

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**Office of the Assistant Secretary for Fair Housing and Equal Opportunity****24 CFR Parts 111 and 115**

[Docket No. FR-3322-F-01]

RIN 2529-AA60

Regulatory Reinvention; Certification and Funding of State and Local Fair Housing Enforcement Agencies

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule represents another step in HUD's continuing efforts to reinvent and streamline its regulations. The Fair Housing Act provides that the Secretary of HUD shall refer complaints alleging a discriminatory housing practice to State or local enforcement agencies certified by the Secretary. Currently, HUD's regulations at 24 CFR part 115 set forth the criteria the Secretary will utilize to certify such agencies. HUD's regulations at 24 CFR part 111 establish the requirements for the Fair Housing Assistance Program (FHAP), through which HUD provides assistance to certified fair housing enforcement agencies. This interim rule consolidates parts 111 and 115, thus providing all necessary requirements in a single part and eliminating unnecessary or repetitive regulatory provisions.

DATES: Effective date: March 29, 1996.

Comments due date: April 29, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding the interim rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m. Eastern Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Marcella Brown, Director, Fair Housing Assistance Program Division, Office of Fair Housing and Equal Opportunity, Room 5218, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-0455. Hearing- or speech-impaired individuals may call HUD's

TDD number (202) 708-0113 or 1-800-877-8339 (Federal Information Relay Service TDD). (Except for the "800" number, these are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:**I. Background**

The Fair Housing Act (42 U.S.C. 3600-3620) (the Act) provides that whenever a complaint alleges a discriminatory housing practice, arising in the jurisdiction of a State or local agency which has been certified by the Secretary under section 810(f) of the Act, HUD shall refer the complaint to that State or local agency. HUD has implemented section 810(f) at 24 CFR part 115, which establishes the criteria the Secretary will utilize to certify State and local fair housing enforcement agencies.

Section 817 of the Act provides that the Secretary may reimburse State and local fair housing enforcement agencies which assist the Secretary in enforcing the Act. HUD has implemented section 817 at 24 CFR part 111, which sets forth the requirements for the Fair Housing Assistance Program (FHAP). Through the FHAP, HUD provides assistance to certified State and local fair housing enforcement agencies. This assistance is designed to provide support for complaint processing, training, technical assistance, data and information systems, and other fair housing projects.

Pursuant to President Clinton's memorandum of March 4, 1995, *Regulatory Reinvention*, HUD conducted a comprehensive, page-by-page review of its regulations. This interim rule marks another step in HUD's continuing efforts to streamline, update and generally improve its regulations. Specifically, the rule consolidates parts 111 and 115, thus providing all necessary requirements for certification and FHAP participation in part 115. This interim rule also eliminates burdensome or redundant regulatory provisions currently located in parts 111 and 115. The Department welcomes comments on how this interim rule may be made more understandable and less burdensome.

II. Justification for Interim Rulemaking

It is HUD's policy to publish rules for public comment before their issuance for effect, in accordance with its own regulations on rulemaking found at 24 CFR part 10. However, part 10 provides that prior public comment will be omitted if HUD determines that it is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1).

HUD finds that in this case prior public comment is contrary to the public interest, since immediate implementation of this interim rule will benefit the public. Specifically, this interim rule will assist FHAP participants by providing all necessary requirements in a single part and eliminating burdensome and redundant provisions. Further, the streamlining amendments made by this interim rule will allow HUD to administer the FHAP in a more efficient manner, thus strengthening its ability to enforce the Fair Housing Act.

III. Other Matters**A. Environmental Impact**

This rulemaking does not have an environmental impact. This rulemaking simply amends an existing regulation by consolidating and streamlining provisions and does not alter the environmental effect of the regulations being amended. A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the time of development of regulations implementing Section 214 of the Housing and Community Development Act of 1980. That Finding remains applicable to this rule, and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

B. Executive Order 12612, Federalism

The General Counsel, as the Designated Official, under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this interim rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This interim rule merely consolidates in a single part the requirements for "substantially equivalent" certification and participation in the FHAP. It effects no changes in the current relationships between the Federal government, the States and their political subdivisions in connection with HUD programs.

C. Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive

Order 12606, *The Family*, has determined that this interim rule will not have a potential significant impact on family formation, maintenance, and general well-being and, thus, is not subject to review under the Order. This interim rule only affects State and local fair housing enforcement agencies which seek certification under section 810(f) of the Act and participation in the FHAP. No significant change in existing HUD policies or programs will result from promulgation of this interim rule, as those policies and programs relate to family concerns.

D. Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this interim rule, and in so doing certifies that this interim rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

24 CFR Part 111

Fair housing, Grant programs—housing and community development, Reporting and recordkeeping requirements.

24 CFR Part 115

Administrative practice and procedure, Aged, Fair housing, Individuals with disabilities, Intergovernmental relations, Mortgages, Reporting and recordkeeping requirements.

Accordingly, under the authority at 42 U.S.C. 3535(d) 24 CFR parts 111 and 115 are amended as follows:

PART 111—[REMOVED]

1. Part 111 is removed.
2. Part 115 is revised to read as follows:

PART 115—CERTIFICATION AND FUNDING OF STATE AND LOCAL FAIR HOUSING ENFORCEMENT AGENCIES

Subpart A—General

- Sec.
- 115.100 Definitions.
 - 115.101 Program administration.
 - 115.102 Public notices.

