviewed

Table 4.1 shows the breakdown of charges brought by HUD through November 4, 1993. The table describes the nature of discrimination and whether or not one party elected to have the case brought by DOJ in U.S. district court. As the numbers indicate, the vast majority of charges relate to family status discrimination. There is no significant difference between the percentages electing and not electing judicial action for each type of discrimination.[85]

Of the charges brought, a very small number have resulted in final decisions, as shown in table 4.2. The breakdown by basis of cases reaching decision roughly approximates the breakdown by basis of charges brought.The FHAA, enacted after some 20 years of enforcement of the original Fair Housing Act, added two protected classes of victims to its coverage, but did not significantly change the parameters of illegal behavior. Accordingly, many of the cases examined simply take their place within the existing body of law. Many of the examined cases present factual disputes over issues such as ownership and the veracity of statements made by the parties, rather than disagreements over the rule of law. Although some of these cases present legal questions, the questions often arise directly from the original (1968) statutory language and simply reflect the ongoing evolution of civil rights law.

A survey of the cases arising since 1989 reveals that the race discrimination cases tried before ALJs represent the types of discrimination that have existed since the passage of the initial Fair Housing Act. The cases examined generally involve refusals to rent or sell, harassment, or the eviction of an existing tenant on the basis of the race of the tenant[86] or the race of his or her guest(s).[87] Few if any legal issues of any novelty are present; each case focuses on whether an adverse action had occurred in fact, and/or whether the reasons offered by the respondent for his or her conduct are legitimate or pretextual.

Higher profile race discrimination claims have proceeded in district court, and generally

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83 *Id.* § 7521(a).

84 *Id.* §§ 4301(2)(D), 4302, 4303; 5 C.F.R. § 930.211 (1993).

85 This report examines both charges and decisions as feasible. First, it incorporates findings from examining the HUD final decisions in 45 cases that have been released and published in the Fair Housing-Fair Lending Reporter (Prentice-Hall). Second, all available FHAA Federal district court and appellate decisions issued between Mar. 2, 1989 (the effective date of the FHAA), and Dec. 6, 1993, were examined. Detailed analysis was restricted to cases alleging private discrimination. Finally, all HUD secretarial reviews and final decisions of ALJ initial decisions through February 4, 1994, were included. In addition, the report examines all HUD charges filed through November 4, 1993. All multiple charges filed concurrently against the same respondent or respondents have been counted as one charge for purposes of this discussion.

86 *See, e.g.*, HUD v. Narlis, 2 Fair Housing-Fair Lending (P-H) ¶ 25,003 (HUD ALJ Sept. 11, 1990).

87 HUD v. Jerrard, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005 (HUD ALJ Sept. 28, 1990).

TABLE 4.1
HUD Charges, by Elected Forum and Basis

Basis	DOJ	HUD	Total
Race	52	30	82
Handicap	47	24	71
Sex	7	4	11
Family status	180	132	312
National origin	4	2	6
Religion	1	—	1
Retaliation	3	4	7
Combination	15	9	24
Total	309	205	514

Source: U.S. Department of Housing and Urban Development, Office of Administrative Law Judges.

TABLE 4.2
Disposition of HUD Charges by Basis

Basis	Decided	Settled	Pending[1]	Total
Race	11	12	7	30
Handicap	5	13	6	24
Sex	1	2	1	4
Family status	24	91	17	132
National origin	—	2	—	2
Retaliation	1	1	2	4
Combination	3	4	2	9
Total	45	125	35	205

Source: U.S. Department of Housing and Urban Development, Office of Administrative Law Judges.

[1] As of Mar. 16, 1994, these charges were still pending in the administrative forum.

with private counsel. In addition to the customary claims just described, these high-profile cases have addressed the responsibility of real estate brokers,[88] insurers,[89] appraisers,[90] and even elevator repair companies[91] for the subtler manifestations of discrimination found in society. These cases frequently raised questions of liability for apparent discriminatory effects without clear proof of discriminatory animus—questions which courts treated with great caution.

Few disability-based charges have been decided by an ALJ. Of these, one concerns the obligation of a housing provider to accommodate a disability by reserving a parking space;[92] one, a refusal by developers to sell to a group home;[93] and one, the alleged harassment of a tenant with AIDS.[94] Once again, the more legally complex cases have been decided in district court.[95]

As noted, the majority of HUD charges brought in the period examined complain of familial status discrimination. Some of these cases involve refusals to rent to large families,[96] or evictions in which the issue is whether the apartment was in fact available, or whether the respondent had a legitimate nonpretextual reason for taking the action.[97] These cases, and the disability-based charges, fit easily into the existing body of fair housing and civil rights law, and have raised few new issues merely because of the new bases of discrimination.[98]

Timeliness

By statute, HUD is required to provide administrative hearings within 120 days of

88 Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990); City of Chicago v. Matchmaker Real Estate Sales Ctr., 2 Fair Housing-Fair Lending (P-H) ¶ 15,663 (N.D. Ill. Nov. 7, 1990), *aff'd in part, rev'd in part,* 982 F.2d 1086 (7th Cir. 1992), *cert. denied,* Ernst v. Leadership Council for Metro. Open Communities, 113 S. Ct. 2961 (1993).

89 NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2335 (1993).

90 Steptoe v. Savings of Am., 800 F. Supp. 1100 (N.D. Ohio 1992).

91 Clifton Terrace Assocs. v. United Technology Corp., 1989 U.S. Dist. LEXIS 8787 (D.D.C. July 27, 1989), *summ. judgment granted, dismissed,* 728 F. Supp. 24 (D.D.C. 1990), *aff'd in part, vacated in part,* 929 F.2d 714 (D.C. Cir. 1991).

92 HUD v. Dedham Hous. Auth., 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUD ALJ Nov. 15, 1991) (initial decision and order), *remanded,* HUDALJ No. 01-90-042401 (HUD Secretary Dec. 13, 1991) (remand order) (without determination on the merits), 2 Fair Housing-Fair Lending (P-H) ¶ 25,023 (HUD ALJ Feb. 4, 1992) (initial decision on remand and order).

93 HUD v. George, 2 Fair Housing-Fair Lending (P-H) ¶ 25,010 (HUD ALJ Aug. 10, 1991).

94 HUD v. Williams, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

95 *See, e.g.,* United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992) (defining handicap in the context of drug and alcohol addiction). *But see* HUD v. Hansen, HUDALJ No. 09-91-2048-3 (HUD ALJ Apr. 28, 1993) (consent order) (Secretary-initiated test case for interpreting the FHAA accessibility guidelines). HUD emphasizes that it "developed an innovative approach to resolving complaints involving buildings that were subject to the FHAA design and construction requirements but which were already constructed in a manner that was not in compliance with those requirements." *See* HUD Comments, p. 7.

96 *E.g.,* HUD v. Morgan, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991), *aff'd in part, rev'd in part, Secretary of HUD v. Morgan,* 85 F.2d 1451 (10th Cir. 1993).

97 *E.g.,* HUD v. Hacker, 2 Fair Housing-Fair Lending (P-H) ¶ 25,038 (HUD ALJ Dec. 2, 1992).

98 HUD stresses that "many of the cases which have come to hearing do involve legal issues of real significance. HUD decisions have been particularly instrumental in protecting the rights of families with children and persons with disabilities." *See* HUD Comments, p. 6.

bringing charges, and ALJs are to issue opinions within 60 days of the completion of the hearing. In all but six cases to date, the 120-day limitation was met. One delay was explained in the decision as due to settlement negotiations,[99] and one delay was explained due to respondent's health problems.[100] The remaining four delays were less than 30 days each and were not explained, but were evidently not at issue.[101] Likewise, the 60-day requirement was met in all but two cases. In those cases decisions were issued within 65 days.[102] The noted delays are *de minimis* and the progress of the cases remarkably efficient by comparison with civil litigation. The efficiency of the ALJs is in noted contrast with HUD's delay in processing complaints as discussed above, even allowing for the commensurate difficulties of conciliation and investigation.

Novel or Difficult Issues

Although the cases to date have generally involved familiar issues, some cases have raised issues of first impression, either because of the new FHAA provisions or because parties contested the manner in which old provisions should be applied to the newly covered situations. For example, since the beginning of the FHAA period, HUD has conducted extensive litigation on the eligibility of communities to qualify as housing for older persons exempt from the prohibition on family status discrimination.[103] This is a politically powerful issue,[104] because thousands of communities, ranging from retirement villages to mobile home parks, practiced family status discrimination prior to the FHAA. The FHAA permits family status discrimination only in communities restricted to, and focused on the needs of, older persons.[105] A succession of early ALJ cases have successfully established HUD's view that the exemption is a narrow one placing the burden of proof on the communities claiming the exemption.[106]

Despite administrative decisions providing that communities of older persons must meet the requirements for exemption from the familial status provisions of the act at the time of a discriminatory action for the action to be

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99 HUD v. Leiner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,021, at n.1 (HUD ALJ Jan. 3, 1992).

100 HUD v. Jancik, 2 Fair Housing-Fair Lending (P-H) ¶ 25,058 (HUD ALJ Oct. 1, 1993).

101 HUD v. Nelson Mobile Home Park, 2 Fair Housing-Fair Lending (P-H) ¶ 25,063 (HUD ALJ Dec. 2, 1993); HUD v. Paradise Gardens, 2 Fair Housing-Fair Lending (P-H) ¶ 25,037 (HUD ALJ Oct. 15, 1992); HUD v. Frisbie, 2 Fair Housing-Fair Lending (P-H) ¶ 25,030 (HUD ALJ May 6, 1992); HUD v. TEMS Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 25,028 (HUD ALJ Apr. 9, 1992).

102 HUD v. Lewis, 2 Fair Housing-Fair Lending (P-H) ¶ 25,035 (HUD ALJ Aug. 27, 1992); HUD v. Lashley, 2 Fair Housing-Fair Lending (P-H) ¶ 25,039 (HUD ALJ Dec. 7, 1992).

103 *See, e.g.,* HUD v. Carter, 2 Fair Housing-Fair Lending (P-H) ¶ 25,029 (HUD ALJ May 1, 1992) (mobile home park); HUD v. TEMS Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 25,028 (HUD ALJ Apr. 9, 1992) (planned community of single-family homes); HUD v. Murphy, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002 (HUD ALJ July 13, 1990) (mobile home park).

104 For instance, the correspondence file provided by HUD contains a number of letters of inquiry from members of Congress and protests from their constituents.

105 42 U.S.C. § 3607(b)(1) and (2) (1988).

106 *See, e.g.,* HUD v. Murphy, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002 (HUD ALJ July 13, 1990). In its comments on this report, HUD emphasized that the *Murphy* case set the tough standard for qualification for the housing for older persons exemption, and the decision has been followed in subsequent administrative and judicial decisions. *See* HUD Comments, p. 6.

legal, at least one Federal district court ruled otherwise.[107] The court, while finding that the existing policies and procedures of the community qualified it for the "over 55" exemption, never addressed the issue of the timing of the discriminatory action, which occurred prior to the adoption of the requisite policies and procedures.[108] On appeal, the 11th circuit reversed and remanded the district court's decision, in part because the ALJ failed to consider that the age verification procedures used to restrict the housing to older persons were not instituted until after the discrimination occurred.[109]

With some exceptions noted here and elsewhere, ALJs to date have not been called upon to answer truly novel questions, or to synthesize a body of law not previously analyzed for that purpose. Instead, the primary challenge of the ALJs has been to establish a body of case law implementing and enforcing the FHAA and its regulations, both new and old, against a body of pervasive behavior that had not been previously subject to fair housing restrictions.

The difficulty and importance of this task is in translating universal rules into particular decisions. For example, ALJs must decide whether the words "adult community" convey a preference against families with children,[110] and whether restricted pool hours for children discriminate in the terms and conditions of housing.[111] The ALJs appear simultaneously to give genuine consideration to the arguments of the respondents, and yet in the end to reaffirm a strict interpretation of the law.

Quality and Persuasiveness of Reasoning

Because ALJ hearings are conducted without a jury, the ALJs, as triers of fact, meticulously detail the facts of each case, and tend to restrict their decisions to the particular situations at hand, rather than issue broad conclusions of law. In general, ALJs take comparable if not greater care to justify each resolution of disputed areas of fact than Federal judges. In the decisions reviewed, ALJs have discussed explicitly evidentiary contradictions; have identified the existence of corroboration or the nonexistence of expected corroboration; have stated their individual beliefs about plausibility; and have made credibility determinations with explicit reference to testimonial contradictions, mannerisms, etc. In addition, ALJs cite testimony, sometimes at length, to justify credibility determinations.

Since the actual motivation of the alleged wrongdoer is an important, but usually obscure, question in fair housing litigation, litigators must resort to proving disparate treatment or disparate impact. Therefore, the proper allocation of burdens of proof and persuasion are critical. The decisions reviewed stated the burdens consistent with precedent and appeared to observe them.

These ALJ decisions are readily reviewable. Unlike some trial court opinions that make credibility determinations and resolve questions of disputed fact without explaining the underlying evidence,[112] the reasoning of these ALJ decisions tends to be explicit to a fairly minute level.

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107 Massaro v. Mainlands Section 1 and 2 Civic Ass'n, 796 F. Supp. 1499 (S.D. Fla. 1992), *rev'd, remanded,* 3 F.3d 1472 (11th Cir. 1993).

108 *Id.*

109 3 F.3d at 1478.

110 *See, e.g.,* HUD v. Paradise Gardens, 2 Fair Housing-Fair Lending (P-H) ¶ 25,037 (HUD ALJ Oct. 15, 1992).

111 *Id.*

112 United States v. Cannon, 2 Fair Housing-Fair Lending (P-H) ¶ 15,743 (D.S.C. Mar. 13, 1992), *aff'd in unpublished opinion,* Mann v. Kemp, 925 F.2d 1473 (11th Cir. 1991).

Similarly, the application of law to fact is careful, if not sometimes formulaic. ALJ opinions routinely recite the text of applicable law and carefully present the well-developed framework for analysis under cases such as *McDonnell Douglas Corp. v. Green.*[113] The repeated recitation of established precedent allows the ALJs, in their decisions to date, to create a system of justice that does not merely reach a correct decision, but also shows the parties that they have been treated fairly.

Improper sympathy with either party has no place in the finding of liability. Although credibility or good faith determinations can mask bias, the careful elaboration of evidence supporting those determinations reduces the room for improper considerations. The ALJ cases examined seemed well-reasoned and persuasive.

Appropriateness of Penalty

The considerations involved in setting a civil penalty, although not identical to those involved in a punitive damage award, certainly invite attention to the blameworthiness of a respondent's actions. Therefore, an ALJ may legitimately lessen the harshness of a decision on an uninformed or unlucky respondent, just as he or she may properly increase the penalty for one who acted with malice. As long as ALJ decisions continue to follow established precedent, the ALJs may properly consider the degree of a respondent's blameworthiness.

Compensatory damages, by contrast, are supposed to be objective. Since they are supposed to return the complainant to the position in which he or she would have been, absent the discrimination, compensatory damages are assessed largely independently of the blameworthiness of the respondent who caused the damage. Of course, rules of causality and proof prevail, but the common law rule is that tortfeasors take their victims as they find them, and are responsible for any damages they cause.

This maxim was openly violated by one ALJ on two occasions. In *HUD v. Guglielmi* and *HUD v. Williams,* the ALJ announced the rule that a rational relationship must exist between what the respondent did and how much he is made to suffer the consequences.[114] As a result, the ALJ limited the compensatory damages, because in both cases the respondent was unsophisticated, not fully aware of the law, and without malice.

Awards in Different Forums

The individual complainant who approaches HUD without the aid of a lawyer or advocacy group may wish to know the comparative advantage of filing a private lawsuit or a complaint with HUD, or of electing a jury trial over an administrative hearing once HUD finds cause.[115] A comparison of damage awards decided in Federal district or administrative courts is more an art than a science. First, the total number of decisions is fairly small, reducing the statistical significance of any apparent patterns in subcategories, such as race or family status cases. Second, it is difficult to determine whether calculations of average awards should reflect the value of complainant's alleged damages in cases decided in favor of the defendant. The different

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113 McDonnell Douglas v. Green, 411 U.S. 792 (1973). For a further discussion of the application of Title VII cases to Title VIII, see chap. 10.

114 HUD v. Guglielmi, 2 Fair Housing-Fair Lending (P-H) ¶ 25,004 (HUD ALJ Sept. 21, 1990); HUD v. Williams, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

115 The Office of Fair Housing and Equal Opportunity's (FHEO) Program Evaluation Branch performed the "Election Study" in December 1991, and subsequently issued "The Fair Housing Law Election Process: What You Need to Know," in July 1992, a brochure to assist the parties in choosing a forum. *See* HUD Comments, p. 7.

success rates in each forum, if significant at all, may simply mean that more nonmeritorious cases ended up in court, or that Federal judges and juries are more likely to rebuff plaintiffs they dislike even while they penalize bad actors more heavily.

Another ambiguity arises from the fact that both administrative and judicial decisions can be altered on appeal. To the extent that this introduces uniformity, it may also obscure characteristic differences between the two systems. Therefore, although a plaintiff who chooses a judicial trial may get a higher initial award, a significant part of the difference between the administrative and judicial forums is viewed by the legal system as error and tends to disappear once appellate review is complete.

Finally, it is difficult to identify award amounts for comparison in every situation. Cases may be consolidated or otherwise present multiple claimants, thus inflating the total award even while the per-claimant award is average or low. Yet identifying a per-claimant award is difficult and perhaps misleading, especially in situations where a single act of discrimination might damage several family members in ways that are difficult to separate.[116]

Complainants generally fall into three separate categories, each suffering damages in distinctive ways. Some plaintiffs are testers, some bona fide seekers of housing, and some are fair housing organizations. Testers generally recover less than bona fide homeseekers. Fair housing organizations can sometimes prove costs from diversion of resources that dwarf any economic damages an individual can prove.

For all these reasons, and to avoid a deceptive clarity, the comparisons of damage awards by forum are not presented in chart form. Unless otherwise stated, the following numbers represent all cases in which liability was found, and exclude verdicts favoring respondents. "Final" damages—i.e., as altered on appeal—are used, for both administrative and court outcomes. Excluded from the court awards are all damages to fair housing organizations and to testers, in order to get the most meaningful comparison with administrative decisions from the point of view of the individual complainant.[117] Applying these constraints, aggrieved housing seekers in the cases examined succeeded more often and received higher damages in the administrative forum than in court. (Excluding testers and fair housing organizations is not meant to diminish in any way the importance of such cases, which often have very significant enforcement effects.)

In the ALJ cases studied, 5 of 45 decisions found no liability, and, thus, awarded no damages. Two of the 45 initial decisions found no

116 For example, although one person should not be able to recover for damages suffered by another, there are ways in which this can be accomplished. For instance, giving one an award for having to cope with the distress suffered by another, or giving one spouse an award for household income lost by the other spouse. Accordingly, household damages might reflect lost wages to one spouse, emotional distress to the other, and loss of playmates to the children, whereas a single parent-plaintiff might well be able to recover a comparable total.

117 These decisions largely explain the difference in our conclusions from those of, for instance, the Washington Lawyers Committee for Civil Rights. (*See* Relman, *Federal Fair Housing Enforcement: The Bush Record and Recommendations for the New Administration.*) Other differences arise from certain reversals and remands not reflected in that paper, as well as minor errors in reporting damages in particular cases.

liability but were reversed by the Secretary and remanded for damage assessments.[118] The mean award in family status cases heard administratively is $7,075. The mean award in court cases is $3,776. The mean ALJ award in race discrimination cases is $39,214. The mean court award is $28,378. This figure excludes not only tester and fair housing organization awards, as noted, but also cases in which the advertising for the unit conveyed an impermissible preference.[119]

Only a handful of cases exists for other types of discrimination, making comparison even less meaningful. ALJs awarded on average $11,580 in four cases to plaintiffs proving handicap discrimination, and $2,180 in two cases for sex discrimination. Only one Federal court handicap case in the sample studied produced a reported damage award ($8,032) and two others won no damages even though liability was found. Similarly, only one sex discrimination court award, of $7,500, was noted.[120]

Even the preceding figures may, in a sense, exaggerate the relative merits of the judicial forum. On the occasions when higher damages have been won in the judicial forum, they stem almost entirely from private litigation. Examination of the judicial damage awards show that those cases originating in election brought by DOJ tend to be the lower awards. The DOJ election cases are most directly comparable to the ALJ cases, so, if they were a statistically significant number, it might be possible to conclude that the administrative forum is markedly superior for complainants.

These comparisons take no account of civil penalties or punitive damages, an adjustment that would significantly change the balance if it could be accomplished scientifically. In the civil cases examined, prevailing plaintiffs or aggrieved parties represented by the Attorney General were awarded $38,329 on the average

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118 HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *rev'd and remanded, In re* Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (record reopened on other grounds), *on remand,* HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,060 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded,* HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19, 1993) (decision), *on second remand,* HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd,* HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994); and

HUD v. Mountain Side Mobile Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,043 (HUD ALJ Mar. 22, 1993) (initial decision), *on remand,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,048 (HUD ALJ June 18, 1993) (initial decision on remand), *rev'd and remanded,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,053 (HUD Secretary July 19, 1993), *on second remand,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,057 (HUD ALJ Sept. 20, 1993) (second initial decision on remand), *rev'd and remanded,* HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD Secretary Oct. 20, 1993) (reversing ALJ's disparate impact analysis and entering judgment for charging party), *on third remand,* HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1 (HUD ALJ Dec. 17, 1993) (third initial decision on remand).

119 Such exclusion is by no means intended to disparage the importance of these cases, which have resulted in very significant jury verdicts. However, because no advertising cases have been brought before ALJs, inclusion of these cases would distort the comparison of damage awards in both forums.

120 It should be noted that the apparent difference in sex discrimination cases, already statistically insignificant, is further distorted by our rules regarding the treatment of appellate reversals. Because in *HUD v. Baumgardner*, damages were reduced on appeal from $15,000 to $5,000, it could be argued that ALJ damages are more generous than shown, and courts are less generous. HUD v. Baumgardner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006 (HUD ALJ Nov. 15, 1990), *aff'd in part, rev'd in part, and amended,* 960 F.2d 572 (6th Cir. 1992).

in punitive damages.[121] By contrast, the civil penalties assessed by ALJs averaged $5,600 for prevailing complainants.[122] It is important to remember that while civil penalties are of interest for weighing the deterrent effect of a judgment, they are awarded to the government and are irrelevant to the complainant's compensation.

Court cases in which punitive damages may be collected appear to tip the balance toward court as a preferred forum for complainants because of the amount of damages awarded. However, this is no reflection on the desirability of the administrative forum. Congress chose not to allow punitive damages in the administrative forum, presumably to induce respondents to submit to the expedited procedures, and to give complainants faster and more certain resolution.

Furthermore, the large punitive and compensatory damage awards have usually resulted from cases that received atypical attention from fair housing organizations and/or expert lawyers, and that typically involve claims of race discrimination. However, for the average complainant seeking resolution and compensation for family status discrimination against an uninformed, but nonmalicious defendant, the administrative forum would appear equal to if not superior to a judicial determination.

Appellate Court Review of ALJ Decisions

To date, the ALJs' liability determinations were upheld in the four reported ALJ opinions that have been the subject of appellate review.[123] One was affirmed; damages were reduced in two; and one decision was remanded to allow for a reasonable conciliation effort. Once again, although these numbers are too low to extrapolate a weighty conclusion, they are consistent with the conclusion that ALJ decisions appear on their face to be generally well-reasoned and consonant with existing law, with certain controversial exceptions discussed here and in chapter 10.

HUD v. Blackwell was the first fair housing case decided by an administrative body.[124] *Blackwell* was a race discrimination case in which the chief ALJ applied a *McDonnell Douglas* analysis to find that the respondent's objections to the African American buyers were merely pretextual.[125] The 11th circuit upheld the methodology,[126] which has continued to serve as the model for subsequent ALJ decisions.[127]

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121 This average excludes the $2 million punitive damage awarded by the jury in *Timus v. William J. Davis, Inc.*, both because the case is vulnerable to reversal or settlement and because, even if final, the award significantly distorts the average. *See D.C. Jury Awards More Than $2.4 Million in Family Status Case,* 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 3, ¶ 3.1, p. 1 (Sept. 1, 1992). This figure also excludes the only civil penalty imposed by a district court where no punitive damages were awarded. *See* United States v. Canestrini, No. 91-C-6651, 1992 U.S. Dist. LEXIS 17023 (N.D. Ill. Aug. 12, 1992).

122 This calculation excluded two decisions where no civil penalty was awarded. In HUD v. Leiner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,021, at 25,261 (HUD ALJ Jan. 3, 1992), the Secretary did not seek a civil penalty, and in HUD v. Kelly, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,363 (HUD ALJ Aug. 26, 1992), the ALJ stated that he would have awarded $3,000, if HUD's delay had not increased the compensatory damages.

123 For a discussion of reviews of ALJ initial decisions by the Secretary of HUD, see chap. 10.

124 HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001 (HUD ALJ Dec. 21, 1989).

125 *Id.* at ¶ 25,005.

126 HUD v. Blackwell, 908 F.2d 864 (11th Cir. 1990).

127 *See* HUD v. Williams, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007, at 25,113-14 (HUD ALJ Mar. 22, 1991).

HUD v. Downs was a more controversial decision than *Blackwell,*[128] The complainant, a mother with a child, had been denied housing after the leasing agent had asked questions about the child's noisiness and had leased the unit to someone without children. The ALJ concluded that the questions relating to the noise level of the child were legitimate because the owner wanted to avoid a noisy neighbor for an elderly tenant.[129] The ALJ also rejected the view that the leasing agent had expressed an illegal preference against children, on the grounds that her motive was innocent.[130]

Represented by experienced fair housing advocates, the appellant attacked the sufficiency of the evidence and argued that, in considering a violation of the statute's discriminatory advertising provisions, the agent's questions should be judged based on whether an ordinary listener would find them discriminatory, not on whether the speaker had a discriminatory intent or motive. In affirming the decision, the second circuit implicitly praised the ALJ's careful analysis and found substantial evidence supported the ALJ's decision.[131] While agreeing with the ordinary listener standard, the court held that the motivation of the speaker was relevant to what the listener would hear.[132]

Both the ALJ and appellate court rejections of the appellant's claim suggest an implied unwillingness to let fair housing legal theory, developed to combat race discrimination, totally replace the judges' view of common experience when other classes are complainants. In some circumstances inquiries as to children may be permissible, whereas inquiring as to race is never permissible. No ordinary applicant, the judges seem to say, should take offense at the questions asked in the context presented, provided such questions have a legitimate purpose.

In two cases, appellate courts reduced sharply the damages awarded by the HUD ALJ, although leaving intact the finding of liability. *HUD v. Baumgardner* involved a landlord's refusal to rent to a group of single men.[133] The sixth circuit reduced damages from $5,000 to $1,500.[134] An award of $2,000 for "economic loss including inconvenience" was reduced to $1,000, even "giving HUD and [complainant] the benefit of some considerable doubt."[135] A $500 award for emotional distress was grudgingly allowed.[136]

In addition, an award for, $2,500 for "loss of civil rights" was overturned completely as

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128 HUD v. Downs, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011 (HUD ALJ Sept. 20, 1991) (initial decision), *permission to intervene granted,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,017 (HUD ALJ Nov. 22, 1991) (memorandum), *petition for review denied,* Soules v. HUD, 967 F.2d 817 (2d Cir. 1992)

129 *Id.*

130 *Id.*

131 Soules v. HUD, 967 F.2d 817 (2d Cir. 1992).

132 *Id.* at 824-25.

133 HUD v. Baumgardner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006 (HUD ALJ Nov. 15, 1990), *aff'd in part, rev'd in part, and amended,* 960 F.2d 572 (6th Cir. 1992).

134 960 F.2d at 580-83.

135 *Id.* at 580-81.

136 *Id.* at 581.

an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven."[137] The $4,000 civil penalty was reduced to $1,500. While this reduction was due in part to HUD's procedural delays, the court also noted that the complaining party did not prove any other evidence of discriminatory conduct by the agent.[138]

The appellate decision in *HUD v. Morgan* is similar to the decision in *Baumgardner*. In *Morgan,* a mobile home park owner was assessed over $14,000 in damages by the ALJ after barring a family with children from the park.[139] The 10th circuit, on appeal, permitted economic damages to the complainant calculated based on the cost of a comparable unit, but eliminated all damages for inconvenience and emotional distress.[140]

Most recently, the sixth circuit reviewed an ALJ opinion involving family status discrimination based on an invalid occupancy policy.[141] Although the court agreed with the ALJ's liability finding, the court did not agree that the parties were afforded a reasonable opportunity to conciliate the complaint.

The ALJ relied upon *Baumgardner* in deciding that the respondent had a reasonable opportunity to conciliate the complaint.[142] The ALJ compared the forms of communication used and the number and length of the conciliation meetings and concluded that HUD had met its obligation to make an objectively reasonable attempt at conciliation.[143] However, on appeal, the sixth circuit concluded that the conciliation efforts were not objectively reasonable because the investigator also served as the conciliator of the complaint.[144] The sixth circuit found that "the conciliation efforts were seriously flawed" by the dual role of the conciliator/investigator, and remanded the case to allow for an unbiased conciliation process.[145]

In addition to the disagreement over the effectiveness of the conciliation, the sixth circuit also questioned the ALJ's damage award.[146] The ALJ's initial damage award reflected the loss suffered by the complainant during HUD's 17-month delay in processing.[147] Recognizing that the damages were greater than they would have been if HUD had acted within the statutory period, the ALJ assessed the full economic damage amount against the respondent, but did not impose a civil penalty.[148]

Although the court vacated the entire damage award to allow for a reasonable conciliation, the court implied that the ALJ erred in

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137 *Id.* at 583.

138 960 F.2d. at 583.

139 HUD v. Morgan, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991), *aff'd in part, rev'd in part,* Morgan v. Secretary of HUD, 2 Fair Housing-Fair Lending (P-H) ¶ 15,816 (10th Cir. Feb. 18, 1993).

140 Morgan v. Secretary of HUD, 2 Fair Housing-Fair Lending (P-H) ¶ 15,816, at 17,320-21 (10th Cir. Feb. 18, 1993).

141 Kelly v. Secretary of HUD, 3 F.3d 951 (6th Cir. 1993).

142 HUD v. Kelly, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,359 (HUD ALJ Aug. 26, 1992).

143 *Id.*

144 3 F.3d at 955.

145 *Id.*

146 *Id.*

147 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, at 25,360-61.

148 *Id.* at 25,363.

the amount of economic damages he awarded. The court stated that, although the complainant should not be made to suffer for HUD's excessive delay in issuing the charge, the respondents should not have to pay for damages "assessed for the period during which HUD completely neglected the case."[149] Therefore, the court suggested that even if the new conciliation effort fails and the ALJ is required to reconsider the charge, the economic damages should be lower than the ALJ originally determined.

149 *Id.*

5. Managing Complaints

The investigation and adjudication of individual complaints of discrimination is perhaps the single most dramatic change in the 1988 fair housing law. HUD's organization and management of this function is crucial to fulfilling the law's promise. The scheme adopted by HUD attempts to adapt the requirements of administrative law and avoidance of conflict of interest to the existing departmental structure, with mixed results.[1]

Organizational Structure

The Secretary of Housing and Urban Development is the lead official responsible for Federal fair housing policy[2] and for administering Title VIII.[3] The Secretary plays not only a general oversight role, but a particular role in the issuance of hearing decisions, which he may reverse, revise, or remand. He has divided enforcement responsibilities for the Fair Housing Amendments Act of 1988 among the Assistant Secretary for Fair Housing and Equal Opportunity; the General Counsel; and the Chief Administrative Law Judge.[4]

The Assistant Secretary and General Counsel in turn have delegated certain functions to regional fair housing directors (who in turn report to HUD regional administrators) and to regional counsels, supervised jointly by the regional administrators and the General Counsel. The regional administrators report to the Deputy Secretary. An assistant to the Secretary for field management "advises the Secretary, Deputy Secretary, and other principal staff on the effectiveness of regional and field operating policies and procedures and serves as the Secretary's principal focal point in all matters dealing with the regional and field offices."[5]

Thus while the Assistant Secretary is responsible for fair housing policy and promulgating internal guidance to staff as to how to

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1 As a result of reorganization efforts, as of April 15, 1994, HUD eliminated its regional administrators and established a more direct chain of command between the former regional offices (now called Enforcement Centers) and the Assistant Secretary. "Because the investigative function will now report directly to the Assistant Secretary, more accountability and better communication of information should enhance enforcement efforts, as well as ensure that enforcement efforts are made more consistent nationally." According to HUD, the Assistant Secretary is already using this new chain of command as a mechanism to disseminate information and direction to the Enforcement Centers. In addition, HUD anticipates that the new chain of command will also result in more efficient case processing. *See* "Recent Fair Housing Initiatives," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 2 (hereafter cited as HUD Initiatives). *See also* "Comments of the Department of Housing and Urban Development," accompanying letter from Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development to Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights, June 9, 1994, p. 7 (hereafter cited as HUD Comments). *See also* National Academy of Public Administration, *Renewing HUD: A Long-Term Agenda for Effective Performance* (August 1994), for an exhaustive analysis of HUD's overall mission and organization.

2 Exec. Order No. 12,259, 3 C.F.R. 307 (1981).

3 42 U.S.C. § 3608(a) (1988).

4 54 Fed. Reg. 13,121 (1989). *See also* 24 C.F.R. §§ 103.200, 103.400 and 104.100 (1993).

5 U.S. Congress, House, Committee on Appropriations, *Department of Veterans Affairs, and Housing and Urban Development, and Independent Agencies Appropriations for 1994: Hearings before the Subcommittee on VA, HUD, and Independent Agencies,* 103d Cong., 1st sess., 1993, Part 3, p. A-2 (hereafter cited as *HUD FY 1994 Budget).*

carry out HUD policy, she does not have line authority over the investigation of fair housing complaints, and her decisions as to reasonable cause are subject to review by the General Counsel.

A fundamental structural problem arises from this arrangement. At the top of the administrative structure implementing the statute are officials for whom fair housing is one of many concerns at both the regional and headquarters level. The General Counsel supervises offices of assisted housing and community development, insured housing and finance, program enforcement, litigation, legislation and regulation, and operations, in addition to the office of equal opportunity and administrative law. The latter office itself is responsible for a variety of other legal activities.

Similarly, the Assistant Secretary herself is responsible for a variety of fair housing and equal employment programs. In addition to Title VIII, programs under the Office of Fair Housing and Equal Opportunity (FHEO) include administering the Fair Housing Assistance Program and Fair Housing Initiatives Program, and enforcing Title VI of the 1964 Civil Rights Act, the Age Discrimination Act, section 504, the Americans with Disabilities Act, section 109, and section 3, as well as administration of the public housing affirmative compliance action programs (PHACA) and HUD's internal equal employment opportunity program.[6] The Assistant Secretary is responsible for ensuring that all HUD programs affirmatively further fair housing.

Furthermore, the regional administrators, who supervise regional fair housing directors in charge of investigations and case management in HUD's 10 regional offices, are responsible for a wide variety of HUD programs in addition to fair housing, including the administration of numerous housing and community development programs. It is not clear how heavily their enforcement of Title VIII weighs in their own annual evaluation by the Deputy Secretary in comparison to their performance of other tasks.

At headquarters, the only officials in a position to resolve differences, ensure the coordination of efforts, and monitor the performance of both the Assistant Secretary and the General Counsel are the Secretary or Deputy Secretary of Housing and Urban Development. However, the Deputy Secretary has oversight responsibilities for at least seven other assistant secretaries and the ten regional administrators.

The end result of this arrangement is a dilution of responsibility for the efficient administration of the act. The chain of command zigzags across separate entities, all of whom report to a central authority beset with problems and priorities other than fair housing. Personnel are evaluated by one set of officials (regional administrators and FHEO directors) while, in effect, receiving their instructions from another set (the General Counsel, Assistant Secretary, and other officials of the Office of Fair Housing and Equal Opportunity).

Overlaid on this chain of command is the route followed by a typical complaint, the merits or nonmerits of which are decided by officials answering to different authorities. The cross-reviews by FHEO and the General Counsel's office and regional FHEO and regional counsels described above[7] are a convoluted attempt to deal with the oddity of having no single authority over the entire operation except the Deputy Secretary, who clearly is unsuited by other demands on his time and energy to be that single authority.

When HUD issued its proposed regulations implementing the FHAA, some commenters objected to the delegation by the Secretary of the responsibility to find reasonable cause and

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6 *HUD FY 1994 Budget,* p. K-1, pp. K-2–K-5.

7 *See* chap. 3.

the prosecutorial function to the General Counsel rather than the Assistant Secretary. According to HUD, commenters asserted that the Assistant Secretary's long experience in administering civil rights matters, particularly 20 years of fair housing experience, made that official the logical decisionmaker regarding fair housing complaints. HUD pointed out, however, that the law refers nearly exclusively to the Secretary and not the Assistant Secretary, and that the near certainty that litigation will result from a cause finding necessitates the involvement of the department's chief legal officer.[8]

A commenter also pointed out that HUD's General Counsel would continue to defend the Department when it was sued for discrimination, presenting a conflict of interest. HUD responded that the Secretary would delegate the cause determination to another employee in such circumstances, but did not provide for such an eventuality in the regulations.[9]

Elsewhere in the Federal Government, agencies responsible for the disposition of complaints filed in quantity by the general public and having the authority to make decisions based on administrative proceedings before administrative law judges, or their rough equivalent, are functionally independent, either as separate agencies or as autonomous units within larger agencies.[10] While the HUD arrangement does not appear to present any legal conflicts of interest,[11] managerially it makes it difficult to fix responsibility for deficiencies in case processing.

Internal Guidance

The Office of Fair Housing and Equal Opportunity

The Fair Housing Amendments Act itself gave the Secretary 180 days from the date of enactment to issue rules implementing Title VIII as amended.[12] This deadline was met when the final rule was published January 23, 1989, effective March 12, 1989.[13] Unfortunately, internal guidance from the Assistant Secretary and General Counsel has not been as timely.

The Deputy Assistant Secretary for Enforcement and Compliance[14] issued a series of

8 24 C.F.R. Ch. I, Subch. A, App. I, at 947 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

9 *Id.* at 947–48.

10 See the National Labor Relations Board, Federal Labor Relations Authority, Merit Systems Protection Board, and the Equal Employment Opportunity Commission as models of Federal agencies handling complaints from the general public.

11 Some critics have pointed out that fair housing complaints against HUD-owned or funded facilities and programs pit fair housing officials against regional administrators. HUD's response has been to have complaints against programs operated by one region investigated by another region.

12 42 U.S.C. § 3601 note (1988).

13 24 C.F.R. Ch. I, Subch. A, App. I, at 911–912 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

14 Leonora L. Guarraia. Later her title became General Deputy Assistant Secretary for Fair Housing and Equal Opportunity; beginning in August 1991, the TGMs were signed by Assistant Secretary Gordon H. Mansfield.

technical guidance memoranda to regional staff on case processing.[15]

Through 1992, approximately 24 memoranda were circulated to regional staff. However, beginning in May 1991, all memoranda to staff provided by HUD to the Commission were in draft form.[16]

The first formal instruction on case processing was issued by the Assistant Secretary on or about November 9, 1989. It consisted primarily of a description of how the investigative file (the Final Investigative Report, or FIR) was to be organized, along with sample formats.[17] It focused on what information was required for the file and how to describe it. No instruction on how to gather information, determine jurisdiction, or identify the issues in a complaint were included. As late as April 5, 1991—2 years after the act became effective—HUD headquarters felt it necessary to instruct regional staff that:

> The investigator must do more than state when, how, and with whom the contact was made. A summary of the content of the contact is also required. For example, following an interview with a complainant, summarize what he or she said relevant to the complaint. . . .
>
> The same principle applies to the FIR's summary description of records. The investigator must be careful not to merely list the name of the record or document. Summarize the relevant information contained in each record or document.[18]

The first "how-to" instruction beyond technical details appeared in September 1990, when a TGM on the conduct of binding arbitration was issued.[19] As noted above, however, binding arbitration is rarely used.

Instruction regarding complaints based on multiple chemical sensitivity disorder (often involving tenant objections to the application of pesticides, for example) was circulated in June 1991.[20] Procedures for expedited case processing where cause and no cause findings would appear to be apparent on their face were circulated in August 1991.[21] The procedures included examples of the kinds of cases covered by the instruction. A lengthy and helpful instruction on the conduct of conciliation was circulated in August 1992.[22] This was one of the very few TGMs with "how-to" advice. A TGM on preparing "no cause" determinations contained only procedural instructions for regional staff on what cases were to be routinely referred to headquarters, what

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15 The technical guidance memoranda were supplied by HUD in response to a request by the U.S. Commission on Civil Rights for "Any technical materials (e.g., manuals, technical guidance memoranda) issued by headquarters to regional offices concerning compliance and case handling procedures and standards of performance specifically relating to intake, investigation, conciliation, reasonable cause determinations." *See* U.S. Commission on Civil Rights, Request for Information and Materials, Oct. 2, 1990. Updates were supplied in response to a later request for "Current compliance manual/s, including draft manuals now used as guidance," and, "Any other relevant current documents outlining HUD procedures and directives on fair housing enforcement." *See* U.S. Commission on Civil Rights, Documents Update Request, Dec. 22, 1992.