Subpart B—Certification of Substantially Equivalent Agencies

- 115.200 Purpose.
- 115.201 Basis of determination.
- 115.202 Criteria for Adequacy of Law.
- 115.203 Performance standards.
- 115.204 Consequences of Certification.
- 115.205 Technical assistance.
- 115.206 Request for certification.
- 115.207 Procedure for interim certification.
- 115.208 Suspension of interim certification.
- 115.209 Denial of interim certification.

- 115.210 Procedure for certification.
- 115.211 Suspension of certification.
- 115.212 Withdrawal of certification.

Subpart C—Fair Housing Assistance Program (FHAP)

- 115.300 Purpose.
 - 115.301 Agency eligibility criteria.
 - 115.302 Capacity Building Funds.
 - 115.303 Eligible activities for Capacity Building Funds.
 - 115.304 Agencies eligible for contributions funds.
 - 115.305 Special Enforcement Effort (SEE) funds.
 - 115.306 Training funds.
 - 115.307 Additional requirements for participation in the FHAP.
 - 115.308 Standards for FHAP program review.
 - 115.309 Reporting and recordkeeping requirements.
 - 115.310 Subcontracting under the FHAP.
 - 115.311 Corrective and remedial action.
- Authority: 42 U.S.C. 3600–3620 and 3535(d).

Subpart A—General

§ 115.100 Definitions.

(a) The terms “Fair Housing Act” and “HUD”, as used in this part, are defined in 24 CFR 5.100.

(b) The terms “Aggrieved person”, “Complainant”, “Conciliation”, “Conciliation agreement”, “Discriminatory housing practice”, “Dwelling”, “Handicap”, “Person”, “Respondent”, “Secretary”, and “State”, as used in this part, are set forth in section 802 of the Fair Housing Act.

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Fair Housing Act, as defined in 24 CFR 5.100.

Assistant Secretary means the Assistant Secretary for Fair Housing and Equal Opportunity.

Certified Agency is an agency to which the Assistant Secretary for Fair Housing and Equal Opportunity has granted interim certification or certification, in accordance with the requirements of this part.

Cooperative Agreement is the assistance instrument HUD will use to provide funds. The Cooperative Agreement will contain attachments and appendices establishing requirements relating to the operation or performance of the agency.

Cooperative Agreement Officer (CAO) is the administrator of the funds awarded pursuant to this part and is the Director of a Fair Housing Enforcement Center in the Office of Fair Housing and Equal Opportunity.

Director of FHEO means a Director of a Fair Housing Enforcement Center.

Dual-Filed Complaint means a housing discrimination complaint which has been filed with both the Fair

Housing Enforcement Center and the certified agency.

FHEO means the Office of Fair Housing and Equal Opportunity.

FHAP means the Fair Housing Assistance Program.

§ 115.101 Program administration.

(a) *Authority and Responsibility.* The Secretary has delegated the authority and responsibility for administering this part to the Assistant Secretary.

(b) *Delegation of Authority.* The Assistant Secretary delegates the authority and responsibility for administering this part to each Director of a Fair Housing Enforcement Center. However, with respect to the duties and responsibilities for administering subpart B of this part, the Assistant Secretary retains the right to make final decisions concerning the granting and maintenance of substantial equivalency certification and interim certification.

§ 115.102 Public notices.

(a) Periodically, the Assistant Secretary will publish the following public notices in the Federal Register:

- (1) A list of all agencies which have interim certification or certification; and
- (2) A list of agencies to which a notice of denial of interim certification has been issued or for which withdrawal of certification is being proposed.

(b) The Assistant Secretary will publish in the Federal Register a notice soliciting public comment before granting certification to a State or local agency. The notice will invite the public to comment on the relevant State and local laws, as well as on the performance of the agency in enforcing its law. All comments will be considered before a final decision on certification is made.

Subpart B—Certification of Substantially Equivalent Agencies

§ 115.200 Purpose.

This subpart implements section 810(f) of the Fair Housing Act. The purpose of this subpart is to set forth:

- The basis for agency interim certification and certification;
- The procedure by which a determination to certify is made by the Assistant Secretary;
- The basis and procedures for denial of interim certification;
- The basis and procedures for withdrawal of certification;
- The consequences of certification;
- The basis and procedures for suspension of interim certification or certification; and
- The funding criteria for interim certified and certified agencies.

§ 115.201 Basis of determination.

A determination to certify an agency as substantially equivalent involves a two-phase procedure. The determination requires examination and an affirmative conclusion by the Assistant Secretary on two separate inquiries:

(a) Whether the law, administered by the agency, on its face, satisfies the criteria set forth in section 810(f)(3)(A) of the Act; and

(b) Whether the current practices and past performance of the agency demonstrate that, in operation, the law in fact provides rights and remedies which are substantially equivalent to those provided in the Act.

§ 115.202 Criteria for Adequacy of Law.

(a) In order for a determination to be made that a State or local fair housing agency administers a law which, on its face, provides rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the law or ordinance must:

(1) Provide for an administrative enforcement body to receive and process complaints and provide that:

(i) Complaints must be in writing;

(ii) Upon the filing of a complaint the agency shall serve notice upon the complainant acknowledging the filing and advising the complainant of the time limits and choice of forums provided under the law;

(iii) Upon the filing of a complaint the agency shall promptly serve notice on the respondent or person charged with the commission of a discriminatory housing practice advising of his or her procedural rights and obligations under the law or ordinance together with a copy of the complaint;

(iv) A respondent may file an answer to a complaint.

(2) Delegate to the administrative enforcement body comprehensive authority, including subpoena power, to investigate the allegations of complaints, and power to conciliate complaints, and require that:

(i) The agency commence proceedings with respect to the complaint before the end of the 30th day after receipt of the complaint;

(ii) The agency investigate the allegations of the complaint and complete the investigation within the time-frame established by section 810(a)(1)(B)(iv) of the Act or comply with the notification requirements of section 810(a)(1)(C) of the Act.

(iii) The agency make final administrative disposition of a complaint within one year of the date of receipt of a complaint, unless it is

impracticable to do so. If the agency is unable to do so it shall notify the parties, in writing, of the reasons for not doing so;

(iv) Any conciliation agreement arising out of conciliation efforts by the agency shall be an agreement between the respondent, the complainant, and the agency and shall require the approval of the agency;

(v) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the agency determines that disclosure is not required to further the purposes of the law or ordinance.

(3) Not place any excessive burdens on the complainant that might discourage the filing of complaints, such as:

(i) A provision that a complaint must be filed within any period of time less than 180 days after an alleged discriminatory housing practice has occurred or terminated;

(ii) Anti-testing provisions;

(iii) Provisions that could subject a complainant to costs, criminal penalties or fees in connection with filing of complaints.

(4) Not contain exemptions that substantially reduce the coverage of housing accommodations as compared to section 803 of the Act.

(5) Provide the same protections as those afforded by sections 804, 805, 806, and 818 of the Act, consistent with HUD's implementing regulations found at 24 CFR part 100.—

(i) As used in section 804(f)(3)(C) of the Act, the term "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(ii) The law or ordinance administered by the State or local fair housing agency may provide that compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1-1986") suffices to satisfy the requirements of section 804(f)(3)(C)(iii) of the Act.

(b) In addition to the factors described in paragraph (a) of this section, the provisions of the State or local law must afford administrative and judicial protection and enforcement of the rights embodied in the law.

(1) The agency must have authority to:

(i) Grant or seek prompt judicial action for appropriate temporary or preliminary relief pending final disposition of a complaint if such action

is necessary to carry out the purposes of the law or ordinance;

(ii) Issue and seek enforceable subpoenas;

(iii) Grant actual damages in an administrative proceeding or provide adjudication in court at agency expense to allow the award of actual damages to an aggrieved person;

(iv) Grant injunctive or other equitable relief, or be specifically authorized to seek such relief in a court of competent jurisdiction;

(v) Provide an administrative proceeding in which a civil penalty may be assessed or provide an adjudication in court at agency expense, allowing the assessment of punitive damages against the respondent.

(2) Agency actions must be subject to judicial review upon application by any party aggrieved by a final agency order.

(3) Judicial review of a final agency order must be in a court with authority to grant to the petitioner, or to any other party, such temporary relief, restraining order, or other order as the court determines is just and proper; affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and enforce the order to the extent that the order is affirmed or modified.

(c) The requirement that the state or local law prohibit discrimination on the basis of familial status does not require that the state or local law limit the applicability of any reasonable local, state or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

(d) The state or local law may assure that no prohibition based on discrimination because of familial status applies to housing for older persons substantially as described in 24 CFR part 100, subpart E.

(e) A determination of the adequacy of a state or local fair housing law "on its face" is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law but must take into account all relevant matters of state or local law. Regulations, directives, rules of procedure, judicial decisions, or interpretations of the fair housing law by competent authorities will be considered in making this determination.

(f) A law will be found inadequate "on its face" if it permits any of the agency's decision-making authority to be contracted out or delegated to a non-governmental authority. For the

purposes of this paragraph, "decision-making authority" shall include:

- (1) Acceptance of the complaint;
- (2) Approval of the conciliation agreement;
- (3) Dismissal of a complaint;
- (4) Any action specified in §§ 115.202(a)(2)(iii) or 115.202(b)(1); and
- (5) Any decision-making regarding whether the matter will or will not be pursued.

(g) The state or local law must provide for civil enforcement of the law or ordinance by an aggrieved person by the commencement of an action in an appropriate court at least one year after the occurrence or termination of an alleged discriminatory housing practice. The court must be empowered to:

- (1) Award the plaintiff actual and punitive damages;
- (2) Grant as relief, as it deems appropriate, any temporary or permanent injunction, temporary restraining order or other order;
- (3) Allow reasonable attorney's fees and costs.

§ 115.203 Performance standards.

A state or local fair housing enforcement agency must meet all of the performance standards listed below in order to obtain or maintain certification.