16 The Department is no longer using the draft TGM form for issuance of guidance and is in the process of developing new systems by which information will be provided to investigative staff. Among the systems in active development is a written compliance manual and a formal notice form for issuance of such instructions. "Recent Fair Housing Initiatives," (hereafter, HUD Initiatives).

17 Technical Guidance Memoranda #2, Nov. 9, 1989.

18 TGM #2, Addendum #1, p. 1.

19 TGM-7, Binding Arbitration under Title VIII, Sept. 5, 1990.

20 TGM 91-3, reissued as TGM-14, Multiple Chemical Sensitivity Disorder, June 6, 1991, marked "draft."

21 TGM-17, Expedited Case Processing Procedures, Aug. 8, 1991, marked "draft."

22 TGM-16, Conducting Conciliation, Aug. 11, 1992, marked "draft." (TGM-16 was dated a full year after TGM-17.)

the determination letter should contain, and how it should be issued.[23]

An instruction on conducting investigations was not issued until July 1992,[24] and was in the nature of helpful hints rather than a comprehensive guide (it consisted of five and a half double-spaced typewritten pages). Much of the text focused on how to avoid onsite investigations, and concluded that, "In general, an onsite investigation is to occur only in exceptional cases."[25] The last "how-to" instruction provided to the Commission focuses on how to investigate complaints of discriminatory advertising and was circulated in August 1992.[26] An instruction on testing gave guidance on when to use testing and how to procure testing services, but not on how testing should be conducted.[27]

As a whole, the TGM series is spotty at best, unfocused, and without a clear purpose. It is neither entirely procedural nor adequately substantive. It is not even systematically enumerated. At least half of the issuances have never been finalized. As a body of instruction, it lacks coherence and omits guidance on critical topics, such as identifying pattern and practice or systemic cases; investigating complaints based on lending discrimination,[28] sexual harassment, or occupancy codes, for example; how and when to request prompt judicial action; or standard operating procedures for intake and administrative closures.

The TGM system was described in TGM-1 as designed to "allow us [HUD] to quickly disseminate guidance on our processing of Title VIII cases pending the issuance of the Title VIII Handbook."[29] The Title VIII handbook has never been issued, although at various times staff have been assigned to write it.[30]

The Office of General Counsel

The Office of General Counsel has not maintained a set of formal issuances that offer guidance on processing fair housing cases. However, a survey of a chronological file supplied to the Commission consisting of a variety of inquiry letters, responses to inquiries,

23 TGM-18, Preparing and Issuing No Reasonable Cause Determinations under the Fair Housing Act, undated, but apparently finalized Dec. 6, 1991, marked "draft."

24 92-3-ECIF, Efficient Investigative Techniques, July 31, 1992, marked "draft." Occasionally, the numbering system used with the instructions varied; the material herein is presented in chronological order.

25 Ibid., p. 6.

26 TGM-92-5-ECIF, Investigating Complaints Alleging Discriminatory Advertising in Violation of Section 804(c), undated, marked "draft." None were issued in FY 1993.

27 Draft Technical Guidance Memorandum # [blank], Testing in Title VIII Cases, undated. Testing conducted under the Fair Housing Initiatives Program is regulated by 24 C.F.R. § 125.405; *see* chap. 7.

28 FHEO is developing and testing models for effective investigation and analysis of mortgage lending data, "HUD Initiatives," p. 2.

29 TGM-1, The Technical Guidance Memoranda System, Nov. 9, 1989.

30 Laurence Pearl, Director, Office of Program Standards and Evaluation, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Mar. 15, 1993.

internal policy memoranda, legal briefs, and other items offering such guidance[31] does reveal something of OGC's role in disseminating guidance regarding HUD's fair housing policy and complaint processing.

One way to evaluate OGC's advice is to examine how it was tracking and integrating developments in fair housing law in civil and administrative cases into HUD's own investigative and prosecutorial apparatus. The files contained numerous legal memoranda addressing questions of interpretation arising in enforcement proceedings, including the reasonability of occupancy standards; use of human models in advertising; coverage of such facilities as university dormitories, intermediate care facilities, and supportive service environments for special needs groups; whether a residential lot or an RV site is a covered "dwelling" under the act; the standing of persons harmed through their acquaintance with friends or family; what differentiates an ex-drug user from a current one; and the status of multiple chemical sensitivity as a handicap. As a whole, the memoranda appeared competent and thorough.

Among the papers provided were memoranda discussing five of the ALJ decisions, one of the appellate reviews of an ALJ decision, and two of the Attorney General's election cases. These are most often addressed to the General Counsel, regional counsel, the Assistant Secretary for FHEO, and the regional directors for FHEO. There is no indication as to whether they received wider circulation. No memoranda were located discussing private civil cases decided during this period.

The case memoranda located were readable, reasonably thorough, and expressly directed toward drawing lessons from each decision, with regard to the underlying investigation, the presentation of the case, and legal arguments. It is not clear to whom they were circulated and whether other cases were covered elsewhere.

A memorandum from September 1992 established a "brief bank,"[32] and another from February 1993 directed that all regional counsel be provided with copies of all opinions by HUD administrative law judges (ALJs).[33] A regional counsel's request for the ALJ opinions suggests that regional attorneys do not receive *Fair Housing-Fair Lending Reporter,*

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31 The Commission requested:

> 1) All correspondence from HUD's Office of General Counsel to headquarters, regional, or field staff establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.
>
> 2) All correspondence from HUD's Office of General Counsel to members of the public, State or local agencies, or other external entities establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.
>
> 3) Any directive or memoranda to HUD headquarters, regional, or field staff from the Office of General Counsel establishing HUD policy or HUD guidance on the interpretation or application of the Fair Housing Amendments of 1988.
>
> Any draft documents that are considered operative, i.e., that HUD staff are directed to use as guidance, should be included in the ambit of this request.
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> (Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, letter to George Weidenfeller, Deputy General Counsel, U.S. Department of Housing and Urban Development, Mar. 17, 1993.)

32 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, Memorandum for All Regional Counsel, re: Legal Briefs—Fair Housing Cases, Sept. 24, 1992.

33 George Weidenfeller, Deputy General Counsel (Operations), Memorandum for All Regional Counsel, Re: Regional Counsel Meeting—Fair Housing Issues, Feb. 3, 1993, p. 2.

which would keep them current not only on all ALJ decisions, but also on private litigation and settlements as well as other fair housing news. Whether or not immediately relevant, such broader exposure would give valuable perspective and new ideas.

Very few memoranda were found that provided direct instruction as to how cases were to be pled and litigated. One from March 1993 reported that HUD had not uniformly been seeking civil penalties separately against each respondent although HUD ALJs had been awarding them when asked; the memorandum instructed that, henceforth, civil damages should be sought from each respondent.

Those examples of legal research and writing viewed in the documents appear to be of high quality. These, together with other materials in the file, certainly left the impression of an ongoing effort to develop and assert positions with regard to emerging legal and policy issues, based on the cumulative case experience including no-cause determinations, cause determinations, settlements, and decisions. However, the evidence was insufficient to draw any general conclusions about the coherence and comprehensiveness of the effort, or whether it was distributed in a timely fashion to an appropriate universe of HUD staff.

An occasional divergence of opinion between staff and supervisor was apparent. One memorandum from the General Counsel announcing that HUD would deem reasonable occupancy standards of "one more than the number of bedrooms"[34] aroused considerable controversy.[35] An OGC staff memo indicated that FHEO expressed concern over the General Counsel's approach to occupancy cases.[36] Within a month of the issuance of the controversial memorandum, the General Counsel withdrew and replaced the earlier policy directive. The new memorandum states that the "two per bedroom" standard was not intended to serve as an occupancy policy to be used in every case, but rather was intended to guide the regional counsel on the evaluation of evidence in occupancy code cases.[37]

Training

HUD's spending on formal Title VIII training has varied widely in the 4 years since the FHAA became effective in 1989. In fiscal year (FY) 1989, HUD spent $215,161; in FY 1990, spending fell to $54,653. It rose again to $125,532 in FY 1991, and fell to $39,208 in FY 1992.[38]

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34 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement Policy: Occupancy Standards, Feb. 21, 1991.

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

36 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, note to Dorothy Brown, Associate Deputy General Counsel, U.S. Department of Housing and Urban Development, Re: Fair Housing Enforcement Policy: Proposed Memorandum on Occupancy Cases, Mar. 19, 1991.

37 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement Policy: Occupancy Cases, Mar. 20, 1991. On March 25, 1991, the General Counsel issued a brief statement explaining that the memorandum issued on March 20, 1991, superseded the February 21, 1991, memorandum on HUD's occupancy code policy. Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, Memorandum for All Regional Counsel, Re: Fair Housing Enforcement: Memoranda on Occupancy Cases, Mar. 25, 1991.

38 Peter Kaplan, Director, Program Training and Technical Assistance, FHEO, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Aug. 6, 1993, and Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Nov. 4, 1993.

In FY 1990, two training sessions focusing on "fair housing basic skills training" were attended by 80 FHEO field staff.[39] Activity increased again in FY 1991; 6 Title VIII sessions were attended by 171 FHEO field staff, including 5 week-long sessions on Title VIII and fair housing attended by 200 FHEO field staff and one session on voluntary compliance attended by 40 FHEO field staff. Another session on both the Fair Housing Assistance Program and Fair Housing Initiatives Program was attended by HUD staff and staff from State and local fair housing enforcement agencies and private fair housing groups.[40]

Training dropped off dramatically in FY 1992, when only one session was held for 32 FHEO staff.[41] But in FY 1993, 10 sessions were scheduled to be attended by 370 staff, including two that were repeated in three regions of the country. All but one focused on fair housing (the remaining session was on implementing the 1992 Housing and Community Development Act). The training appeared to become much more specialized, with sessions including such topics as identifying cases for prompt judicial action, use of statistical evidence in complaint processing, investigative writing, and preparation of the Final Investigative Report, and "advanced Title VIII investigative training." Projected spending would total $402,565—nearly twice the previous high of $215,161 in FY 1989.[42] The increase was part of a new emphasis placed on training by HUD. Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, noted that "My commitment to effective training resulted in setting in place an FHEO training program for this fiscal year that is eight times larger than the amount spent on training in fiscal year 1992."[43] FHEO "secured $90,000 in additional funding to complete a training needs assessment this fiscal year."[44]

In FY 1989 and 1990, training was the responsibility of the Office of Fair Housing Enforcement and Section 3 Compliance. In FY 1991, training became the responsibility of a new Office of Program Training and Technical Assistance,[45] with no apparent change in direction or productivity. Staff were selected for training by regional FHEO directors based on the positions they held (not necessarily on seniority or newest employees first).

Regions have provided some training on their own initiative. For example, Region IX provided staff with internal training on conciliations and on section 504 and the Age Discrimination Act,[46] while Region III trained staff on handling complainants with mental disabilities.[47] Most training is informal and acquired on one's own initiative;[48] sharing

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39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Roberta Achtenberg, Assistant Secretary, Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Arthur A. Fletcher, Chair, U.S. Commission on Civil Rights, Aug. 23, 1993.

44 Ibid.

45 Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Frederick D. Isler, Deputy Assistant Staff Director for Civil Rights Evaluation, Nov. 4, 1993.

46 Ibid.

47 Burrichter 1993 interview.

48 Vicki Gums 1993 interview.

case files and experiences is a prime means of learning the job.[49]

The Office of General Counsel also conducted internal training, in August 1989, May 1990, December 1990, June 1992, and April 1994. Annual meetings of regional and field counsel included fair housing training, and both OGC and FHEO staff attended outside fair housing conferences.[50] HUD indicated in its comments on this report that the department considered substantive training activities to be a critical component of providing full, fair enforcement of the Fair Housing Act.[51]

FHEO Budget and Staffing

HUD got a late start on acquiring the resources to enforce the Fair Housing Amendments Act. In September 1988, when passage of the new law was imminent, HUD sought approval by the Office of Management and Budget of a FY 1989 supplemental appropriation of $8 million. The $8 million was intended to pay for 76.4 additional staff years for FHEO headquarters and regional operations, the Office of Administrative Law Judges, and the Office of General Counsel.[52]

Congress failed to act on the request before adjournment. Instead, on November 15, 1988, HUD asked permission from both the House and Senate Appropriations Committees to redirect $4.57 million and 41.5 staff years from other HUD programs. The request was approved December 9, 1988. The reprogrammed amount covered staff costs, travel, training, and data processing.[53]

Later in FY 1989 HUD again asked for an additional $3.49 million to reach the original levels sought earlier. The supplemental appropriation was approved June 30, 1989, just 3 months before the end of the fiscal year, 9 months after passage of the act, and 3 months after it became effective.[54]

Regional fair housing staff, measured in FTEs,[55] rose from 142.4 in FY 1988 prior to the new law to 309 in FY 1992, the highest year. Table 5.1 shows that the largest increase took place in 1990, when staff rose by 103.5, from 167.3 to 270.8. For 1993 and 1994, HUD estimated that the figure would be 298.5 and 301.9, respectively. The staffing level requested of Congress by HUD was consistently less than the number authorized until 1992, when the figures are approximately the same.

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49 Burrichter 1993 interview.

50 HUD comments, p. 7.

51 According to Henry G. Cisneros, Secretary, U.S. Department of HUD, the Department presented recent training programs to the FHEO staff and the substantially equivalent agencies staff (and which included many Department staff as participants and trainers) on investigative skills, and a series of week-long sessions on Advanced Investigative Skills. Secretary Cisneros also indicated that the Office of General Counsel presented joint training live by satellite to FHEO investigators and counsel nationally spring of 1994. He stated with over 300 participants, this interactive training focused on current critical issues in enforcement, including proof of fair housing violations, standards of seeking prompt judicial action, use of testing to aid in investigations, new and developing issues in zoning cases, standing, remedies, and multiple chemical sensitivity as a handicap under the Act. Presenters included DOJ attorneys, representatives from the National Fair Housing Alliance and the NAACP Legal Defense and Education Fund, and private counsel, as well as senior FHEO and OGC staff. "HUD Initiatives," p. 2.

52 This narrative is adapted from U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, *The State of Fair Housing 1989,* p. 7 (hereafter cited as *The State of Fair Housing 1989).*

53 Ibid.

54 Ibid.

55 Full-time equivalent positions measure the total number of hours worked or to be worked divided by the number of compensable hours applicable to each fiscal year, rather than the actual number of persons employed.

TABLE 5.1
HUD Regional Staff FTEs

	Fiscal years						
	1988	1989[1]	1990	1991	1992	1993	1994
Actual:							
Fair housing staff	142.4	167.3	270.8	295.4	309.0	298.5[2]	301.9[3]
Total staff	456.0	491.4	545.0	582.0	566.0	543.0[4]	531.0[5]
Percent fair housing	31.2	34.0	49.7	50.8	54.6	55.0	56.9

Source: HUD Budgets, FY 1989-1994.
[1] In 1989 reprogramming increased the FTEs by 41.5 and a supplemental appropriation added another 34.9 FTEs. *See The State of Fair Housing 1989*, p. 7.
[2] Estimate for fiscal 1993 made during fiscal year.
[3] Requested for fiscal 1994.
[4] Estimate for fiscal 1993 made during fiscal year.
[5] Requested number of fiscal 1994.

Case Processing

HUD began processing cases under the Fair Housing Amendments Act on March 13, 1989, halfway through FY 1989. In FY 1988 and 1989, HUD reported processing 4,682 and 4,943 cases respectively. It was not until FY 1990 that the number of complaints received leapt upward, to 7,476, and eventually in FY 1992 to 9,153. HUD's predictions of its caseload were not far off the mark. Its estimate[56] for FY 1990 was 7,833, increasing to 9,500 for 1992.

HUD reported that in FY 1988, staff spent 58.9 unit hours on each complaint. While it appears these figures are deduced from other information, rather than through direct observation or inference, e.g., an audit of actual time spent, they do provide a benchmark. In FY 1988 HUD was processing cases that involved minimal investigation and voluntary conciliation for resolution. Despite a radical change in the depth of investigation and documentation required under the new law, case processing time varied very little. In FY 1989, HUD reported that unit hours actually fell to 58.4 before rising in FY 1990 to 67.8 and falling off again to 65.7 in 1991 and 61.6 in FY 1992. Advance projections of the time needed per case varied from a low of 47.5 in FY 1990 to a high of 64.2 in FY 1991.

Given HUD's expectations for the number of complaints it would receive and its knowledge of what the new law required, the low projections seem quite unrealistic. Contrary to the impression left in the budgets submitted to Congress, HUD never was able to process all the complaints it received in a timely fashion. In FY 1990 HUD closed 3,489 cases; in 1991, 5,238 cases; and in 1992, 6,400 cases.

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

TABLE 5.2
Complainants Assisted

Projected accomplishments:[1]	1988	1989	1990	1991	1992	1993	1994
Actual	4,682	4,943	7,476	8,476	9,153	N/A	—
Estimate 1[2]	—	4,721	7,833	8,090	9,500	10,000	10,500
Estimate 2[3]	4,575	5,500	7,833	8,589	9,500	10,000	N/A

Projected unit hours:[4]	1988	1989	1990	1991	1992	1993	1994
Actual	58.9	58.4	67.8	65.7	61.6	N/A	—
Estimate 1		57.7	47.5	55.7	59.1	56.0	54.0
Estimate 2	58.3	55.3	57.7	64.2	58.9	56.2	

Staff years:	1988	1989	1990	1991	1992	1993	1994
Actual	131.6	138.9	243.5	267.3	269.1	N/A	—
Estimate 1		130.9	178.9	215.9	268.0	268.0	271.9
Estimate 2	127.2	146.1	217.4	264.0	267.0	269.2	N/A

Source: HUD Budgets, FY 1988-1994.
[1] Complaints processed.
[2] Estimate 1 was projected by HUD 2 years in advance.
[3] Estimate 2 was projected by HUD 1 year in advance.
[4] Hours spent on each complaint.

In contrast, HUD reported the number of complainants assisted ranged from nearly 5,000 in FY 1989 to more than 9,000 in FY 1992 (see table 5.2). The number of cases that aged as a proportion of cases closed has remained high (see below). For whatever reason, accurate estimates of staff resources needed were never forwarded to Congress.

To HUD's credit, the proportion of regional staff devoted to fair housing activities rose steadily from less than one-third to over half (table 5.1 above). Internally, HUD put more emphasis on Title VIII, but its absolute resources did not keep pace with the complaints filed.

Departmental Management Plans

HUD produced its first comprehensive plan for enforcing FHAA for FY 1990. Three HUD documents provide an internal view of the success of HUD's plans: the "Secretary's Priorities," the "Departmental Management Plan (Executive Summary)," and the "Office of Fair Housing and Equal Opportunity Management Plan (Part B)."

The Secretary's Priorities document directed regional offices to conduct comprehensive investigations and improve case processing in order to "provide timely and thorough relief to victims of discrimination."[57] To fulfill the objective, five goals were listed:

57 U.S. Department of Housing and Urban Development, Management Plan, FY 1990, Secretary's Priorities, (unpaged).

a. Produce investigative files sufficient to make a determination whether reasonable causes exists to believe a discriminatory housing practice has occurred or is about to occur.

b. By fiscal year end, no more than 10 percent of all cases within the Region's control take more than 73 days to process before sending to headquarters.[58]

c. By fiscal year end, no more than 10 percent of the cases within Headquarters control are remanded for additional work in the Regions.

d. Identify at least (10) ten housing practices or situations that warrant a Secretary-initiated investigation.

e. Provide training, guidance, and education as necessary to support the processing of Title VIII.[59]

The FHEO management plan reiterated the case processing objective, along with goals (b) and (c) above and a corollary goal of ensuring that 90 percent of conciliation agreements reviewed by headquarters were acceptable. The FHEO plan did not ask regions to identify situations for Secretary-initiated complaints as in goal (d), a requirement that was apparently postponed.[60] Goal (e), arguably in part a headquarters function, was also omitted.[61]

Year-end reports show mixed results for 1990. Most regions reported implementing new systems and strategies to process cases in a timely fashion and to reduce backlogs. However, they also reported increases of 200–300 percent in complaints filed, which impeded reducing the overall proportion of aged cases.

Aged cases[62] were reduced to roughly one-third of caseloads in several regions, although performance varied considerably across regions. According to the plans, some regions introduced a peer review strategy to improve the quality of case files and some reported biweekly staff meetings and training sessions. Supervisory staff intervened to identify cases for conciliation and targeted the oldest cases for resolution. Some regions were able to hire new staff; one reported a 100 percent increase in caseload with no increase in staff. Those who reported on identifying opportunities to file Secretary-initiated complaints said they sent information to headquarters and heard nothing in return. They said they lacked the resources to investigate such complaints themselves.

In FY 1991, the Secretary's priorities continued to stress the need to improve the quality and timeliness of Title VIII case processing.[63] The goals for achieving this objective remained the same as 1990, with three notable exceptions.[64] First, while still requiring that investigative files be "sufficient" to make cause determinations, in 1991, one goal explicitly required investigative files to be in "proper format," presumably reflecting adoption of the TGM on final investigative reports. Second, the goal for Secretary-initiated investigations in 1991 was reduced to 3 from 10, but

58 The 73-day standard in goal (b) applied to the investigative stage and was established so that headquarters could process complaints and make determinations within the 100-day goal set in the law.

59 Ibid.

60 U.S. Department of Housing and Urban Development, FHEO Management Plan, Part B, 1990, p. 8.

61 The departmental management plan for 1990 restated the same Title VIII objective and goals. *See* U.S. Department of Housing and Urban Development. Office of Fair Housing and Equal Opportunity, FY 1991 Departmental Management Plan, (unpaged).

62 By statute, aged cases are older than 100 days. Regional offices reported as aged those cases exceeding the 73 days they are allotted for processing before sending the cases to headquarters.

63 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Part A, Secretary's Priorities, p. 1.

64 Ibid.

instead of requiring only that such cases be *identified,* the 1991 goal required that investigations be *conducted.* Finally, regional offices were required to develop a staff training module, in addition to providing "training and guidance as necessary."[65]

Another objective[66] focused on fair housing education and outreach, with special attention in one goal toward furthering awareness of the Fair Housing Act. The last objective mandated annual performance reviews of substantially equivalent State and local agencies and outreach and assistance regarding certification of substantially equivalent laws and ordinances.[67]

Part B (Program Plan) of the Secretary's priorities contained more detailed goals tailored to the situations prevailing in individual regions. FHEO's assessment of regional performance in 1991 as measured against the FY 1991 plan was enthusiastic.[68] The rate at which cases were remanded from headquarters to the field for further investigation was reduced to 9.4 percent, exceeding the goal of 10 percent, an improvement that the Assistant Secretary labeled "extraordinary."[69] Four regions fell below a 6 percent remand rate, and only two regions exceeded 15 percent.[70] Finally, the assessment of FY 1991 performance pointed out that HUD obtained $1.98 million in monetary relief and 565 housing units, "indicating that management initiatives to improve conciliation efforts were successful."[71]

In the 1991 "Headquarters Plan,"[72] FHEO enumerated additional measures in support of the general goal of improving Title VIII enforcement and case management:

> Take appropriate steps to assure that the pending inventory in Headquarters is reviewed timely [sic] in order to meet the statutory objective of 100-day processing of fair housing cases.
>
> Implement a management case processing system to track and process Title VIII cases and related correspondence within specific time frames.
>
> Document, distribute and implement uniform Title VIII processing standards.
>
> Develop technical guidance manual(s) for processing Title VIII complaints.
>
> Translate forms and informational materials for major linguistically different minorities.[73]

HUD did not achieve its 1991 goal of developing technical guidance manuals, and has not yet published such a manual. As noted above, staff must rely primarily on a series of

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65 Ibid.

66 Objective #A-3. Not all objectives pertained to Title VIII.

67 Ibid.

68 Memorandum for Linda Z. Marston, Assistant to the Secretary for Field Management, from Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Subject: Departmental Management Plan—Executive Summary Reports Assessment, Nov. 18, 1991.

69 Ibid., p. 3.

70 Ibid. pp. 4–6. The regional performance figures that exceeded the 10 percent goal were mislabeled, however, as having missed by a percentage figure that actually should have been expressed in percentage points. For example, a remand rate of 12.2 percent was said to have exceeded the 10 percent goal "by less than 3 percent," when in fact the rate exceeded the goal by 22 percent.

71 Ibid., p. 4.

72 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, FY 1991 Departmental Management Plan, Office of Fair Housing and Equal Opportunity, Headquarters Plan, p. 1.

73 Ibid., p. 1.

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

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

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

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

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

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

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

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

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

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

77 Ibid.

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

79 Calculations based on "Objective 22."

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

81 Ibid.

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

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

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

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

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

The plan went on to note that:

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

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

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

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

Assessing HUD's Progress

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

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

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

83 Ibid.

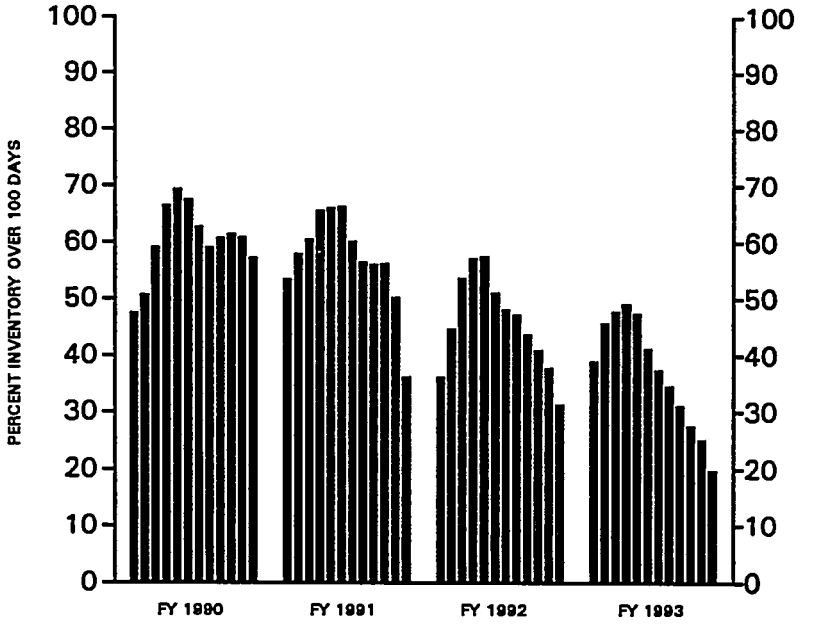
84 U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Field Management Plan—FY 1993, Second Quarter Report (unpaged).

85 Ibid.

86 Ibid.

87 Ibid., p. 4

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



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

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

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

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

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

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

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

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

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

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

Comparing Regions

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

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

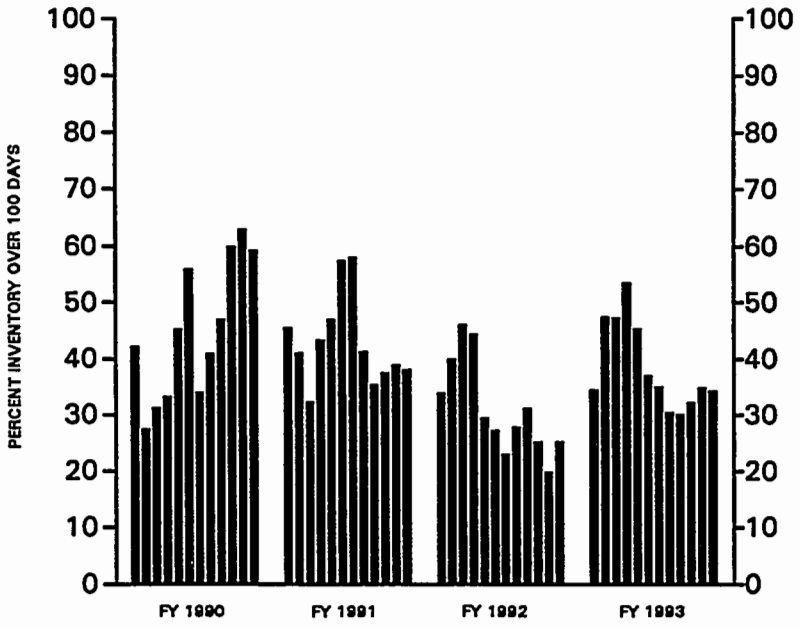
89 Backlog rates for each region reflect *all* complaints assigned to that region, regardless of whether control had been passed to headquarters.

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

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

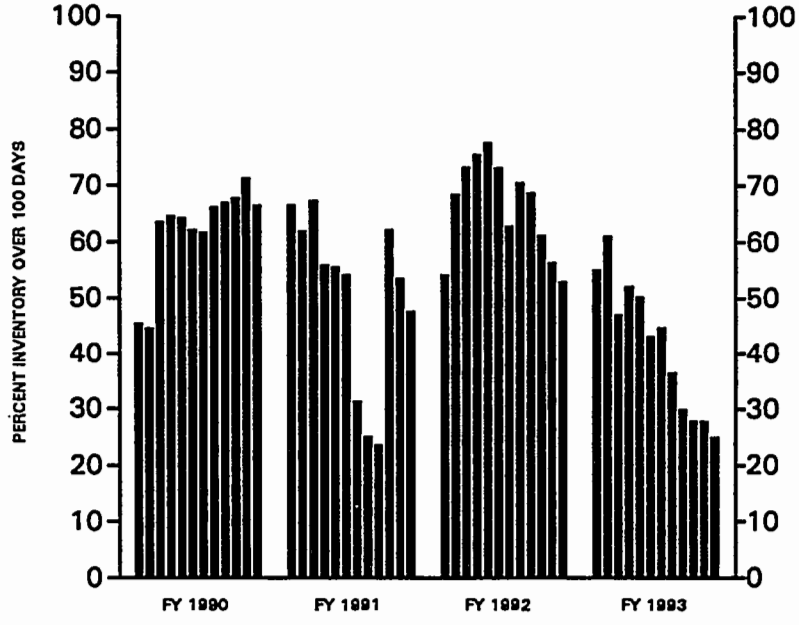
92 More than 1,400 cases were added to HUD's caseload on Sept. 13, 1992, as a result of the reactivation of cases previously deferred to State and local agencies when those agencies did not achieve certification as substantially equivalent. Although many had already been in the system for some time,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

FIGURE 5.2
Cases over 100 Days as Percentage of Inventory: Region I



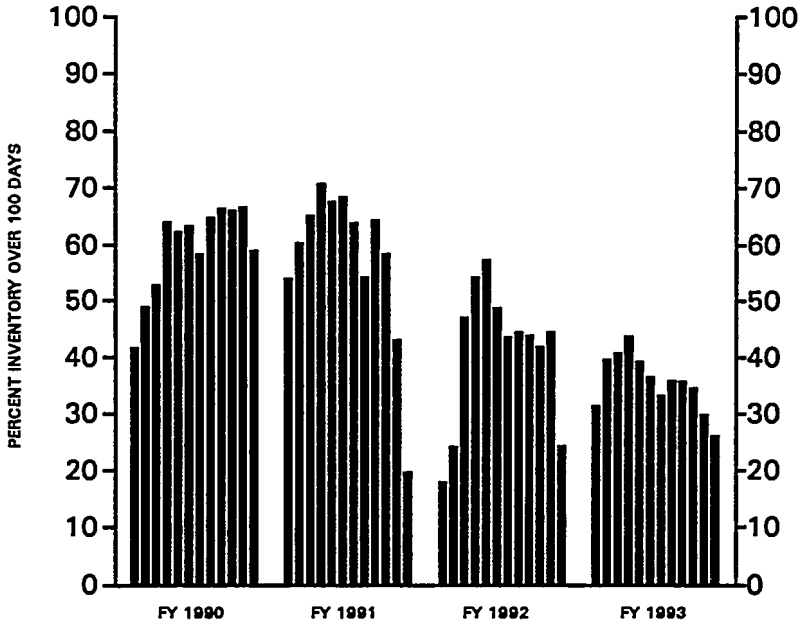
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.3
Cases over 100 Days as Percentage of Inventory: Region II



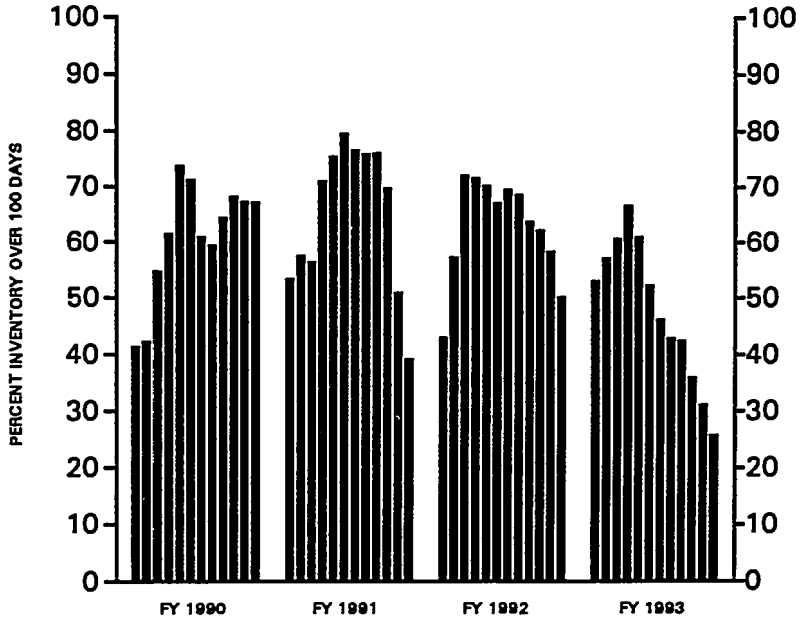
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

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



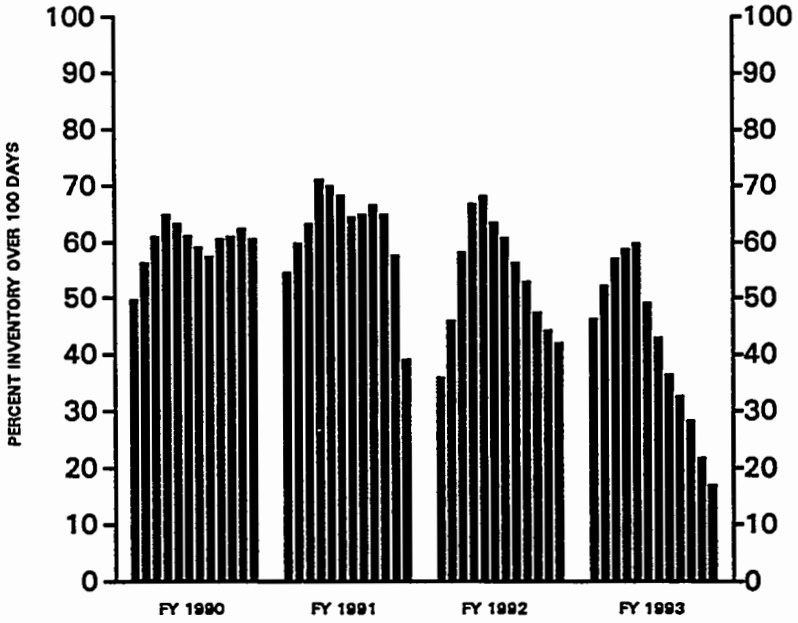
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

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



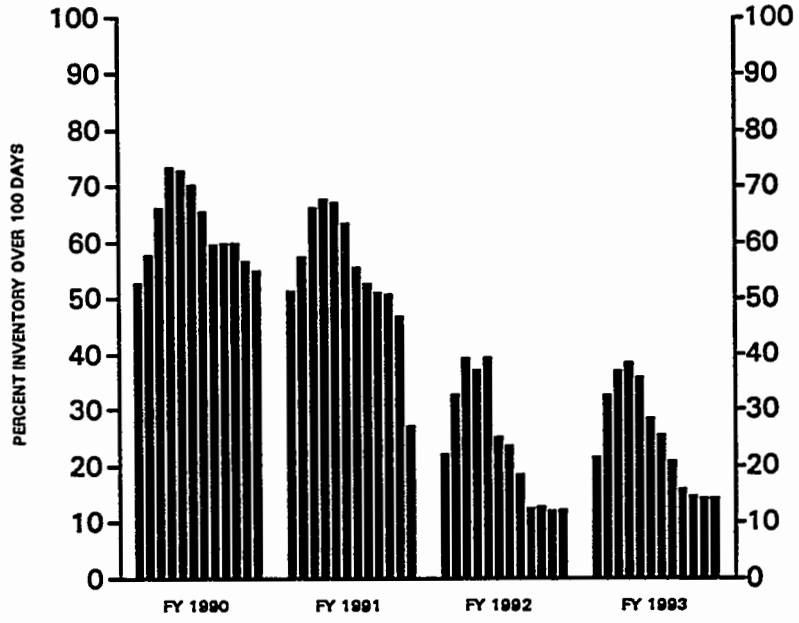
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 old on the last day of October 1989.