(a) Engage in timely, comprehensive and thorough fair housing complaint investigation, conciliation and enforcement activities. The performance assessment will consider the following to determine the effectiveness of an agency's fair housing complaint processing, consistent with such guidance as may be issued by HUD:

- (1) The agency's case processing procedures;
- (2) The thoroughness of the agency's case processing;
- (3) A review of cause and no cause determinations for quality of investigations and consistency with appropriate standards;
- (4) A review of conciliation agreements and other settlements; and
- (5) A review of the agency's administrative closures; and
- (6) A review of the agency's enforcement procedures.

(b)(1) Commence proceedings with respect to a complaint:

- (i) Before the end of the 30th day after receipt;
- (ii) Carry forward such proceedings with reasonable promptness;
- (iii) Make final administrative disposition within one year; and
- (iv) Within 100 days of receipt of the complaint complete the identified proceedings.

(2) To meet this standard, the performance assessment will consider

the timeliness of the agency's actions with respect to its complaint processing, including, but not limited to:

- (i) Whether the agency began its processing of fair housing complaints within 30 days of receipt;
- (ii) Whether the agency completes the investigative activities with respect to a complaint within 100 days from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay;
- (iii) Whether the agency administratively disposes of a complaint within one year from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reasons for the delay; and
- (iv) Whether the agency completed the investigation of the complaint and prepared a complete final investigative report.

(3) The performance assessment will also consider documented conciliation attempts and activities and a review of the bases for administrative disposition of complaints.

(c) Conduct compliance reviews of settlements, conciliation agreements and orders issued by or entered into to resolve discriminatory housing practices. The performance assessment will include, but not be limited to:

- (1) An assessment of the agency's procedures for conducting compliance reviews;
- (2) Terms and conditions of agreements and orders issued;
- (3) application of its authority to seek actual damages, as appropriate; and
- (4) Application of its authority to seek and assess civil penalties or punitive damages.

(d) Consistently and affirmatively seek and obtain the type of relief designed to prevent recurrences of such practices. The performance assessment will include, but not be limited to:

- (1) An assessment of the types of relief sought and obtained by the agency with consideration of the inclusion of affirmative provisions designed to protect the public interest;
- (2) The adequacy of the disposition of the complaint;
- (3) The relief sought and awarded;
- (4) The number of complaints closed with relief and the number closed without relief; and
- (5) Whether all the issues and bases were investigated adequately and appropriately disposed of.

(e) Consistently and affirmatively seek the elimination of all prohibited practices under its fair housing law. An assessment under this standard will include, but not be limited to:

- (1) A discussion and confirmation of the law or ordinance administered by the agency;

(2) The identification of any amendments, court decisions or other rulings or documentation that may affect the agency's ability to carry out provisions of its fair housing law or ordinance;

(3) Identification of the education and outreach efforts of the agency; and

(4) Identification and discussion of any special requirements of the fair housing law or ordinance.

§ 115.204 Consequences of Certification.

(a) Whenever a complaint received by the Assistant Secretary alleges violations of a state or local fair housing law or ordinance administered by an agency that has been certified as substantially equivalent, the complaint will be referred to the agency, and no further action shall be taken by the Assistant Secretary with respect to such complaint except as provided for by the Act, this part, 24 CFR part 103, subpart C, and any written agreements executed by the Agency and the Assistant Secretary.

(b) If HUD determines that a complaint has not been processed in a timely manner in accordance with the performance standards set forth in § 115.203, HUD may reactivate the complaint, conduct its own investigation and conciliation efforts, and make a determination consistent with 24 CFR part 103.

(c) Notwithstanding paragraph (a) of this section, whenever the Assistant Secretary has reason to believe that a complaint demonstrates a basis for the commencement of proceedings against any respondent under section 814(a) of the Act or for proceedings by any governmental licensing or supervisory authorities, the Assistant Secretary shall transmit the information upon which such belief is based to the Attorney General, Federal financial regulatory agencies, other Federal agencies, or other appropriate governmental licensing or supervisory authorities.

§ 115.205 Technical assistance.

(a) The Assistant Secretary, through the FHEO Field Office, may provide technical assistance to the agencies. The agency may request such technical assistance or the FHEO Field Office may determine the necessity for technical assistance and require the agency's cooperation and participation.

(b) The Assistant Secretary, through FHEO Headquarters or Field staff, will require that the agency participate in training conferences and seminars that will enhance the agency's ability to process complaints alleging discriminatory housing practices.

§ 115.206 Request for certification.

(a) A request for certification under this subpart B shall be filed with the Assistant Secretary by the State or local official having principal responsibility for administration of the State or local fair housing law. The request shall be supported by the following materials and information:

(1) The text of the jurisdiction's fair housing law, the law creating and empowering the agency, any regulations and directives issued under the law, and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the jurisdiction's fair housing law.

(2) Organizational information of the agency responsible for administering and enforcing the law.

(3) Funding and personnel made available to the agency for administration and enforcement of the fair housing law during the current operating year, and not less than the preceding three operating years (or such lesser number during which the law was in effect).

(4) If available, data demonstrating that the agency's current practices and past performance comply with the performance standards described in § 115.203.

(5) Any additional information which the submitting official may wish to be considered.

(b) The request and supporting materials shall be filed with the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. A copy of the request and supporting materials will be kept available for public examination and copying at:

(1) The office of the Assistant Secretary; and

(2) The HUD Field Office in whose jurisdiction the State or local jurisdiction seeking recognition is located; and

(3) The office of the State or local agency charged with administration and enforcement of the State or local law.

§ 115.207 Procedure for interim certification.

(a) Upon receipt of a request for certification filed under § 115.206 of this part, the Assistant Secretary may request further information necessary for a determination to be made under this section. The Assistant Secretary may consider the relative priority given to fair housing administration, as compared to the agency's other duties and responsibilities, as well as the compatibility or potential conflict of fair

housing objectives with these other duties and responsibilities.

(b) *Interim certification.* If the Assistant Secretary determines, after application of the criteria set forth in § 115.202 that the State or local law or ordinance, on its face, provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the Assistant Secretary may offer to enter into an Agreement for the Interim Referral of Complaints and Other Utilization of Services (Interim Agreement). The interim agreement will outline the procedures and authorities upon which the interim certification is based.

(c) Such interim agreement, after it is signed by all appropriate signatories, will result in the agency receiving interim certification.

(d)(1) Interim agreements shall be for a term of no more than three years. The Assistant Secretary, through the FHEO Field Office, will conduct one or more on-site assessments to determine whether the agency administers its fair housing law or ordinance in a manner that is substantially equivalent to the Act.

(2) *Performance Improvement Plan.* If the agency is not administering its law or ordinance in a manner that is substantially equivalent, the Assistant Secretary, may, but need not, offer a Performance Improvement Plan (PIP) to the agency. The PIP will outline the agency's deficiencies, identify necessary corrective actions, and include a timetable for completion.

(3) If the agency receives a PIP, funding under the FHAP may be suspended for the duration of the PIP. Once the agency has implemented corrective actions to eliminate the deficiencies, and such corrective actions are accepted by the Assistant Secretary, funding may be reinstated.

§ 115.208 Suspension of interim certification.

(a)(1) The Assistant Secretary will suspend the agency's interim certification if the Assistant Secretary has reason to believe that the State or locality may have limited the effectiveness of the agency's implementation of the fair housing law or ordinance by:

(i) Amending the fair housing law or ordinance;

(ii) Adopting rules or procedures concerning the fair housing law or ordinance; or

(iii) Issuing judicial or other authoritative interpretations of the fair housing law or ordinance.

(2) If the Assistant Secretary suspends interim certification under paragraph (a)(1) of this section, such suspension will remain in effect until the Assistant Secretary conducts a review of the changes in language and/or interpretation and determines whether the law or ordinance remains substantially equivalent to the Act on its face or in its operations.

(i) If the Assistant Secretary determines that, notwithstanding the actions taken by the State or locality as described in paragraph (a)(1) of this section, the law or ordinance remains substantially equivalent on its face and in operation to the Act, the Assistant Secretary will rescind the suspension and reinstate the agency's interim certification and/or recommend the agency for certification. HUD will provide reimbursement for cases processed during the period of the suspension.

(ii) If the Assistant Secretary determines that the actions taken by the State or locality do limit the agency's effectiveness interim certification will be denied pursuant to § 115.209.

(b)(1) The Assistant Secretary will suspend the interim certification of an agency charged with the administration of a fair housing law or ordinance if the Assistant Secretary has reason to believe that the agency's performance does not comply with the criteria set forth by this part. Such suspension shall not exceed 180 days.

(2) If the agency is suspended pursuant to paragraph (b) of this section, the FHEO Field Office will not provide payment for complaints processed within that period of time unless and until the Assistant Secretary determines that the agency is fully in compliance with § 115.203. The FHEO Field Office will provide technical assistance to the agency during this period of time.—

(i) During the period of a suspension the Assistant Secretary shall not refer complaints to the agency.

(ii) Suspension under this section also renders the agency ineligible to receive Fair Housing Assistance Program Funds under subpart C of this part, pending correction of the deficiencies by the agency.

(3) Before the end of the suspension, a final performance assessment will be provided to the Assistant Secretary upon which a determination will be made as to the adequacy of the agency's performance.

§ 115.209 Denial of interim certification.

(a) If the Assistant Secretary determines, after application of the criteria set forth in this Part that the State and local law or ordinance, on its face or in its operation, does not provide substantive rights, procedures, remedies, and availability of judicial review for alleged discriminatory housing practices which are substantially equivalent to those provided in the Fair Housing Act, the Assistant Secretary shall inform the State or local official in writing of the reasons for that determination.

(b) The agency, within 20 days from the date of the receipt of this notice, may submit, in writing, any opposition to the planned denial of Interim Certification to the Assistant Secretary. The Assistant Secretary will evaluate all pertinent written comments, information, and documentation. If, after reviewing all materials submitted by the agency, the Assistant Secretary is still of the opinion that interim certification should be denied, the Assistant Secretary will inform the agency in writing of that determination.

(c) If the agency does not, within 20 days of receipt of the Assistant Secretary's notice of denial of interim certification, make a request of the Assistant Secretary under paragraph (b) of this section to submit additional data, views, or comments, no further action shall be required of the Assistant Secretary and denial of interim certification shall occur.

§ 115.210 Procedure for certification.