FIGURE 5.6
Cases over 100 Days as Percentage of Inventory: Region V



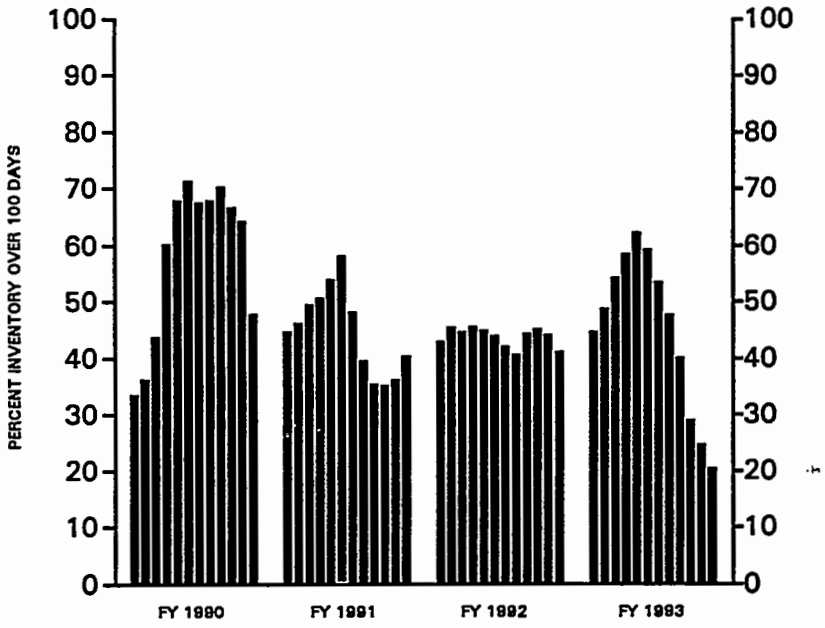
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.7
Cases over 100 Days as Percentage of Inventory: Region VI



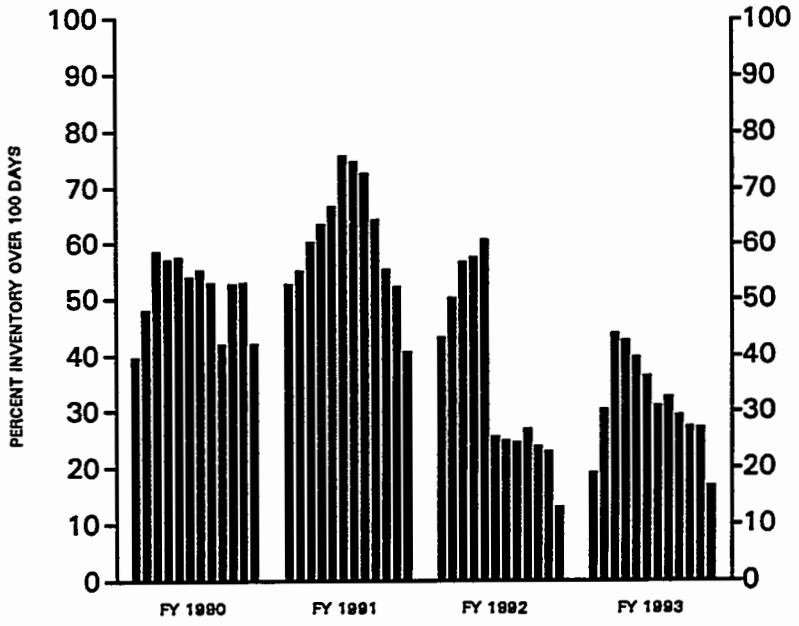
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.8
Cases over 100 Days as Percentage of Inventory: Region VII



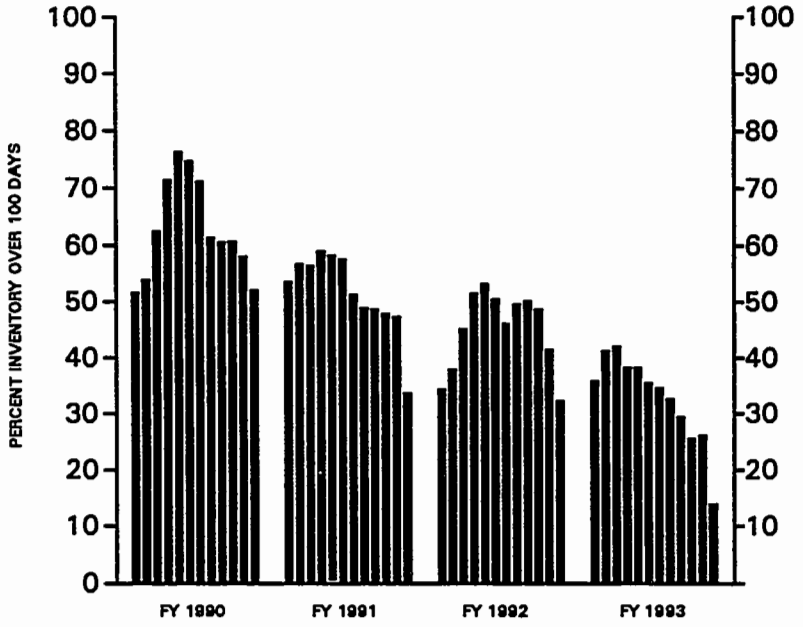
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.9
Cases over 100 Days as Percentage of Inventory: Region VIII



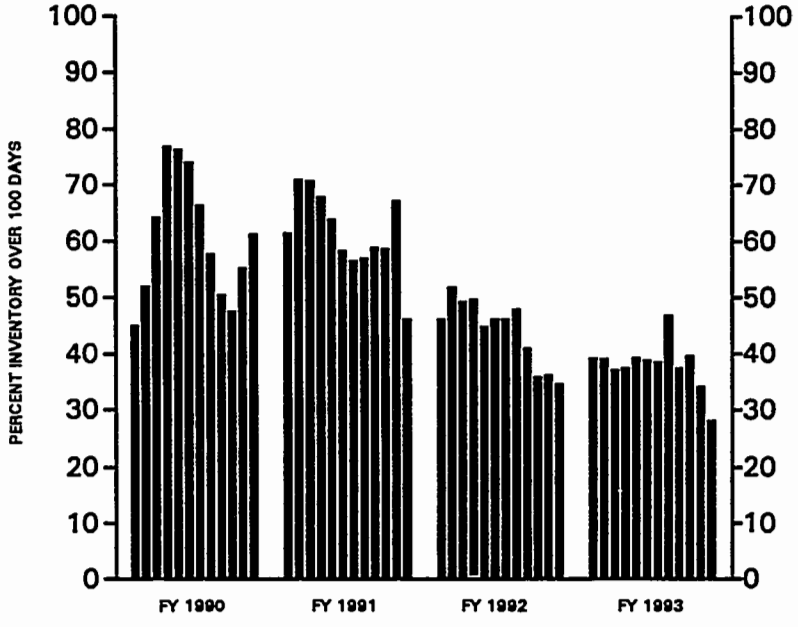
Source: HUD Title VIII database.
Note: The bars represent the caseload on the last day of each month of the Federal fiscal year (October 1 to September 30). Thus, the first bar on the left is the percentage of the caseload more than 100 days old on the last day of October 1989.

FIGURE 5.10
Cases over 100 Days as Percentage of Inventory: Region IX



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

FIGURE 5.11
Cases over 100 Days as Percentage of Inventory: Region X



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

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

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

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

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

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

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

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

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

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

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

6. The Fair Housing Assistance Program

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

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

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

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

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

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

2 42 U.S.C. § 3610(f) (1982).

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

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

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

6 24 C.F.R. § 111.103 (1993).

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

8 Ibid.

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

FHAP Funding

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

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

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

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

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

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

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

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

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

15 24 C.F.R. § 111.105 (1993).

16 *Id.* § 111.105(a).

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

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

19 24 C.F.R. § 111.105(a) (1993).

20 *Id.* § 111.105(b).

21 *Id.* § 111.105(b)(1).

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

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

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

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

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

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

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

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23 24 C.F.R. § 111.105(b)(2) (1993).

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

25 Ibid., pp. 13–14, and 24 C.F.R. § 111.105(b)(2) (1993). Also, other HUD funds became available; see chap. 7.

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

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

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

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

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

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

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

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

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

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

FHAP Agency Certification

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

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

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

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

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

36 Ibid., pp. 656–57.

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

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

39 HUD Comments, p. 8.

40 Ibid.

41 42 U.S.C. § 3610(f)(3) (1988).

42 24 C.F.R. §§ 115.1–115.11 (1993).

43 *Id.* § 115.5(a).

44 *Id.* § 115.1(a)(3).

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

46 *Id.* § 115.2(b).

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

Complaint Referral

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

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

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

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

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

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47 *Id.* § 115.11.

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

49 42 U.S.C. § 3610(f)(1) (1988).

50 *Id.*

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

52 *Id.* § 103.100(b).

53 *Id.* § 103.110.

54 42 U.S.C. § 3613 (1988).

55 24 C.F.R. § 103.100(b) (1993).

56 *Id.* § 103.45(d).

57 *Id.* § 103.100(b).

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

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

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

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

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

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

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58 42 U.S.C. § 3610(f)(2) (1988).

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

60 *Id.* § 103.110.

61 *Id.* § 103.110(a).

62 *Id.* § 103.110(b).

63 *Id.* § 103.110(c).

64 *Id.*

65 *Id.*

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

67 24 C.F.R. § 103.115(a) (1993).

68 *Id.* § 103.115(b)(1).

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

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

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

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

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

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

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69 *Id.* § 103.115(b)(2).

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

71 24 C.F.R. § 103.115(b)(3) (1993).

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

73 Ibid., p. 5.

74 Ibid., p. 8.

75 Ibid., p. 9.

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

77 Ibid., p. 15.

Temporary Referral and Extension Procedures

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

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

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

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

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

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

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

80 42 U.S.C. § 3610(f)(4) (1988).

81 *Id.*

82 *Prospects and Impact,* pp. 12–13.

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

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

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

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

The Reactivated Caseload

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

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84 Ibid.

85 Ibid.

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

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

88 24 C.F.R. § 103.110(b) (1993).

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

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

91 Ibid.

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

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

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

Performance Assessments

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

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

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

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

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

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

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92 Ibid.

93 24 C.F.R. §§ 115.1–115.11 (1993).

94 *Id.* § 115.4(b)(2)(i).

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

96 *Id.* § 115.4(b)(4).

97 *Id.* § 115.4(c).

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

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

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

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

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

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

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

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99 Ibid., p. 8.

100 Ibid., p. 10.

101 Ibid., p. 14.

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

103 Draft Performance Assessment TGM, p. 10.

104 Ibid.

105 Ibid.

106 Ibid., p. 16.

107 Ibid., p. 11.

108 42 U.S.C. § 3610(f)(5) (1988).

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

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

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

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

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

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

Completed Assessments

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

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109 Draft Performance Assessment TGM, p. 11.

110 Ibid., p. 35.

111 Ibid., p. 30.

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

113 Draft Performance Assessment TGM, p. 31.

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

115 24 C.F.R. § 115.9(a) (1993).

116 *Id.* § 115.9(b)(1).

117 *Id.* § 115.9(c).

118 *Id.* § 115.9(d).

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

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

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

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

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

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

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

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

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

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

121 Ibid., p. 6.

122 Ibid., p. 8.

123 Ibid.

124 Ibid., p. 10.

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

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

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

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

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

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

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

Complaint Outcomes

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

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127 Ibid., p. 4.

128 Ibid.

129 Ibid., p. 2.

130 Ibid., p. 5.

131 The particular association was not identified.

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

7. Fair Housing Initiatives Program

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

Fair Housing Initiatives Program

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

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

According to HUD:

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

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

The Administrative Enforcement Initiative

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

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

2 24 C.F.R. § 125.104(a) (1993).

3 *Id.* § 125.102.

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

5 24 C.F.R. § 125.104(c) (1993).

6 *Id.* § 125.203.

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

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

b) Implementing fair housing testing programs; and

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

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

Education and Outreach Initiative

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

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

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

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7 *Id.* § 125.202.

8 *Id.* § 125.203.

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

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

11 *See* 24 C.F.R. § 111.105 (1993).

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

13 24 C.F.R. § 125.301 (1993).

14 *Id.*

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

For outreach projects, HUD emphasized:

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

Private Enforcement Initiative

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

HUD's regulations described the scope of such activities:

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

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

FHIP Expansion

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

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

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

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

17 24 C.F.R. § 125.401 (1993).

18 *Id.*

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

20 *Id.* § 125.404.

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

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

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

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

Administrative Overview

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

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

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

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

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

25 42 U.S.C. § 1616 note (1988).

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

27 *Id.*

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

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

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

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

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

33 Ibid, p. 637.

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

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

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

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

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

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

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

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

35 Ibid.

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

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

38 Ibid.

39 Ibid.

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

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

42 Ibid.

43 Ibid.

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

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

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

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

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

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

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

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

48 Achtenberg Answers, pp. 15–17.

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

50 Ibid.

51 HUD Initiatives, p. 3.

52 Ibid., p. 4.

53 Ibid.

54 Ibid.

TABLE 7.1
FHIP Appropriations and Expenditures
(Millions of Dollars)

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

Source: HUD Budgets, FY 1989-1994.

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

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

FHIP Funds and HUD Litigation

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

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

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

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

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

TABLE 7.2
FHIP Budget and Expenditures by Category (Millions of Dollars)

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

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

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

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

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

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

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

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

According to the notice of funding availability:

This $200,000, to be awarded on the bases of FHIP criteria, is to be used to further fair housing in the East Texas class action counties through:

1. Monitoring the compliance of the providers of low-income housing in the 36 counties (including federally subsidized and assisted housing) with the fair housing laws and the requirements placed upon such providers as a consequence of the settlement order;

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

3. Encouraging and assisting the development of desegregated opportunities.[63]

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

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

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

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

59 *Id.*

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

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

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

63 *Id.*

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

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

According to the NOFA, funds would be awarded:

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

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

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

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

Testing under FHIP

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

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

FHIP Testing Guidelines

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

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

66 *Id.*

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

68 HUD Comments, pp. 8–9.

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

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

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

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

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

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

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

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

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

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

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

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

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

77 24 C.F.R. § 125.405(b)(1) (1993).

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

79 *Id.* § 125.405(b)(3).

80 *Id.* § 125.405(b)(4).

81 *Id.* § 125.405(c).

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

(2) A tester training program which will—

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

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

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

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

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

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

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

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

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

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

82 *Id.*

83 *Id.* § 125.405(d)(1).

84 Brown, Dallas FHAP Conference.

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

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

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

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

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

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

Perspectives on Testing

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

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

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

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

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

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86 Brown, Dallas FHAP Conference, p. 1.

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

88 Achtenberg Testimony, pp. 15–17.

89 *Id.*

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

91 Ibid.

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

Commenting on HUD's regulations, council officials said:

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

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

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

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

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

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

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

He continued:

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

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

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

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

93 K. Williams Interview.

94 M. Davis Interview.

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

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

97 Ibid. p. 16.

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

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

Mortgage Lending Testing

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

According to one HUD official, lending testing is difficult:

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

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

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

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

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

98 Ibid. pp. 75–76.

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

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

101 Ibid., p. 4.

102 Brown, Dallas FHAP Conference, p. 5.

103 Ibid., pp. 5 and 8.

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

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

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

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

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

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

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

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

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

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

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

107 Ibid.

108 Ibid.

109 Ibid.

110 Ibid., p. 9.

111 Ibid.

112 Ibid., pp. 9–10.

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

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

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

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

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

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

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

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113 Ibid., p. 10.

114 Ibid., p. 13.

115 Ibid.

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

117 Ibid., pp. 2–3.

118 Ibid., p. 5.

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

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

Community Housing Resource Boards

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

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

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

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

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

120 Ibid., p. 2.

121 Ibid., p. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

128 Ibid., pp. 2–3.

129 Ibid., p. 5.

130 Ibid.

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

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

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

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

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

Monitoring the CHRB Program

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

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

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

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

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

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

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

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

137 Ibid.

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

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

Funding for CHRBs

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

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

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

Revamping the CHRB Program

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

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

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138 Settles Interview.

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

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

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

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

143 Ibid., p. 488.

144 Ibid.

145 Ibid., p. 492.

146 Ibid.

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

148 Ibid., p. 649.

149 Ibid.

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

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

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

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

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

151 Wilkinson Interview.

152 Ibid.

153 Ibid.

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

8. Handicap

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

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

Defining Handicap

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

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

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

2 Ibid.

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

4 42 U.S.C. § 3602(h) (1988).

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

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

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

6 *Id.* § 100.201(c).

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

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

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

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

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

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

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

Prohibited Handicap Discrimination

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

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

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

8 *Id.* § 100.202(d).

9 *Id.*

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

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

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

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

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

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

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

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

HUD's Enforcement Policy

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

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

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

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

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

19 42 U.S.C. § 3604(f)(1)-(2) (1988).

20 *Id.* § 100.202(c).

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

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

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

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

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

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

Group Homes

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

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

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25 Ibid. (quoting the memorandum).

26 Ibid.

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

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

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

30 FHAA Committee Report, p. 2,185.

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

32 FHAA Committee Report, p. 2,185.

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

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

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

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

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

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

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

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

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

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

37 *Id.* at 1560.

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

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

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

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

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

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

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

HIV Infection and AIDS

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

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

41 Ibid., p. 2.

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

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

44 Thomas Letter.

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

46 FHAA Committee Report, p. 2,179.

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

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

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

He went on to note:

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

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

Multiple Chemical Sensitivity Disorder

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

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

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

48 Ibid.

49 Ibid.

50 Ibid., p. 1.

51 Ibid., p. 3.

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

53 Ibid.

54 Ibid.

The draft TGM covering MCSD noted that:

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

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

—A tenant with MCSD has a sensitivity to chemical pesticides. He requests that the housing provider notify him in advance before fumigating the apartment building and substitute boric acid for the chemicals normally used to spray his apartment.

—An applicant with MCSD has a sensitivity to the chemicals found in certain types of carpeting. She inquires about an available apartment located in a building in which all the apartments have wall-to-wall carpeting. She requests that the housing provider inform her as to the type of carpeting used throughout the building so that she may determine whether the apartment would suit her needs before renting it.[57]

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

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

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

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

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55 Ibid.

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

57 Ibid., p. 2.

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

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

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

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

Accessibility Requirements

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

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

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

61 Bauerle Case Memorandum, p. 3.

62 Ibid.

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

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

65 42 U.S.C. § 3604(f)(3)(C) (1988).

66 24 C.F.R. § 100.205(a) (1993).

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

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

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

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

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

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

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

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

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

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

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

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

72 *Id.*

73 *Id.* at 24,370.

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

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

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

77 *Id.* at 24,377.

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

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

The Final Accessibility Guidelines

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

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

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

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

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

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

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 997.

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

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

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

Applying the Accessibility Guidelines

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

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

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

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

(i) the public and common use portions of such dwellings are not readily accessible to and usable by handicapped persons;

(ii) all doors designed to allow passage into and within all premises within such dwellings are not sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings do not contain the following features of adaptive design; an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair could maneuver about the space.[90]

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

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86 *Id.* at 9473.

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

88 24 C.F.R. § 100.205 (a) (1993).

89 Hansen Charge at 6.

90 *Id.* at 5.

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

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

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

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

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

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

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

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91 *Id.* at 2-7.

92 *Id.* at 7.

93 *Id.* at 7-8.

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

95 *Id.* at 7-9.

96 *Id.* at 10-11.

97 *Id.* at 13-14.

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

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

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

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

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

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

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

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

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

100 Ibid., p. 2.

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

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

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

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

Complaints Processed

Approximately 1 year after the passage of the amendments, the number of complaints based on handicap received by HUD and Fair Housing Assistance Program agencies was relatively small in comparison with the total number of complaints.[104] In 1989, for example, HUD received 3,248[105] complaints, of which 484 were based on handicap, or 14.9 percent of its total caseload. From 1990 to 1992 the number of complaints based on handicap received by HUD grew from 1,059 to 1,608, but in fiscal 1993 they fell to 1,490. Throughout this period, however, handicap complaints remained a remarkably steady fraction of all complaints at just under 23 percent.

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

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

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

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

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

9. Familial Status

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

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

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

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

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

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

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

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

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

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1 42 U.S.C. § 3604(a)-(e) (1988).

2 *Id.* § 3602(k)(1)(2).

3 *Id.*

4 *Id.* § 3607(b).

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

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

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

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

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

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

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

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

Enforcement of Familial Status Provisions

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

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

9 *FHAA Committee Report* at 2182.

10 *Id.*

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

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

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

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

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

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

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

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

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

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

He continued:

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

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

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

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

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

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

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

18 Ibid.

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

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

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

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

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

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

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

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

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19 Wilson Familial Status Memorandum, p. 6.

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

21 Ibid., p. 2.

22 Ibid., p. 2.

23 Ibid., p. 3.

24 Ibid.

25 Ibid.

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

The Associate General Counsel wrote:

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

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

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

The Older Persons Exemption

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

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

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

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

27 Ibid., p. ii.

28 Ibid.

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

30 *Id.* § 3607(b)(2)(C)(ii).

31 *Id.* § 3607(b)(2)(C)(iii).

32 *Id.* § 3607(b)(2)(C)(i).

33 *Id.* § 3607(b)(2)(A).

34 *FHAA Committee Report* at 2182.

35 *Id.*

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

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

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

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

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

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

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

37 Ibid., p. 2.

38 Ibid.

39 Ibid.

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

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

42 42 U.S.C. § 3607(b)(2)(A) (1988).

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

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

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

Occupancy Standards

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

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

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

43 TGM #4.

44 Ibid.

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

46 Ibid., p. 1.

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

48 42 U.S.C. § 3607(b)(1) (1988).

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

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

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

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

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

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

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

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

51 *Id.*

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

53 J. Johnson Memorandum, p. 2.

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

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

56 Ibid., p. 1.

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

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

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

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

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

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

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

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

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

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58 Ibid.

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

60 Ibid., pp. 2–4.

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

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

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

64 Ibid.

65 Ibid.

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

He wrote in the letter:

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

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

Permitted Inquiries

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

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

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

67 Ibid., pp. 1–2.

68 Ibid., p. 3.

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

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

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

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

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

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

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

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

Complaints Processed

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

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

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

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74 Ibid., p. 3.

75 Ibid, p. 4.

76 Ibid.

77 Ibid., p. 4.

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

10. HUD Policy and Implementation

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

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

Discriminatory Housing Practices

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

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

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

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

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

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

3 42 U.S.C. § 3602(b) (1988).

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

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

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

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

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

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

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

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

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

8 24 C.F.R. §§ 100.50, 100.60 (1993).

9 *Id.* § 100.60(b)(3).

10 *Id.* § 100.60(b)(4).

11 *Id.* § 100.60(b)(5).

12 *Id.* § 100.65(a).

13 *Id.* § 100.65(b)(1).

14 *Id.* § 100.65(b)(2).

15 *Id.* § 100.70(c).

16 42 U.S.C. § 3604(e) (1988).

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

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

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

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

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

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

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

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18 *Id.* § 100.85.

19 *Id.* § 100.85(c).

20 *Id.* § 100.75(c)(1) and (2).

21 *Id.* § 100.75(c)(3).

22 42 U.S.C. § 3605(b) (1988); 24 C.F.R. § 100.115 (1993).

23 42 U.S.C. § 3605(a) (1988).

24 *Id.* § 3605(c).

25 *Id.* § 3606; 24 C.F.R. § 100.50(b)(7) (1993).

26 24 C.F.R. § 100.50(b)(7) (1993).

27 42 U.S.C. § 3617 (1988).

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

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

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

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

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

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

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

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

31 *Id.* § 3603(b)(1).

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

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

34 42 U.S.C. § 3603(b)(2) (1988).

35 *Id.* § 3607.

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

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

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

Proving Discrimination

The Title VII Analogy

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

Disparate Treatment or Intentional Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50 *Id.* at 2747.

51 *Id.*

52 *Id.* at 2747-48.

53 *Id.* at 2747.

54 *Id.* at 2749.

55 *Id.* at 2747.

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

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

Mixed Motive Disparate Treatment

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

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

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

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

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

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

59 HUD Comments, p. 10.

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

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

62 490 U.S. at 244-45.

63 490 U.S. at 246.

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

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

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

Disparate Impact

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

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

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65 *Id.* § 2000e-5(g).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Secretary's Role in Litigating Complaints

Secretary-Initiated Complaints

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

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

Such delegations have not yet taken place, nor has HUD published any guidance as to what is properly the subject of a Secretary-initiated complaint. What instruction exists on the topic is in the form of directions to the regional offices to forward suggested complaints to headquarters, with very modest results.[89]

The regulations also state that the Assistant Secretary may employ systemic processing for any complaint whenever she "determines that the alleged discriminatory practices contained in the complaint are pervasive or institutional in nature, or that the processing of the complaint will involve complex issues, novel questions of fact or law, or

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81 HUD Unified Agenda for FHEO, #1621 Discriminatory Conduct Under the Fair Housing Act (FR-3534), 58 Fed. Reg. 56,445 (1993). Although OGC could not reveal the details of the proposed regulations, Associate General Counsel Carole Wilson indicated that she believes the regulations will merely codify the position that HUD has advanced since the inception of the FHA amendments. *See* Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Dec. 15, 1993 (hereafter cited as Wilson, HUD OGC December 1993 interview).

82 42 U.S.C. § 3610(a) (i) (1988).

83 54 Fed. Reg. 13,121 (1989); *see* 24 C.F.R. § 103.15 (1993).

84 24 C.F.R. § 103.15 (1993). *See also* Schwemm, *Law and Litigation,* § 24.4(1), p. 24-9.

85 24 C.F.R. § 103.200(b) (1993).

86 *Id.*

87 24 C.F.R. Ch. I, Subch. A, App. I, p. 953 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

88 *Id.* at 954.

89 *See* chap. 5.

will affect a large number of persons."[90] This determination may:

> be based on the face of the complaint or on information gathered in connection with the investigation. Systemic investigations may focus not only on documenting facts involved in the alleged discriminatory housing practice that is the subject of the complaint, but also on review of other policies and procedures related to matters under investigation, to make sure that they also comply with the nondiscrimination requirements of the FHAA.[91]

The provision for Secretary-initiated complaints apparently has been little used to date. In fact, only eight such complaints have been filed since March 1989, when the act took effect.[92] Of these, five were allegations of discriminatory advertising against families with children; one was an allegation of race discrimination; and two involved the construction of buildings inaccessible to the handicapped.

The allegation of race discrimination was referred to the Justice Department as a pattern and practice case, and subsequently resolved through a consent decree.[93]

Of the five advertising cases, two allege discriminatory advertising by the publishers of telephone yellow pages.[94] The first, against Southwestern Bell, was filed January 15, 1993, and has not been resolved; according to HUD's database, it is open in the regional FHEO office.[95] The other, against US West, was filed and conciliated virtually simultaneously in November 1993, but the terms of the conciliation agreement have been kept secret by the parties.[96] Conciliation agreements are to be made public except when the parties request nondisclosure and when the "Assistant Secretary determines that disclosure is not required to further the purposes of the Fair Housing Act."[97]

Of the remaining three advertising cases, one was filed against a real estate firm,[98] one against a tricounty multiple listing service and its member real estate associations,[99] and one against a condominium development.[100] The two real estate cases, filed in March 1993, are also reported as open in regional FHEO. Only the condominium case, filed in September 1992, has been charged, and the charge was issued in December 1993. The portion of the complaint involving the condominium homeowners association was conciliated in

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90 24 C.F.R. § 103.205 (1993).

91 *Id.*

92 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, letter to Suzanne Crowell, U.S. Commission on Civil Rights, Dec. 21, 1993 (hereafter cited as Pratt letter).

93 U.S. v. Arizona Oddfellow-Rebekah Hous., No. Civ 91-802 PHX WPC (D. Ariz. Mar. 2, 1992).

94 Mansfield v. Geschwind, et al. (Southwestern Bell Yellow Pages, Inc.) (HUD No. 07-93-0205-8) and Achtenberg v. US West Marketing Resources Group, Inc. (HUD No. 08-94-0046-8).

95 Pratt letter.

96 Ibid.

97 24 C.F.R. § 103.330(b) (1993).

98 Guarraia v. Lange, HUD No. 03-93-0429-8, (HUD Secretary Mar. 9, 1993) (HUD-903 Complaint).

99 Guarraia v. Koerner, HUD No. 03-93-0430-8, (HUD Secretary Mar. 9, 1993) (HUD-903 Complaint).

100 Mansfield v. Indian Summer Homeowners Ass'n, HUD No. 09-92-1797-8, (HUD Secretary July 20, 1992) (HUD 903 Complaint).

January 1993, prior to the charge.[101] The conciliation agreement provided that the homeowners association would carry out a variety of affirmative marketing activities and place $5,000 in escrow to be used to construct a children's playground and swimming pool, with any excess to be contributed to a nonprofit organization serving children's needs. The remaining portion against the development company and its owners is the subject of the charge and is now in Federal district court[102] as a result of an election.

The remaining two Secretary-initiated cases concern application of the accessibility guidelines to new construction. The first such complaint was filed in May 1992,[103] and is reported open in FHEO headquarters.[104] It alleges that new construction covered by FHAA violates the law by failing to provide wheelchair accessibility and grab bars in bathrooms.

The second accessibility complaint is the only case to date to be charged and completely resolved through the administrative process.[105] The complaint was filed September 26, 1991;[106] a charge was issued December 5, 1991;[107] and a consent decree was issued April 28, 1992.[108]

In all, only one of three cases resolved can be said to demonstrate HUD's determination to use the secretarial complaint process to send a signal about its commitment to enforce Title VIII, because it is the only case to be publicly resolved with HUD's participation. Of the other two cases, as noted above, one (Oddfellows) was referred to the Justice Department and the other one (US West) privately conciliated. The latter is particularly troubling, since US West is a large corporation whose activities are closely monitored by others in the telecommunications industry as well as by the investment community, and its acquiescence to a given remedy could send a strong signal to other companies similarly situated.

Secretarial Review

The FHAA allows the Secretary to review initial decisions of ALJs with respect to all findings of fact and conclusions of law, and to issue final decisions.[109] In issuing a final decision, the Secretary has great latitude to affirm, modify, or set aside, in whole or in part, the initial decision of the ALJ.[110] In addition, the Secretary may send the initial decision

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101 Mansfield v. Indian Summer Homeowners Ass'n, HUD No. 09-92-1797-3, (HUD Secretary Apr. 20, 1993) (conciliation agreement). The agreement was signed by the respondent Jan. 6, 1993, and by Leonora Guarraia, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity Apr. 20, 1993.

102 U.S. v. Brigley (D.Az.); *see* DOJ comments, attachment, p. 2.

103 Mansfield v. Sundial Apts, HUD No. 10-92-0340-8, (HUD Secretary May 19, 1992) (HUD-903 complaint).

104 Pratt letter.

105 Mansfield v. Shawntana Development Corp., HUD No. 09-91-2048-3, (HUD Secretary Sept. 26, 1991) (HUD 903 complaint).

106 *Id.*

107 Mansfield v. Hansen, HUD ALJ No. 09-91-2048-3, (HUD Secretary Dec. 5, 1991) (determination of reasonable cause and charge of discrimination).

108 Mansfield v. Hansen, HUD ALJ No. 09-91-2048-3 (HUD ALJ Apr. 28, 1992) (consent order). The substance of this case is discussed in chap. 8.

109 42 U.S.C. § 3612(h) (1) (1988); 24 C.F.R. § 104.930(a) (1993). The ALJ decisions are issued after an administrative hearing in accordance with 42 U.S.C. § 3612(g) (1988). For a discussion of the administrative hearing process, *see* chap. 4.

110 24 C.F.R. § 104.930(a) (1993).

back to the ALJ on remand for further proceedings.[111]

On December 9, 1991, the Secretary delegated the authority to review and remand ALJ decisions under the FHAA to the Executive Officer for Administrative Operations and Management.[112] In practice, the Executive Officer for Administrative Operations and Management signs the order returning the initial decision back to the ALJ on remand.[113] However, when the Secretary issues a final decision, the opinion is written and signed by the Secretary's Chief of Staff. Although the FHAA regulations and delegations do not contain an official designation of authority to the Chief of Staff, the designation appears under the general provision for Secretary review found in the Department of Housing and Urban Development Act (HUD Act).[114] Associate General Counsel Carole Wilson surmised that the Secretary delegated the FHAA review authority to the executive officer simply to maintain procedural continuity through a nonpolitical career position, while designating to the Chief of Staff all of the Secretary's authority under the HUD act to write and issue the substantive policies of the agency.[115]

The FHAA Secretary review process is consistent with the agency review process contemplated by the Administrative Procedures

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111 *Id.* The Secretary, or his designee, is required to serve the final order on all parties and aggrieved persons within 30 days of the date of the initial ALJ decision. 24 C.F.R. § 104.930(a) (1993). If the Secretary does not issue a final decision within the 30-day time period, the initial decision of the ALJ shall be deemed the final decision effective as of 30 days after the issuance of the ALJ's initial decision. 24 C.F.R. § 104.930(b) (1993).
If the Secretary remands the initial decision, the ALJ has up to 60 days from the date of the Secretary's remand order to issue another decision on remand. 24 C.F.R. § 104.930(d) (1993). However, in the event that it is impractical for an ALJ to issue a decision on remand within 60 days, the ALJ may delay the decision after notifying all the parties, the aggrieved persons, and the Assistant Secretary of the reasons for the delay. *Id.*

112 56 Fed. Reg. 65,740 (1991).

113 *See, e.g.,* HUD v. Holiday Manor Estates Club, Inc., HUDALJ No. 05-89-0533-1 (HUD Secretary Dec. 23, 1991) (remand order).

114 The HUD act includes a general provision for secretarial review of all determinations, orders, or interim rulings of HUD hearing officers. 42 U.S.C. § 3535(d) (1988). Under the HUD act regulations, any party may request review of determinations or orders of HUD hearing officers by filing a written petition with the Secretary within 15 days of receipt of the determination or ruling. 24 C.F.R. § 26.25(a) (1993). The Secretary, or the Secretary's designee, has discretion to grant or deny the petition for review, which is limited to review of the factual record produced before the hearing officer. *Id.* § 26.25(c). Certain interlocutory rulings may also be petitioned within 10 days of their issuance. *Id.* § 26.26. Pursuant to the HUD act regulations, the Secretary designated the counselor to the Secretary, and subsequently the Chief of Staff, to exercise all review powers under the HUD act. *See* 57 Fed. Reg. 9426 (1992) and 57 Fed. Reg. 20,125 (1992). To date, Secretary Cisneros has continued the designation of the review authority to his Chief of Staff, Bruce Katz.
In the delegation of authority to the chief of staff, HUD indicated that the delegation applied, in addition to named hearings, to other hearings required by statute or regulation, to the extent the rules are not inconsistent with the rules under the HUD act. 57 Fed. Reg. 20,125 (1992). Thus, a party affected by a HUD ALJ decision may petition for review of that decision under the FHAA, as long as the FHAA secretarial review process is not inconsistent with the HUD act process.
Despite the apparent crossover in delegations and designations, HUD stated in its comments that neither the General Counsel nor the ALJs thus far have looked to the Part 26 regulations as governing Part 104 hearings. According to OGC, "the assumption has been that the Part 104 regulations are the only regulations that directly apply to such hearings, though other Departmental regulations may be looked to for nonbinding guidance.... Thus, the General Counsel's office would consider it an open question that has yet to be reached whether the Part 26 regulation on interlocutory appeals applies to proceedings under Part 104." HUD Comments, p. 11. This issue may require recognition from OGC because the FHAA appears to permit broader secretarial review than the HUD act's factual record limitations.

115 Wilson, HUD OGC December 1993 interview.

Act (APA).[116] Under the APA, agency heads are not required to defer to the factual findings of the ALJ in the same way that an appellate court must defer to a trial judge's factual determinations. In fact, the APA states that "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[117] Thus, the HUD Secretary may overturn an ALJ's factual and/or legal determinations.

In practice, the Secretary reviews both the factual record and issues of law.[118] This broad power to review ALJ decisions is particularly significant because it allows HUD greater latitude in setting policy through the administrative adjudicative process. In addition, the Secretary review process, unlike judicial review, does not require the involvement of DOJ.[119] To date, the Secretary has remanded six ALJ initial decisions and issued final decisions in four of them.[120] In all six cases, OGC, serving as both the charging party on behalf of the

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116 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1988).

117 *Id.* § 557(b).

118 *Compare In re* Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (remanded ordering record reopened), *rev'g and remanding,* HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *on remand,* HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,060 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded,* HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19, 1993) (decision), *on second remand,* HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd,* HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994); *with*

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

119 24 C.F.R. § 104.950 (1993); "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of 1988," Dec. 7, 1990, p. 8 (hereafter cited as Memorandum of Understanding). For a discussion of DOJ's role in the judicial review process, *see* chap. 11.

120 HUD v. Ocean Sands, Inc., 2 Fair Housing-Fair Lending (P-H) ¶ 25,055 (HUD ALJ Sept. 3, 1993) (initial decision), *aff'd in part, modified in part, remanded in part,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,056 (HUD Secretary Oct. 4, 1993), *on remand,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,061 (HUD ALJ Nov. 15, 1993) (initial decision on remand);

In re Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050 (HUD Secretary June 23, 1993) (remanded ordering record reopened), *rev'g and remanding,* HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,047 (HUD ALJ May 24, 1993) (initial decision), *on remand,* HUD v. Aylett, 2 Fair Housing-Fair Lending (P-H) ¶ 25,060 (HUD ALJ Oct. 21, 1993) (initial decision on remand), *remanded,* HUDALJ No. 08-90-0283-1 (HUD Secretary Nov. 19, 1993) (decision), *on second remand,* HUDALJ No. 08-90-0283-1 (HUD ALJ Jan. 5, 1994) (initial decision on second remand), *aff'd,* HUDALJ No. 08-90-0283-1 (HUD Secretary Feb. 4, 1994);

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

HUD v. Holiday Manor Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,016 (HUD ALJ Nov. 26, 1991) (initial decision), *remanded,* HUDALJ No. 05-89-0533-1 (HUD Secretary Dec. 23, 1991) (remand order), *motion to intervene*

complainant and HUD, and as the counsel for the Secretary, believed that the ALJs decided incorrectly the cases as a matter of law and/or fact. Based on the procedures followed in these six cases, it appears that OGC simultaneously files a motion for reconsideration or partial reconsideration with the ALJ, a memorandum in support of the motion for reconsideration, and a motion for remand with the Secretary.[121] The motions for remand, signed by OGC staff, state:

> Counsel for the Secretary hereby moves the Secretary, pursuant to 42 U.S.C. § 3612(h) and 24 C.F.R. § 104.930(a) and (d), to remand the initial decision for 45 days so that the ALJ may fully and fairly consider the matters raised in the motion to reconsider.[122]

Because OGC serves as counsel for the Secretary, it appears that the motion, on its face, has the Secretary, in his adversarial capacity, requesting a remand from himself, in his adjudicative capacity. HUD asserts that, "When the Secretary grants a motion for remand of an ALJ decision, the Secretary is not requesting a remand from himself in his adjudicative capacity. Rather, the Secretary, as the agency head, is exercising his review authority under 24 C.F.R. § 104.930 (1993), to remand the ALJ's initial decision for further proceedings."[123]

The language of each remand order signed by the Executive Officer for Administrative Operations and Management states:

> In making this remand, the Secretary makes no determination on the merits of either the initial decision or the motion for reconsideration. This remand is to allow Respondents the opportunity, as provided by 24 C.F.R. § 104.450(b), to answer the motion for reconsideration, and also to allow the ALJ an opportunity to decide the motion fully and fairly before his initial decision would become final pursuant to 42 U.S.C. § 3612(h) (1) and 24 C.F.R. § 104.930(b).[124]

It appears that rather than allowing the ALJ to rule on the motion to reconsider, the Secretary requires the ALJ to reconsider the initial decision by remand. The practical consideration appears to be that before issuing a final

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denied, 2 Fair Housing-Fair Lending (P-H) ¶ 25,022 (HUD ALJ Jan. 21, 1992), *on remand,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,025 (HUD ALJ Feb. 21, 1992) (initial decision on remand), *aff'd in part, remanded in part,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992) (final decision);

HUD v. Dedham Hous. Auth., 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUD ALJ Nov. 15, 1991) (initial decision), *remanded,* HUDALJ No. 01-90-0424-1 (HUD Secretary Dec. 13, 1991) (remand order), *on remand,* 2 Fair Housing-Fair Lending ¶ 25,023 (HUD ALJ Feb. 4, 1992) (initial decision on remand); and

HUD v. Denton, 2 Fair Housing-Fair Lending (P-H) ¶ 25,014 (HUD ALJ Nov. 12, 1991) (initial decision), *remanded,* HUDALJ Nos. 05-90-0012-1 and 05-90-0406-1 (HUD Secretary Dec. 12, 1991), *on remand,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,024 (HUD ALJ Feb. 7, 1992) (initial decision on remand).

121 *See, e.g.,* HUD v. Holiday Manor Estates Club, Inc., HUD ALJ No. 05-89-0533-1 (Dec. 23, 1991) (motion for remand of the administrative law judge's initial decision, motion for partial reconsideration of initial decision and order, and memorandum in support of motion for partial reconsideration).

122 *See, e.g.,* HUD v. Denton, HUD ALJ Nos. 05-90-0012-1 and 05-90-0406-1 (Dec. 11, 1991) (HUD's motion for remand of the administrative law judge's initial decision).

123 HUD Comments, p. 11.

124 *See, e.g.,* HUD v. Holiday Manor Estates Club, Inc., HUD ALJ No. 05-89-0533-1 (Dec. 23, 1991) (order). Although the regulations permit a 60-day remand period, the Secretary, to date, has given the ALJs 45 days to reconsider their initial decisions. According to OGC staff, the remand period allows OGC more time to formulate its arguments on appeal, and can "stop the clock" for up to 60 days. Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Wilson, HUD OGC July 1993 interview).

decision himself, the Secretary ensures reconsideration of the initial decision before the expiration of his 30-day review period, thus extending the review process. In effect, this extension of the internal review process gives OGC two opportunities to reverse an adverse ALJ initial decision before it becomes the final decision of the agency. While it may appear that OGC as counsel for the Secretary has an advantage over the respondent when it comes to having an adverse decision reviewed by the Secretary, the respondent may appeal the final agency decision to Federal court, whereas OGC cannot appeal the final decision of its own agency.[125]

In the four cases involving remands in which the Secretary issued an opinion, the decisions were written and signed by the Secretary's Chief of Staff instead of the Executive Officer for Administrative Operations and Management, who had signed the remand orders.[126] The order from the Chief of Staff instead of the Executive Officer indicates that, with respect to issuing final decisions, the Secretary follows the HUD Act's delegation of authority rather than the FHAA's delegation. Thus, HUD has employed the Secretary's delegation of the review authority available under the HUD Act, while applying the broader standard of review permitted by the FHAA.

Only one of the six cases involved a purely factual issue. *In re Bobbie Burris,* a race discrimination case, the Secretary's Chief of Staff set aside and remanded the ALJ's decision to exclude the HUD investigator's testimony offered to support the complainant's assertion of discrimination.[127] Because the parties testified to "absolutely conflicting facts," the Chief of Staff stated that the testimony of the HUD investigator would be essential to the ALJ's assessment of the parties' credibility.[128] Thus, rather than defer to the ALJ's initial credibility assessment, the Chief of Staff set aside the decision and required the ALJ to admit the testimony offered by HUD's OGC to support the complainant's claim on remand.[129] The other five cases remanded by the Secretary involve significant issues of policy and law. For example, *HUD v. Holiday Manor Estates,* a case based on familial status discrimination and unlawful interference, was the first case in which the Secretary issued a final decision.[130] *Holiday Manor* is significant because it illustrates the potential conflicts of interests that arise when HUD attorneys represent the interests of both the individual complainant and the general public.

In *Holiday Manor* the complainant and her 10-year-old son planned to move into one of two mobile homes owned by the complainant's parents located in the mobile home park owned and operated by the Holiday Manor Estates Club, Inc.[131] The complainant submitted a rental application to the club's board of directors and was rejected, because her parents' second mobile home was situated in a section of the park that did not permit minor

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125 *See HUD Complainants Cover Uncertain Legal Terrain With Intervention Efforts,* 1 Fair Housing-Fair Lending (P-H), vol. 7, no. 9, ¶ 9.2, p. 4 (Mar. 1, 1992).