(a)(1) *Certification.* If the Assistant Secretary determines, after application of the criteria set forth in §§ 115.202, 115.203 and this section, that the State or local law or ordinance, both "on its face" and "in operation," provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the Assistant Secretary may enter into a Memorandum of Understanding (MOU) with the agency. The MOU is a written agreement providing for the referral of complaints to the agency and for communication procedures between the agency and HUD that are adequate to permit the Assistant Secretary to monitor the agency's continuing substantial equivalency certification. A MOU, after it is signed by all appropriate signatories, may authorize an agency to be a certified agency for a period of not more than five years.

(2) *Performance Improvement Plan.* If the agency is not administering its law or ordinance in a manner that is

substantially equivalent, the Assistant Secretary, may, but need not, offer a Performance Improvement Plan (PIP) to the agency. The PIP will outline the agency's deficiencies, identify necessary corrective actions, and include a timetable for completion.

(3) If the agency receives a PIP, funding under the FHAP may be suspended for the duration of the PIP. Once the agency has implemented corrective actions to eliminate the deficiencies, and such corrective actions are accepted by the Assistant Secretary, funding may be reinstated.

(b) The Assistant Secretary shall annually assess the performance of an agency to determine whether it continues to qualify for certification under this part. If the Assistant Secretary affirmatively concludes that the agency's law and performance have complied with the requirements of this part in each of the five years, the Assistant Secretary may offer the agency an updated Memorandum of Understanding.

(c) An agency shall receive interim certification prior to receiving certification.

§ 115.211 Suspension of certification.

(a)(1) The Assistant Secretary will suspend the agency's certification if the Assistant Secretary has reason to believe that the State or locality may have limited the effectiveness of the agency's implementation of the fair housing law or ordinance by:

(i) Amending the fair housing law or ordinance;

(ii) Adopting rules or procedures concerning the fair housing law or ordinance; or

(iii) Issuing judicial or other authoritative interpretations of the fair housing law or ordinance.

(2) If the Assistant Secretary suspends certification under paragraph (a)(1) of this section, such suspension will remain in effect until the Assistant Secretary conducts a review of the changes in language and/or interpretation and determines whether the law or ordinance remains substantially equivalent on its face and in its operation to the Act.—

(i) If the Assistant Secretary determines that the law or ordinance remains substantially equivalent on its face and in operation to the Act, the Assistant Secretary will rescind the suspension and reinstate the agency's interim certification and/or recommend the agency for certification. HUD will provide reimbursement for cases processed during the period of the suspension.

(ii) If the Assistant Secretary determines that the actions taken by the State or locality do limit the agency's effectiveness, certification will be withdrawn pursuant to § 115.212.

(b)(1) The Assistant Secretary will suspend the certification of an agency charged with the administration of a fair housing law or ordinance, if the Assistant Secretary has reason to believe that the agency's performance does not comply with the criteria set forth by this part. Such suspension shall not exceed 180 days.

(2) If the agency is suspended pursuant to paragraph (b) of this section, the FHEO Field Office will not provide payment for complaints processed within that period of time unless and until the Assistant Secretary determines that the agency is fully in compliance with 115.202 of this part. The FHEO Field Office will provide technical assistance to the agency during this period of time.—

(i) During the period of a suspension the Assistant Secretary shall not refer complaints to the agency.

(ii) Suspension under this section also renders the agency ineligible to receive Fair Housing Assistance Program Funds under subpart C of this part, pending correction of the deficiencies by the agency.

(3) Before the end of the suspension, a final performance assessment will be provided to the Assistant Secretary upon which a determination will be made as to the adequacy of the agency's performance.

§ 115.212 Withdrawal of certification.

(a) If the Assistant Secretary finds, as a result of a review undertaken in accordance with this part, that the agency's fair housing law or ordinance no longer meets the requirements of this part, the Assistant Secretary shall propose to withdraw the certification previously granted.

(b) The Assistant Secretary will propose withdrawal of certification under paragraph (a) of this section unless further review and information or documentation establishes that the current law and/or the agency's administration of the law meets the criteria set out in this part.

(c) If the Assistant Secretary determines, after application of the criteria set forth in this Part, that the state or local law or ordinance, in operation, does not provide substantive rights, procedures, remedies, and availability of judicial review for alleged discriminatory housing practices which are substantially equivalent to those provided in the Fair Housing Act, the Assistant Secretary shall inform the

State or local official in writing of the reasons for that determination.

Subpart C—Fair Housing Assistance Program (FHAP)

§ 115.300 Purpose.

The purpose of the Fair Housing Assistance Program (FHAP) is to provide assistance to State and local fair housing enforcement agencies. The intent of this funding program is to build a coordinated intergovernmental enforcement effort to further fair housing and to encourage the agencies to assume a greater share of the responsibility for the administration and enforcement of their fair housing laws and ordinances. This financial assistance is designed to provide support for:

- (a) The processing of dual-filed complaints;
- (b) Training under the Fair Housing Act and the agencies' fair housing law;
- (c) The provision of technical assistance;
- (d) The creation and maintenance of data and information systems; and
- (e) The development and enhancement of other fair housing enforcement projects.

§ 115.301 Agency eligibility criteria.

Any agency with certification or interim certification under subpart A of this part, and which has entered into a MOU or interim agreement, is eligible to participate in the FHAP.

§ 115.302 Capacity Building Funds.