126 *See* HUD v. Ocean Sands, Inc., 2 Fair Housing-Fair Lending (P-H) ¶ 25,056, at 25,448; *In re* Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050, at 25,475; HUD v. Mountain Side Mobile Estates, HUDALJ Nos. 08-92-0010-1 and 08-92-0011-1, slip op. at 13 (HUD Secretary Oct. 20, 1993); and HUD v. Holiday Manor Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,303.

127 *In re* Bobbie Burris, 2 Fair Housing-Fair Lending (P-H) ¶ 25,050, at 25,476-78.

128 *Id.* at 25,477.

129 *Id.*

130 HUD v. Holiday Manor Estates, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027 (HUD Secretary Mar. 23, 1992).

131 HUD v. Holiday Manor Estates Club, Inc., 2 Fair Housing-Fair Lending (P-H) ¶ 25,016, at 25,220 (HUD ALJ Nov. 26, 1991).

children.[132] Several months later, the complainant moved into the park despite the respondent's rejection of her earlier application.[133] In addition to her claim for unlawful discrimination based on familial status, the complainant alleged that the respondent unlawfully harassed and interfered with her in retaliation for moving into the park without permission from the board of directors, and for filing the complaint with HUD.[134]

The Secretary and ALJ Andretta disagreed on two major issues: whether the complainant employed impermissible remedies by moving into the park without authorization from the board of directors, and whether the complainant should be permitted to intervene in the case.[135] On secretarial remand, the ALJ had held that the proper course for the complainant would have been to seek injunctive relief, not to move into the park without permission.[136]

This proposed decision was then reviewed again by the Secretary, who issued a final decision.[137] The Secretary applied a balancing test and held that the complainant was both a member of a protected class based on familial status and engaged in protected activity.[138] The Secretary stated that the respondent possessed a legitimate interest only in the public spaces of the park, not in the private space the complainant occupied with the consent of her parents.[139] Thus, the complainant's activities were protected as long as she had the permission of the homeowners. Finally, the Secretary held that the respondents harassed the complainant's parents, but not the complainant herself.[140]

OGC's representation of the complainant's interests was challenged when OGC refused, on appeal, to argue certain allegations in the complaint. Upon respondents' appeal to the Secretary, OGC no longer argued that the actions of the respondents had harassed the complainant. Instead, OGC indicated that substantial evidence in the record supported the ALJ's decision.[141] (The Secretary's decision alludes to OGC's reversal.) OGC refused to continue pursuing the harassment charge despite the complainant's continued assertion that she had been harassed. The Secretary allowed the complainant to intervene on her own behalf while still rejecting her claim for damages stemming from the alleged harassment, in order to allow her to appeal the administrative decision in Federal court.[142]

Recently, in a handicap discrimination case, the Secretary issued a final decision that did not agree entirely with the arguments

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132 *Id.* at 25,220-21.

133 *Id.* at 25,221.

134 *Id.* at 25,229.

135 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,297 and 25,302-303 (final decision).

136 *See* HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,025, at 25,285 (initial decision on remand).

137 HUD v. Holiday Manor Estates Club, 2 Fair Housing-Fair Lending (P-H) ¶ 25,027, at 25,302 (final decision).

138 *Id.* at 25,299-300.

139 *Id.*

140 *Id.* at 25,300-301. However, since the respondents only harassed the complainant's parents, who neither filed the complaint, nor were the persons on whose behalf the suit was brought, the Secretary awarded no damages for the harassment.

141 *Id.* at 25,297.

142 *Id.* at 25,302. For further discussion on interventions, *see* chap. 4.

raised by OGC in its memorandum. In *HUD v. Ocean Sands, Inc.,* the Secretary agreed with OGC's position that the ALJ's initial award for emotional distress should be increased to reflect the amount of similar damages awarded in prior cases.[143] In addition, the Secretary clarified the ALJ's order prohibiting the condominium association from assessing the complainant's housing unit for any of the costs or attorneys' fees incurred during the litigation of the complaint.[144] However, the Secretary refused the request of the OGC attorneys to increase the $3,500 civil penalty assessed against the respondent.[145]

Interaction with DOJ

Although HUD is the lead agency in enforcement of Title VIII, the Department of Justice (DOJ) also plays a role in FHAA enforcement. The FHAA requires the Secretary to refer certain types of complaints to DOJ. The statute indicates that whenever the Secretary believes that a complaint filed with HUD involves the legality of any State or local zoning or land use law,[146] a pattern or practice of discriminatory behavior, an issue of general public importance, an enforcement of a subpoena, or proceedings by any government licensing or supervisory authorities, the Secretary must refer the claim to the Attorney General or the appropriate government authority.[147]

Zoning Referrals

The FHAA states that the Secretary must immediately refer to the Attorney General complaints involving the legality of any State or local zoning or other land use law or ordinance.[148] However, under present practice, the Assistant Secretary for Fair Housing and Equal Opportunity (FHEO), in effect, prescreens complaints involving State or local zoning or land use laws or ordinances to determine if a discriminatory housing practice has occurred or is about to occur. In the preamble to its regulations, HUD explicitly stated its intention to investigate zoning complaints before forwarding the complaints to DOJ.[149]

According to the regulations, the Assistant Secretary conducts a review of the factual circumstances in all complaints, regardless of the subject matter, as part of the HUD investigation.[150] If the Assistant Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary will dismiss the complaint.[151] Thus,

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143 HUD v. Ocean Sands, Inc., 2 Fair Housing-Fair Lending (P-H) ¶ 25,056, at 25,552-53 (HUD Secretary Oct. 4, 1993) (decision and order).

144 *Id.* ¶ 25,056, at 25,553-554.

145 *Id.* at 25,553.

146 42 U.S.C. § 3610(g)(2)(C) (1988).

147 *Id.* § 3610(e)(2). The Attorney General may also commence a civil action in Federal court for a breach of a conciliation agreement upon referral from the Secretary. *Id.* § 3614(b)(1)(A).

148 *Id.* § 3610(g)(2)(C).

149 24 C.F.R. Ch. I, subch. A, App. I, p. 961 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

150 *Id.* § 103.400(a).

151 *See Id.* § 103.400(a)(1). Although the Assistant Secretary has delegated the authority to make no reasonable cause determinations to the directors of HUD FHEO regional offices, the Assistant Secretary maintains the authority to reopen no cause determinations made by regional FHEO directors. *See* 57 Fed. Reg. 45,066 (1992).

even if the complaint involves the legality of a zoning or land use law or ordinance, the Assistant Secretary will dismiss the complaint if no reasonable cause exists to pursue the claim.[152]

If the Assistant Secretary does not issue a no cause determination, the Assistant Secretary shall forward the matter to the General Counsel for consideration.[153] Upon referral, the General Counsel will either issue a reasonable cause determination and charge, issue a no reasonable cause determination and a dismissal,[154] or refer the matter to the DOJ if the complaint involves the legality of a State or local zoning or land use law or ordinance.[155]

The delegation to the General Counsel indicates that the referral to DOJ does not occur until after FHEO completes its investigation and prepares a final investigative report.[156] In this way, the Assistant Secretary prescreens complaints involving zoning and land use ordinances and only refers to the General Counsel claims in which reasonable cause may be found.

The General Counsel has redelegated concurrent authority to determine which complaints involve the legality of local zoning or land use laws to the Associate General Counsel for Equal Opportunity and Administrative Law and to the Assistant General Counsel for Fair Housing.[157] If the Associate General Counsel or the Assistant General Counsel determines that the matter "involves the legality of zoning or land use," OGC must refer the complaint and the HUD investigative materials to the Attorney General in lieu of making a reasonable cause determination.[158] HUD is responsible for notifying the aggrieved persons and respondents by certified mail or personal service about the referrals to DOJ.[159]

Once the zoning complaint is referred to DOJ, the Attorney General has the discretion to commence a civil action in Federal court no later than 18 months after the occurrence or termination of the alleged discriminatory housing practice.[160] DOJ and HUD have agreed that DOJ will review the zoning matter promptly, may conduct its own investigation, and will notify OGC, the complainant, and the respondent when it decides whether or not to file a civil action.[161]

To ensure that enforcement of zoning cases is not barred by the 18-month statute of limitations, FHEO developed a draft technical guidance memorandum (TGM) for regional FHEO directors on processing and investigating zoning and land use cases.[162] The draft

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152 55 Fed. Reg. 53,293 (1990).

153 24 C.F.R. § 103.400(a)(2)(1993).

154 *Id.* § 103.400(a)(2)(i) and (ii).

155 *Id.* § 103.400(a)(3).

156 *See* Schwemm, *Law and Litigation,* § 26.3(2), p. 26-27.

157 56 Fed. Reg. 2931 (1991).

158 24 C.F.R. § 103.400(a)(3) (1993).

159 *Id.*

160 42 U.S.C. § 3614(b)(1) (1988).

161 Memorandum of Understanding, p. 6.

162 Leonora L. Guarraia, Deputy Assistant Secretary for Fair Housing and Equal Opportunity, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, memorandum to all regional FHEO directors, Draft TGM-15, Case Processing Procedures for Zoning and Land Use Cases, July 26, 1991.

TGM states that zoning cases will be immediately assigned for investigation, and if the region or the investigator has a backlog of cases, zoning cases must be a priority.[163]

In addition, the investigation should be completed and the case transmitted to the Office of Fair Housing Enforcement not later than 15 months after the occurrence or termination of the alleged discriminatory act.[164] The TGM suggests that in determining the date of occurrence or termination, the regional director should "make a conservative, independent judgment that may differ from the date alleged by the complainant" in order to avoid violating the statute of limitations.[165] For example, the TGM explains that the regional director should toll the statute of limitations at the date of the first permit denial, rather than after any subsequent appeals or denials.[166]

Additionally, the TGM states that the regional director should "be particularly cautious about interpreting an act as 'continuing'."[167] Although the TGM does not explain whether or not the application of discriminatory zoning ordinances is considered a "continuing practice" for purposes of the statute of limitations,[168] the extra caution indicates that FHEO believes that DOJ or the courts may be reluctant to consider zoning ordinances continuing practices. The Supreme Court accepted the propriety of the continuing violations theory under Title VIII for racial steering. In a similar situation involving zoning, the second circuit held that a suit could be brought under Title VIII where a denial of approval for housing funding was based upon a zoning ordinance.[169] While the courts have generally accepted the continuing violations theory, as used in *Havens,* specific application to zoning cases has not been interpreted by the courts.

In addition to HUD's ability to prescreen zoning cases prior to referral, HUD and DOJ have agreed that referral is not required if "a zoning issue is raised as an ancillary and insubstantial addition to a complaint that HUD has authority to address, and a reasonable cause determination can be rendered independent of the zoning issue."[170] In a position paper on zoning written before the final version of the "HUD-DOJ Memorandum of Understanding," OGC detailed to what extent HUD may retain jurisdiction over certain

163 Ibid.

164 Ibid., p. 1.

165 Ibid., p. 2.

166 Ibid.

167 Ibid.

168 The Supreme Court addressed continuing practices generally under Title VIII in *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380-81 (1982). HUD adopted the continuing violation theory for tolling the limitations period in FHAA complaints generally at 24 C.F.R. § 103.40(c) (1993). *See* Schwemm, *Law and Litigation,* § 25.2, p. 25-8.

169 Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391, 394 n.3 (2d Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983).

170 Memorandum of Understanding, p. 6.

matters involving the legality of zoning and land use cases.[171] According to OGC, the initial confusion over zoning matters involved the "legality of" language inserted into the FHAA.[172] OGC stated that, for the purposes of mandatory referral to DOJ, the zoning issue must be significant and not merely tacked on as an incidental issue. This is significant because a complainant or respondent may attempt to use the zoning issue to force the matter into Federal court.[173]

Based on FHAA legislative history and policy considerations, OGC concluded that referral to DOJ after the HUD investigation is proper in cases "which raise a significant issue as to the facial validity, the operation, or the administration of a zoning or land use ordinance."[174] OGC will refer such cases regardless of the intent of the State or local governing authority.

OGC also stated that policy considerations support referral to DOJ when the zoning issues are significant. Because of the limited remedies available to HUD in administrative proceedings, OGC asserted that DOJ is better equipped to litigate zoning complaints in which revision of the law or ordinance is the appropriate remedy.[175] Thus, if it is determined that a zoning board is making decisions with consideration to race, color, religion, sex, familial status, national origin, or handicap, then it may be necessary to reform the process by which the zoning board members are selected or provide for review of zoning board decisions. If HUD were to handle all zoning cases, OGC would have to determine, before the administrative hearing, that such remedies are unnecessary, whereas DOJ may pursue such remedies in Federal court at its discretion.[176] According to OGC, in practice, DOJ rarely pursues revision of zoning ordinances or restructuring of zoning boards, but instead asserts that exemptions or reasonable accommodations should be issued by the responsible zoning authority.[177]

Despite the fact that HUD has ostensibly prescreened the validity of all the zoning and land use complaints it refers to DOJ, DOJ files civil claims in relatively few of the complaints referred by HUD. According to DOJ data, as of March 29, 1993, DOJ has filed claims in only 14 of the 93 zoning complaints referred by HUD.[178] Of the 79 complaints not filed, 53 complaints are listed as "closed" or "to be closed," and 23 complaints are under DOJ investigation.[179]

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171 Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum to Leonora L. Guarraia, Deputy Assistant Secretary for Enforcement and Compliance, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Oct. 26, 1989. Harry L. Carey's title changed from Assistant General Counsel for General Law to Assistant General Counsel for Fair Housing at some point between the Jan. 12, 1990, and Jan. 25, 1991, delegations of authority. *See* 56 Fed. Reg. 41,369 (1991).

172 Ibid.

173 Ibid., p. 2.

174 Ibid., p. 3.

175 Ibid., p. 3.

176 Ibid.

177 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Dec. 20, 1993 (hereafter cited as Pratt December 1993 interview).

178 DOJ Caseload Database as of Mar. 29, 1993.

179 Ibid.

Prompt Judicial Actions

HUD and DOJ must also coordinate their efforts to obtain prompt judicial actions.[180] The FHAA allows the Secretary to authorize the Attorney General to pursue a prompt judicial action in Federal court for immediate intervention whenever such action is necessary to "carry out the purposes" of the act.[181] The statute clearly indicates that the prompt civil action is only temporary or preliminary pending final disposition of the complaint, and should not affect the initiation of the administrative proceedings by HUD.[182] In addition, the FHAA requires that all temporary restraining orders, or other preliminary or temporary orders, must be issued in accordance with the Federal Rules of Civil Procedure.[183]

The FHAA requires that once HUD issues the authorization, DOJ must pursue whatever temporary or preliminary relief is requested.[184] However, to permit initiation, the regulations require HUD to consult with the Assistant Attorney General for the Civil Rights Division before making the determination that a prompt judicial action is necessary.[185] Thus, although DOJ has no choice but to pursue an action once it is authorized by HUD, the prompt judicial action cannot be authorized without consulting DOJ first.

On occasion, DOJ has received information about cases requiring prompt judicial action before HUD has made a referral,[186] but DOJ still cannot proceed without authorization from HUD. Consequently, DOJ must wait until HUD investigates the need for temporary relief before proceeding to court.[187]

Because prompt judicial actions often require immediate attention and quick investigation, HUD has tried to develop an efficient internal process for the disposition of these actions. HUD regulations and internal guidance have attempted to coordinate the roles of FHEO and OGC regional and headquarters offices, as well as the interaction with DOJ.

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180 A prompt judicial action is a temporary or preliminary order, such as a temporary restraining order or a preliminary injunction, designed to prevent further injury to aggrieved persons pending a complete investigation of the merits of their claims. According to both OGC and DOJ, it is often unnecessary to file the action officially with the Federal court, because the mere threat of a prompt judicial action will cause the defendant to voluntarily comply with the request. Jonathan Strong, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Strong, HUD OGC July 1993 interview); Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 19, 1991, transcript, pp. 42–43 (hereafter cited as Hancock 1991 interview).

181 42 U.S.C. § 3610(e)(1) (1988). The Secretary delegated this authorization power to the General Counsel at 54 Fed. Reg. 13,121 (1989).

182 42 U.S.C. § 3610(e)(1) (1988); 24 C.F.R. § 103.500(a) (1993).

183 42 U.S.C. § 3610(e)(1) (1988). For general requirements for preliminary injunctions and temporary restraining orders, see Fed. R. Civ. P. 65(a) and 65(b).

184 42 U.S.C. § 3610(e)(1) (1988).

185 24 C.F.R. § 103.500(a) (1993). According to one HUD official, the consultation prior to authorization gives DOJ implicit approval authority over prompt judicial actions. Pratt December 1993 interview. Thus, the application of this provision appears to conflict with congressional intent indicating that the Secretary should determine the merits of the claim. The legislative history states that prompt judicial actions should be authorized "when the Secretary concludes that such action is necessary. This will be important where, for example, the dwelling unit is still available and the Secretary believes the complaint has merit." U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988,* 100th Cong., 2d sess., 1988 H. Rept. 100–711 *reprinted in* 1988 U.S.C.C.A.N. 2173, 2196 (hereafter cited as FHAA Committee Report).

186 Hancock 1991 interview, p. 63.

187 Ibid., p. 63.

The 1989 memorandum of understanding between FHEO and OGC indicates that HUD policy initially emphasized the roles of FHEO and OGC headquarters offices in the prompt judicial action process.[188] The memorandum states that the FHEO headquarters office must provide OGC with early notification of any request for prompt judicial action.[189] Then, OGC must consult with DOJ as soon as possible upon receipt of the request from FHEO headquarters, to ensure the prompt initiation of a civil action.[190] Thus, according to the 1989 memorandum, the prompt judicial action request should be transmitted, after the initial intake, from the FHEO regional office to FHEO headquarters, from FHEO headquarters to OGC, and from OGC to DOJ.

Perhaps in recognition of the fact that regional offices have the greatest access to and familiarity with the investigation of complaints, the Assistant Secretary and the General Counsel delegated most of the responsibility for prompt judicial actions to the regional directors and counsel, respectively.[191] A 1990 OGC memorandum states that the regional counsel will be responsible for processing cases for prompt judicial actions, and coordinating the development of evidence between the FHEO regional office and the Housing and Civil Enforcement Section of the Civil Rights Division at DOJ.[192]

Accordingly, the consultation with DOJ is conducted primarily by the regional counsel who is most familiar with the facts of the cases, thereby eliminating the intermediate step of transmitting the available case information to both FHEO and OGC headquarters. Once the consultation with DOJ is completed, the regional counsel must advise the Assistant General Counsel for Fair Housing[193] of the cases that are identified for consideration of prompt judicial action and routinely report on the progress of those cases.[194] In practice, DOJ, OGC headquarters, and FHEO headquarters often participate in a conference call with the regional investigator and regional

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188 "Memorandum of Understanding Between FHEO and OGC on the Implementation of the Federal Fair Housing Law," p. 2 (May 18, 1989), signed by Carolyn Lieberman, Acting General Counsel and Thomas D. Casey, General Deputy Assistant Secretary (hereafter cited as FHEO-OGC Memorandum of Understanding).

189 Ibid.

190 Ibid.

191 Frank Keating, General Counsel, U.S. Department of Housing and Urban Development, memorandum to Regional Counsel, Feb. 27, 1990 (hereafter cited as Keating Feb. 27, 1990 memorandum). The *Federal Register* does not contain an official notice of this redelegation to the regions.
Recently, the National Performance Review indicated that HUD will eliminate all regional offices under a 5-year plan. *From Red Tape to Results: Creating a Government that Works Better & Costs Less,* Report of the National Performance Review, Sept. 7, 1993, p. 96. In addition, Secretary Cisneros announced a plan to implement the elimination of regional offices. *See* "Cisneros Outlines HUD Revamp But Has No Specifics on Savings," *Washington Post,* Dec. 2, 1993, p. A-19.

192 Keating Feb. 27, 1990 memorandum.

193 The General Counsel redelegated the authorization and consultation powers concurrently to the Associate General Counsel for Equal Opportunity and Administrative Law and the Assistant General Counsel for Fair Housing, formerly known as the Assistant General Counsel for General Law. 24 C.F.R. § 103.500(a) (1993); 55 Fed. Reg. 1286 (1990). The Assistant General Counsel for General Law was renamed as the Assistant General Counsel for Fair Housing at some point between the Jan. 12, 1990, and Jan. 25, 1991, delegations of authority. *See* 56 Fed. Reg. 41,369 (1991).

194 Keating Feb. 27, 1990 memorandum.

counsel to discuss the preliminary information required to justify a prompt judicial action.[195]

Regional counsel are also responsible for obtaining the information necessary for these cases, and for preparing correspondence for the signature of the Assistant General Counsel for Fair Housing officially authorizing DOJ to seek prompt judicial action.[196] In any case in which prompt judicial action is authorized, the regional counsel must work with DOJ to provide the documentation necessary to obtain appropriate orders.[197] It appears that in order to minimize time spent, OGC has given the regional counsels the authority to process prompt judicial actions and consult with DOJ while still retaining the final authorization power, thus eliminating the need for FHEO and OGC headquarters to serve as intermediaries in the investigations.[198]

To understand the standards of proof required for each type of prompt judicial action under the FHAA, it is first necessary to understand the general distinctions made by the Federal Rules of Civil Procedure and the Federal courts. Although applications for both types of prompt judicial actions are subject to the discretion of the court, the Federal Rules of Civil Procedure distinguish procedurally between preliminary injunctions and temporary restraining orders.[199] Under the rules, a preliminary injunction cannot be issued without notice to the adverse party nor without a hearing.[200] In fact, the rule allows the court to consolidate the hearing on the preliminary injunction with a full presentation of evidence on the merits of the claim, in part, because a preliminary injunction has a greater and longer effect on the adverse party.[201] A temporary restraining order, on the other hand, may be entered without prior notice to the other party or parties after a showing that the order is needed to prevent immediate and irreparable injury, until a motion for a preliminary injunction can be considered.[202] However, according to DOJ, this is only an exception, and courts are extremely cautious about allowing an order without notice to the other party[203] According to HUD, although a temporary restraining order may be entered without prior notice, prior notice is often provided.[204]

A preliminary injunction cannot be issued by a Federal court without a hearing "which affords the adverse party an opportunity to

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195 Strong, HUD OGC July 1993 interview. According to OGC, the authorization power has been internally delegated from the General Counsel to the Assistant General Counsel for Fair Housing. Now, the Associate General Counsel for Equal Opportunity and Administrative Law can sign a request to DOJ for prompt judicial action and send a copy to the General Counsel, rather than having to meet with the General Counsel in every case. Ibid.

196 Ibid.

197 Ibid.

198 Under HUD's reorganization, effective April 15, 1994, the regional counsels have become Assistant General Counsels for various geographic areas. They now have the authority to authorize DOJ to seek temporary restraining orders without review or concurrence by the General Counsel. HUD Comments, p. 11.

199 *Compare* Fed. R. Civ. P. 65(a) (preliminary injunctions) *with* Fed. R. Civ. P. 65(b) (temporary restraining orders).

200 *Id.* 65(a)(1).

201 *Id.* 65(a)(2); *see* Schwemm, *Law and Litigation,* § 25.3(4)(c), p. 25-45.

202 Fed. R. Civ. P. 65(b). A temporary restraining order issued without notice to the adverse party is known as an ex parte restraining order. An ex parte order expires after a fixed term determined by the court and not to exceed 10 days.

203 DOJ Comments, p. 5.

204 HUD Comments, p. 11.

present evidence in his behalf."[205] Additionally, a preliminary injunction usually is issued for an indefinite period of time, "since its purpose is to preserve the status quo until the issues are adjudged after a final hearing."[206]

The Federal circuit courts have generally accepted a traditional approach for evaluating the propriety of a preliminary injunction. This approach consists of four factors: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm if the injunction is not granted; (3) whether the benefits of the injunction will outweigh any harm to the defendant caused by the injunction; and (4) whether the public interest favors or disfavors issuing the injunction.[207] Since these factors are not required by Rule 65 of the Federal Rules of Civil Procedure or a Supreme Court decision, the application of the factors varies among the circuits.[208]

Unlike a preliminary injunction in Federal court, a temporary restraining order may be entered "upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties... upon a motion for a preliminary injunction."[209] The grant or denial of the temporary restraining order does not preclude the grant or denial of a preliminary injunction on a subsequent motion.[210] In addition, a party may not ordinarily appeal a temporary restraining order, unless the temporary restraining order was continued in violation of the Federal Rules.[211]

HUD and DOJ do not agree on when HUD should request injunctive relief. One HUD official characterized the issue as a disagreement over the standard of proof for preliminary injunctions and temporary restraining orders.[212] Although HUD argues that temporary restraining orders should require only a demonstration of irreparable harm in order to maintain the status quo during further investigations by HUD, HUD reports that DOJ expects HUD to authorize temporary

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205 *See* James Wm. Moore et al., Moore's Federal Practice ¶ 65.05, at 65-102 (1990).

206 Ibid.

207 *See, e.g.,* Curtis v. Thompson, 840 F.2d 1291, 1296 (7th Cir. 1988); Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1354-55 (11th Cir. 1983). *See also* Schwemm, *Law and Litigation,* § 25.3(4), p. 25-44 (citations omitted).

208 Haitian Centers Council, Inc. v. McNary, 960 F.2d 1326, 1338 (2d Cir. 1992) (requiring a showing of irreparable harm if the injunction is not granted, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief); Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992) (applying a "sliding scale" approach that balances likelihood of success on the merits against irreparable harms); and United States v. Village of Palatine, No. 93-C-2154, 1993 U.S. Dist. LEXIS 13814 (N.D. Ill. Sept. 28, 1993) (applying the balancing test in a fair housing case).

209 James Wm. Moore et al., Moore's Federal Practice ¶ 65.05, at 65-100 (1990). *See, e.g.,* Haitian Centers Council, Inc. v. McNary, 789 F. Supp. 541, 546-47 (E.D.N.Y. 1992) (a court may issue a temporary restraining order upon a showing of irreparable harm and for the purpose of preserving the status quo long enough to hold a hearing).

210 *See* James Wm. Moore et al., Moore's Federal Practice ¶ 65.05, at 65-102 to -103 (1990).

211 *See* ibid., at 65-102.

212 Wilson, HUD OGC July 1993 interview. HUD and DOJ will need to resolve the issue, in light of a new "Program and Management Plan" issued by Secretary Cisneros. As part of the plan to reduce discrimination in housing and to enforce Title VIII aggressively, the Secretary hopes to increase the use of prompt judicial actions. The plan states that by Sept. 30, 1994, HUD will develop and issue technical guidance and conduct training in all the HUD regions on the proper use of prompt judicial actions. *See Creating Communities of Opportunity: Priorities of the U.S. Department of Housing and Urban Development,* Program and Management Plan, October 1993, p. 15 (hereafter cited as HUD 1993 Program and Management Plan).

restraining orders only when enough evidence exists to support a reasonable cause determination on the merits.[213] The disagreement may arise, in part, because DOJ usually files a request for both a temporary restraining order and a preliminary injunction at the same time.

In its comments on this report, DOJ implied that temporary restraining orders and preliminary injunctions should not be treated as "two totally separate things." DOJ's support for this position is that in virtually all cases a temporary restraining order is accompanied by a request for a preliminary injunction.[214] However, as HUD maintains, the fact remains that it is well within the Federal Rules of Civil Procedure to treat the two actions separately and to use the distinction between their evidentiary standards to the advantage of the complainant seeking prompt judicial action.[215]

Because DOJ often files both motions at the same time, DOJ requires HUD to develop enough evidence to succeed on the merits of the claim.[216] However, situations that require temporary restraining orders, such as alleged discriminatory evictions, often arise on short notice and may require a court order within 24 hours.[217] Accordingly, HUD believes that DOJ should pursue a motion for a temporary restraining order on a demonstration of irreparable harm to delay the adverse action while HUD investigates the merits of the claim for a preliminary injunction.[218] However, in its comments on this report, DOJ points out that, because a temporary restraining order is generally in effect for no longer than 10 days, the gathering of evidence as to the merits of the claim is "of some urgency."[219] Despite HUD's concern that the need for action is often immediate, DOJ stated that, "No one has ever been evicted or suffered other adverse consequences as a result of our requiring investigation into the facts."[220]

In response to DOJ's position on evidence required for temporary restraining orders, OGC headquarters issued a memorandum explaining the procedures that FHEO regional investigators should follow in pursuing motions for a temporary restraining order.[221] The memorandum details the specific evidence to be collected by the regional investigator before a temporary restraining order request will be authorized. In addition to evidence of irreparable harm, threat of imminent eviction, or sale of the unit to a third party, the memorandum requires investigators to collect evidence that is "so substantial as to show that the

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213 Ibid. *See* Pratt December 1993 interview.

214 DOJ Comments, p. 5.

215 For an example of a complaint for prompt judicial action filed by DOJ, see, e.g., United States v. Bobak, No. 89-C-3232, 2 Fair Housing-Fair Lending (P-H) ¶ 21,049 (N.D. Ill. Apr. 20, 1989) (complaint for prompt judicial action); *see also* Schwemm, *Law and Litigation,* App. D., p. D-16 (reprint of Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction in United States v. Blackwell).

216 Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., July 2, 1993 (hereafter cited as Pratt, HUD OGC July 1993 interview).

217 Hancock 1991 interview, p. 8.

218 Pratt, HUD OGC July 1993 interview; Pratt December 1993 interview.

219 DOJ Comments, p. 5.

220 Ibid.

221 Harry L. Carey, Assistant General Counsel for General Law, U.S. Department of Housing and Urban Development, memorandum to Wagner Jackson, Director, Office of Fair Housing Enforcement and Section 3 Compliance, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, June 2, 1989.

complainant is likely to prevail in a trial on the merits of the complaint."[222] This evidence includes statements and affidavits of the complainant(s), other witnesses to the alleged discriminatory action, and/or testers.[223]

Regardless of either agency's official position, it appears that the day-to-day practice of prompt judicial actions has affected the frequency of requests by regional counsel. According to one former OGC official, the number of prompt judicial action requests is significantly lower than anticipated by the Secretary, because regional counsel tend prematurely to eliminate from consideration cases that they believe will not survive DOJ's standards.[224] In its comments on this report, DOJ took exception to the claim that its standards have the effect of reducing the number of prompt judicial action requests from HUD. According to the Assistant Attorney General for Civil Rights, on numerous occasions, DOJ has brought possible prompt judicial actions to the attention of HUD for investigation.[225]

Judicial Review

The FHAA provides that any party aggrieved by a final order for relief may obtain a review of that order in the appropriate U.S. court of appeals.[226] Under the regulations, the party must file the petition for review within 30 days of the date of issuance of the final decision.[227]

As HUD's lawyer, OGC may not appeal to Federal court any adverse administrative decisions that become the final order of the agency.[228] Thus, if an aggrieved person on whose behalf a complaint was originally filed wishes to preserve a right to appeal an adverse administrative decision, the aggrieved person must intervene in the proceedings and provide his or her own representation.[229]

If a party aggrieved by the administrative decision chooses to appeal the final order, DOJ is responsible for the judicial review litigation actions before the court of appeals regardless of the relief sought.[230] However, in recognition of HUD's interest in the outcomes of appeals, the memorandum of understanding between HUD and DOJ provides for some coordination between the two agencies with respect to the litigation of the appeals.[231]

DOJ may authorize HUD to litigate appeals "in appropriate cases to be determined by the Department of Justice after consultation with HUD" subject to DOJ's ultimate review.[232] Although DOJ has not authorized HUD to litigate any appeals to date, the memorandum of understanding provides guidance for delegating responsibility in those instances. According to the memorandum, the two agencies should work closely to draft briefs and pleadings and to prepare the record for the court. Any brief that DOJ wishes to file will be submitted to HUD for "suggestions and

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222 Ibid.

223 Ibid.

224 Pratt December 1993 interview.

225 *See* DOJ Comments, p. 5.

226 42 U.S.C. § 3612(i) (1988); 24 C.F.R. § 104.950(a) (1993).

227 42 U.S.C. § 3612(i)(2) (1988); 24 C.F.R. § 104.950(a) (1993).

228 *HUD Complainants Cover Uncertain Legal Terrain With Intervention Efforts,* 1 Fair Housing-Fair Lending (P-H), vol. 7, no. 9, ¶ 9.2, p. 4 (Mar. 1, 1992).

229 For a discussion of the intervention process, see chap. 4.

230 Memorandum of Understanding, p. 8.

231 Ibid.

232 Ibid., p. 9.

comments," but any brief submitted by HUD "shall be reviewed by DOJ" before it is filed.[233] Thus, it appears that although HUD's appellate arguments are subject to final approval from DOJ, DOJ is only required to give HUD the opportunity to comment on DOJ briefs.

DOJ's appeal in *HUD v. Baumgardner* illustrates the effect that DOJ's involvement in Federal court litigation has on shaping HUD's internal strategy for litigating administrative cases.[234] The complainant alleged that the respondent refused to rent a four-bedroom house to the complainant and three other single men because of their gender.[235] The ALJ had awarded the aggrieved parties $2,000 for "economic loss including inconvenience," $500 for emotional distress, and $2,500 for "loss of civil rights," and assessed a civil penalty of $4,000.[236]

On appeal, the sixth circuit reduced the civil penalty to $1,500 and reduced damages from $5,000 to $1,500.[237] The $2,000 award for "economic loss including inconvenience," was reduced to $1,000, "giving HUD and [complainant] the benefit of some considerable doubt."[238] The $500 award for emotional distress was also affirmed reluctantly, based on giving the complainant the same "benefit of the doubt."[239] The $2,500 award for "loss of civil rights" was overturned completely as an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case."[240]

On appeal, DOJ did not try to defend the award for loss of civil rights as compensation for the abstract value of the complainant's civil rights, but instead argued that the award was intended to redress a compensable injury, namely, the loss of a housing opportunity.[241] According to HUD, OGC strongly voiced its objection to the argument raised in DOJ's appellate brief. After DOJ refused to change its position, "HUD continued to press Justice to revise the brief to minimize the damage to HUD's position on the issue but, unfortunately, Justice made only the most minimal concessions on this issue."[242]

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233 Ibid.

234 Baumgardner v. HUD, 960 F.2d 572 (6th Cir. 1992).

235 HUD v. Baumgardner, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006, at 25,094 (HUD ALJ Nov. 15, 1990).

236 *Id.* at 25,099-101.

237 Baumgardner v. HUD, 960 F.2d at 580-83. Although the reduction was due in part to HUD's procedural delays, the court considered the award unduly punitive for a respondent who had made a relatively innocent mistake in a career otherwise unblemished by discriminatory practices. *Id.* at 583.

238 *Id.* at 580-81.

239 *Id.* at 581.

240 *Id.* at 583.

241 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, memorandum to Frank Keating, General Counsel, Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, all regional counsel, and all regional directors of FHEO, June 22, 1992, p. 6 (hereafter cited as Wilson, June 22, 1992 memorandum). *See also* Baumgardner v. HUD, 960 F.2d at 581.

242 HUD Comments, p. 12. *See also* Strong, HUD OGC December 1993 interview. Jonathan Strong stated that "lost civil rights" is a statutory intangible loss as opposed to the personal intangible loss contemplated by an award for "lost housing opportunity." However, Strong also stated that asking for both types of damages is strategically difficult since a request for multiple intangible injuries might cause an ALJ to question the validity of the complainant's tangible losses. In addition, Strong indicated that because both intangible awards do not generally exceed $500, they are, in effect, interchangeable.

DOJ's position on appeal is alluded to in the appellate opinion, but is more clearly revealed in an internal HUD memorandum.[243] Nine days after DOJ argued the appeal in *Baumgardner,* OGC issued a memorandum to all regional counsel stating that DOJ does not consider the loss of a complainant's civil rights to be a compensable injury.[244] Accordingly, the memorandum further instructed HUD attorneys to seek damages for the compensable loss of housing opportunity in their administrative charges, where appropriate, rather than seek compensation for the loss of civil rights.[245] Following the circuit court's ruling in *Baumgardner,* another HUD memorandum stated that HUD attorneys litigating claims before ALJs need to link any presumed damages for loss of civil rights to actual injuries, in order to avoid future appellate reversals.[246]

However, although the court in *Baumgardner* stated that the allowed damages accounted sufficiently for this complainant's "intangible dignitary interests," the court did not rule out the possibility that presumed damages may be possible in other civil rights cases in which the complainant can prove actual injury.[247] A sixth circuit opinion cited a Supreme Court case holding that:

> When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for. Presumed damages must be tied to a compensatory purpose for harms that may be impossible to measure.[248]

In addition to this narrow possibility of compensation for intangible injuries recognized by the Supreme Court and the sixth circuit majority, Circuit Judge Nathaniel Jones wrote a concurrence to "reenforce the majority's observation that presumed damages may be appropriate for civil rights violations."[249] Judge Jones' concurrence, although not controlling, appears to serve as an invitation to both HUD and DOJ to continue to pursue the loss of civil rights damages in the sixth circuit in a case with better facts to support the award.

Based on the potential claim for intangible injuries suggested by the Supreme Court and

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243 HUD stated in its comments that only DOJ could have appealed the decision of the sixth circuit in *Baumgardner.* HUD added that, "The Sixth Circuit's rejection of an award for loss of civil rights was not inconsistent with Justice's position." HUD Comments, p. 12.

244 Harry L. Carey, Assistant General Counsel for Fair Housing, U.S. Department of Housing and Urban Development, memorandum to all regional counsel, Aug. 15, 1991. DOJ argued the appeal on Aug. 8, 1991. *See* Baumgardner v. HUD, 960 F.2d at 572.

245 Ibid. Loss of housing opportunity refers generally to the aspects of a housing situation uniquely valuable to the discrimination victim and not otherwise reflected in the sale or rental value, such as proximity to school or work. Thus, in appropriate circumstances lost housing opportunity is a genuinely compensable injury not properly conflated with the abstract value of a right, which has no relation to the victim's actual experience.
DOJ argued that the ALJ intended the award for loss of civil rights to serve as compensation for actual injury, not the abstract value of civil rights. However, the court rejected DOJ's assertion, and held that the ALJ had intended "loss of civil rights" to be "an added award for an intangible injury not in the nature of proven compensatory damages." 960 F.2d at 582.

246 Wilson, June 22, 1992 memorandum, p. 6.

247 HUD v. Baumgardner, 960 F.2d at 583.

248 Memphis Community School Dist. v. Stachura, 477 U.S. 299, 310-11 (1986) (citations omitted). Although the Supreme Court ruled against the plaintiff in this particular 42 U.S.C. § 1983 claim, the Court did not entirely preclude an award of presumed damages.

249 HUD v. Baumgardner, 960 F.2d at 585.

the sixth circuit, it is possible to argue that, given a case with better facts, presumed damages may be appropriate. In addition, even if an award for the loss of civil rights is precluded in the sixth circuit, it may still be possible to seek damages for the loss of civil rights in other circuit courts which have not ruled against such an award.[250]

Elections

Once HUD files a charge, the complainant (including the Assistant Secretary for FHEO if HUD initiated the complaint), the respondent, or any aggrieved party on whose behalf a charge was filed may elect to litigate the claim in a Federal civil action rather than in a HUD administrative proceeding.[251] The right to remove a fair housing complaint to Federal court was included in the 1988 FHAA in order to satisfy the constitutional right to a jury trial in common law suits involving an amount in controversy over $20; certain members of Congress believed that an administrative proceeding allowing for damage awards without a jury violated the seventh amendment.[252] Failure to elect a judicial proceeding amounts to a waiver of any claim asserting that the HUD administrative proceeding violates the constitutional right to a jury trial.[253]

The party wishing to pursue a civil action has 20 days from receipt of the charge to make the election.[254] If the Assistant Secretary chooses to elect a civil action, she must do so within 20 days of service of the charge.[255] In addition, the notice of election must be filed with the Office of Administrative Law Judges (OALJ) and served on the General Counsel, the Assistant Secretary, and the other parties.[256] If a civil trial begins under any Federal or State law regarding an alleged discriminatory housing practice, the ALJ may not continue any administrative proceedings regarding the challenged practice.[257]

Once an election is made, the General Counsel must immediately authorize a civil action in Federal district court seeking relief under the FHAA on behalf of the aggrieved person.[258] Upon authorization from the General Counsel, the Attorney General must commence and maintain the civil action within 30 days.[259] Although DOJ is responsible for the litigation of the complaint, the regulations specifically provide that HUD's General Counsel should be available for consultation with the Attorney General to discuss appropriate litigation strategies in the event of new court decisions or new evidence relevant to the original reasonable cause determination.[260]

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250 In commenting on this report, the Department of Justice stated that "given the ruling of the Supreme Court in the *Stachura* case that the 'abstract value' of a right cannot form the basis for damages, there had to be an actual injury cause by any such loss of right in order for compensation to be appropriate. The *Stachura* decision is quite absolute on this point, and we have no basis for believing that there will be any different result in circuits other than the Sixth Circuit on this issue." DOJ Comments, p. 2 of attachment.

251 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(a) (1993).

252 *See* Schwemm, *Law and Litigation,* § 24.8(1).

253 *See* ibid.

254 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(b) (1993).

255 42 U.S.C. § 3612(a) (1988); 24 C.F.R. § 103.410(b) (1993).

256 24 C.F.R. § 103.410(b) (1993).

257 42 U.S.C. § 3612(f) (1988).

258 24 C.F.R. § 103.410(d) (1993).

259 42 U.S.C. § 3612(o)(1) (1988).

260 24 C.F.R. § 103.410(e) (1993); 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing

HUD included the consultation provision in the regulations to give the agencies an opportunity to discuss appropriate litigation strategies in the event of new court decisions or new evidence relevant to the original reasonable cause determination.[261] Many people commenting on the regulations claimed that the consultation provision "is unnecessary, serves no useful purpose, may be used by DOJ to reduce its caseload, is not required by statute and should be deleted."[262] However, because an election claim might not be filed in district court until 56 days after the charge is issued,[263] it is possible that new facts or court decisions may surface rendering the cause determination inappropriate and the civil action unnecessary. If new information does materialize, HUD may amend its final investigative report or void the reasonable cause determination before DOJ is required to proceed with the litigation of the claim.[264] Thus, HUD included the consultation provision:

> for the sole purpose of assuring that all civil actions are supportable at the time of filing and, in line with the intention of Congress, to ensure that the Secretary is the official making the determination whether to proceed with...[the cause of action].[265]

The United States, represented by DOJ, is the plaintiff in the lawsuit initiated on behalf of the aggrieved parties. However, the statute provides that any person aggrieved by the issues in the case has the right to intervene in the civil action.[266] If the court finds that a discriminatory practice has occurred or is about to occur, it may grant any relief that would be available to the aggrieved party in a private civil action.[267] Such relief may include actual and punitive damages, permanent or temporary injunctions, temporary restraining orders, or any other order the court may wish to impose.[268] In addition, the court may award to any prevailing party, other than the United States, a reasonable attorney's fee and costs.[269] A nonintervening aggrieved party will not be permitted damages if he or she refuses to comply with court-ordered discovery.[270]

To allow DOJ the maximum amount of time to prepare the charges brought as elections, HUD's General Counsel redelegated the authorization of the Attorney General to the

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Fair Housing Amendments Act of 1988).

261 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

262 *Id.*

263 In addition to a copy of the reasonable cause determination and charge, each party receives a standard notice from the OALJ explaining each party's rights and responsibilities and a scheduled hearing date. The standard notice states that an election to proceed in district court must be received by the OALJ chief docket clerk within 26 days from the date the charge was mailed. *See, e.g.*, HUD v. Dove Creek Apts., HUD ALJ No. 06-91-0722-1 (Mar. 18, 1992) (determination of reasonable cause and charge of discrimination). Once the election is received by the OALJ, DOJ has 30 days to file the claim in Federal district court.

264 42 U.S.C. § 3610(b)(5)(B) (1988).

265 24 C.F.R. Ch. I, Subch. A, App. I, at 963 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

266 42 U.S.C. § 3612(o)(2) (1988).

267 *Id.* § 3612(o)(3).

268 *Id.* § 3613(c).

269 *Id.* § 3612(p).

270 *Id.* § 3612(o)(3).

regional counsel, thus bypassing the need for OGC to serve as an intermediary.[271] In addition, a few months before the official delegation, OGC issued a memorandum to all regional counsel requiring them to send case files directly to DOJ as soon as they become aware of the fact that an election has been made.[272] The memorandum states that neither an official authorization letter nor the OALJ's Notice of Election is necessary before transferring the case file.[273] The memorandum states that these files can be forwarded separately when they are completed.[274]

In 1992 OGC issued a memorandum to all regional counsel as to whether settlement negotiations should be conducted during the 30-day period between issuance of the charge and expiration of the opportunity to elect for a judicial hearing.[275] According to the memorandum, it has generally been the practice of both OGC and regional counsel to avoid attempting settlement in this period. Despite the general HUD policy favoring conciliation and settlement of HUD charges, OGC has avoided settlement in this period for several reasons. One reason is to "keep respondents from utilizing such discussions to assist them in 'forum shopping' between HUD's administrative hearing process and a federal civil action."[276] The emphasis on preventing respondents from forum shopping may result from the fact that respondents consistently elect judicial proceedings at a rate of 79 percent to 21 percent.[277]

According to Assistant General Counsel Harry Carey, OGC no longer insists that regional counsel avoid settlement during the election period.[278] Instead, OGC policy indicates that while regional counsel still do not solicit settlements during the election period, regional counsel are authorized to negotiate settlements upon request of the respondents.[279]

One issue of controversy between HUD and DOJ involves whether and to what extent DOJ may return elected charges to HUD either for further investigation or for a revised reasonable cause determination.[280] Although the FHAA requires DOJ to file a lawsuit in every election,[281] DOJ has returned a few

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271 56 Fed. Reg. 41,369 (1991).

272 George L. Weidenfeller, Deputy General Counsel for Operations, U.S. Department of Housing and Urban Development, memorandum to all regional counsel (May 17, 1991).

273 Ibid.

274 Ibid.

275 Carole Wilson, Associate General Counsel, memorandum to all regional counsel regarding settlement of Title VII cases during election periods, Oct. 6, 1992.

276 Ibid.

277 Janet Rouamba, chief docket clerk, Office of Administrative Law Judges, telephone interview, Oct. 14, 1993. For a further discussion of elected cases, see chap. 11.

278 Harry L. Carey, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview in Washington, D.C., Dec. 15, 1993 (hereafter cited as Carey, HUD OGC December 1993 interview).

279 Ibid.

280 *See* Strong, HUD OGC July 1993 interview; Strong, HUD OGC December 1993 interview.

281 42 U.S.C. § 3612(o) (1988).

election charges for further investigation by HUD.[282] DOJ interprets the consultation provision of the regulations as allowing DOJ to return elected charges to HUD for further analysis and/or reconsideration.[283] DOJ and HUD disagree over both the limits of DOJ's procedural authority to return elected charges and the extent to which DOJ may challenge the substance of HUD's reasonable cause determinations.[284]

OGC has stated that DOJ has inappropriately returned a few election cases to HUD. OGC believes that DOJ's refusals to file certain elected charges represent an impermissible review of HUD's reasonable cause determinations.[285] OGC argues that, in the event that DOJ discovers new information that might alter the initial reasonable cause determination, DOJ may only seek consultation from the General Counsel, not return cases unilaterally.[286] However, DOJ maintains it does not return elected charges unless the charge issued by HUD is flawed.[287] Although DOJ acknowledges its obligation to support HUD's reasonable cause determinations and charges, DOJ contends that it also has a responsibility to abide by the rules of Federal court that prevent the filing of frivolous claims.[288] Thus, although HUD insists that DOJ impermissibly returns cases based on the substantive policy issues involved in the charges, DOJ maintains that elected charges are returned only when the complaint is based on insufficient evidence or procedural error.

For example, in one election case that DOJ returned to HUD, OGC had issued a section 804 charge against the Farmers Home Administration (FmHA) of the Department of Agriculture and the owner of the housing development receiving FmHA Rural Rental Housing Assistance funds.[289] In returning the charge against FmHA, DOJ asserted that the doctrine of sovereign immunity prevents DOJ from filing suit against another government

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282 According to Joseph Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, DOJ has returned no more than five election charges to HUD during the entire FHAA period. *See* Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993 (hereafter cited as Rich interview). However, HUD OGC believes that DOJ has refused to file at least 10 elected charges since the FHAA took effect. *See* Strong, HUD OGC July 1993 interview.
When a case is returned to HUD, the initial charge is voided and refiled later if appropriate. *See* Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, telephone interview, Oct. 21, 1993 (hereafter cited as Strong October 1993 interview). According to Joseph Rich, HUD has withdrawn four out the five elected charges returned by DOJ. *See* Rich interview.

283 *See, e.g.,* John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, Oct. 29, 1991, citing 24 C.F.R. § 103.410(e) (1993). *See also* Rich interview.

284 Pratt December 1993 interview.

285 Pratt, HUD OGC July 1993 interview; Wilson, HUD OGC December 1993 interview.

286 24 C.F.R. § 103.410(e) (1993).

287 Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Dec. 20, 1993 (hereafter cited as Hancock December 1993 interview).

288 Hancock December 1993 interview, citing Fed. R. Civ. P. 11.

289 HUD v. FmHA, HUDALJ No. 08-90-0195-1 (Dec. 4, 1992) (determination of reasonable cause and charge of discrimination). DOJ filed the claim against the owner in United States v. Sollenberger, DJ No. 175-13-109 (Jan. 28, 1993), and a consent decree was entered July 1, 1993.

agency.[290] However, OGC's policy has consistently supported HUD's ability to issue administrative charges against other governmental entities under the FHAA.[291]

Although OGC consistently argues in favor of an FHAA waiver of sovereign immunity against other Federal agencies, Paul Hancock believes that HUD policy does not favor a waiver of sovereign immunity when HUD is the defendant. Hancock stated that HUD always raises a sovereign immunity defense whenever the agency is sued by a private complainant.[292] HUD stated in its comments that the preamble to its regulations recognizes HUD's responsibility to investigate, make reasonable cause determinations, conduct administrative proceedings, and use HUD employees to prosecute claims whenever complaints are filed against HUD.[293]

It is said that "The doctrine of sovereign immunity generally protects the United States and its agencies and departments from suit unless Congress has waived that immunity in a statute."[294] Although it remains unclear whether the FHAA includes a sufficient waiver of sovereign immunity,[295] HUD argues that the FHAA was amended to allow charges against all respondents, including government entities, not merely against private persons.[296] In addition, HUD believes that regardless of DOJ's views on sovereign immunity under the FHAA, DOJ is required to support HUD's position on the issue of proper respondents under the act.[297] However, DOJ's Housing and Civil Enforcement Section asserts that under current DOJ policy, it lacks authority to file suits against other Federal agencies under the FHAA.[298]

HUD reports that DOJ is also unwilling to proceed in election cases that do not involve "significant" issues of law, although they may involve blatant violations of the FHAA.[299] For

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290 Hancock December 1993 interview citing Exec. Order No. 12,146, 3 C.F.R. 409 (1979). The Executive order cited by Paul Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice does not appear explicitly to prevent civil law suits between agencies. If two executive agencies, whose heads are not named to a term of years, cannot resolve a legal dispute, the matter will be submitted to the Attorney General, unless "a specific statutory vesting of responsibility for a resolution" is elsewhere. *See* Exec. Order No. 12,146, 3 C.F.R. 411, § 1-402.

291 *See* Frank Keating, General Counsel memorandum to Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Jan. 22, 1992. *See also* Harry L. Carey, Assistant General Counsel for Fair Housing, memorandum to John Dellera, regional counsel, Feb. 19, 1993. Recently, DOJ's Office of Legal Counsel issued a memorandum stating that, although the antidiscrimination provisions of the FHAA apply to Federal agencies, the doctrine of sovereign immunity bars recovery of monetary damages for their violations of the FHAA. *See* Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice to James S. Gilliland, General Counsel, U.S. Department of Agriculture, Apr. 18, 1994. *See also DOJ: Government Immune from Monetary Damages under Fair Housing Act,* 1 Fair Housing-Fair Lending (P-H), vol. 9, no. 12, ¶ 2.1, pp. 1–3 (June 1, 1994).

292 *See* Hancock December 1993 interview.

293 *See* HUD Comments, p. 12, *citing,* 24 C.F.R. Ch. I, Subch. A, App. I, pp. 947–48 (1993) (Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988).

294 Schwemm, *Law and Litigation* § 12.3(4)(d), p. 12-34.

295 *See* Schwemm, *Law and Litigation,* § 12.3(4)(d), pp. 12-34 to 12-35.

296 Frank Keating, General Counsel memorandum to Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Jan. 22, 1992, citing 42 U.S.C. §§ 3602(n), 3610(a)(1)(B)(ii) (1988).

297 Pratt December 1993 interview.

298 Hancock December 1993 interview. Paul Hancock did contemplate the possibility that the FHAA could be amended to allow HUD to charge a Federal respondent in an internal HUD administrative hearing process without a right to election. According to Hancock, an administrative hearing would not raise the same conflicts of representation that would occur if DOJ had to litigate in Federal court representing both the complainant and the respondent.

example, in one elected handicap charge returned by DOJ, HUD maintains that DOJ refused to file the claim because the complaint did not involve a novel issue, and because DOJ does not agree with HUD's interpretation of the FHAA reasonable accommodation requirement.[300] HUD's complaint alleged that the respondent condominium association had failed to reasonably accommodate the complainant's disability by allowing her to use a flotation device in the swimming pool and had made unreasonable requests for information regarding the nature of the complainant's disability.[301]

In returning the case, DOJ maintained that the charge was based on a factual error. The DOJ investigation alleged that although the respondent condominium association had threatened the complainant with a fine, the association had not actually prevented her from using the flotation device while she resided at the condominium.[302] Furthermore, DOJ disagreed at least in part with the basis for HUD's reasonable cause determination. DOJ asserted that the respondents' request for more information regarding the nature of the complainant's disability was not unreasonable.[303] Thus DOJ directly and, in HUD's view, impermissibly challenged the Secretary's authority to make reasonable cause determinations.

Regardless of DOJ's reasons for returning the elected charges, HUD believes that DOJ should be willing to deputize OGC attorneys so that HUD can litigate the claims that DOJ does not wish to pursue. To date, DOJ has refused to do so.[304]

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299 Wilson, HUD OGC July 1993 interview. OGC reports that DOJ calls issues having little legal significance "swimming pool cases," because these cases often involve housing units that discriminate against families by restricting swimming pool use to adults only. OGC believes that DOJ's unwillingness to file these claims implies that the cases are not worthy of DOJ's attention.

300 Strong October 1993 interview.

301 HUD v. The Club at East Brunswick Condominium Ass'n, HUDALJ No. 02-91-0940-1 (HUD Jan. 29, 1993) (determination of reasonable cause and charge of discrimination).

302 Hancock December 1993 interview.

303 Ibid.

304 Wilson, HUD OGC July 1993 interview.

11. DOJ Policy and Implementation

The U.S. Department of Justice (DOJ) plays a leading role in the enforcement of the Fair Housing Amendments Act of 1988 (FHAA).[1] Under the original Fair Housing Act of 1968,[2] the Attorney General was authorized to file suits that either challenged a pattern or practice of housing discrimination, or were of significant public importance regarding such discrimination.[3] Under the 1968 law, courts ruled that the Attorney General could not obtain actual or punitive damages on behalf of aggrieved parties represented by DOJ,[4] but could only obtain equitable relief in the form of injunctions or declaratory judgments, and occasionally restitution of victims' security deposits or other discriminatory overcharges.[5] If conciliation efforts failed to resolve a fair housing complaint, victims of discrimination had to pursue their claims in private civil actions in order to obtain full monetary relief.[6] In addition to creating an administrative adjudication process within the U.S. Department of Housing and Urban Development (HUD), the FHAA dramatically altered DOJ's litigation options. Congress expanded the Attorney General's litigation authority and the types of relief available to the Attorney General for resolving fair housing complaints. In turn, the Attorney General's primary civil litigation responsibilities under Title VIII have been delegated internally to the Housing and Civil Enforcement Section[7] of the Civil Rights Division.

To ensure coordination, consistency, and cooperation between HUD and DOJ in the enforcement of the FHAA, both departments have executed a "Memorandum of Understanding."[8] The memorandum outlines the roles and responsibilities of each department with regard to several matters: pattern or practice cases, prompt judicial actions, land use and zoning cases, breaches of conciliation agreements, subpoena enforcements, prosecutions for interference with fair housing rights, judicial review and enforcement of

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1 42 U.S.C. §§ 3601-16, 3617-19, 3631 (1988).

2 Fair Housing Act of 1968, Pub. L. No. 90-284, § 8, 82 Stat. 85 (1968).

3 42 U.S.C. § 3613 (1988).

4 *See* Robert G. Schwemm, *Housing Discrimination Law* (Washington, D.C.: The Bureau of National Affairs, 1983), p. 286 (hereafter cited as Schwemm, *Housing Discrimination Law).*

5 Ibid., p. 287.

6 Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Feb. 19, 1991, transcript, p. 7 (hereafter cited as Hancock 1991 interview).

7 This unit is also responsible for the enforcement of the public accommodations provisions of the 1964 Civil Rights Act (*see* Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., June 24-25, 1993 (hereafter cited as Hancock June 1993 interview)) and the Equal Credit Opportunity Act Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances berry, Chairperson, U.S. Commission on Civil Rights, July 13, 1994, attachment, p. 2 (hereafter cited as DOJ Comments, attachment).

8 "Memorandum of Understanding between DOJ and HUD Concerning Enforcement of the Fair Housing Act, as Amended by the Fair Housing Amendments Act of. 1988," Dec. 7, 1990 (hereafter cited as Memorandum of Understanding).

HUD administrative law judge (ALJ) orders, and. judicial elections, as well as referrals of matters from DOJ to HUD, press relations, resolutions of differences, and exchanges of information.[9]

DOJ-Initiated Civil Enforcement

The Attorney General may initiate a civil action in Federal district court whenever she has reasonable cause to believe that an individual or group is involved in "a pattern or practice of resistance to the full enjoyment of any of the rights" granted by the FHAA.[10] In addition, the FHAA statute and regulations require the HUD General Counsel to refer to the Attorney General any claims reasonably believed to involve a pattern or practice of discrimination.[11] Although the Federal courts decide whether or not DOJ has proven that a pattern or practice of discrimination actually occurred, the courts will not review the Attorney General's initial reasonable cause determination.[12] Thus, the Attorney General's discretion and authority to file claims are not in dispute. The FHAA does not require DOJ to file a pattern or practice claim within a specific statutory timeframe. In fact, because pattern or practice cases require extensive investigation over long periods of time, DOJ pattern or practice claims have never been rejected for failure to file in a timely manner.[13] However, because the FHAA now allows DOJ to obtain monetary relief on behalf of an aggrieved party, some may argue that DOJ should be required to meet the same statute of limitations required of private litigants.[14]

Although "pattern or practice" is not defined in the statute, the Supreme Court has held that "the words reflect only their usual meaning."[15] The definition of pattern or practice applied to other civil rights laws is helpful with respect to Title VIII, to wit:

> more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.[16]

"Pattern or practice" has been construed to mean discriminatory policies or practices that

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9 Ibid.

10 42 U.S.C. § 3614(a) (1988).

11 *See id.* §§ 3610(e)(2), 3614(a) (1988); 24 C.F.R. § 103.500(b) (1993).

12 *See* Robert G. Schwemm, *Housing Discrimination: Law and Litigation,* (Deerfield, IL: Clark Boardman Callaghan, 1992), § 26.2(1), p. 26-4 (citing United States v. Yonkers Bd. of Ed., 624 F. Supp. 1276, 1291 n.9 (S.D.N.Y. 1985), *aff'd,* 837 F.2d 1181 (2d Cir. 1987), *cert. denied,* 486 U.S. 1055 (1988)) (hereafter cited as Schwemm, *Law and Litigation)*

13 Ibid. § 26.2(4), p. 26-11.

14 Ibid. A private civil action initiated by an aggrieved person must be filed not later than 2 years after the occurrence or termination of an alleged discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A) (1988).
Similarly, while the FHAA does not impose a statute of limitations on Secretary-initiated complaints, HUD's own regulations require the Secretary to file a complaint within 1 year of the occurrence or termination of the alleged discriminatory housing practice. *Compare* 42 U.S.C. § 3610(a)(1)(A)(i) *with* 24 C.F.R. § 103.15 (1993). *See generally* Schwemm, *Law and Litigation,* § 24.4(1), p. 24-9. For a further discussion of Secretary-initiated complaints, see chap. 10.

15 International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.11 (1977), *remanded,* EEOC v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981). *See also* Schwemm, *Law and Litigation,* § 26.2(2), p. 26-5.

16 431 U.S. at 336.

affect groups or classes rather than isolated episodes affecting only individuals.[17] In his treatise on the subject, housing expert Robert Schwemm has noted that although most successful pattern or practice cases have involved three or more instances of discriminatory behavior, DOJ need not demonstrate a minimum number of discriminatory acts.[18] As Schwemm noted, the "key to a pattern or practice case is the defendant's overall policy toward protected class homeseekers."[19] Isolated instances of discrimination against particular individuals have been used, not to establish a pattern of discriminatory behavior, but as examples of the defendant's overall behavior patterns.

Similarly, the FHAA permits the Attorney General to file a claim of discrimination not only against an individual, but also against any "group of persons" believed to have engaged in a pattern or practice of discriminatory behavior.[20] The FHAA does not require DOJ to prove that each member of the group independently engaged in discriminatory behavior, but rather that the behavior of the individuals taken as a whole was discriminatory, as in blockbusting or steering practices.[21]

The FHAA also authorizes the Attorney General to file suit when there is reasonable cause to believe that "any group of persons has been denied any of the rights granted by this title [FHAA] and such denial raises an issue of general public importance. . . ."[22] The "general public importance" provision gives DOJ broad discretion to initiate claims of housing discrimination.[23] DOJ may file suit against a defendant for an issue of general public importance even if the alleged discriminatory practice does not involve a pattern or practice of behavior.[24] However, the statutory language indicates that Congress intended to limit DOJ's enforcement power regarding private citizens to violations with a measurable public impact.[25] Courts have also held that the Attorney General's demonstration of reasonable cause in cases of general public importance, as with pattern and practice cases, is not reviewable by the courts.[26]

DOJ is no longer limited to seeking only injunctive relief in the cases it pursues, but may also obtain monetary damages for aggrieved persons and civil penalties to vindicate the public interest in certain types of claims.[27] To permit greater coordination between private civil claims and DOJ actions, the FHAA allows DOJ to obtain monetary

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17 Administrative Conference of the United States, "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act," by Leland Ware (Washington, D.C.: January 1992), p. 24 (hereafter cited as Ware, "New Weapons").

18 Schwemm, *Law and Litigation,* § 26.2(2), p. 26-6.

19 Ibid.

20 42 U.S.C. § 3614(a) (1988).

21 United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 123 (5th Cir.), *cert. denied,* 414 U.S. 826 (1973).

22 42 U.S.C. § 3614(a) (1988).

23 United States v. Northside Realty Assocs., 474 F.2d 1164, 1168 (5th Cir. 1973), *later appeal,* 501 F.2d 181 (5th Cir. 1974), *cert. denied,* 424 U.S. 977 (1976) (based on pre-FHAA statute).

24 *See* United States v. Hunter, 459 F.2d 205, 218 (4th Cir. 1972), *aff'g* 324 F. Supp. 529 (D. Md. 1971), *cert. denied,* 405 U.S. 934 (1972); Cabrera v. Fischler, 814 F. Supp. 269 (E.D.N.Y. 1993).

25 *See* Schwemm, *Law and Litigation,* § 26.2(1), p. 26-4, (citing United States v. Hunter, 459 F.2d at 217).

26 United States v. Yonkers Bd. of Ed., 624 F. Supp. at 1291 n.9; *see* Schwemm, *Law and Litigation,* § 26.2(1), p. 26-4.

27 42 U.S.C. § 3614(d)(1) (1988).

damages for aggrieved persons, even if the aggrieved parties have not intervened in the DOJ action or filed their own private claim.[28] Under the statute, civil penalties are available in both pattern or practice and general public importance cases.[29] Civil penalties in these cases may include up to $50,000 for the first violation,[30] and up to $100,000 "for any subsequent violation."[31]

DOJ may also participate in private civil actions brought by aggrieved persons.[32] Under the FHAA, private parties have 2 years from the date of occurrence or termination of the alleged discriminatory housing practice in which to file a private civil action.[33] The Attorney General may intervene in a civil action if she certifies that the case is of general public importance.[34] However, if the Attorney General does not intervene in the private action, DOJ may still bring its own civil action against the same defendant at a later date.[35] DOJ and the private plaintiff may consolidate their claims against the same defendant, or proceed separately without limitations based on the actions or results obtained by the other.[36] If the Attorney General intervenes in a private civil action, she may obtain preventive relief in the form of a permanent or temporary injunction, temporary restraining order, or other order necessary to guarantee the full enjoyment of rights provided by the FHAA.[37] The court also has the discretion to award any other appropriate relief, including actual and punitive monetary damages, to the aggrieved party, as well as attorneys' fees and costs to prevailing parties other than the United States.[38] In lieu of actual interventions into private civil actions, DOJ often files *amicus curiae* briefs in support of the complainant.[39]

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28 *See* Schwemm, *Law and Litigation,* § 25.1, pp. 25-4 to 25-5.

29 42 U.S.C. § 3614(d)(1)(C) (1988). In addition, civil penalties are available for any claims involving patterns or practices of discrimination, the legality of zoning or land use ordinances, and enforcement of conciliation agreements. However, civil penalties are not available in judicial election actions under 42 U.S.C. § 3612(o)(3).

30 *Id.* § 3614(d)(1)(C)(i).

31 *Id.* § 3614(d)(1)(C)(ii).

32 Aggrieved persons may pursue a private civil action in addition to or in lieu of filing a complaint with HUD. *See id.* § 3613(a). An aggrieved person is not automatically a party to the HUD charge, but the ALJ may permit the aggrieved person to intervene on his or her own behalf if an intervention request is timely filed. *Id.* § 3612(c) (1988); 24 C.F.R. § 104.200(a)(3) (1993). For a further discussion of interventions in HUD complaints, see chap. 4.

33 *Id.* § 3613(a)(1)(A). Under the 1968 act, individuals were authorized to file suit and could win both injunctive relief and actual damages. In addition, the courts could assess up to $1,000 in punitive damages. Complainants in private actions had to file their claims within 180 days of the alleged occurrence of the discriminatory practice. *See id.* § 3612(a), (c).

34 *Id.* § 3613(e). Similarly, the aggrieved party may intervene in a § 3614 suit brought by DOJ and may obtain the same relief as is available in a private civil action. *See id.* § 3614(e).

35 *See* Schwemm, *Law and Litigation,* § 26.1, p. 26-3.

36 Ibid. § 25.1, p. 25-4.

37 42 U.S.C. § 3613(c)(1) (1988).

38 *Id.* § 3613(c)(1)-(2). Although the statute appears to indicate that DOJ cannot obtain civil penalties when intervening in a private civil action, Housing and Civil Enforcement Chief Paul Hancock does not concede that civil penalties are precluded in interventions, although DOJ has not attempted to obtain civil penalties through this method. Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Sept. 23, 1993 (hereafter cited as Hancock September 1993 interview).

39 Hancock September 1993 interview.

Criminal Prosecutions

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

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by [provisions of the FHAA].[40]

A violation of this section may be brought as a HUD complaint, as a private lawsuit, or as a civil lawsuit or criminal prosecution by the Attorney General.[41]

The Attorney General may initiate a criminal prosecution for coercion, intimidation, or interference pursuant to the FHAA. Under the statute, the Attorney General may prosecute, "whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with" persons exercising their fair housing rights under Title VIII.[42] If the defendant interferes with housing rights without causing bodily injury, as in most cross-burning situations, the defendant is charged with a misdemeanor and can be fined up to $1,000 and/or imprisoned for not more than 1 year.[43] If bodily injury results from the intimidation or interference, the crime is elevated to a felony and the defendant may be fined up to $10,000 and/or imprisoned for not more than 10 years.[44] If death results, the defendant may be sentenced to life imprisonment.[45]

In 1990 Congress directed the United States Sentencing Commission to enhance the penalties for crimes committed in furtherance of discrimination.[46] Under the sentencing guidelines, a defendant convicted of criminal interference involving the threat or use of force may be sentenced as a felon to 10 years' imprisonment if no injury occurred, or 15 years if injury occurred.[47] If the defendant

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40 42 U.S.C. § 3617 (1988). These actions can be brought by either HUD or DOJ.

41 A complaint alleging interference may be brought to HUD pursuant to § 3610(a)(1)(A); filed as a private civil action pursuant to § 3613(a); and/or prosecuted by the Attorney General pursuant to § 3631 if the matter involves the use of force or threat of force.

42 42 U.S.C.A. § 3631 (West Supp. 1993). Hereafter, the phrase "criminal interference" will be used to refer to all of the criminal acts prohibited by the FHAA, including the use of force or threat, intimidation, and coercion.

43 *Id.* Senator Arlen Specter recently reintroduced a bill, which was referred to the Committee on the Judiciary, that makes interference in the exercise of housing rights a felony even if no bodily injury results. *See* S. 668, 103d Cong., 1st sess. (1993).
Under the new bill, 42 U.S.C. § 3631 would elevate the base offense to a felony punishable by imprisonment for one year and/or a fine of up to $100,000. The bill increases the penalties if the crime is aggravated by any of the following conditions:. (1) if the defendant's actions result in property damage exceeding $100, (2) if the defendant uses or carries a firearm in the commission of the offense, or (3) if the defendant uses or attempts to use fire in the commission of the act. If the crime is aggravated and no bodily injury results, it would be punishable by up to 5 years imprisonment and a fine up to $250,000 or both. If the crime is aggravated and death results, the defendant may be sentenced to imprisonment for life or death. *See* U.S. Congress, Senate, Committee on the Judiciary, *Fair Housing Rights Amendments Act of 1993,* 103d Cong., 1st sess., 1993, S. Rept. 103-149, p. 2-3.

44 *Id.*

45 *Id.*

46 Recently, the U.S. House of Representatives passed legislation directing the United States Sentencing Commission to further enhance sentences for persons convicted of hate crimes. Hate Crimes Sentencing Enhancement Act of 1993, H.R. 1152, 103d Cong., 1st sess. (1993). 139 Cong. Rec. H6792 (daily ed. Sept. 21, 1993) (passed as amended by voice vote).

47 18 U.S.C. app. § 2H1.3 (Law. Co-op. 1993). Under certain circumstances, the punishment may be increased. *Id.*

committed criminal interference without the threat or use of force, he or she may still be convicted as a felon to 6 years' imprisonment.[48]

DOJ Litigation Program

DOJ primarily affects fair housing policy through litigation, by using each case to establish the Government's positions on issues.[49] However, unlike other civil rights statutes, the FHAA requires a unique coordination between Federal agencies with respect to litigation.[50] Generally, the FHAA limits the discretion of both HUD and DOJ by requiring HUD to investigate every complaint and requiring DOJ to file suit whenever a party elects to pursue a Federal civil action after reasonable cause is found.[51] Thus it appears that Congress envisioned that the Federal Government would investigate every complaint and HUD would prosecute or refer to DOJ all apparent violations of the FHAA.[52] Recognizing the unique interagency coordination required by the FHAA, HUD and DOJ meet weekly to discuss which policies to pursue and which claims to litigate.[53]

The Housing and Civil Enforcement Section of DOJ's Civil Rights Division is primarily responsible for litigating fair housing cases, although some assistance is provided by local U.S. attorneys.[54] According to DOJ, 46 cases were assigned to U.S. attorneys' offices nationwide. In addition, the criminal prosecutions for intimidation and coercion are litigated by the Criminal Section of the Civil Rights Division, and all civil and criminal appeals are handled by the Appellate Section of the Civil Rights Division.[55] Nearly all cases pursued by DOJ are based upon factual investigations conducted by both HUD and DOJ using the criteria established by the FHAA and agency regulations.[56]

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48 *Id.* app. § 2H1.5. Under the statute, this provision applies to "other deprivations of rights in furtherance of discrimination." As with crimes involving the use of force, imprisonment can be increased under certain circumstances.

49 Congress required only the Secretary to issue rules implementing Title VIII within 180 days after the enactment of the FHAA. *See* 42 U.S.C. §§ 3601 note & 3614a (1988).

50 Hancock 1991 interview, p. 18.

51 DOJ is not required to file every HUD-referred zoning case. *See* 42 U.S.C. § 3614(b)(1)(A) (1988).

52 Ibid. However, the FHAA requires HUD to refer complaints to any certified State or local agency that operates under a fair housing law substantially equivalent to the FHAA. 42 U.S.C. § 3610(f) (1988); 24 C.F.R. § 103.100 (1993). *See also* chap. 6.

53 Ibid., p. 23; Hancock June 1993 interview.

54 According to Paul Hancock, U.S. attorneys in some districts do litigate civil rights issues. However, in the past, DOJ has only given prompt judicial action cases to U.S. attorneys offices with a civil rights division and/or experienced civil rights litigators, such as the southern district of New York and the district serving the Chicago area. Hancock 1991 interview, pp. 36–37.
The U.S. attorney in southern Florida started a voluntary civil rights task force to combat discrimination against persons displaced by Hurricane Andrew. Hancock June 1993 interview.
In addition, the Attorney General has implemented a plan to enlist the assistance of U.S. attorneys offices to litigate election cases and prompt judicial action requests. *See AG Reno Announces Major Expansion of DOJ's Housing Section,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993) and Attachment to DOJ Comments, p. 2.

55 Ware, "New Weapons," p. 58.

56 Hancock 1991 interview, p. 35.

TABLE 11.1
DOJ Fair Housing Caseload

	Actual		Estimates	
	1991	1992	1993	1994
Total number of cases filed or participated in	105	85	125	135
HUD referrals requiring filing	79	66	80	80
Other HUD referrals	7	5	10	10
Pattern or practice or intervention	6	9	20	30
Amicus curiae	8	3	5	5
Consent decrees	36	74	80	90
Litigated judgments	16	12	20	25

Source: DOJ Budget, 1994.

DOJ handled only 13 fair housing cases in FY 1988,[57] increasing to 27 following the fiscal 1989 effective date of FHAA.[58] In FY 1990 DOJ filed 40 fair housing claims.[59] Table 11.1 represents the Housing and Civil Enforcement Section's current and projected caseload as reported in the FY 1994 DOJ appropriations hearings.[60]

Proving Discrimination

One of the most controversial policy issues in civil rights litigation generally involves the standard of proof required to prove discrimination. As discussed above in chapter 10, the standards of proof required to prove a violation of the FHAA have evolved from analogies to Title VII case law. Generally, a complainant alleging discrimination under the FHAA must demonstrate either that she or he was treated differently on a prohibited basis or that the respondent's actions had a discriminatory effect or disparate impact on members of a protected class.

Attorney General Janet Reno stated that DOJ plans to apply the disparate impact theory to housing discrimination cases.[61] Although under the Bush administration, HUD generally had endorsed an effects test or disparate impact analysis,[62] DOJ refused to apply a disparate impact analysis in litigating

57 Ibid., pp. 9–10.

58 Ibid.

59 Ibid.

60 U.S. Congress, House, Committee on Appropriations, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1994: Hearings Before the Subcomm. on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies,* 103d Cong., 1st sess., 1993, p. 684 (hereafter cited as *DOJ 1994 Hearings).* The previous peak for DOJ fair housing cases occurred in 1973 when 58 suits were filed. Joseph D. Rich, "Survey: Enforcement of the Fair Housing Act, As Amended, By the Department of Justice," *The Business Lawyer,* vol. 46 (1991), p. 1337.

61 Janet Reno (speech delivered at the National Fair Housing Summit, Arlington, Va., Jan. 21, 1994), p. 8.

62 Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Strong, HUD OGC July 1993 interview). *See also* Hancock June 1993 interview.
On October 13, 1993, Secretary Henry G. Cisneros issued a new "Program and Management Plan" for HUD making

FHAA cases.[63] However, Assistant Attorney General for Civil Rights Deval Patrick stated in his comments on this report, "Regardless of what may have happened under previous administrations, the current position of this Department is unqualified support for the disparate impact theory."[64]

According to one DOJ official, the effects test is unnecessary for a variety of reasons. First, since DOJ must prove a discriminatory intent to obtain punitive damages or civil penalties, DOJ attorneys always try to establish liability based on intent.[65] Second, DOJ may prove intent by demonstrating through both direct and indirect evidence that the aggrieved persons were simply treated differently, rather than by demonstrating that the respondent held a discriminatory animus toward the protected class of which the complainant is a member.[66] Under this interpretation of the intent standard, virtually all acts of discrimination in housing are intentional.[67]

Although 10 of 13 circuit courts have applied an effects test as of November 1992,[68] the district court in *United States v. Lepore* found for the complainant without explicitly applying an effects test.[69] The case involved a mobile home park that had a two-person per unit occupancy limit for over 25 years and a separate adults only policy for over 10 years.[70] The complainants, who were expecting a child, filed a complaint with HUD alleging familial status discrimination.[71] In response to the HUD investigation, the defendant withdrew his "adults only" policy; however, he continued to apply the occupancy restriction and attempted to evict the complainants for violation of the occupancy limit after the baby was born.[72]

The court, apparently at the urging of the Government, found that the enforcement of the occupancy limit evidenced a discriminatory intent and thus violated the FHAA.[73] The court ruled that an intent to discriminate

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aggressive enforcement of Title VIII a priority for the Department. As part of the plan to reduce discrimination in housing, HUD plans to propose and publish new regulations on the use of the effects test by Sept. 30, 1994. *See Creating Communities of Opportunity: Priorities of the U.S. Department of Housing and Urban Development,* Program and Management Plan, October, 1993 (hereafter cited as HUD 1993 Program and Management Plan). For a full discussion of HUD's disparate impact policy, see chap. 10.

63 Hancock June 1993 interview.

64 DOJ Comments, p. 6.

65 Hancock June 1993 interview.

66 Ibid.

67 Ibid.

68 Despite DOJ's *past reluctance* to argue in favor of an effects test, 10 Federal circuit courts have applied an effects test in FHAA cases, and the remaining 3 circuits have not addressed the issue. *See* Schwemm, *Law and Litigation,* § 10.4(1) p. 10-22 (release date November 1992).

69 United States v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991).

70 *Id.* at 1014.

71 *Id.* at 1013.

72 *Id.*

73 *Id.* at 1020. *See also* United States v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (holding that a landlord's facially neutral single occupancy requirement for one-bedroom apartments violated the FHAA).

could be inferred from the earlier and admitted open discrimination of the "adults only" policy, coupled with the enforcement of a policy the defendants "knew would essentially perform the same function [to exclude children] as the adults only policy."[74]

By imputing knowledge of the "function" of the occupancy limit to defendants, the court essentially inferred an intent to discriminate from the discriminatory effect of the policy. The court found the inferred intent adequate to establish liability, but did not find the defendants' intentional behavior sufficiently egregious to warrant an award of punitive damages.[75] Based on the court's reliance on the effect of the practice to establish liability, it is difficult to understand why this court and DOJ will acknowledge relying on the impact of a housing practice as indirect evidence of intentional discrimination, but will not establish liability based on discriminatory effect alone.

DOJ-Initiated Cases

Pattern or Practice

DOJ also uses pattern or practice cases to set forth its fair housing policy. By exercising the discretion to choose which pattern or practice cases to pursue, DOJ helps shape the policy direction of the FHAA. Because the FHAA does not require DOJ to file pattern or practice cases within a specific statutory time limit, DOJ can take time to pursue its policy objectives, investigate violations thoroughly, and develop strong arguments against defendants before filing a claim.[76]

Although not limited by a statutory filing deadline under the FHAA, DOJ has not been able to investigate every alleged pattern or practice violation because of a lack of resources.[77] Therefore, DOJ has prioritized its investigations in pattern or practice cases by focusing on claims involving race, national origin, mortgage lending, and homeowner's insurance.[78] According to DOJ, familial status cases are not a priority because the department believes that these cases are resolved adequately through the HUD process.[79] Because familial status cases often involve blatant acts of discrimination, victims of such discrimination are aware of the acts and are able to file complaints, as opposed to race cases in which the victims of discrimination often do not know they have been injured in violation of the law.[80] DOJ not only relies on its own knowledge of pattern or practice violations, but may also initiate investigation of a pattern or practice claim based on referrals from HUD, judicial elections,[81] information

74 *Id.*

75 *Id.* at 1024.

76 Hancock 1991 interview, p. 65.

77 Ibid.

78 Hancock June 1993 interview.

79 Ibid. As Table 11-2 indicates DOJ has filed 28 pattern or practice cases alleging familial status discrimination and only 5 cases alleging discrimination based on national origin. Although these figures appear to demonstrate that DOJ has wavered from its stated priorities, 17 of the 28 family status cases were first brought to DOJ as party elections, and only after investigating the private claim did DOJ find enough evidence to allege a pattern or practice of discrimination. Consistent with the stated priorities, DOJ has filed 30 pattern or practice cases alleging racial discrimination. *See* Table 11-2.