(a) Capacity Building Funds (CBF) are funds that HUD may provide to an agency with interim certification during the agency's first three years of participation in the FHAP. Agencies receiving CBF are not eligible to receive contributions funds under § 115.304.

(b) Capacity Building Funds will be provided in a fixed annual amount to be utilized for the eligible activities established pursuant to § 115.303. However, in the second and third year of the agency's participation in the FHAP, HUD has the option to permit the agency to receive Capacity Building funding on a per case basis, rather than in a single annual amount.

(c) In order to receive capacity building funds, agencies will be required to submit a statement of work which identifies:

- (1) The objectives and activities to be carried out with the CBFs received;
- (2) A plan for training all of the agency's employees involved in the administration of the agency's fair housing law or ordinance;
- (3) A statement of the agency's intention to participate in HUD-

sponsored training in accordance with the training requirements set out in the cooperative agreement;

(4) A description of the agency's complaint processing data and information system or, alternatively, whether the agency plans to use capacity building funds to purchase and install a data system; and

(5) A description of any other fair housing activities that the agency will undertake with its capacity building funds.—

- (i) All such activities must address matters affecting fair housing enforcement which are cognizable under the Fair Housing Act. Any activities which do not address the implementation of the agency's fair housing law or ordinance, and which are therefore not cognizable under the Fair Housing Act, will be disapproved.
- (ii) Reserved.

§ 115.303 Eligible activities For Capacity Building Funds.

The primary purposes of capacity building funding is to provide for complaint activities and to support activities that produce increased awareness of fair housing rights and remedies. All such activities must support the agency's administration of its fair housing law or ordinance and address matters affecting fair housing which are cognizable under the Fair Housing Act. HUD will periodically publish a list of eligible activities in the Federal Register.

§ 115.304 Agencies Eligible for Contributions Funds.

(a) An agency that has received Capacity Building Funds for three consecutive years is eligible for contributions funding. Contributions funding consists of three categories:

- (1) Complaint Processing (CP) Funds;
- (2) Administrative Costs (AC) Funds; and
- (3) Special Enforcement Efforts (SEE) Funds (§ 115.305 sets forth the requirements for SEE funding).

(b) *Complaint Processing Funds.* (1) Agencies receiving CP funds will receive such support based solely on the number of complaints processed by the agency and accepted for payment by the Director of FHEO during a consecutive, specifically identified, 12-month period. Normally this period will be the previous year's funding cycle.

(2) Funding for agencies in their fourth year of participation in the FHAP will be based on the number of complaints acceptably processed by the agency during the agency's third year of participation in the FHAP.

(c) *Administrative Cost (AC) Funds.* Agencies which acceptably process 100

or more cases will receive no less than 10 percent of the agency's annual FHAP payment amount for the preceding year, in addition to case processing funds, contingent on fiscal year appropriations. Agencies that acceptably process fewer than 100 cases will receive a flat rate contingent on fiscal year appropriations.

(1) Agencies will be required to provide HUD with a statement of how they intend to use the AC funds. HUD may require that some or all AC funding be directed to activities designed to create, modify, or improve local, regional, or national information systems concerning fair housing matters (including the purchase of state of the art computer systems and getting on line or internet access, etc.).

(2) [Reserved.]

§ 115.305 Special Enforcement Effort (SEE) funds.

(a) SEE funds are funds that HUD will provide to an agency to enhance enforcement activities of the agency's fair housing law or ordinance. SEE funds will be a maximum of 20% of the agency's total FHAP cooperative agreement for the previous contract year, based on approval of eligible activity or activities, and based on the appropriation of funds. All agencies receiving contributions funds are eligible to receive SEE funds if they meet three of the six criteria set out below:

(1) The agency has taken action to enforce a subpoena or make use of its prompt judicial action authority within the past year;

(2) The agency has held at least one administrative hearing or has had at least one case on a court's docket for civil proceedings during the past year;

(3) At least ten percent of the agency's fair housing caseload resulted in written conciliation agreements providing monetary relief for the complainant as well as remedial action, monitoring, reporting and public interest relief provisions;

(4) The agency has had in the most recent three years, or is currently handling, at least one major fair housing systemic investigation requiring an exceptional amount of expenditure of funds;

(5) The agency's administration of its fair housing law or ordinance received meritorious mention for its complaint processing or other fair housing activities that were innovative; or

(6) The agency must have fully investigated 10 fair housing complaints during the previous funding year.

(b) Notwithstanding the eligibility criteria set forth in paragraph (a) of this section, an agency will be ineligible for

SEE funds if 20% or more of an agency's fair housing complaints result in administrative closures.

(c) SEE funding amounts are subject to the FHAP appropriation by Congress and will be described in writing in the cooperative agreements annually. HUD will periodically publish a list of activities eligible for SEE funding in the Federal Register.

§ 115.306 Training funds.

(a) All agencies are eligible to receive training funds. Training funds are fixed amounts based on the number of agency employees to be trained and shall be allocated based on the FHAP appropriation. Training funds may be used only for HUD-approved or HUD-sponsored training. Agency initiated training or other formalized training may be included in this category. However, such training must first be approved by the Cooperative Agreement Officer (CAO) and the Government Technical Representative (GTR). Specifics on the amount of training funds that an agency will receive and, if applicable, amounts that may be deducted, will be set out in the cooperative agreement each year.