80 Ibid.

81 Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993 (hereafter cited as Rich interview). According to Rich, some pattern or practice cases begin as elections. During the investigations of these cases, DOJ uncovers enough evidence to pursue pattern or practice claims and amends the complaints to reflect the additional charge.

obtained from fair housing groups, or newspaper articles.[82]

Table 11.2 represents the total number of pattern or practice cases that DOJ has filed since the FHAA took effect, the basis for each case, and the current status of each case as of December 6, 1993.[83] As the table indicates, DOJ has filed 88 pattern or practice cases and obtained consent decrees in 56 of the cases filed.

Decatur Federal

Perhaps DOJ's largest pattern and practice case to date involved race discrimination in mortgage lending practices.[84] DOJ began studying mortgage lending patterns and practices in the Atlanta area after the publication of a series of newspaper articles highlighting disparities in the number of mortgage loans approved in white and black neighborhoods.[85] After surveying the lending industry, DOJ focused its investigation on Decatur Federal Savings and Loan Association because of its size, poor record of loan origination in black neighborhoods, and high rejection rate of black applicants.[86] Although DOJ targeted Decatur Federal, DOJ stated that its investigation could have applied to other Atlanta-based institutions, as well as other financial institutions nationwide.[87]

After a lengthy investigation, DOJ simultaneously filed a complaint and consent decree against Decatur Federal alleging that the institution engaged in unlawful race discrimination in its mortgage lending program.[88] The complaint not only alleged that Decatur Federal consistently rejected black applicants at significantly higher rates than white applicants, but also that the institution opened branch offices only in predominantly white areas of Atlanta.[89]

In order to avoid costly litigation on the merits, both parties agreed that the complaint should be resolved voluntarily. Thus the parties agreed that the consent decree is not to be construed as an admission by Decatur Federal of the validity of any of the claims asserted in the complaint.[90] In addition to enjoining Decatur Federal from engaging in any racially discriminatory practices, the consent decree also provides that Decatur Federal will extend its serving area to include minority communities, establish an advertising program, follow a home mortgage loan production program to increase its origination of loans to black borrowers, and apply the same evaluation and underwriting criteria to both black and white applicants.[91]

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82 Hancock 1991 interview, p. 11.

83 DOJ Caseload Database as of Dec. 6, 1993.

84 United States v. Decatur Federal Savings and Loan Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 19,377 (N.D. Ga. Sept. 17, 1992) (consent decree).

85 U.S. Congress, Senate, Committee on Banking, Housing, and Urban Affairs,. *Hearings on Mortgage Lending Discrimination,* 103d Cong., 1st sess., Feb. 24, 1993, statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, p. 3.

86 Ibid., p. 3.

87 Ibid., pp. 3–4.

88 United States v. Decatur Federal Savings and Loan Ass'n, No. 1-92-CV-2198 (N.D. Ga. Sept. 17, 1992) (complaint).

89 Complaint at 4-7.

90 United States v. Decatur Federal Savings and Loan Ass'n, 2 Fair Housing-Fair Lending (P-H) ¶ 19,377, 19,624 (N.D. Ga. Sept. 17, 1992) (consent decree).

91 *Id.* at 19,624-28.

TABLE 11.2
DOJ Pattern or Practice Cases, 3/12/89-12/6/93

Status as of 12/6/93	Race	Family status	Handicap	Sex	National origin	Religion	Combined basis	Total
Presuit	1	—	—	—	—	—	—	1
Pending	8	1	2	2	5	1	3[1]	22
Settlement entered	—	1	—	—	—	—	—	1
Consent decree entered	17	25	9	1	—	—	4[2]	56
Summary judgment for U.S.	—	—	1	—	—	—	—	1
Judgment for U.S.	1	1	—	—	—	—	—	2
Jury verdict for U.S., penalty order	1	—	—	—	—	—	—	1
Judgment for U.S. on appeal	1	—	—	—	—	—	—	1
Judgment for U.S. and relief reversed	—	—	1	—	—	—	—	1
Settlement after judgment for defendant	1	—	—	—	—	—	—	1
Not filed	—	—	1	—	—	—	—	1
Total	30	28	14	3	5	1	7	88[3]

Source: DOJ Caseload Database.

[1] One case alleged race and familial status discrimination, one case alleged discrimination based on familial status and disability, and one case alleged both national origin and familial status discrimination.

[2] One case alleged discrimination based on race and sex; one involved race and familial status discrimination; one case alleged discrimination based on familial status and national origin; and one involved alleged interference with the enjoyment of housing rights.

[3] Twenty-one of the pattern or practice cases were first brought as elections and enough evidence was discovered to amend the complaint to include a pattern or practice violation. Joseph D. Rich, Deputy Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Oct. 14, 1993.

In addition, Decatur Federal has agreed to develop special programs to serve low and moderate income home buyers and to recruit and train black employees.[92] The consent decree also established a $1 million fund to be distributed by the United States to individual complainants identified by DOJ as aggrieved persons under the FHAA and the Equal Credit Opportunity Act.[93]

Testing

In order to improve the investigation of pattern and practice cases, DOJ has begun a testing program.[94] Testing is often the most effective investigative technique for producing evidence in pattern or practice cases.[95] Although DOJ plans to test for discrimination against all protected classes in housing sales and rentals, race and national origin discrimination are the major focus of the testing program due to the ongoing covert nature of such discrimination.[96]

DOJ's testing is conducted proactively based on bona fide allegations but not necessarily on specific complaints.[97] The DOJ testing program has added credibility because all encounters with housing providers are taped, which often eliminates disagreements over the content of conversations and sequence of events.[98]

DOJ contracts with private fair housing organizations to conduct testing.[99] However, unlike HUD's Fair Housing Initiatives Program (FHIP), which provides grants to private fair housing groups serving as testers (see chapter 7), DOJ hires its own employees to conduct testing in areas not served by fair housing groups.[100] The Housing and Civil Enforcement Section now has three employees exclusively working to coordinate the testing program.[101] In addition, the section has trained 100 DOJ employee volunteers to conduct testing in areas of the country not served by member organizations of the National Fair Housing Alliance.[102]

DOJ has begun testing in large metropolitan areas.[103] Currently, DOJ is involved in six major testing cases; a significant increase

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92 *Id.* at 19,628-31.

93 *Id.* at 19,631. 15 U.S.C. § 1691.

94 DOJ *1994 Hearings,* pp. 685–86. In FY 1994 DOJ plans to use $1.46 million to expand the mortgage lending initiative and the testing program. In prior years, DOJ reprogrammed a portion of its budget earmarked for other programs to fund its own testing program. *DOJ Announces Plans to Conduct Testing for Housing Discrimination,* 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

95 Hancock 1991 interview, p. 50.

96 *DOJ Announces Plans to Conduct Testing for Housing Discrimination,* 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

97 Ibid.

98 Hancock June 1993 interview.

99 *DOJ Files First Lawsuits Based on Evidence Gathered Under Testing Contracts,* 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 6, ¶ 6.20, p. 21 (Dec. 1, 1992).

100 *DOJ Announces Plans to Conduct Testing for Housing Discrimination,* 1 Fair Housing-Fair Lending (P-H) vol. 7, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1991).

101 *DOJ Testing Program Yields $350,000 Settlement in Michigan Race Case,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 3, ¶ 3.6, p. 8 (Sept. 1, 1993).

102 Ibid.

103 Hancock June 1993 interview.

over the previous seven testing cases in 20 years.[104] The first lawsuits filed by DOJ based on the new testing program targeted the metropolitan Detroit area.[105] The lawsuits each alleged that an apartment complex and a mobile home park engaged in a pattern and practice of racial discrimination against prospective tenants.[106]

In 1993 DOJ obtained the largest civil penalty ever in a housing discrimination case, by settling one of the Detroit lawsuits.[107] Under the terms of the settlement, the owners will pay a $125,000 civil penalty and $225,000 in actual damages, distributed by DOJ, to individuals with valid claims.[108] The owners are also required to advertise their vacancies monthly in Detroit-area newspapers, and pay for advertising to locate people who may have been turned away from the apartment complex because of their race or color.[109]

DOJ defends the need for its own testing program by pointing to the importance of testing in the development of pattern and practice cases. By bringing pattern or practice cases based on testing, DOJ can attack housing discrimination more efficiently on a metropolitan basis than through the litigation of individual complaints.[110] In addition, although private fair housing groups such as the National Fair Housing Alliance are largely successful,[111] DOJ testers can test in areas not served by housing groups.[112] Finally, despite the valuable role private fair housing advocacy groups play in eradicating discrimination, DOJ believes that the primary instrument of civil rights enforcement should be the Federal Government.[113]

Other Major Cases and Interventions

Cases of general public importance may be filed when the Attorney General can prove that more than one person was affected by a discriminatory act.[114] General public importance cases may involve statutory conflicts with State or local law, issues of law with major implications for the FHAA, or decisions affecting a large number of property owners or businesses.[115]

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104 Ibid.

105 DOJ also filed a lawsuit earlier in 1992 alleging race discrimination by a housing provider in the Los Angeles area. *DOJ Files First Lawsuits Based on Evidence Gathered Under Testing Contracts,* 1 Fair Housing-Fair Lending (P-H) vol. 8, no. 6, ¶ 6.20, p. 20 (Dec. 1, 1992).

106 Ibid.

107 Michael Isikoff, "Justice 'Sting' Finds Housing Discrimination," *The Washington Post,* June 22, 1993, p. A6.

108 *DOJ Testing Program Yields $350,000 Settlement in Michigan Race Case,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 3, ¶ 3.6, p. 7 (Sept. 1, 1993) (citing United States v. Grillo, No. 92-CV-75869-DT (E.D. Mich. June 21, 1993)).

109 Ibid., p. 8.

110 Ibid., p. 9 (quoting Paul Hancock).

111 *See* United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992), *cert. denied,* 114 S. Ct. 58 (1993). The seventh circuit upheld the jury's verdict which was based largely upon testing conducted by the Metropolitan Milwaukee Fair Housing Council, and remanded for an award of punitive damages, civil penalties, and damages to testers for emotional distress.

112 Hancock 1991 interview, pp. 47–49. In particular, Hancock stated that DOJ needs to bring testing programs to areas of the Southeast, including Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, and Tennessee.

113 Hancock June 1993 interview.

114 United States v. City of Parma, 494 F. Supp. 1049, 1095 (N.D. Ohio 1980), *aff'd in part, rev'd in part,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 456 U.S. 926 (1982).

115 *See, e.g.,* United States v. Hunter, 459 F.2d 205, 218 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972). *See generally* Schwemm, *Housing Discrimination Law,* pp. 285–86.

Although permitted by law to intervene in private civil actions, DOJ rarely exercises this option.[116] In fact, since the FHAA took effect, DOJ has only intervened in three cases; two alleging discrimination based on disability and one alleging discrimination based on familial status.[117] Such intervention is rare because it requires a nondelegable authorization from the Attorney General certifying that the case is of public importance.[118] Thus, rather than wait for Attorney General certification, the Housing and Civil Enforcement Section merely initiates its own companion claim.[119] The two claims are usually consolidated by the court for discovery and trial, and often DOJ obtains an order that is entered in both cases.[120]

After reviewing the statutory construction, one might surmise that DOJ avoids intervening in private civil actions because the FHAA does not permit civil penalties in an intervention.[121] Although the Housing and Civil Enforcement Section has never asked for civil penalties in an intervention, DOJ is unwilling to concede that civil penalties are unavailable in such an action.[122] As noted above, if DOJ believes civil penalties are warranted in a claim, the Housing and Civil Enforcement Section initiates its own claim instead of filing an intervention.[123]

In lieu of intervention, DOJ has filed *amicus curiae* briefs in support of private civil actions, which tend to lend added credibility to the complainants' arguments.[124] DOJ has filed *amicus curiae* briefs in 23 private civil actions. Of these, 23 briefs were filed in support of plaintiffs alleging discrimination based on handicap status; 5 were in support of plaintiffs alleging race discrimination; and 4 supported plaintiffs alleging discrimination based on familial status.[125]

Criminal Cases

As of December 8, 1992, DOJ had filed 57 criminal housing cases alleging illegal interference, coercion, or intimidation.[126] Sometimes, HUD receives the initial complaint, which may involve, for example, assault and battery, cross-burnings, or firebombings. Thus it is crucial for the HUD intake person to recognize claims that may require a criminal investigation and immediately refer them

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116 Hancock September 1993 interview.

117 DOJ Caseload Database as of Dec. 6, 1993.

118 42 U.S.C. § 3613(e) (1988).

119 Hancock September 1993 interview.

120 Hancock 1991 interview, p. 15.

121 42 U.S.C. § 3613(e) (1988). This provision indicates that upon an intervention, the Attorney General may seek the same relief that is available to her under 42 U.S.C. § 3614(e). Under 42 U.S.C. § 3614(e), the court is authorized to grant the same appropriate relief as would be available in a civil action under 42 U.S.C. § 3613. The relief provision for civil actions, 42 U.S.C. § 3613(c), does not list civil penalties among the available remedies.

122 Hancock September 1993 interview.

123 Ibid.

124 *See, e.g.,* NAACP v. American Family Mut. Ins., Co., 1990 U.S. Dist. LEXIS 18522 (E.D. Wis. Dec. 17, 1990), *aff'd in part, rev'd in part,* 978 F.2d 287 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2335 (1993).

125 DOJ Caseload Database as of Dec. 6, 1993.

126 "DOJ Criminal Housing Cases Filed 1989-1992."

to FHEO headquarters and then to DOJ.[127] Most often, cases prosecuted by DOJ under the criminal provisions are brought to the attention of the department from non-HUD sources.[128]

Because these claims involve both criminal and civil fair housing issues, DOJ and HUD must coordinate their activities.[129] In practice, if DOJ chooses to pursue a criminal investigation, then HUD will defer the fair housing investigation until the criminal investigation is completed or DOJ indicates that the civil investigation may continue.[130] The HUD process will be deferred even if the delay will cause the investigation to remain open beyond the statutory 100-day timeframe.[131]

According to the HUD-DOJ memorandum of understanding, it is understood that the pending criminal investigation is appropriate grounds for asserting that completion of the HUD investigation is "impracticable."[132] Although HUD is statutorily required to disclose fully to the parties in writing the reasons for a delay in the investigation,[133] the memorandum requires HUD to notify the parties in a manner designed not to jeopardize DOJ's criminal investigation.[134]

Under the Bush administration, DOJ urged Congress to increase the penalties for cross-burning and certain other forms of illegal intimidation under the FHAA.[135] Former Acting Assistant Attorney General Bruce Navarro encouraged the increases in fines and penalties at the time, because "the message of hatred and violence that cross-burnings convey inflicts enormous psychological damage on victims."[136] Although Congress has not amended the substantive criminal provision of the FHAA, in September 1993 the House of Representatives passed legislation directing the United States Sentencing Guidelines Commission to amend the sentencing guidelines to enhance the penalties for criminal interference based on the defendant's discriminatory motive, the force used, and the severity of the injury.[137]

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127 Sara K. Pratt, Deputy Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Pratt, HUD OGC July 1993 interview); Hancock 1991 interview, p. 22.

128 Attachment to DOJ Comments, p. 2.

129 HUD may process a complaint under 42 U.S.C. § 3610(a)(1)(A)(i) (1988) alleging a violation of the protections against coercion, intimidation, or interference found in § 3617.

130 "Memorandum of Understanding," p. 10; Hancock 1991 interview, p. 22.

131 "Memorandum of Understanding," p. 10. HUD must complete an investigation within 100 days after the filing of the complaint. 42 U.S.C. § 3610(a)(1)(B)(iv) (1988).

132 "Memorandum of Understanding," p. 10. HUD may exceed the 100-day investigation limit, if it would be impracticable to complete the investigation within the statutory period. *Id.* § 3610(a)(1)(B)(iv).

133 42 U.S.C. § 3610(a)(1)(C).

134 "Memorandum of Understanding," p. 10.

135 *DOJ Seeks Increased Penalties for Intimidation Under Fair Housing Act,* 1 Fair Housing-Fair Lending (P-H) vol. 6, no. 1, ¶ 1.5, p. 6 (July 1, 1990).

136 Ibid.

137 Hate Crimes Sentencing Enhancement Act of 1993, H.R. 1152, 103d Cong., 1st sess. (1993); 139 Cong. Rec. H6792 (daily ed. Sept. 21, 1993) (passed as amended by voice vote); 139 Cong. Rec. S12241 (daily ed. Sept. 22, 1993) (referred to the Senate Judiciary Committee). In addition, Senator Dianne Feinstein introduced a companion bill in the Senate on Oct. 6, 1993, that was also referred to the Senate Judiciary Committee. *See* Hate Crimes Sentencing Enhancement Act of 1993, S. 1522, 103d Cong., 1st sess. (1993); 139 Cong. Rec. S13172 (daily ed. Oct. 6, 1993). *See also* Sentencing Guidelines for the United States Courts, 18 U.S.C. app. §§ 2H1.3, 2H1.5, and 2J1.1 (1993). *See gen-*

Although antidiscrimination laws such as the FHAA have long been held to be constitutional,[138] "hate crimes" and the issue of penalty enhancement have been addressed recently by the Supreme Court. Hate crimes have received attention because some defendants have argued that their acts of coercion, intimidation, and/or interference are protected by the free speech clause of the first amendment.

In *R.A.V. v. City of St. Paul,* the Supreme Court struck down a city ordinance that prohibited the placement on any public or private property of symbols, objects, or graffiti "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. . . . "[139] Although all nine Justices voted to defeat the ordinance, the majority of five held that the ordinance unconstitutionally prohibited otherwise permitted speech based solely on the subjects addressed and the ideas expressed.[140] Thus, it appears that the first amendment may limit the government's ability to restrict conduct that is singled out because of its racial hostility.[141] However, the R.A.V. defendants were prosecuted by DOJ and convicted for the same crossburning that was the subject of the city's prosecution, and the conviction was upheld by the eighth circuit in April 1994.[142]

Some fair housing scholars have asserted that the decision in *R.A.V.* may restrict the criminal interference provision of the FHAA.[143] However, the Supreme Court has also addressed the issue of penalty enhancement for hate crimes in a way that appears to leave the FHAA provisions intact. In *Wisconsin v. Mitchell,* the Supreme Court unanimously upheld a State sentence enhancement provision that increased the maximum penalty for perpetrators of certain crimes who select their victims because of the victim's race, religion, national origin, or sexual orientation.[144] The Court held that it is permissible for a sentencing judge to take into account the defendant's motives and racial animus towards his or her victim, as long as doing so proves something more than the defendant's abstract beliefs.[145]

The FHAA's criminal interference provision continues to survive constitutional challenge after both *R.A.V.* and *Mitchell.* For example, in a recent cross-burning case, the seventh circuit rejected the defendants' argument that cross-burning is protected

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erally House Panel Approves "Hate Crimes" Bill, 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 4, ¶ 4.22, p. 21 (Oct. 1, 1993).

138 *See, e.g.,* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984).

139 112 S. Ct. 2538, 2541 (1992) (citing *St. Paul Bias-Motivated Crime Ordinance* § 292.02, St. Paul, Minn. (1992)).

140 *Id.* at 2542-50.

141 Schwemm, *Law and Litigation,* § 20.3, p. 20-15.

142 U.S. v. J.H.H., 22 F.3d 821 (8th Cir. 1994); *see also* Attachment to DOJ Comments, p. 3.

143 Ibid., § 20.3, pp. 20-15 to 20-16.

144 113 S. Ct. 2194 (1993).

145 *Id.* at 2200.

speech.[146] Although the court stated that cross-burning is a form of expressive conduct, the court found the government's prohibition of the conduct a permissible, content-neutral regulation.[147] The court stated that the criminal interference provision of the FHAA is "aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech."[148] Thus, the provision does not directly regulate speech, but rather furthers an important government interest unrelated to the suppression of speech, namely, the protection of fair housing rights.[149]

Also, the Attorney General delegated to the Federal Bureau of Investigation's (FBI) Uniform Crime Reports Section the Attorney General's responsibility to collect and publish statistics on crimes motivated by hate under the Hate Crimes Statistics Act passed in 1990.[150] The act applies not only to crimes against persons, but also crimes against property, including arson and destruction, damage, or vandalism of property.[151] DOJ is required to collect data on crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.[152]

Coordination with HUD

Zoning and Land Use Cases

As of December 16, 1993, DOJ had filed 14 cases alleging discrimination in zoning or land use laws. Of these, 11 cases alleged discrimination based on handicapped status; 2 alleged discrimination based on familial status; and 1 case involved a combination of both bases.[153] As of December 6, 1993, DOJ litigated and won three cases, lost one case, and obtained consent decrees in four cases; two cases are on appeal, and two cases are still pending.[154]

Although HUD is statutorily required to refer all zoning and land use cases to DOJ,

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146 United States v. Hayward, 6 F.3d 1241, 1249-52 (7th Cir. 1993). *See also* United States v. Garner, No. 92-5069, 1993 U.S. App. LEXIS 1925 (4th Cir. Feb. 4, 1993) (per curiam) (upholding a sentence enhancement based on defendant's racial animus toward the victim).
But see United States v. Lee, 6 F.3d 1297 (8th Cir. 1993). In *Lee* the eighth circuit reversed a criminal conspiracy conviction for cross-burning because of the trial judge's unconstitutional application of the facially neutral statute in his jury instructions. The circuit court held that the application of the facially neutral criminal conspiracy provision focused impermissibly on the "communicative and emotive impact" of the cross-burning rather than on the defendant's intent to incite and produce imminent lawless action. *Id.* at 1301-02. Although the jury acquitted the defendant on the charge of the use of force or threat in criminal interference with housing rights, the decision addresses the application of facially neutral restrictions on expressive conduct which may have future implications for FHAA cases in the eighth circuit. *See generally Opposite Fates Accorded Cross-burning Convictions By Federal Appeals Courts,* 1 Fair Housing-Fair Lending (P-H), vol. 9, no. 6, ¶ 6.10, pp. 10–11 (Dec. 1, 1993).

147 6 F.3d at 1250-51.

148 *Id.* at 1250.

149 *Id.*

150 Hate Crimes Statistics Act, 28 U.S.C. § 534 note (1993). The act is scheduled for reauthorization in 1994. *See* 55 Fed. Reg. 28,610 (1990) and 57 Fed. Reg. 4888 (1992).

151 *Id.* The act requires DOJ to collect data on crimes against persons including, murder, nonnegligent manslaughter, forcible rape, aggravated assault, simple assault, and intimidation.

152 *Id.* Although DOJ is required to collect data on these crimes under the statute, the act does not create the right to bring an action in court. 28 U.S.C. § 534(b)(3) note. In addition, while requiring DOJ to maintain statistics on crimes based on sexual orientation, the act does not create a cause of action based on sexual orientation, nor does it recognize sexual orientation as a protected classification. 28 U.S.C. § 534(b)(3) and Sec. 2 note.

153 Ibid.

154 Ibid. Of the remaining cases, one was closed by summary judgment for the United States and the other by a voluntary dismissal.

DOJ has discretion to decide if the matter should be litigated.[155] DOJ may challenge an exclusionary zoning law without a HUD referral if the case involves a pattern or practice of behavior or raises an issue of general public importance.[156] If the law does not qualify as a pattern and practice or general public importance action, DOJ has the discretion to litigate any HUD-referred zoning or land use claims under the general discriminatory housing practice provision of the FHAA.[157]

According to the memorandum of understanding, HUD and DOJ have interpreted the FHAA as requiring referral to DOJ of all challenges to zoning or land use decisions, as well as direct challenges to the underlying laws.[158] However, if the zoning issue raised is "an ancillary and insubstantial addition to a complaint that HUD has authority to address," then no referral is necessary if HUD can make a reasonable cause determination independent of the zoning issue.[159]

During the committee debates on the FHAA, strong opposition was voiced to the provision of the FHAA regarding discrimination in zoning and land use cases. The opposition expressed concern that the FHAA as passed would be "used by advocacy groups, Federal judges or bureaucrats to bust local zoning."[160] The opposition wanted to require proof of a discriminatory intent before declaring a particular zoning or land use law discriminatory, in order to protect what they called "quintessentially a local government decision."[161] However, by failing to require proof of intentional discrimination, the legislative history suggests that Congress did not wish to limit the scope of the zoning cases subject to DOJ review.

Prompt Judicial Actions

Although the FHAA grants to DOJ the exclusive authority to litigate prompt judicial actions in Federal court, as noted above, the claims require close cooperation between DOJ and HUD.[162] In practice, DOJ, OGC, and FHEO participate in a conference call with the regional investigator to discuss the preliminary information required to justify a prompt judicial action.[163] While DOJ is expediting the paper work, HUD will notify the respondent of the impending action. DOJ is usually prepared to send an attorney to court within 24 hours to request a temporary restraining order (TRO) or preliminary injunction, but often such action is unnecessary, because the mere threat of a TRO will cause the defendant

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155 *Compare* 42 U.S.C. § 3610(g)(2)(C) *with* § 3614(b)(1)(A) (1988). See chap. 10 for a full discussion of HUD's policies on the legal issues involved in zoning.

156 42 U.S.C. § 3614(a).

157 *Id.* § 3614(b).

158 "Memorandum of Understanding," p. 6.

159 Ibid.

160 U.S. Congress, House, Committee on the Judiciary, *Fair Housing Amendments Act of 1988,* 100th Cong., 2d sess., 1988, H. Rept. 100-711 *reprinted in* 1988 U.S.C.C.A.N. 2173, 2224 (hereafter cited as *FHAA House Committee Report).*

161 *Id.*

162 *See* 42 U.S.C. § 3610(e)(1) (1988). For a full discussion of the legal framework for prompt judicial actions, see chap. 10.

163 Hancock 1991 interview, p. 63. According to HUD's OGC, the authorization power has been internally delegated from the General Counsel to the Assistant General Counsel for Fair Housing. Now, the Associate General Counsel for Equal Opportunity and Administrative Law can sign a request to DOJ for prompt judicial action and send a copy to the General Counsel, rather than having to meet with the General Counsel in every case. *See* Strong, HUD OGC July 1993 interview.

to take the appropriate action without the court order.[164]

As discussed in chapter 10, HUD and DOJ do not always agree on the evidence needed to obtain a prompt judicial action.[165] DOJ asserts that its attorneys must be able to sustain a meritorious claim in Federal court showing irreparable harm, and, therefore, it is not unreasonable to request some evidence of the merits before proceeding to court.[166] In order to maintain the claim for prompt judicial action, DOJ needs some evidence indicating that a cognizable issue needs to be resolved.[167] Thus, DOJ expects HUD to investigate the prompt judicial action claims as thoroughly as possible in the time available.

However, according to HUD, DOJ's prompt judicial action standards, while not explicitly restrictive, have the effect of reducing the number of prompt judicial actions pursued by HUD regional staff.[168] Despite HUD's assertion that the net effect of DOJ's standards results in fewer prompt judicial action requests, the Assistant Attorney General for Civil Rights, Deval Patrick, has stated, "Let me assure you that prompt action has never been delayed as a result of our request to HUD for information on the merits."[169] He continued:

> We would also take exception to a claim that our actions have had the effect of holding down the number of prompt judicial actions which have been sought. In fact, on numerous occasions, we have brought possible PJAs [prompt judicial actions] to the attention of HUD where we have received information about the need for possible immediate enforcement action and we need the agency to begin investigation of a complaint.[170]

While it is true that early in the FHAA's enforcement, HUD rarely requested prompt judicial action of its own accord, HUD maintains that DOJ's standards now have the effect of discouraging the use of prompt judicial actions.

Prompt judicial action is an area of litigation in which DOJ may benefit from the help of local U.S. attorneys. Although DOJ has been reluctant to use them in the past, the Attorney General recently announced a plan to have U.S. attorneys handle prompt judicial action requests.[171] According to one DOJ official, the success of the plan to seek assistance from U.S. attorneys offices will depend on the amount of time and resources DOJ will have to train them in housing discrimination litigation.[172]

DOJ obtained both a TRO and a preliminary injunction under the FHAA in *United*

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164 Hancock 1991 interview, pp. 42–43. *See also* Strong, HUD OGC July 1993 interview.

165 Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Wilson, HUD OGC July 1993 interview).

166 Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, D.C., Dec. 20, 1993 (hereafter cited as Hancock December 1993 interview). *See also* DOJ Comments, p. 4.

167 Hancock December 1993 interview.

168 Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, telephone interview, Dec. 20, 1993 (hereafter cited as Pratt December 1993 interview).

169 DOJ Comments, p. 4.

170 DOJ Comments, p. 5.

171 *AG Reno Announces Major Expansion of DOJ's Housing Section,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

172 Hancock 1991 interview, p. 37; Hancock December 1993 interview.

States v. Blackwell.[173] This early attempt at fully exercising this power encountered a particularly recalcitrant defendant.[174] The case involved an African American family who contracted to buy a house, after which the white owners leased the property to a white family.[175] The would-be buyer filed a complaint with HUD, which in turn asked DOJ to obtain a TRO.[176] DOJ obtained the TRO[177] and, later, a preliminary injunction preventing the sale or rental of the house to anyone other than the complainant; the owner failed to comply and was ultimately cited for contempt.[178]

The case was tried before an ALJ who found for the complainant and awarded monetary relief of approximately $75,000, including a $10,000 civil penalty.[179] The owner failed to comply with the ALJ decision, and DOJ filed a petition to enforce the order with the court of appeals, which upheld the ALJ ruling.[180] While undoubtedly a trying episode for the complainant, the case gave DOJ the opportunity to demonstrate its willingness to pursue FHAA protections exhaustively on behalf of victims of discrimination.

Table 11.3 represents DOJ's prompt judicial action caseload as of December 6, 1993.[181] As the table indicates, half of the actions are resolved either through settlement or conciliation.[182] The table also shows that 14 of the 35 actions filed alleged discrimination based on family status, and 13 of the 35 actions alleged discrimination based on handicap discrimination.

Enforcing Conciliation Agreements and Subpoenas

The FHAA requires that, "whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed . . . for the enforcement of [the] agreement."[183] Under the regulations, the General Counsel has been charged with the obligation to make such referrals.[184]

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173 *See* HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, at 25,004 (HUD ALJ Dec. 21, 1989), *enforced*, 908 F.2d 864 (11th Cir. 1990).

174 DOJ requested prompt judicial action in three earlier cases, but in one election case a consent decree was entered, and the other two cases were conciliated making the prompt judicial actions unnecessary.

175 HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) at 25,003.

176 *Id.* at 25,004.

177 The district court issued an *ex parte* temporary restraining order on July 28, 1989, prohibiting respondent from selling or leasing the house or implementing any lease executed subsequent to the contract of sale with the complainants.

178 HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) at 25,004.

179 *Id.* at 25,016-17.

180 HUD v. Blackwell, 908 F.2d 864.

181 DOJ Caseload Database as of Dec. 6, 1993.

182 The power of a prompt judicial action is further supported by a partial list of temporary restraining order (TRO) assignments provided by HUD. The partial list of TRO assignments to OGC attorneys indicates that HUD investigated 67 complaints requiring prompt judicial actions between June 1991 and July 1993. Clearly, most of these claims were either resolved or dropped by DOJ prior to the filing of a prompt judicial action. *See* Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, letter to Frederick Isler, Deputy Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, July 6, 1993.

183 42 U.S.C. § 3610(c) (1988).

TABLE 11.3
DOJ Prompt Judicial Actions, 3/12/89-12/6/93

	Classification of discrimination				
Status as of 12/6/93	**Race**	**Family status**	**Handicap**	**National origin**	**Total**
Settled without filing	1	2	7	1	11
Motion to dismiss filed	1	—	—	—	1
Case dismissed after conciliation	1	4	—	1	6
Consent decree in election case	—	2	—	—	2
Consent decree in zoning case	—	—	1	—	1
TRO granted, PI granted, case dismissed	1	—	—	—	1
TRO granted, PI granted, consent decree	—	—	2	—	2
TRO granted	1	1	—	—	2
TRO granted, PI granted	—	2	—	—	2
TRO granted, PI denied	—	—	1	—	1
TRO denied, complaint filed	—	—	1	—	1
TRO denied	—	1	1	—	2
ALJ decision affirmed	1	—	—	—	1
United States won in election case	—	2	—	—	2
Total	6	14	13	2	35

Source: DOJ Caseload Database.

The Attorney General has discretion, as in zoning and land use referrals, to file a civil action against the respondent for breach of a conciliation agreement.[185] If the Attorney General chooses to pursue the claim, DOJ must commence a civil action no later than 90 days after the date of referral.[186] If the Attorney General does not pursue enforcement, the statute also authorizes any person aggrieved by the breach to pursue a private civil enforcement of the agreement.[187]

Although the regulations indicate that HUD will submit all conciliation breaches to DOJ, HUD attempts to resolve breaches internally before notifying DOJ to proceed in Federal court.[188] However, if HUD cannot resolve the breach, the Secretary refers the matter to DOJ. DOJ's Housing and Civil Enforcement Section has one paralegal who regularly monitors compliance with HUD orders, including conciliations. If DOJ receives information about an alleged conciliation breach before HUD is notified, DOJ consults with HUD to

184 24 C.F.R. § 103.335 (1993).

185 42 U.S.C. § 3614(b)(2)(A) (1988).

186 *Id.* § 3614(b)(2)(B).

187 *Id.* § 3613(a)(1)(A).

188 24 C.F.R. § 103.335 (1993). *See also* Hancock 1991 interview, p. 60.

determine the appropriate method for proceeding.[189]

Whenever possible, DOJ tries to avoid a court proceeding, because civil actions are costly and time-consuming for the aggrieved party, who often needs compliance as soon as possible, and for the Government as well. Since the FHAA became effective, DOJ has only filed five conciliation enforcement cases, all of which alleged discrimination based on familial status.[190] Instead of proceeding directly to court, DOJ has submitted some breaches for binding arbitration, which often results in a quicker resolution of the matter.[191]

HUD believes that conciliation breaches need more attention.[192] If respondents know that conciliations will be enforced vigorously, they may be less likely to breach an agreement. In addition, complainants may be more willing to conciliate if they are confident that the agreement will be enforced strictly. For these reasons, OGC has offered openly to seek enforcement of conciliation agreements in Federal court, rather than requiring DOJ to litigate conciliation breaches.[193] According to HUD, the authority to enforce breaches in conciliation agreements could be delegated to OGC without a change in the statute.[194]

In addition to pursuing referrals from HUD, the Attorney General may seek enforcement of a subpoena issued by the Secretary or issued on behalf of any other party, including the defendant.[195] Subpoenas are issued to aid in investigations and hearings in administrative or judicial proceedings on behalf of HUD or any party in a HUD proceeding.[196] In addition to ordering enforcement of the subpoena, the court may award reasonable attorneys' fees and costs to the prevailing party other than the United States, and may hold the United States liable for attorneys' fees and costs pursuant to the Equal Access to Justice Act.[197]

Appellate Litigation

As of December 6, 1993, DOJ has litigated 24 ALJ decisions in Federal appellate courts.[198] DOJ is ultimately responsible for all appellate litigation, including petitions to review and enforce HUD ALJ orders and decisions of the Federal courts. However, because HUD has a vested interest in appellate proceedings, DOJ is permitted to authorize HUD to litigate "in appropriate cases" subject to

189 "Memorandum of Understanding," p. 7.

190 DOJ Caseload Database as of Dec. 6, 1993.

191 Hancock 1991 interview, pp. 61–62.

192 Harry L. Carey, Assistant General Counsel for Fair Housing, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., July 2, 1993 (hereafter cited as Carey, HUD OGC July 1993 interview).

193 Ibid.

194 Ibid.

195 42 U.S.C. § 3614(c) (1988); 24 C.F.R. § 103.500(b) (1993).

196 Schwemm, *Law and Litigation*, § 26.4, p. 26-29. DOJ may only proceed for enforcement of a subpoena in the district court in which the person "resides, was served, or transacts business.". 42 U.S.C. § 3614(c) (1988).

197 *Id.* § 3614(d)(2); 28 U.S.C. § 2412 (1988).

198 DOJ Caseload Database as of Dec. 6, 1993.

DOJ's ultimate review.[199] As noted above, DOJ has not authorized HUD to litigate any appeals, but the memorandum of understanding provides guidance for delegating responsibility in such instances.[200]

Judicial Elections

In a majority of cases, parties have elected to proceed in district court rather than pursue an administrative proceeding handled by HUD. As of October 14, 1993, parties have elected to proceed in Federal court in 369 of 619 charges issued by HUD, or in approximately 60 percent of all HUD charges.[201]

Respondents have made the elections in 79 percent of the cases where election occurred.[202] As of October 14, 1993, respondents in 268 charges elected to proceed in Federal court, as compared to 77 complainants. In 24 charges, both the respondent and the complainant chose the judicial forum.[203]

Table 11.4 represents the number of election charges processed by DOJ as of December 6, 1993.[204] The table indicates that DOJ addressed 293 election charges and resolved 166 by consent decree.[205] Based on these figures, only 17 cases went to court, 16 of which ended ultimately in a judgment for the United States.

Congress did not anticipate the high number of judicial elections, but instead expected that the administrative forum would serve the best interests of the litigants.[206] Thus it is important to understand why the parties, especially the respondents, are electing a judicial forum.

Aggrieved parties may find elections preferable because proceeding in Federal court provides potential recovery of punitive damages.[207] In addition, even if the case does not actually proceed to court, the threat of punitive damages may raise the amount of money a complainant can receive in a settlement. However, because it is difficult to prove the level of intent required to warrant punitive damages, the possibility of obtaining punitive damages may not adequately explain the high percentage of elections made by plaintiffs.[208]

In light of the case backlog in most Federal district courts, respondents may elect judicial proceedings as a tactical move to slow the progress of the case.[209] However, defendants

199 "Memorandum of Understanding," p. 9. For a full discussion of HUD's interest in appellate litigation, see chap. 10.

200 According to Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, HUD's OGC has requested authorization to litigate at least one appeal, but DOJ denied OGC's request. Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, interview with HUD OGC in Washington, D.C., Dec. 15, 1993 (hereafter cited as Wilson, HUD OGC December 1993 interview).

201 Janet Rouamba, docket clerk, Office of Administrative Law Judges, telephone interview, Oct. 14, 1993 (hereafter cited as Rouamba interview). According to Paul Hancock, DOJ initially anticipated that only 25 percent of the parties would choose to proceed in Federal court. *See* Hancock 1991 interview, p. 10.

202 Rouamba interview. This figure represents the 268 charges in which only the respondent elected a judicial forum and the 24 charges in which both parties elected to proceed in Federal court. Complainants elected in 27 percent of the total charges, including the 24 charges in which both parties made elections. Thus, there is a 6 percent overlap.

203 Ibid.

204 DOJ Caseload Database as of Dec. 6, 1993.

205 This figure includes 3 consent decrees which were filed but not entered by the court as of Dec. 6, 1993.

206 *FHAA House Committee Report,* 1988 U.S.C.C.A.N. 2173, 2178.

207 Hancock 1991 interview, p. 67.

208 Ware, "New Weapons," p. 69.

209 Ibid.

TABLE 11.4
DOJ Election Cases, 3/12/89-12/6/93

Status as of 12/6/93	Race	Family status	Handicap	Sex	National origin	Religion	Combined basis	Total
Case to be filed	3	4	4	—	—	—	1[1]	12
Pending	17	48	12	2	1	2	4[2]	86
Settlement	1	1	2	—	—	—	1[3]	5
Consent decree	24	114	18	3	2	—	5[4]	166
Charge withdrawn	—	—	1	—	—	—	—	1
Charge not filed	—	—	1	—	—	—	1[5]	2
Motion to dismiss granted	—	—	1	—	—	—	—	1
Dismissed and intervention on appeal	—	—	—	1	—	—	—	1
Summary judgment for U.S. & pending remedy	—	1	—	—	—	—	—	1
Summary judgment & damages for U.S.	—	1	—	—	—	—	—	1
Summary judgment for U.S. on liability with partial consent decree & damages	—	—	1	—	—	—	—	1
Stipulated judgment	1	1	—	—	—	—	—	2
Judgment for U.S.	2	8	—	—	—	—	1[6]	11
Judgment for defendant	1	—	—	—	—	—	—	1
Judgment for defendant, consent decree	—	1	—	—	—	—	—	1
Judgment for defendant reversed on appeal	—	1	—	—	—	—	—	1
Total	49	180	40	6	3	2	13	293

Source: DOJ Caseload Database.

[1] Based on both sex and familial status.

[2] Three based on race and familial status; one based on race and national origin.

[3] Entered in a charge for alleged interference in the enjoyment of housing rights.

[4] Two based on race and sex; one based on race and familial status; one based on sex and handicap; and one based on a charge of interference with enjoyment of housing rights.

proceeding in Federal court must defend themselves against the United States and the skills, resources, and experience of DOJ, which they perceive to be overwhelming or intimidating.[210] Despite the fact that HUD attorneys have developed equal expertise in litigating housing matters since the FHAA went into effect, the perception remains that DOJ is a more formidable opponent because DOJ attorneys have been litigating fair housing cases since 1968 under the original Fair Housing Act. Indeed, as table 11.4 indicates, over half of the election cases filed by DOJ are resolved prior to an actual courtroom trial.

Defendants may also choose a civil court proceeding based on the fear that HUD administrative law judges are biased in favor of the OGC attorneys litigating the cases,[211] despite the fact that the ALJs' decisionmaking process is functionally separate from HUD's OGC.[212] In addition, because the Secretary has recently increased the use of his review authority to reverse adverse ALJ decisions, it might appear to respondents that the Secretary, as the final arbiter in the administrative forum, is also biased in favor of the OGC attorneys.[213] The high number of elections may simply result from the fact that both parties are more familiar and thus more comfortable with civil court than with administrative proceedings.[214]

Because an examination of cases filed in both forums reveals no significant advantage to having a jury serve as the factfinder in fair housing cases, the administrative process may prove to be a better forum for both parties.[215] Administrative forums are less expensive and more expeditious than Federal court proceedings. In addition, both parties may benefit from decisions made by administrative law judges who are selected based in part on their expertise in housing law.

Although the FHAA requires DOJ to file a claim in every election,[216] DOJ has returned a few election charges for further investigation by HUD.[217] Although FHAA regulations provide that DOJ may consult with the General Counsel if new court decisions or new evidence affect HUD's initial reasonable cause determination,[218] OGC finds it troubling that DOJ refuses to proceed in some cases.[219] OGC asserts that DOJ returns

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210 Ibid. For example, DOJ has more financial resources than HUD to devote to hiring expert witnesses in election cases. Hancock June 1993 interview.

211 Strong, HUD OGC July 1993 interview.

212 24 C.F.R. § 104.140 (1993).

213 See chap. 10 for a further discussion of the Secretary review process.

214 Hancock 1991 interview, p. 67.

215 Ware, "New Weapons," p. 70. *See also* 1 C.F.R. § 305.92-3 (1993) (Recommendations of the Administrative Conference of the United States on Enforcement Procedures Under the Fair Housing Act).

216 42 U.S.C. § 3612(o) (1988).

217 According to Joseph Rich, DOJ has returned no more than five election cases to HUD during the entire FHAA period. *See* Rich interview. However, HUD OGC believes that DOJ has refused to file at least 10 election cases since the FHAA took effect. *See* Strong, HUD OGC July 1993 interview.

218 24 C.F.R. § 103.410(e) (1993).

219 Pratt, HUD OGC July 1993 interview; Jonathan Strong, Deputy Assistant General Counsel for Fair Housing Litigation, Office of Equal Opportunity and Administrative Law, U.S. Department of Housing and Urban Development, telephone interview, Oct. 22, 1993 (hereafter cited as Strong October 1993 interview).

elected charges when DOJ does not agree with the substantive issues involved in HUD's reasonable cause determination.[220] However, DOJ maintains that it only returns an elected HUD charge when new information makes filing a claim inappropriate or frivolous.[221] While DOJ acknowledges that it must support the Secretary's reasonable cause determination, DOJ argues it must also fulfill its obligations to the Federal courts to file only sound claims.[222]

DOJ and the Newly Protected Classes

DOJ's top priority in the enforcement of protections for disabled persons has been the challenge of local zoning laws used to block the construction of group homes for disabled persons.[223] DOJ filed its first disability-based claim in June 1989 against the city of Chicago Heights, Illinois, which had denied a special use permit to construct a group home for 15 mentally disabled adults.[224] DOJ charged that the denial was based on the handicap of the residents, in violation of section 804(f) of the FHAA.[225] To avoid further litigation, the city signed a consent decree, without any admission or concession of liability, granting the permit and awarding $30,000 to the builder as partial reimbursement for costs.[226] The city also agreed to place $15,000 in an escrow account to be distributed evenly among the first 15 residents of the facility as compensation for the delay caused by the discriminatory act.[227] In addition to litigating denials of building permits for group homes, DOJ is developing policy by challenging municipal "spacing" requirements that limit the distance between group homes.[228] In one such case in which DOJ intervened, a local law required that all community living arrangements must be located at least 2,500 feet apart.[229] In granting summary judgment for the plaintiffs on the issue of liability, the district judge stated that the zoning board's "strict adherence to a rule that has the effect of precluding handicapped individuals from residing in the residence was precisely the type of conduct that the FHAA sought to overcome."[230]

DOJ also litigated a claim against members of a homeowners' association for using a restrictive covenant to prevent a homeowner

220 For a full discussion of the substantive issues involved in returned election charges, see chap. 10.

221 Hancock December 1993 interview.

222 Hancock December 1993 interview.

223 Rich, p. 1344.

224 United States v. City of Chicago Heights, 2 Fair Housing-Fair Lending (P-H) ¶ 19,369, at 19,551 (N.D. Ill. Jan. 16, 1990) (consent decree).

225 *Id.* at 19,551.

226 *Id.* at 19,552.

227 *Id.*

228 Hancock June 1993 interview.

229 United States v. Village of Marshall, 787 F. Supp. 872, 873 (W.D. Wis. 1991) (summary judgment).

230 *Id.* at 879.

from selling to a group home for the disabled.[231] Another DOJ case challenged an owner's refusal to negotiate the sale of a house to an organization that provided group homes for learning disabled children.[232]

In the early years of the statute, DOJ brought four cases involving the new fair housing protections for individuals recovering from drug addictions or alcoholism.[233] DOJ obtained mixed results in *United States v. Southern Management Corp.*, a test case designed to establish the rights of persons recovering from addiction.[234] The lower court ruled that individuals recovering from drug abuse and participating in a treatment program are covered by the FHAA.[235] The court issued an injunction barring property owners from refusing to rent to individuals who had completed a year in a drug treatment program, who were drug free for a year, and who were entering the reentry phase of their treatment.[236] In addition to the jury award of $10,000 in compensatory damages and $26,000 in punitive damages, the district court assessed a $50,000 civil penalty for discrimination against participants in a county-run treatment program considered to be drug-free.[237]

On appeal, the fourth circuit vacated the entire monetary award, but still affirmed the injunctive relief and liability determinations.[238] The fourth circuit added that protection from discrimination for individuals recovering from addiction "does not per se exclude from its embrace every person who could be considered a drug addict," but is instead designed to recognize addiction as a disease that may be treated through rehabilitation.[239] Thus, the FHAA extends protection to individuals with a history of drug or alcohol problems, if they discontinue using drugs or alcohol and participate in recovery or a rehabilitation program.[240] DOJ has defended the FHAA against two challenges to its constitutionality based on its coverage of family status. In *Seniors Civil Liberties Association v. Kemp,* the 11th circuit affirmed a lower court ruling that the over-55 provisions of the FHAA are well within Congress' commerce clause power and do not violate any of the

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231 Rich, p. 1345 (citing United States v. Scott, 788 F. Supp. 1555 (granting summary judgment for United States on liability), *later proceeding on relief,* 809 F. Supp. 1404 (D. Kan. 1992)).

232 Rich, p. 1345 (citing United States v. Saxonville Realty, C.A. 90-12744MA (D. Mass. Dec. 20, 1991) (consent decree)).

233 Rich, p. 1345. Persons currently using illegal substances are not protected against discrimination. *See* 42 U.S.C. § 3602(h) (1988); 24 C.F.R. 100.201(a)(2) (1993).

234 United States v. Southern Management Corp., 2 Fair Housing-Fair Lending (P-H) ¶ 15,651 (E.D. Va. Oct. 15, 1990), *aff'd in part, rev'd in part,* 955 F.2d 914 (4th Cir. 1992).

235 United States v. Southern Management Corp., 2 Fair Housing-Fair Lending (P-H) ¶ 15,651 at 16,338 (E.D. Va. Oct. 15, 1990).

236 *Id.*

237 *Id.*

238 United States v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992). The award was vacated because of a perceived "ambiguity" in Congress' statutory exclusion of those "addicted." Id. at 923. The grammar of the statute was ambiguous because it was unclear whether "current" modifies "use" [of drugs] alone or also addiction [to drugs]. *Id.* at 920.

239 *Id.* at 923.

240 42 U.S.C. § 3602(h) (Law. Co-op. 1983 and Supp. 1993). *See also FHAA House Committee Report,* 1988 U.S.C.C.A.N. 2173, 2183.

constitutional rights of property owners.[241] In February 1993, the 10th circuit also rejected a similar constitutional challenge to the FHAA raised by the respondents on appeal from an ALJ decision.[242] Thus, DOJ is confident that the FHAA will continue to resist constitutional challenges.[243]

The majority of family status cases involve either "adults only" policies or unit occupancy limits adversely affecting families with children. Since Congress recognized that certain housing units catering to older persons should be exempt from the familial status provisions, so as not to adversely affect the rights of older residents[244] it is understandable that most litigation over "adults only" policies involves defendants who claim exemption as housing providers for older persons.

Remedies

After the passage of the Fair Housing Amendments Act (FHAA), DOJ moved quickly to assert its new opportunity to seek monetary relief by filing two cases the day after the FHAA became effective. In both cases, DOJ sought monetary damages for the alleged pattern or practice of racial discrimination in apartment rentals.[245]

In *United States v. Rent America, Corp.*, the court ruled not only that the Government was entitled to request monetary relief for actual damages, damages for emotional distress, and punitive damages,[246] but also that such relief could compensate for discrimination occurring before the FHAA became effective.[247]

DOJ computes and recommends damage awards based on the seriousness of the violation. In this assessment, DOJ considers the extent of the injury to the aggrieved parties, including out-of-pocket costs and emotional distress.[248] DOJ tends to combine all of the separate damages together to judge the overall value of the case. In addition, DOJ always assesses the defendant's financial resources.[249]

Since the FHAA became effective March 12, 1989, through May 1994, DOJ won $29,651,645.72 for victims of discrimination

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241 Seniors Civil Liberties Ass'n v. Kemp, 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). The court also dismissed constitutional challenges based on vagueness of the act and taking of property without just compensation.

242 Morgan v. Secretary of HUD, 985 F.2d 1451 (10th Cir. 1993), *aff'g in part, rev'g in part* HUD v. Morgan, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008 (HUD ALJ July 25, 1991).

243 Hancock June 1993 interview.

244 42 U.S.C. § 3607(b)(1)-(3) (1988).

245 Rich, p. 1338 (citing United States v. Rent America, Corp., 734 F. Supp. 474 (S.D. Fla. 1990) and United States v. Klinkner, DOJ No. 175-39-25 (D. Minn. Dec. 19, 1989) (consent decree)).

246 United States v. Rent America, Corp., 734 F. Supp. 474, 482 (S.D. Fla. 1990). Schwemm thinks the law fails to explain clearly whether or not DOJ can request punitive damages on behalf of a nonintervening aggrieved party under the provision allowing for "other appropriate relief.". Schwemm, *Law and Litigation*, § 26.2(5)(c), p. 26-21.

247 The court applied the three-part test used in Bradley v. Richmond School Bd., 416 U.S. 696 (1974) requiring consideration of: "(a)the nature and identity of the parties, (b)the nature of their rights, and (c)the nature of the impact of the change in the law upon those rights.". 734 F. Supp. 474, 479-80 (S.D. Fla. 1990). It appears that the penalties may apply retroactively only if the substantive aspects of the discriminatory acts were also impermissible under the old FHA, otherwise, defendants' substantive rights might be deprived.

248 Hancock June 1993 interview.

249 Ibid.

in 271 cases where damages were awarded,[250] including $20 million from the New York City Housing Authority.[251] Fair housing groups received $586,500 in 23 of these cases, and in 11 cases other aggrieved parties received awards totaling $326,221.[252] Civil penalties of $719,100 were assessed in 26 cases.[253]

While DOJ has succeeded in winning compensatory damages for the victims of housing discrimination, it has been considerably more difficult to obtain punitive damages and compensation for emotional distress suffered by the aggrieved parties. Recently, a district court judge drastically reduced a jury award of damages for emotional distress and punitive damages in a private (non-DOJ) civil action.[254] The jury in *Darby* awarded the plaintiffs $200,000 in compensatory damages, including over $185,000 for emotional distress. The judge reduced the compensatory award to $50,000, in order to reduce the jury's award for emotional distress, because it far exceeded the damages awarded in other housing discrimination cases. In addition, the jury had awarded the plaintiffs $250,000 in punitive damages that the district judge reduced to $50,000, because the jury award was not found to be reasonably related to the reduced amount of compensatory damages.[255]

DOJ has also succeeded in obtaining damages for fair housing organizations. These awards not only compensate fair housing groups for the testing they conduct, but also include compensation for future fair housing training sessions they may conduct for a defendant's personnel. As a matter of policy, DOJ has pursued damages "for private fair housing groups who played important roles in uncovering the alleged discrimination involved. . . ."[256]

Although in the view of one DOJ official, "The most significant awards of monetary relief have come in cases involving race discrimination,"[257] awards have also been made in cases where members of the newly protected classes were the plaintiffs.[258] However, especially in group home situations, injunctive relief is more important to the aggrieved parties.[259]

In addition to monetary relief, DOJ also requests affirmative measures to prevent future or continuing discrimination.[260] Affirmative relief may include requiring a defendant to advertise a nondiscriminatory policy, conduct fair housing sensitivity training for

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250 Attachment to DOJ Comments, p. 3.

251 Davis v. New York City Housing Auth., Nos. 90-CIV-0628(PNL), 92-CIV-4873(PNL), 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992). Under the consent decree, HUD is required to issue 200 Section 8 housing vouchers for use in the private housing industry. The $24 million award is calculated based on the estimated value of the vouchers over a 15 year period.

252 Attachment to DOJ Comments, p. 3.

253 Ibid.

254 Darby v. Heather Ridge, 827 F. Supp. 1296 (E.D. Mich. 1993), *denying motion for new trial, granting, in part, motion for remittur,* 806 F. Supp. 170 (1992).

255 *Id.* DOJ continues to assert that "emotional distress and punitive damages

256 Rich, p. 1348.

257 Ibid. This result is consistent with DOJ's litigation priorities.

258 Ibid.

259 Ibid.

260 42 U.S.C. § 3614(d)(1)(A) (1988).

employees, adopt objective criteria to screen rental applicants, or maintain records on the race of applicants.[261]

DOJ often requires apartment buildings to post listings of the cost and availability of apartments to make it more difficult for housing providers to give false information about availability and prices.[262] DOJ also asks for periodic reports, sometimes including a photograph of the listings, to ensure continued compliance with the enforcement order.[263]

Funding and Resources

The Housing and Civil Enforcement Section is headed by a section chief and three deputy chiefs.[264] To enforce the FHAA, the Housing and Civil Enforcement Section was initially authorized to hire 33 people to serve as attorneys, paralegals, and clerical support.[265] At the end of FY 1990, the section consisted of 26 attorneys, 4 professional staff, and 9 clerical staff.[266] By the close of FY 1991, the section had an operating staff of 30 attorneys, 6 professional staff, and 10 clerical staff members.[267] At the close of FY 1992, the section had a $6.357 million budget,[268] and consisted of 37 attorneys, 9 professional staff, and 10 clerical staff.[269] The Civil Rights Division budget for FY 1993 was $52.7 million, of which $6.415 million was intended for housing and civil enforcement.[270] The Housing and Civil Enforcement Section staff for FY 1993 totaled 58, including 33 staff attorneys.[271]

The FY 1994 Civil Rights Division overall budget was $59.956 million, with Housing and Civil Enforcement receiving $9.283 million.[272] In December 1993 the Attorney General

261 Schwemm, *Housing Discrimination Law,* p. 288.

262 Hancock 1991 interview, p. 57.

263 Ibid., p. 58.

264 Paul Hancock, Chief, Housing and Civil Enforcement Unit, Civil Rights Division, U.S. Department of Justice, letter to Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, Apr. 1, 1993.

265 Ware, "New Weapons," p. 58.

266 "Civil Rights Division Historical Tracking of Full-Time Permanent Positions," supplied by the Department of Justice, Nov. 12, 1993.

267 Ibid.

268 DOJ *1994 Hearings,* p. 667. Between November 1991 and September 1992 DOJ devoted a considerable amount of time and resources to the investigation of race discrimination in mortgage lending in the *Decatur Federal Savings and Loan Ass'n* case. DOJ *1994 Hearings,* p. 685.

269 "Civil Rights Division Historical Tracking of Full-Time Permanent Positions," supplied by the Department of Justice, Nov. 12, 1993.

270 DOJ *1994 Hearings,* p. 665.

271 Paul Hancock, Chief, Housing and Civil Enforcement Unit, Civil Rights Division, U.S. Department of Justice, letter to Suzanne Crowell, director, Fair Housing Project, U.S. Commission on Civil Rights, Apr. 1, 1993 (hereafter cited as DOJ submission letter).

272 *See* Jean Chipouras, Budget Analyst, Budget Office, Civil Rights Division, U.S. Department of Justice, telephone interview, Aug. 15, 1994. *See also* "Civil Rights Division Fund Tracking Chart Enacted Levels," supplied by the Department of Justice, July 1, 1993; DOJ *1994 Hearings,* p. 667.

stated that she had reallocated $1.1 million of the FY 1994 budget to the Housing and Civil Enforcement Section.[273] The reallocation was used to fund 18 new staff positions for the section.[274]

Until the introduction of the election process, DOJ attorneys in the Housing and Civil Enforcement Section did not litigate in jury trials. In order to prepare for jury trial litigation, the attorneys attended the DOJ Advocacy Institute and a 1-day retreat, and consulted other DOJ attorneys about jury selection and courtroom demeanor.[275] In addition, "some attorneys on the section staff had jury trial experience from previous employment in the private sector," and others with such experience were hired. Informal and formal discussions and training on the job has been ongoing.[276]

Because of the unanticipated high numbers of judicial elections, in the past DOJ has had to take time and resources away from pattern and practice cases in order to litigate the large number of elections.[277] However, DOJ plans to enlist the assistance of U.S. attorneys offices to litigate election cases as well as prompt judicial actions.[278] According to the Attorney General, the assistance of the U.S. attorneys is intended to allow the Housing and Civil Enforcement Section to devote more of its resources to testing initiatives and enforcement efforts against lending discrimination and insurance redlining.[279] In FY 1994 DOJ planned to use $1.46 million to expand the mortgage lending initiative and the testing program.[280] The allocation will be used to formulate and conduct testing and to hire testers on a contractual basis.[281] DOJ has also allocated resources for education and public outreach. Between October 1988 and April 1993, DOJ officials made over 200 public appearances to discuss FHAA enforcement with representatives of the housing industry, State and local governments, legal organizations, and fair housing advocacy groups.[282] Although representatives from both DOJ and HUD are usually invited to speak at these conferences, the two departments try to coordinate their appearances to avoid duplication.[283]

DOJ has maintained an outreach program for housing providers to encourage voluntary compliance.[284] In addition, DOJ wrote to local civil rights and fair housing organizations

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273 *AG Reno Announces Major Expansion of DOJ's Housing Section,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

274 Ibid. In FY 1994, the section received 89 FTEs and 101 actual positions according to the Civil Rights Division's Budget Office. *See* Chipouras interview, Aug. 15, 1994.

275 Hancock June 1993 interview.

276 Attachment to DOJ Comments, p. 3.

277 Hancock 1991 interview, p. 68.

278 *AG Reno Announces Major Expansion of DOJ's Housing Section,* 1 Fair Housing-Fair Lending (P-H) vol. 9, no. 6, ¶ 6.1, p. 1 (Dec. 1, 1993).

279 Ibid.

280 DOJ *1994 Hearings,* p. 685. The mortgage lending initiative is designed to attack the racially discriminatory mortgage lending practices of some financial institutions.

281 *Id.*

282 "Public Appearance and Outreach Efforts Since Enactment of the Fair Housing Amendments Act of 1988," (from Oct. 25, 1988 to Apr. 29, 1993), DOJ submission letter.

283 Hancock 1991 interview, p. 35.

284 Ibid., p. 33.

across the country advising them of the changes in the law.[285] DOJ also has spoken with organizations representing persons with disabilities, to explain the new protections afforded them.[286]

285 Ibid., p. 32.

286 Ibid., p. 33.

12. Findings and Recommendations

The passage of the Fair Housing Amendments Act of 1988 (FHAA) required a complete reorientation of the U.S. Department of Housing and Urban Development, from an agency devoted to resolving fair housing complaints through conciliation and voluntary compliance to one devoted to administrative enforcement, with all the changes such a transformation requires. HUD staff were required to learn how to make a case that could withstand scrutiny in a judicial setting—how to amass evidence, present findings, determine cause, and ultimately defend decisions before either an administrative or, through the Department of Justice, a Federal district court judge.

This shift in emphasis required a substantial increase and retraining of staff, creation of complaint processing systems, and maintenance of quality assurance in securing justice for individual complainants. In addition, the law gave HUD new tools to make fair housing laws work, including the power to file complaints at the Secretary's discretion, the availability of civil penalties for offenders, and certain legal tools, including the power to subpoena witnesses, conduct discovery, and seek prompt judicial action, among others.

In response to these new tasks, HUD has moved from construction of an administrative structure during the Bush administration to promulgation of new policy and enforcement initiatives in the Clinton administration. Under Secretary Cisneros, HUD has become the focus of much of the civil rights activity in the new administration.

The Department of Justice also acquired new responsibilities to obtain prompt judicial action and pursue charges of discrimination on behalf of individual victims in Federal district court. The enforcement scheme envisioned by the Fair Housing Amendments Act relies heavily on coordination and cooperation between HUD and DOJ. In addition, DOJ must continue to play a leading role in initiating fair housing cases of public importance and where a pattern or practice of discrimination can be demonstrated.

Apart from the new administrative responsibilities of both HUD and DOJ, the Fair Housing Amendments Act expanded the bases on which discrimination is barred to include disability and family status (families with children). HUD was assigned the task of setting policy governing the definition of discrimination against the newly covered groups, and both HUD and DOJ were called upon to demonstrate the Government's commitment to enforcing the new protections through filing complaints and lawsuits and prosecuting cases before administrative and Federal district court judges.

Part I: The Setting

Finding: Overall, the resources provided by Congress and the President have fallen well short of what is needed by HUD to carry out its new responsibilities. Budget analyses reveal that an enormous increase in workload has occurred, both because of increased number of complaints from the original protected groups, complaints from the newly protected groups, vastly increased investigative requirements, and lack of fully certified State and local agencies to process complaints. Consequently, enforcement of the new statute has entailed substantial backlogs and lengthy delays in processing cases from the first year in which the law became effective.

In addition, until recently HUD has taken a passive approach to fair housing enforcement, failing to utilize its authority to file complaints (see below), to provide adequate outreach and education, and to provide adequate policy guidance on fair housing discrimination.

Recommendation: Congress and the President should ensure that funds and other resources are provided to fully meet HUD and DOJ's expanded enforcement responsibilities

under the Fair Housing Amendments Act of 1988. Congress should hold oversight hearings to examine how well HUD and Justice have implemented the law and what additional resources may be required. In addition, HUD should evaluate all its activities to ensure implementation of proactive enforcement of fair housing law, and not simply respond to individual complaints of discrimination.

Part II: Complaints

Management

Notwithstanding the difficulties inherent in implementing a comprehensive new scheme of administrative law, HUD's management of the complaint process has been deficient since 1989 in several respects.

Procedures

Finding: HUD has lacked a systematic approach to processing complaints that would ensure timely, consistent management of complaints across regions.

HUD has failed to promulgate a set of systematic instructions or a comprehensive manual that would guide staff in the uniform intake, investigation, and disposition of complaints. For example, HUD has failed to define administrative closure or systemic complaints. The majority of the instructions disseminated in the form of a series of technical guidance memoranda (TGMs) have been issued in draft form and never finalized. It is not clear whether the TGM series is intended to serve primarily as a reference for procedures or policy or both.

Recommendation: HUD should develop and publish a fair housing complaints manual instructing staff on how to process complaints and on current HUD policy regarding what evidence is needed to support a claim of discrimination under Title VIII. HUD should review existing instructions, revise them as needed and finalize them, organizing them into a set of easily-referenced memoranda whose primary aim is to provide technical guidance. Policy guidance should be provided through a complaints manual and appropriate, timely supplements to such a manual. HUD should analyze the topics covered in existing memoranda and add new instructions as appropriate.

Travel

Finding: HUD instruction to staff appears to discourage onsite investigation of complaints, which is often necessary to investigate charges fully and to conduct conciliation.

Recommendation: HUD should ensure that complaints are investigated onsite as necessary by allotting sufficient funds and staff time for travel.

Testing

Finding: Intake procedures do not appear to emphasize identifying cases amenable to immediate testing as a technique of investigation. In general, testing for disparate treatment in individual cases appears little used by HUD.

Recommendation: Testing should be routinely incorporated in HUD's investigative techniques. HUD should instruct staff to identify cases for testing for disparate treatment and disparate impact as soon as possible after they are filed, and should maintain the ability to test quickly as needed, using preselected contractors.

Training

Finding: HUD staff training, while showing improvement, has been sporadic and uneven since 1988. Budgets from year to year have varied enormously. Training has been focused on national or regional sessions of a few days' duration. Regional offices have been left on their own to provide on-the-job training, without national goals or standards.

Recommendation: A comprehensive approach to training new and continuing staff should be developed and implemented. Budgets should be developed and maintained consistently from one year to the next. HUD should explore arrangements for ongoing professional training at the regional and field level using educational resources available on location at law schools and paralegal training programs. Regional offices or their organizational successors should be required to meet clearly defined training goals for new and continuing staff.

Conciliation

Finding: Standards for the conciliation of complaints have been lacking. HUD's interest in resolving the complaint, often prompted by large complaint backlogs, may result either in undue pressure on the complainant, who may be unaware of his or her options and most likely lacks counsel, to settle for less compensation than might otherwise be available, or on the respondent, who may feel coerced into a settlement of complaint without basis. Conciliation agreements must serve the public interest, but the implementation of provisions in such agreements that protect the public interest are apparently not often monitored, except for the receipt of required written reports.

Recommendation: HUD should revisit its instruction to staff regarding conciliation, and care must be taken that the parties' rights are fully respected, including their right to refuse conciliation if they so wish. Public interest provisions of conciliation agreements should be aggressively monitored. Such mandates can only be implemented through a sound quality assurance program.

Withdrawals

Finding: Many complaints are resolved when complainants withdraw their complaints in return for a given resolution, sometimes with the encouragement of HUD staff. In such cases neither formal agreements enforceable by HUD nor endorsement of the resolution as in the public interest by HUD are required. Respondents who have apparently discriminated are permitted confidential settlements, and they escape future detection as repeat offenders. Withdrawals with resolution appear to substitute for the conciliation process intended by Congress.

Recommendation: Complainants should be fully informed as to the consequences of resolving a complaint outside the conciliation process, which include that HUD assumes no responsibility for enforcing such agreements. Respondents should be made aware that resolution of a complaint in return for withdrawal does not preclude the Secretary from pursuing the complaint or referring it to the Department of Justice or other appropriate legal authority. Such withdrawals should be routinely reviewed as potential Secretary-initiated complaints.

Timeliness

Finding: In the vast majority of cases, HUD has not made a cause determination within the 100-day benchmark set by Congress. While it can be anticipated that some complaints will require more than 100 days to reach a determination, Congress clearly expected that HUD would reach a conclusion as to reasonable cause within 100 days in most situations. Delays beyond 100 days risk a court decision that the delay has weakened the complaint, and they are costly to all the parties. In addition, as cases age they become more difficult to prove, thus permitting discrimination to go unaddressed.

Recommendation: HUD should reexamine its procedures, staffing, and resources and institute procedures that will result in timely processing of most complaints without sacrificing the quality of its investigations, determinations, or other essential areas of fair housing enforcement. If the reexamination reveals reasons why HUD cannot determine cause within 100 days, HUD should make those reasons known and seek the resources needed to correct the situation.

Consistency

Finding: Not only has HUD as a whole failed in the majority of cases to make a cause determination within 100 days, but HUD's regional offices have also varied widely in their methods of case management and their ability to complete investigations in a timely fashion prior to evaluation of the complaint for a cause determination. For example, the regions also have widely varying backlogs measured as a percentage of the total caseload that exceeds 100 days and 200 days.

Recommendation: HUD should evaluate each region's performance and determine what factors are responsible for the wide variation in processing times. Based on this evaluation, HUD should adjust staff and resources, training, and headquarters

monitoring in order to achieve a uniformly timely disposition of complaints.

Organization

Finding: The division of responsibility for administering the 1988 Fair Housing Amendments Act between HUD's General Counsel and the Assistant Secretary for Fair Housing and Equal Opportunity has resulted in the anomaly whereby no one below the Secretarial level has sole responsibility for the equitable and efficient implementation of the law. Furthermore, implementation of the law at the regional level has been accomplished by delegating supervisory authority to a regional administrator responsible for a variety of functions in addition to fair housing. This delegation has also had the effect of severing policy and administrative responsibilities from the Assistant Secretary for Fair Housing and Equal Opportunity.

Recommendation: A single independent administrative agency within HUD at the deputy secretary level should be created to carry out HUD's responsibilities under the law. This agency would contain the legal and general fair housing staff required to enforce the law.

HUD should ensure that its regional and/or field structure for fair housing enforcement, however reorganized, reports directly to the agency head. Similarly, regional attorneys assigned fair housing duties should report to and be evaluated by both the General Counsel and the Assistant Secretary. Should an independent agency be created, the Office of Administrative Law Judges should remain an independent entity within HUD.

Administrative Adjudication

Overall, the administrative adjudication program set up by the Fair Housing Amendments Act has been a reasonably effective tool of fair housing enforcement once cause determinations were made. On their face, the decisions of administrative law judges (ALJs) have been reasoned in a competent fashion, and have marshalled fact and law appropriately to justify their conclusions in accordance with HUD policy. Damage awards have been at least commensurate with the damages awarded in the court system. At the same time, the ALJs have treated respondents fairly and have found in favor of respondents against whom solid proof was lacking. For this reason, it is unlikely that many ALJ decisions will be overturned on appeal.

HUD's attorneys appear to have been able to establish the reach of the FHAA at, or certainly close to, its widest defensible limits in the vast majority of cases reviewed. The statutory and regulatory interpretations offered and the standards of proof employed have resulted in fairly aggressive enforcement of the FHAA. Despite the newness of the amendments, the heretofore "socially acceptable" nature of housing discrimination against children and some disabled persons, and the ignorance of the law or lack of ill-will exhibited by many defendants, HUD ALJs have generally avoided creating loopholes and allowing excuses.

The cases that have been most problematic for the ALJs are also instructive. In two cases, *HUD v. Downs* and *HUD v. Williams*, ALJs condoned inquiries about a person's protected status, despite HUD's argument that the mere inquiry is illegal.[1] These decisions appear to create a zone of conduct in which an ALJ will not penalize a person for what the ALJ perceives to be a slight mistake without proof of intent to discriminate. Such attempts to draw fine distinctions are problematic and could lead to uneven and perhaps unjust enforcement of the law.

Interventions

Finding: Only the parties to a case may appeal the final agency decision reached after an administrative hearing. In each case, HUD serves as the charging party on behalf of both

1 HUD v. Downs, 2 Fair Housing-Fair Lending (P-H) ¶ 25,011 (HUD ALJ Sept. 20, 1991); HUD v. Williams, 2 Fair Housing-Fair Lending (P-H) ¶ 25,007 (HUD ALJ Mar. 22, 1991).

the complainant and the public interest. Since the final agency decision is in effect the Secretary's decision, HUD's OGC cannot appeal adverse administrative decisions. A complainant represented only by HUD, who loses in the administrative forum, therefore cannot appeal the decision unless he or she intervenes in the administrative forum to become a party to the case. In addition, intervention is the only method by which complainants may argue their own position in the administrative forum if the complainant's interests differ from the public interest in the ALJ proceeding. Under the current law, an aggrieved person adversely affected by an ALJ decision who is not a officially a party to the case must file a timely request for intervention. However, the law does not clearly set the period for a timely request. In addition, the ALJs have disagreed about when an intervention request will be considered timely.

Recommendation: HUD should develop clearer regulations governing the intervention process. HUD should set a reasonable timeframe in which aggrieved persons may intervene in the administrative process. Recognizing that reasonable differences occur as to the best interests of aggrieved persons and of the public, HUD should make clear that aggrieved persons may intervene at any stage in the administrative process, up to and including just prior to the deadline for any appeal, in order to present their own case or to preserve a right to appeal an adverse decision in Federal court.

Part III: HUD-Funded Activities

In addition to fair housing activities carried out by HUD staff directly, HUD funding of State and local agency programs and nonprofit fair housing groups makes a significant contribution to expanding the reach of Title VIII. State and local fair housing agencies have historically been a presence in areas where HUD resources do not permit Federal activity, thereby providing service to underserved areas and allowing HUD to focus resources on areas where no alternative agencies exist. Such agencies can continue to perform important educational and outreach functions and provide local access to fair housing enforcement with support from the Fair Housing Assistance Program.

Fair housing groups assisted by the Fair Housing Initiatives Program can also play an important educational role, provide representation to complainants, ferret out local patterns of discrimination, and conduct fair housing tests of allegations of discrimination and audits of fair housing opportunities.

Fair Housing Assistance Program

The Fair Housing Assistance Program has perforce been completely revamped by the Fair Housing Amendments Act of 1988. Agencies must meet the standards set by the new act, and while upwards of two dozen are in the process of doing so, only two have been judged to be operating under substantially equivalent statutes and have actually been granted status as substantially equivalent agencies.[2] In view of this limited experience, findings cannot be extensive, but certain observations are warranted.

HUD Reimbursement

Finding: Certification of substantially equivalent agencies still lags behind HUD's expectations when the FHAA was passed. While there may be a variety of reasons for disinterest in or inability of State and local agencies to achieve certification, one possibility apart from the political difficulties inherent in the passage of new laws is that the monetary incentives are insufficient to induce States and localities to expend the effort required for certification. Currently, cases are reimbursed on a flat fee basis, regardless of the individual agency's costs, although, on

2 For a complete discussion of the problems and issues surrounding certification, see the Commission's report, *Prospects and Impact of Losing State and Local Agencies from the Federal Fair Housing System* (Washington, D.C., 1992). In that report, the Commission upheld HUD's insistence that the standards for certification remain strong.

average, costs vary depending on agency overhead and on the extent of investigation required (e.g., whether a case is fully investigated or closed administratively).

Recommendation: First, HUD should examine its incentive structure to see whether the compensation offered provides sufficient incentives for State and local jurisdictions to achieve substantial equivalency and actually reimburses agencies for the costs incurred in investigating and adjudicating cases where cause has been found. Second, consideration should be giving to reimbursing cases in varying amounts depending on the effort required to resolve the complaint (whether it is dismissed administratively, conciliated, or fully investigated).

Agency evaluations

Finding: In the two evaluations for substantial equivalency status of State agencies conducted by HUD, no civil rights or women's organizations were interviewed, nor were any fair housing groups consulted as to their knowledge of the performance of the agencies in question, nor were any special local outreach efforts made to ascertain the views of local interested parties other than those few groups selected by HUD itself.

Recommendation: In certifying that agencies are performing in a substantially equivalent status in fact, HUD should include interviews with civil rights and women's groups and fair housing advocacy organizations as well as real estate industry groups and other community organizations. HUD should consider publishing the content of its *Federal Register* notice that it invites comment on the performance of such agencies in statewide newspapers and mail it to appropriate interested organizations.

Finding: Evaluation of State and local agencies must sometimes occur with very little data on complaints. Some jurisdictions are simply too small to generate very many complaints. Newly created or revamped agencies do not always receive very many housing complaints in their first years of operation. Finally, outreach may be inadequate to the task of informing the broad population of its fair housing rights, resulting in fewer complaints filed.

Recommendation: A threshold requirement for a minimum caseload by which to judge substantially equivalent status should be established. HUD should consider seeking alteration of the 2-year deadline by which it must abrogate interim certification and certify an agency as substantially equivalent or deny certification altogether. In the alternative, HUD should exercise greater scrutiny of agencies with limited records when they have been granted full certification.

Fair Housing Initiatives Program

The Fair Housing Initiatives Program has funded worthwhile efforts by private nonprofit fair housing groups, but its administration has been flawed by funding delays and apparent indecision regarding the purposes for which funding would be granted.

Distribution of funds

Finding: HUD has been dilatory in distributing funds in a timely fashion to groups able to make constructive use of them, to the point where congressional intent that such groups receive timely funding has been frustrated. The program has consistently distributed money at the end of the fiscal cycle permitted by law, and notices of funding availability have often been suspended, delayed, and revised such that it appears HUD lacks a clear plan for or even commitment to the distribution of the money and the purposes for which it is intended.

Recommendation: HUD should revise its internal procedures such that timely announcement and distribution of FHIP funds are made, and so that a clear set of priorities for use of the funds is established and publicized.

Underserved areas

Finding: When analyzed geographically, distribution of FHIP funds has been concentrated in the Northeast and Midwest, upholding the finding of Congress that new fair housing organizations are needed in unserved and underserved sections of the country.

Recommendation: HUD should actively assist in the formation of fair housing groups

in underserved areas of the country, using FHIP funds allocated under the Fair Housing Organizations Initiative. This assistance can take the form of aid to fair housing groups in formation or groups with the capacity to expand elsewhere, as well as conducting conferences and meetings to stimulate interest in the formation of such groups.

Testing

Finding: HUD will fund testing activities for law enforcement purposes only in response to a "bona fide" allegation of housing discrimination. Such an allegation is defined as a complaint by an individual alleging an instance of discrimination.

Recommendation: HUD should fund testing activities for law enforcement purposes not only when a complainant alleges discrimination but also wherever there are reasonable grounds to believe discrimination may be occurring, such as observed statistical disparities, media reports, or substantive anecdotal evidence.

Part IV: The New Jurisdictions

Several questions have arisen regarding coverage extended by the Fair Housing Amendments Act to persons with disabilities and families with children.[3] In some instances, the questions pertain to what extent the law regarding treatment of new groups can be derived by analogy to the groups originally protected by Title VIII. In other cases, questions arise from situations unique to the FHAA. As with other issues, HUD policy has emerged from regulations, written guidance, answers to letters of inquiry, ALJ decisions, and secretarial review. DOJ, too, has had to grapple with issues arising from the new provisions of Title VIII.

For the most part, such policy has properly expressed the intent of Congress, with few exceptions. In some cases, greater clarity could be achieved by explicit policy statements of HUD's view of the law.

Privacy

Finding: The extent of privacy rights of those involved in real estate transactions has been the subject of dispute. In one case, a condominium association attempted to require an owner to produce a doctor's description of her disability before approving use of a flotation device. HUD argued correctly that such a description went beyond the association's need to know, and that a simple statement from a doctor that an accommodation was required should be sufficient. DOJ disagreed, arguing the inquiry was not improper.

In a separate inquiry, the extent to which a disability can or need be disclosed by a broker (or presumably a buyer or tenant) was at issue when a hypothetical situation involving Acquired Immune Deficiency Syndrome was posed to HUD. HUD took the position that an agent ought not volunteer such information and need not answer any question as to HIV status.[4]

Recommendation: HUD should issue policy guidance detailing what inquiries are proper regarding the disability of a person involved in a real estate transaction.

Zoning and Land Use Laws

Finding: DOJ challenges individual applications of zoning laws that fail to make reasonable accommodations for persons with disabilities by disapproving group homes, but the laws themselves are not modified by this approach. Thus every zoning complaint is addressed separately.

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3 Some of the issues raised here are discussed in Part V.

4 HUD has already revised its regulations governing discovery to bar requiring a medical exam as part of the proceedings in a given case, except where ordered by an administrative law judge. The medical exam can only be ordered upon "a showing by the moving party that the physical or mental condition of the person who is the subject of the request is in controversy and that good cause exists for the requested examination." 59 Fed. Reg. 1642.

Recommendation: HUD, in consultation with DOJ, should issue policy guidance stating that zoning ordinances should not only permit reasonable accommodations to persons with disabilities, but also contain a presumption in favor of providing reasonable accommodations.

Prohibited Inquiries

Finding: HUD has argued that it is improper to make inquiries of potential tenants or owners that indicate an impermissible bias on a prohibited basis. For example, it is widely accepted that inquiring as to the race of an applicant for housing has no legitimate purpose. However, administrative law judges have held that inquiries about the desirability of a given applicant may arise from the protected status of the applicant. For example, an ALJ ruled that to inquire whether an applicant's children are noisy does not indicate bias against children.

Recommendation: HUD should issue formal policy guidance clarifying the nature of proper inquiries of prospective tenants or buyers which makes clear that questions indicative of a tenant's suitability must be based on business necessity and asked of all prospective tenants where they might apply.

Ancillary Facilities

Finding: As HUD has noted in its regulations, the Fair Housing Amendments Act of 1988 bars discrimination in all facilities associated with housing, such as use of recreational and parking facilities. HUD has issued internal guidance regarding such facilities based on its experience. For example, HUD has held that landlords may reasonably develop safety rules regarding the use of swimming pools or recreational equipment, as long as such rules apply equally. Rather than prohibit all children from swimming without a parent, HUD has said landlords should bar all nonswimmers from using a pool without a responsible swimmer in attendance.