(b) All staff of the agency responsible for the administration of the fair housing law or ordinance must participate in mandatory FHAP training sponsored by HUD at the national and field office levels. If the agency does not participate in the mandatory national and field office HUD-sponsored training, training funds will be deducted from their overall training amount.

§ 115.307 Additional requirements for participation in the FHAP.

(a) Agencies which participate in the FHAP must:

- (1) Conform to reporting and record maintenance requirements determined by the Assistant Secretary;
- (2) Agree to on-site technical assistance and guidance and implementation of corrective actions set out by the Department in response to deficiencies found during the technical assistance or performance assessment evaluations of the agency's operations;
- (3) Agree to implement and adhere to policies and procedures (as their laws and ordinances will allow) provided to the agencies by the Assistant Secretary, including but not limited to guidance on investigative techniques, case file preparation and organization, implementation of data elements for complaint tracking, etc.;
- (4) Spend at least twenty (20) percent of its total annual budget on fair housing activities; and
- (5) Not unilaterally reduce the level of financial resources currently committed

to fair housing complaint processing (budget and staff reductions or other actions outside the control of the agency will not, alone, result in a negative determination for the agency's participation in the FHAP).

(b) The agency's refusal to provide information, assist in implementation, or carry out the requirements of paragraph (a) of this section may result in the denial or interruption of its receipt of FHAP funds.

§ 115.308 Standards for FHAP program review.

HUD will conduct reviews of the agency's cooperative agreement implementation. This review will also identify:

- (a) How the agency used the FHAP funds received;
- (b) Whether its draw-down of funds was timely;
- (c) Whether the agency has been audited and received copies of the audit reports in accordance with applicable rules and regulations for State and local governmental entities; and
- (d) If the agency complied with all certifications and assurances required by HUD in the cooperative agreement.

§ 115.309 Reporting and recordkeeping requirements.

(a) The agency shall establish and maintain records demonstrating:

- (1) Its financial administration of the FHAP funds; and
- (2) Its performance under the FHAP.

(b) In accordance with the cooperative agreement in effect between the agency and HUD, the agency will provide to HUD the agency reports maintained pursuant to paragraph (a) of this section. The agency will provide reports to HUD in accordance with the cooperative agreement in effect between the agency and HUD for frequency and content, regarding complaint processing, training, data and information systems, enforcement and other activities explaining how FHAP funds were expended and used.

(c) The agency will permit reasonable public access to its records, consistent with the jurisdiction's requirements for release of information. Documents relevant to the agency's participation in FHAP must be made available at the agency's office during normal working hours (except that documents with respect to ongoing fair housing complaint investigations are exempt from public review consistent with Federal and/or State law).

(d) The Secretary, the Inspector General of HUD, and the Comptroller General of the United States, or any of their duly authorized representatives,

shall have access to all pertinent books, accounts, reports, files, and other payments for surveys, audits, examinations, excerpts, and transcripts as they relate to the agency's participation in FHAP.

(e) All files will be kept in such fashion as to permit audits under applicable procurement regulations and guidelines and the Single Audit requirements for State and local agencies.

(f) The FHAP financial records and files will be kept at least three years on-site after any cooperative agreement has terminated.

§ 115.310 Subcontracting under the FHAP.

If an agency subcontracts to a public or private agency any activity for which the subcontractor will receive FHAP funds, the agency must ensure and certify in writing that the subcontractor is:

- (a) Using services and facilities that are accessible in accordance with the Americans with Disability Act (ADA) (29 U.S.C. 706) and Section 504 of the 1973 Rehabilitation Act (29 U.S.C. 792);
- (b) Complying with the standards of Section 3 of the Housing and Urban Development Act (12 U.S.C. 1701u); and
- (c) Furthering fair housing.

§ 115.311 Corrective and remedial action.

(a) If HUD makes a preliminary determination that an agency has not complied with § 115.309, the agency will be given written notice of this determination and an opportunity to show, through demonstrable facts and data, that it has done so within a time prescribed by HUD.

(b) If an agency fails to demonstrate to HUD's satisfaction that it has met program review standards, HUD will request the agency to submit and comply with proposals for action to correct, mitigate, or prevent performance deficiencies, including, but not limited to:

(1) Preparing and/or following a schedule of actions for carrying out the affected fair housing activities;

(2) Establishing and/or following a management plan that assigns responsibilities for carrying out the actions required;

(3) Canceling or revising activities likely to be affected by a performance deficiency before expending FHAP funds for the activities; and

(4) Redistributing or suspending disbursement of FHAP funds that have not yet been disbursed.

(c) HUD may condition the use of FHAP award amounts with respect to an agency's succeeding fiscal year's allocation on the satisfactory

completion by the agency of appropriate corrective actions. When the use of funds is so conditioned, HUD will specify the deficiency(ies), the required corrective action(s), and the time allowed for taking these actions. Failure of the agency to complete the actions as specified will result in a reduction or withdrawal of the FHAP allocation in an amount not to exceed the amount conditionally granted.

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Elizabeth K. Julian,

*Acting Assistant Secretary for Fair Housing
and Equal Opportunity.*

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