Recommendation: HUD should publish policy guidance in the *Federal Register* on the use of facilities, similar to the guidance it has distributed internally.

Part V: Fair Housing Policy and Implementation

Federal leadership in fair housing policy has been delegated by the President to the Department of Housing and Urban Development in a 1994 executive order, while the responsibility for litigation remains with the Department of Justice. Both HUD and DOJ have generally pursued fair housing policies that address the needs of both complainants and respondents, as well as the public interest. More recently, HUD Secretary Cisneros has used the secretarial review provisions to clarify HUD policy in a forthright manner. However, HUD has lagged in using its ability to file Secretary-initiated complaints to attack unique or systemic discrimination and to break new ground.

DOJ has been innovative in pursuing cases against discrimination in new arenas, such as mortgage lending, but not in ascertaining the reach of the law through, for example, utilizing generally accepted tenets of disparate impact in litigation.

Given the unique nature of the agencies' shared responsibility for fair housing enforcement, HUD and DOJ are required to coordinate their efforts to establish and implement fair housing policy consistent with the intent of Congress. To date, the two departments generally cooperate, but some disagreements have not been adequately resolved.

Proving Discrimination

Disparate Impact

Finding: Since passage of the Fair Housing Act of 1968 (Title VIII), courts have borrowed from the standards of proof developed under Title VII to prove discrimination under Title VIII. Under the Bush administration, HUD pursued fair housing cases using a disparate impact analysis, while DOJ declined to do so. Under the Clinton administration, both the Secretary of HUD and the Attorney General have stated that they will pursue housing cases alleging discrimination based on disparate impact. HUD plans to issue regulations supporting the use of disparate impact, and the Attorney General has stated that DOJ will

now present disparate impact arguments in Federal court.

Recommendation: Both HUD and DOJ should continue to apply the disparate impact analysis in fair housing cases.

Secretary-initiated complaints

Finding: Secretary-initiated complaints can be an effective tool of Title VIII enforcement with great, albeit unrealized potential. Secretary-initiated complaints, like pattern or practice cases filed by DOJ, afford HUD the opportunity to pursue broader cases of discrimination without relying on individual complainants. Since the effective date of the FHAA, HUD has filed only eight Secretary-initiated complaints.

Recommendation: HUD should greatly intensify its efforts to develop Secretary-initiated complaints. It should issue guidance or regulations detailing the subjects that may be properly pursued in a Secretary-initiated complaint. Further, HUD should target discrimination least susceptible to correction through individual complaints, either because individuals are unaware they are being discriminated against or because the remedy for an individual might be inadequate to prevent future discrimination. To meet this goal, staff and resources devoted to Secretary-initiated complaints must be substantially increased.

Timeliness

Finding: HUD regulations currently require the Secretary to file his complaint within one year of the occurrence or termination of the alleged discriminatory housing practice despite the fact that the FHAA does not appear to impose such a filing limitation. The Department of Justice may file a pattern and practice case at any time the Attorney General has reasonable cause to believe such a case is warranted.

Recommendation: HUD should remove or at least lengthen the regulatory time constraints on filing Secretary-initiated complaints, so that HUD may pursue complex cases that may require more time and resources than are currently permitted.

Conciliation agreements

Finding: An important conciliation agreement reached in a Secretary-initiated complaint has been kept secret, robbing it of any deterrent effect although a prima facie case of discrimination was evident.

Recommendation: While all conciliation agreements should generally be made public, in particular, the terms of conciliation agreements reached as a result of Secretary-initiated complaints should be disclosed and publicized barring extraordinary circumstances. Such circumstances should be defined in new regulations. Public disclosure is particularly important in the case of large corporations or public entities that are closely monitored by similarly situated organizations. Such agreements may serve to stimulate voluntary compliance by putting potential respondents on notice.

Secretarial review process

The Secretary of HUD serves as the final arbiter of issues and cases raised in the administrative forum. Thus, when HUD's position, as argued by OGC, does not persuade an ALJ, HUD may, in effect, internally appeal the decision to the Secretary. The Secretary has full discretion to affirm, modify, reverse, or remand initial ALJ decisions and orders so that they may be consistent with HUD policy.
Procedures

Finding: While the substantive positions taken by the Secretary in his review of ALJ initial decisions have fulfilled the purpose of the Fair Housing Amendments Act, the Secretarial review procedure itself appears biased in favor of HUD as the complaining party, in one respect. Respondents or other parties are not made aware of the option to file objections to the decision of an administrative law judge with the Secretary prior to his review, and the Office of General Counsel may file its objections without notice to the respondent.

Recommendation: HUD should clarify the rights of parties to object to the decision of an administrative law judge prior to its review by the Secretary, and so notify them.

Policymaking

Finding: The Secretary has used the review process to establish policies on new and controversial issues through adjudication. For example, the Secretary recently used his review authority to establish policy for the agency on the application of the business necessity standard in disparate impact cases. While such decisions serve as precedent for ALJs to follow and are not in the least inappropriate, they are essentially reactive in nature and easily reversed by a different Secretary. Agency policy is best set by regulation open to public comment and review and not reversible except by the same process. Policy set by regulation also gives better guidance to ALJs and carries greater weight should cases end up in appeals courts.

Recommendation: Policies with broad application that interpret Title VIII should be promulgated through the regulatory process and open for public comment and review. Issues that arise in the course of administrative adjudication should be addressed as needed through the secretarial review process, but should also be regularized by issuance of appropriate regulations on a timely basis.

Other matters

Zoning cases

Finding: Although the FHAA requires HUD to refer all complaints involving the legality of State or local zoning or land use laws immediately to the Attorney General, the Assistant Secretary prescreens and investigates zoning complaints before referring them to DOJ. Thus, if the Assistant Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary must dismiss the complaint regardless of whether the case involves the legality of a zoning or land use ordinance.

The legal requirement to refer viable zoning cases to DOJ for litigation is important because DOJ may pursue remedies in Federal court not available to HUD in the administrative process. Unlike HUD, DOJ has the discretion to pursue remedies such as reforming the selection process for zoning board members or providing for a review process of zoning board decisions.

Recommendation: The Assistant Secretary should continue to prescreen cases involving the legality of State and local zoning or land use ordinances. The prescreening process allows HUD to eliminate no cause complaints early in the FHAA process, thus conserving resources for complaints demonstrating reasonable cause.

Prompt judicial actions

Finding: Prompt judicial actions are an effective method by which HUD and DOJ can eliminate discrimination without costly litigation. Often the mere threat of a prompt judicial action causes the respondent to comply with HUD's position. In particular, temporary restraining orders are extremely valuable for preventing, on short notice, allegedly discriminatory evictions or sales of property to innocent third parties.

Although DOJ is required by statute to pursue whatever temporary or preliminary relief HUD authorizes, DOJ exerts considerable influence over HUD, prior to HUD's authorization, with respect to the standard of proof required to authorize temporary restraining orders. HUD maintains that temporary restraining orders, unlike preliminary injunctions, require only a demonstration of irreparable harm in order to maintain the status quo during further investigation by HUD on the merits. However, it appears that DOJ expects HUD to authorize both preliminary injunctions and temporary restraining orders only when enough evidence exists to support a reasonable cause determination on the merits. It appears that this disagreement over the appropriate standard for authorizing a temporary restraining order has reduced the frequency of prompt judicial action requests by regional counsel.

Recommendation: It is essential that HUD and DOJ agree on the standards necessary to pursue temporary restraining orders. Because of the often severe consequences involved in situations requiring prompt judicial action, DOJ should agree to pursue temporary restraining orders upon a showing of irreparable harm to the complainant, rather than

requiring the higher standard of likely success on the merits.

HUD's plan to issue technical guidance and provide training in the HUD regions on the use of prompt judicial actions is commendable. However, the guidance and training will only be effective if HUD and DOJ agree on the standards required to authorize such actions. Without a clear position, HUD regional counsel are less able to identify situations in which the harm to the complainant could be reduced by maintaining the status quo pending further investigation.

Judicial review

Finding: DOJ is responsible for representing the United States in all appeals reviewing the final decisions of HUD. However, DOJ may authorize HUD to litigate appeals in Federal court. DOJ and HUD, by their own agreement, are supposed to work closely together on all appeals.

DOJ's involvement in Federal court appellate litigation often influences HUD's internal strategy for litigating administrative cases. For example, DOJ did not defend the ALJ's decision to award damages for loss of civil rights in its appeal in *Baumgardner v. HUD* before the sixth circuit. Thus, after the sixth circuit overturned that particular damage award, HUD issued a memorandum stating that regional counsel should no longer seek damages for loss of civil rights even if the complaint does not arise in a sixth circuit jurisdiction because DOJ does not consider the loss of civil rights to be a compensable injury. Thus, rather than pursue the damage award in other cases in other circuits, DOJ accepted the view of the sixth circuit and refused to argue in favor of damages for loss of civil rights.

Recommendation: HUD and DOJ should work closely together to develop the litigation strategy for appeals in Federal court. In the rare event that they disagree on such strategy, DOJ should make every effort to develop an approach that will incorporate HUD's views such that HUD's policy positions are adequately represented. In addition, when appropriate, DOJ should test the limits of fair housing law by continuing to pursue important substantive issues in other circuit courts.

Judicial elections

Finding: In passing the FHAA, Congress wanted to create an administrative process that would provide a fair and inexpensive means of resolving fair housing disputes. However, complainants and, in particular, respondents are electing to proceed in Federal court in the majority of cases, rather than litigating their complaints in the HUD administrative forum. The number of elected charges has far exceeded the expectations of both HUD and DOJ. To alleviate the burden on DOJ attorneys litigating fair housing cases, DOJ has recently authorized U.S. attorneys to litigate elected charges.

Once an election is made, the FHAA requires HUD to authorize a civil action and requires DOJ to litigate the complaint on behalf of both the aggrieved persons and the public interest in Federal court. DOJ is allowed to return elected charges to HUD only when new court decisions or new evidence may be relevant to the initial reasonable cause determination. However, HUD believes that, on occasion, DOJ has returned elected charges simply because DOJ does not agree with HUD's reasonable cause determination or HUD's substantive policy position. While DOJ acknowledges its responsibility to support HUD's reasonable cause determination, DOJ maintains that it only returns elected charges when the charge is flawed or when it conflicts with DOJ's responsibility to avoid filing frivolous claims in Federal court.

Recommendation: While recognizing DOJ's obligations to the Federal courts, DOJ must in turn recognize that HUD's reasonable cause determination is not reviewable except when a new court decision or new evidence would affect the initial determination. If DOJ disagrees with the substantive issues of a HUD charge such that it cannot litigate the charge in good faith, DOJ should authorize HUD attorneys to pursue the charge. In addition, DOJ should authorize HUD attorneys, as well as U.S. attorneys, to handle the litigation of elected charges where appropriate or where resources are otherwise inadequate.

In addition, Congress, HUD, and DOJ should study the election process to determine why parties, particularly respondents, are electing to litigate in Federal court rather than pursue the administrative adjudication intended by the FHAA.

Sovereign immunity

Finding: Currently, HUD and DOJ disagree as to whether or not HUD may file an administrative charge against another Federal agency. Most recently, the controversy has arisen in the context of a judicial election of a HUD charge filed against the Farmers Home Administration. While HUD asserts that the FHAA was amended to allow charges against all respondents including government entities, DOJ maintains that Federal agencies generally may not sue one another and that Congress did not expressly permit such suits in the FHAA. Thus, until the issue is settled, according to DOJ, Federal agencies may only be sued by private litigants for violating the FHAA.

Recommendation: The President should issue an executive order requiring Federal agencies charged with fair housing discrimination to submit to binding arbitration of fair housing complaints. In the alternative, Congress should either mandate such binding arbitration, as it has in certain employment matters, or expressly waive sovereign immunity in order to allow HUD or DOJ to sue another Federal agency for a violation of the FHAA.

Conciliation breaches

Finding: If a party breaches a conciliation agreement, HUD attempts to resolve the breach internally before seeking enforcement in Federal court. However, if HUD cannot resolve the breach, HUD refers the breach to DOJ with a recommendation to pursue a civil action. The Attorney General may then decide whether to file a claim in a conciliation breach. Rather than file a civil action, DOJ tries to avoid costly and time-consuming litigation by attempting to resolve the breach or by submitting the case for binding arbitration, which often results in a faster resolution of the matter.

Recommendation: DOJ should litigate conciliation breaches more aggressively, so that such litigation can serve as an effective deterrent against respondents who may wish to breach an agreement. If complainants are confident that conciliation agreements will be enforced effectively, they may be more willing to conciliate.

Recognizing the extensive burden on DOJ attorneys and resources primarily because of the high number of elected charges, DOJ should delegate the authority to enforce conciliation breaches to HUD.

Concurring Statement of Commissioner Robert P. George

This report offers a number of recommendations to strengthen administrative enforcement of amendments passed by Congress in 1988 to a series of fair housing laws over the last 25 years. I concur in the view that laws should be enforced by the executive departments such as HUD, which were created for that purpose.

I also concur in the report's declaration that "Housing discrimination undermines a fundamental premise on which our free society rests: that every person, regardless of class or group background, should have the same right to the rewards of his or her work and enterprise." (p. 5)

I write separately, however, to record my misgivings about certain aspects of the general approach to civil rights problems adopted in the report. These are, in my judgment, obsolete, unhelpful, and potentially counterproductive to the cause of civil rights.

The focus of my concern is symbolized by the report's undifferentiated use of the invidious word "segregation" to describe virtually all racially and ethnically concentrated communities. Most American citizens understand "segregation" as the legal or socially enforced separation of persons by racial categories. The concept of "separate but equal" rights for different races, constitutionally sanctioned by the Supreme Court in *Plessy v. Ferguson* (1896), came under continuous legal and political challenge until it was abolished by the Court in *Brown v. Board of Education of Topeka,* whose 40th anniversary we are celebrating this year.

Following the *Brown* decision, President Kennedy issued Executive Order 11063 outlawing discrimination in public housing. Since then Congress has acted repeatedly to reduce and eliminate legal and social barriers to freedom of access to housing for all Americans, passing the Civil Rights Act of 1964, the 1968 Civil Rights Act, the Housing and Community Development Act and the Equal Credit Opportunity Act in 1974, and the 1988 Fair Housing Amendments, which are the subject of this report.

Since that time, too, state governments, municipalities, and other governmental entities have passed thousands of laws and regulations to break down race based segregation in housing. Billions of dollars have been spent since the 1960s by governments at all levels to provide public, mixed, and low income housing mostly for the benefit of minorities, sometimes fighting challenges through the courts for years to ensure that housing for minorities is available in white neighborhoods such as Yonkers and Mount Laurel.

Because of these efforts America's communities today look very different from those of 30 years ago. Yet this report disparages three decades of struggle for equal civil rights in housing. Citing a *USA Today* newspaper article, the report endorses the assertion that "the majority of the Nation's 30 million African Americans are as segregated now as they were at the height of the civil rights movement in the 1960s." (p. 3) I believe that this defeatist viewpoint should have no place in the document the Commission sends to Congress today.

If it were true that 30 years of vigorous desegregation efforts have utterly failed, then the Commission would find itself in agreement with opponents of civil rights and anti-discrimination laws who always argued that progress could not be made in desegregation by passing Federal, state, and local legislation. Moreover, such a failure could be taken by others as a justification for enacting punitive legislation in a misguided endeavor to make the Nation conform to a politically correct model of a multicultural society.

The report's method of precisely calculating racial concentrations implies an egalitarian standard that could only be achieved by a draconian policy of racial and ethnic quotas. Its methodology, in other words, points down the path of increasing government intervention in local communities and interference with the homes and families of America, a path which has already strained the virtues of responsibility, individual choice, independence, and self-government which should distinguish the citizens of a democracy.

Nowhere does the report canvas the range of explanations, some legitimate, others not, for why people of common racial and ethnic backgrounds live together in particular neighborhoods. It apparently disregards the historical fact that immigrant peoples have often settled in urban communities of common tongue and custom until later generations were "Americanized." In a free regime many of those arriving from abroad probably will choose to live with others who share their ethnic, religious, cultural, and linguistic heritage.

Neither does the report examine a second crucial feature in minority residence patterns, the impact of economic barriers to home ownership in more affluent neighborhoods. Since a large number of blacks, Latinos, and other minorities are poor, homes in many suburban communities are out of reach for most.

Yet even as this report was being drafted, the *Washington Post* was reporting record numbers of black families abandoning Washington, D.C., for suburbia:

> The District's population loss is accelerating, and nearly equal numbers of whites and minorities are making the exodus. . . . The District had more black residents than all the suburbs combined in 1980; by the end of the decade, more blacks lived in the Maryland suburbs than in the city.
>
> William Frey, a demographer at the University of Michigan who studies city-suburb relationships, said the census data suggest that flight from the city is now led by blacks. ["Migration From D.C. Is Booming," p. A1, April 28, 1994].

A refusal to acknowledge the factors of choice and poverty in minority residence patterns blinds the report both to the powerful dynamics among minorities who *are* moving freely from community to community, as well as to deeper problems of the poor such as the homelessness of thousands of minority families, about which the report is silent.

Over 150 years ago the prophetic observer of America, Alexis De Tocqueville, warned democracies of a new form of "soft despotism" that threatened to undermine the capacity for moral choice that characterizes human beings. Rising concerns about our nation's growing problems of inner city crime, violence, drug abuse, and family breakdown exemplify Tocqueville's warnings about the dangers created by an ever expanding government which is gradually co-opting our freedom to make intelligent decisions about our lives. In *Democracy in America* Tocqueville wrote:

> [Centralized government] daily makes the exercise of free choice less useful and rarer, restricts the activity of free will within a narrower compass, and little by little robs each citizen of a proper use of his own faculties . . .
>
> [G]overnment . . . covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd. . . .
>
> It does little good to summon those very citizens who have been made so dependent on the central power to choose the representatives of that power from time to time [i.e., in elections]. However important, this brief and occasional exercise of free will will not prevent them from gradually losing the faculty of thinking, feeling, and acting for themselves, so that they will slowly fall below the level of humanity. [G. Lawrence, trans., pp. 692, 694]

An important part of the freedom Tocqueville argued for is in the area of how and where to house our families. Governmental policies which overregulate and aim indiscriminately at outcomes rather than enhancing people's freedom to live where they wish generate the

perception that government is being manipulated by some groups at the expense of others, creating resentment and rationalizing prejudice.

The goal of housing laws should be the elimination of remaining barriers to the equal opportunity to live wherever one chooses. The Commission and the Nation should focus attention in the 1990s on what my fellow commissioner, Russell Redenbaugh, calls a "new paradigm" for free society in which the poor are empowered morally and materially to shape their lives well by their own choices. This model of self-government is the very opposite of the "soft despotism" Tocqueville described so well in 1840.

In the "new paradigm" of freedom, the poor can be liberated from unlivable public housing slums often run by uncaring, corrupt officials. In some cases we can, for example, sell public housing units to tenant occupants; in other cases we can turn management over to tenants; and we can provide vouchers for use in the private housing market. Fundamentally the "new paradigm" means that self-government requires *trust* in the American people to make their own decisions without assuming that most are prejudiced, bigoted, or acting in bad faith.

Over the past 30 years we have made great progress in defeating segregation and advancing the cause of civil rights. Still, prejudice remains and our fight must continue. The means we use in this just cause, however, must themselves be just. Indeed, if the means we employ are unjust we will have undermined the very cause of civil rights to which we have dedicated ourselves. So we must ask whether the race-based categorizing of individuals that has become the hallmark of our statecraft has compromised this great cause. We must ask whether policies that treat people differently based on ethnic or racial characteristics, thus dividing Americans into categorizes of skin color and speech pattern in order to dole out benefits, have had the effect of stimulating prejudice and exacerbating racial tension. Our report should not have left these questions unasked and unanswered.

Statement by Mary Frances Berry, Chairperson

This Fair Housing Report is designed to implement the Commission's responsibility to monitor the enforcement activities of Federal civil rights agencies and to recommend ways that they can improve their job performance. The report is designed to help HUD, in concert with the Justice Department, to implement the Fair Housing Amendments Act of 1988 more efficiently.

President Reagan proposed and Congress enacted Fair Housing legislation in 1988 because governmental officials acknowledged that civil rights enforcement in housing had been weak and ineffectual for years. Discriminatory barriers kept too many Americans from gaining access to the housing of their choice. In 1985, John Knapp, General Counsel at HUD told this Commission at a consultation that there were about 2 million instances of housing discrimination occurring every year.

The housing opportunities of African Americans are only one important aspect of the housing discrimination problem. However, urban residential segregation of African Americans remains greater than that of any other racial or ethnic group, and when African Americans move to the suburbs they are most often subjected to involuntary segregation through the use of steering and other tactics. Discrimination in access to housing of their choice, whether in the suburbs or the cities for African Americans, even when they can afford it, has been well documented by researchers and the use of testers. African Americans are not free to live where they choose whatever their socioeconomic status.

The work of HUD under the Fair Housing Amendments Act of 1988 focuses on the claims of people who seek housing and are denied illegally. This report makes important recommendations, which should help HUD and the Justice Department to respond more efficiently to those who are excluded from the housing of their choice, because of disability, familial status, race, sex, color, national origin, or religion.

Appendix A

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
THE SECRETARY
WASHINGTON, D.C. 20410

October 13, 1994

Mary Frances Berry
Chair, U.S. Commission on Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Dear Madam Chair:

The Department of Housing and Urban Development is pleased to provide its response to the recommendations included in the Commission's report, "The Fair Housing Amendments Act of 1988--The Enforcement Report." Your graciousness in providing the opportunity to comment is greatly appreciated.

I take my responsibility to enforce the Fair Housing Act very seriously. Together with the Assistant Secretary for Fair Housing and Equal Opportunity Roberta Achtenberg, I have endeavored to improve the operation of HUD's fair housing enforcement programs and to shift badly needed departmental resources to this effort. To that end, I have elevated the office of Fair Housing and Equal Opportunity ("FHEO") to stand equal with HUD's other program offices. In an environment of government-wide staff reductions, I have authorized Assistant Secretary Achtenberg to add 48 new employees to her staff so that the civil rights obligation of the Department can be more faithfully and effectively discharged. And, in an effort to leverage and maximize human resources, the Department has increased threefold staff training funds for fair housing, and hired outside consultants to improve management systems and provide needed expertise on technical issues.

I believe that many of the recommendations made in the Commission report have been resolved or will be addressed as the results of HUD's reorganization of the Fair Housing Act enforcement function are felt. Beginning in April, 1994, fair housing field staff, including those who carry out investigations to determine if the Fair Housing Act has been violated, now report directly to HUD's chief civil rights enforcement official. The restructuring will enable the office of Fair Housing and Equal Opportunity to oversee field activity more directly, and to provide consistent and thorough application of the Fair Housing Act.

Additionally, the Department has also completely revamped its system for making determinations of whether or not a Title VIII complaint filed by a private party should be brought to a hearing or to trial. Authority to make determinations of whether there is cause to believe that a violation of Title VIII has occurred is now lodged with FHEO. The Office of General Counsel ("OGC") will continue to play an essential role, and have concurrence authority

in these determinations. With the assistance of counsel, fair housing staff will begin identifying legal issues prior to the commencement of investigations. In order to develop a consistent system for determining whether cause exists for HUD to go forward, both cause and no cause cases will be reviewed in Headquarters before a charge is issued. We believe that after a period of adjustment, the new system will substantially address issues of consistency and timeliness.

Below are comments on each of the report's recommendations.

Part I: The Setting

We agree that funding should be provided to meet HUD's expanded enforcement responsibilities. The Department has already allocated additional funds to support new initiatives to address mortgage lending and insurance discrimination and undertake more aggressive action in national and regional systemic investigations. The Department has already begun to evaluate all of its activities toward full and fair enforcement of the Fair Housing Act. In addition to providing resources for more effective enforcement, the Department has strengthened the role of the Office of Fair Housing and Equal Opportunity throughout the Department, so that fair housing concerns have become a component of all of the Department's program activities, in an unprecedented fashion. Beyond the allocation of resources to a particular office, the Department is committed to utilizing its existing program resources to advancement of fair housing issues within the entire Department.

Part II: Complaints

Procedures

The Department's actions are already well underway to address the Commission's concerns about the lack of a consistent system for processing complaints. The Department has initiated a new system for provision of guidance to the field on uniform procedures. It has issued guidance and provided training on consistent intake procedures. It has issued guidance on administrative closures. Guidance on systemic investigations and Secretary-initiated complaints will be issued in the very near future.

The Department has replaced the "draft TGM" system with a formalized system of Notices which are public documents and which go through an internal clearance process. Where circumstances are urgent, interim guidance is issued in memorandum form, which is also considered to be a public document, and which is later placed in the Notice format. The first Notice issued addressed administrative closures, and contained a consistent national approach to circumstances in which such closures may, and may not, be used.

Six chapters of a compliance manual are expected to go into internal HUD clearance by the end of October. These chapters will address such critical investigative guidance issues as Intake, Conducting an Investigation, and Conciliation. Other chapters are in active preparation.

Travel

Although in the past financial resources may not have been made available for on-site investigation in cases under the Fair Housing Act, every effort was made this fiscal year to make such funds available. We are unaware of any current circumstances in which on-site investigation is being discouraged or not utilized in all appropriate cases. Moreover, for the first time, as a result of the FHEO reorganization, FHEO will now have control over allocation of travel funds for its own staff. FHEO intends to ensure the availability of funds in the future. The issue of using on-site investigations routinely will be also be re-emphasized in future guidance.

Testing

The Department agrees that testing to confirm or refute experiences described by complainants has been an underutilized investigative tool in the past. This administration made funding available to each of its regional offices in FY '94 for procurement of testing services from private fair housing groups as part of the Department's investigative effort. The Department has budgeted funds for FY '95 to continue this practice. This will assure that adequate funds will be available in FY '95 to make testing in individual complaint situations a viable option. We note, however, that the prompt availability of trained testers may not always be possible in some parts of the country, and HUD is considering alternatives to address that concern.

Training

The Department agrees that past training on fair housing enforcement issues, dating back to 1989, has been wholly inadequate. Beginning last year, shortly after Assistant Secretary Achtenberg was confirmed, FHEO initiated a series of substantive training activities. Among them was a basic course on conciliation techniques, an advanced program on investigation techniques, and a joint training for attorneys and investigators which was broadcast nationally to over 400 participants. This teleconference addressed current difficult issues, including use of prompt judicial actions as an enforcement technique, zoning issues, theories of proof in fair housing cases, and proof of damages. Among the presenters were the best in the field, from the Department of Justice, private fair housing groups, private counsel, civil rights advocates and FHEO and OGC staff.

FHEO has provided the first ever intake training, to intake staff from across the country, to provide direct and concrete instruction on dealing consistently and effectively with intake issues. Other trainings have included two one week courses on investigation of mortgage lending cases, which included hands-on case analysis and sampling techniques, and a course on advanced disability techniques. Every training session provided during the past year, including a fair housing planning conference for fair housing field staff, has included a substantial component devoted to proof theories in fair housing cases.

The Department is currently considering ways to institutionalize and broaden its training activities on an on-going and consistent basis. Among the areas in preliminary development are basic fair housing orientation training materials, self-taught materials on the Intake process, and effective conciliation techniques. In addition, the Department is preparing video tapes of several of its recent training courses, including the Intake training, for distribution to state and local agencies which enforce laws which are substantially equivalent to the Fair Housing Act and to field offices for use in training current employees.

Conciliation

The Department agrees that further instruction and training on effective, and non-threatening, conciliation techniques is critical to the process. Written guidance on conciliation will be included in the compliance manual currently in production. Staff has already received clear instruction on the rights of the parties to a complaint to engage or not to engage in conciliation. However, because various judicial decisions have indicated clearly that the Department must engage in adequate conciliation efforts, it is necessary to at least ascertain, and perhaps re-confirm, the desire of the parties to engage, or not to engage, in conciliation.

The Department will also require its newly created enforcement centers to monitor compliance with conciliation agreements. Tests will be one way by which this monitoring may be performed.

Withdrawals

The Department has already issued guidance which instructs staff on the proper handling of private settlements of cases, including the specific requirement that staff not encourage private settlements and advise complainants and respondents of the disadvantages of such settlements. The Administrative Closure guidance requires staff to review private agreements and take appropriate action, including recommendation of a Secretary-initiated complaint, where policy issues are not resolved by private settlement. This issue is also addressed in formal guidance which will be issued in the near future regarding criteria for recommendation of Secretary-initiated complaints.

Timeliness

The Department is currently engaging in a review of cases which have been in investigation for over 100 days, through on-site visits in the field and consultations with staff on the reasons for delay. Every Enforcement Center has already been asked to develop procedures to ensure more timely processing of cases, and this requirement has been incorporated in their management plan. Part of the Department's assessment will include a review of resources and other issues within the Department's control; however, some cases, by their nature, cannot be investigated, and a determination made, within the 100-day period. The Department has also initiated a new letter which will be used to advise the parties in cases where investigation cannot be completed within 100 days. The letter includes an estimated time for completion of the investigation. Compliance with that date will be monitored routinely.

The Department also expects that implementation of a revised delegation process in effect on October 1, 1994, which authorizes the Assistant Secretary for Fair Housing and Equal Opportunity to make determinations of cause and no cause, will expedite the determination process, because it requires involvement of counsel from the beginning of the complaint process and will therefore not require extensive delays in cases resulting from legal reviews. Counsel will concur on every determination to ensure that concerns from a legal perspective are addressed.

Consistency

The new determination process is expected to improve consistency, as well as case processing times. Under the revised system, field offices which have conducted the investigation will prepare a determination, but all determinations, at least initially, will be reviewed by the Office of Investigations in FHEO Headquarters. Steps have been taken to help ensure that this process does not unduly delay case processing; on the other hand, development of a consistent approach to case outcomes will be facilitated by a central review process, as well as by the legal review. The system will also allow monitoring of individual field office performance.

The Department is reviewing case processing time frames on an office-by-office basis. High level staff from the Washington office are reviewing all cases over 100 days old. In some instances, additional staff have been provided, or specific guidance given, to improve performance. Priority is being given to addressing the most serious performance problems first.

Organization

I share the Commission's belief that by consolidating Title

VIII case processing under a single office and increasing the authority of the Assistant Secretary to guide the process, enforcement will improve. For this reason, as discussed more fully above, I have used a "delegation of authority" to place authority to make determinations of cause and no cause in fair housing cases with the Assistant Secretary for Fair Housing and Equal Opportunity. This determination will be made with the concurrence of the General Counsel. In addition, the implementation of this new delegation will result in closer and more ongoing consultation with the Office of General Counsel throughout the investigation. That delegation was effective October 1, 1994.

Interventions

Currently, complainants are provided with information regarding their right to intervene in a Title VIII case and appeal an adverse decision reached by an Administrative Law Judge. HUD currently has no plans to issue regulations regarding the intervention process.

Part III: HUD-Funded Activities

Fair Housing Assistance Program

HUD Reimbursement

Congress has approved a significant increase in funding for the Fair Housing Assistance Program for FY 1995. This program reimburses state and local fair housing agencies for processing complaints under non-federal fair housing statutes. FHEO is currently conducting a comprehensive study of actual case processing costs to assess whether the reimbursement schedule should be modified. Among matters being considered are increased rates for complex or time-consuming cases, and incentive funding to allow the funding of special projects or activities which will enhance investigatory performance.

Agency Evaluations

The recommendation regarding interviews with women's groups and civil rights advocacy groups in the certification process is a helpful one, as is the recommendation regarding notification of such groups on the opportunity to comment on performance issues when determinations on equivalency are being made. HUD will redouble its efforts to consult widely in its next round of reviews.

Fair Housing Initiatives Program

Distribution of Funds

HUD has overhauled its administration of the Fair Housing Initiatives Program (FHIP) to address the types of changes recommended in the Commission's report. Through a process known as Business Process Reengineering ("BPR"), we have streamlined and modified the grant-making process. As a result of the effort, the funding cycle time for FHIP has been reduced from 131 weeks to 36 weeks; a substantial amount of staff time has been redirected to activities that add value to the final product; a five-year cost savings of over $1.9 million is projected; and a proactive, customer-service approach has been adopted.

The FHIP BPR project has been so successful that it was awarded the Price Waterhouse Worklight Award in October 1994. The FHIP project was selected for its creativity and customer-focus in identifying opportunities for improving the FHIP funding process. The award serves as a model for reinvention efforts throughout government and private industry. The FHIP BPR project also was recognized as one of the top twenty best BPR efforts in the country as listed in the September issue of CFO magazine. Of the twenty, the FHIP BPR project was the only one from a government agency.

Underserved Areas

Like the Commission, the Department is very pleased with the 1992 legislation which created the Fair Housing Organizations Initiative. Both the FY 1993 and FY 1994 Notices of Funding Availability (NOFA) identified specific unserved and underserved areas of the country in which the Department sought to create new private fair housing organizations. (The FY 94 NOFA also allowed applicants to identify additional areas which were unserved/underserved by existing groups.) Since the legislative amendment, 24 new private fair housing enforcement organizations have been created in underserved areas of the country. FHEO has recently issued a notice to all current and potential program participants soliciting their comments on the administration of the new program.

Testing

As a result of 1992 legislation, FHIP has been expanded to permit recipients to carry out testing programs wherever they have a reasonable basis for doing so, including statistical disparities, reports and other types of substantive information. The Department has fully implemented the new authority. Through NOFAs and the proposed FHIP rule, published for comment on August 29, 1994, HUD has informed FHIP recipients that the old restrictions on testing activities have been lifted.

Part IV: The New Jurisdictions

Privacy

The Task Force on Occupancy Standards in HUD Public and Assisted Housing submitted its final report to HUD on April 7, 1994. Chapter 9 of the Report, Privacy and Confidentiality, is being reviewed by the Department. Any needed regulatory changes will be proposed by December 31, 1994; modified or new guidance will be issued in the form of handbook or forms changes.

Zoning and Land Use Laws

The Department has no objection to the development of policy guidance on requirements that zoning ordinances should incorporate the concept of reasonable accommodations for persons with disabilities. However, the Department believes that preparation of such guidance would more properly be led by the Department of Justice, which has the authority to determine which zoning/land use cases to litigate. Unlike the usual procedure under the Fair Housing Act, HUD does not make determinations of whether zoning or land use provisions violate the Act.

Prohibited Inquiries

The Task Force on Occupancy Standards in HUD Public and Assisted Housing submitted its final report to HUD on April 7, 1994. A discussion of Disability-Related Inquiries in the Application Process (P. 1-34 et seq. of the Task Force Report) recommended that HUD clarify the scope of limited inquiries that can be made. This recommendation is being reviewed to determine the need for regulatory changes or other guidance to HUD-assisted housing providers.

Ancillary Facilities

The Department does not object to the publication of guidance addressing health and safety rules as a defense to discrimination cases. However, this issue is one with many potential ramifications, which will require a significant amount of time to address comprehensively.

Part V: Fair Housing Policy and Implementation

Proving Discrimination-The Department is routinely applying a disparate impact analysis to its cases, through application of case law precedent. In the lending area, the Department successfully urged the Interagency Taskforce on Fair Lending, composed of HUD, DOJ, and the federal bank regulatory agencies, to include in the Fair Lending Policy Statement published in the Federal Register on April 15, 1994, provisions describing the applicability of a disparate impact analysis in lending situations. The Department is

in the process of developing a regulation which will be applicable to all types of Fair Housing Act cases, to be published in 1995.

Secretary-initiated Complaints

Guidance which tracks the recommendations of the report is in the final stages of preparation. Additional resources have already been devoted to identification of potential targets for Secretary-initiated complaints and investigation of such complaints. More staff is being added to handle the investigation of such cases at the Headquarters level. Additionally, field resources will be brought into play on such cases. A significant number of Secretary-initiated complaints have recently been initiated, specifically targeted to discrimination in mortgage lending.

Timeliness

The Fair Housing Act states:

> An aggrieved person may, not less than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint. Sec. 810(a)(1)(A)(i).

It is the Department's interpretation that the one year statute of limitations applies to all complaints, including Secretary-initiated complaints. However, HUD is actively applying the theory of continuing violations wherever appropriate, in accordance with existing law, to enable us to reach on-going discriminatory practices which otherwise would exceed the statute of limitations period.

Conciliation Agreements

The Fair Housing Act states:

> Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.

When conciliating complaints in which the Secretary is a complainant, the Department will ensure that all Conciliation Agreements are disclosed.

Secretarial Review Process, Procedures

HUD will initiate action to develop an appropriate mechanism to assure that all decisions issued by HUD ALJs include a statement that the decision will become final after 30 days and that any

objections to the findings and conclusions must be submitted to the Secretary within that time frame.

Secretarial Review Process, Policymaking

HUD agrees that, to the extent that policy is made by Secretarial decisions, rulemaking may be necessary to institutionalize the policy or interpretation.

Other Matters

Zoning Cases

The Department has no plans to modify its current process of making no cause determinations in zoning cases.

Prompt Judicial Actions

HUD takes the position that prompt judicial relief may be necessary to maintain the status quo to avoid irreparable harm to complainants during the investigation, where the equities favor protecting the fair housing rights of complainants.

Judicial Review

The Department and DOJ have agreed to put an effective mechanism in place which will enable joint strategy decisions on pursuit of all appeals in fair housing cases.

Judicial Elections

The Department conducted an early study of the reasons parties elected to have their cases heard in a judicial, rather than administrative forum. Several changes were made to address issues identified in the study.

The Department has presented strong evidence of damages to Administrative Law Judges which has resulted in higher damage awards during the past two years. Since there has been more passage of time, and more parties continue to make the election, this issue should be re-visited. Included in such a study should be the types and amounts of relief awarded in the various forums.

Sovereign Immunity

The Office of Legal Counsel at the Department of Justice has ruled that principles of separation of powers and sovereign immunity result in a conclusion that the Department may not issue a charge under the Fair Housing Act against a federal agency. The Department is continuing to accept complaints, conduct investigations, and attempt conciliation in such cases. The

Department, in consultation with DOJ's Civil Rights Division, is considering a variety of options for addressing the issues which the Office of Legal Counsel has identified.

After completing a comprehensive review of the options, a joint decision will be made on appropriate action.

Conciliation Breaches

HUD and DOJ recognize the importance of enforcement actions where breaches of conciliation agreements occur and will aggressively pursue litigation where compliance with an agreement cannot be obtained voluntarily. HUD and DoJ will allocate necessary resources to accomplish this enforcement objective.

Thank you for the opportunity to present these comments.

Sincerely,

Henry Cisneros

Henry G. Cisneros

Appendix B

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

OCT 13 1994

Honorable Mary Frances Berry
Chairperson
United States Commission on Civil Rights
624 9th Street, N.W., Room 700
Washington, D.C. 20425

Re: The Fair Housing Amendments Act of 1988 - The Enforcement Report

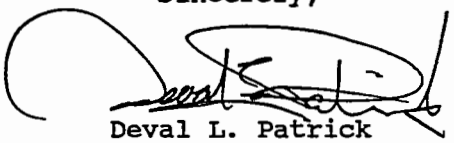
Dear Madame Chairperson:

Thank you for providing us with a copy of the Commission's Enforcement Report concerning the Fair Housing Amendments Act of 1988. We have reviewed this draft and appreciate its thoroughness and your consideration of the July 13, 1994 comments provided on behalf of the Civil Rights Division of the Department of Justice to the Commission's earlier Draft Report. While those comments, which apparently will be attached to the final Report, speak for themselves, we continue to be concerned with what appears in our view to be the undue focus of the Report on the few occasions where this Department and the Department of Housing and Urban Development (HUD) have disagreed on whether a so-called HUD "election" case should be filed in federal court. As I indicated in my July letter, the amendments to the Fair Housing Act have necessitated a great amount of interaction and cooperation between HUD and this Department in the fair housing enforcement arena, and that process has worked very well. Since the amended Act went into effect in March 1989, "elections" to proceed in federal court with a HUD charge of discrimination have been made on approximately 400 occasions, yet, as indicated in my previous letter, the number of times our agencies have been unable to resolve differences with regard to these cases has been extremely small. This is not reflected in the Commission's latest draft, and I would suggest that far too much discussion is expended concerning a very minor problem.

Federal enforcement of the Fair Housing Act is at an unprecedented level. Cooperation between HUD and this Department in this area has been and continues to be a vital factor in the increasing federal presence in the fair housing field. We pledge our continuing commitment to work with HUD in this ever important area of civil rights. Again, I would like to commend the

Commission for the thorough analysis and careful thought which have gone into its efforts in preparing its Report.

Sincerely,



Deval L. Patrick
Assistant Attorney General
Civil Rights Division

U.S. COMMISSION ON CIVIL RIGHTS
Washington, DC 20425