

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR-4094-F-02]

RIN 2529-AA80

Implementation of the Housing for Older Persons Act of 1995

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

ACTION: Final rule.

SUMMARY: This rule implements the Housing for Older Persons Act of 1995 (HOPA). HOPA amended the requirements for qualification for the housing for persons who are 55 years of age or older portion of the "housing for older persons" exemption established in the Fair Housing Act. In addition, HOPA established a good faith defense against civil money damages for persons who reasonably relied in good faith on the application of the "housing for older persons" exemption even when, in fact, the housing provider did not qualify for the exemption. This rule updates HUD's regulations to reflect the changes made by HOPA.

EFFECTIVE DATE: May 3, 1999.

FOR FURTHER INFORMATION CONTACT: Sara K. Pratt, Director, Office of Enforcement, Office of Fair Housing and Equal Opportunity, Room 5206, 451 Seventh Street, SW, Washington, DC 20410-0500, telephone (202) 708-0836. (This is not a toll-free number.) Hearing or speech-impaired individuals may reach this office by calling the toll-free Federal Information Relay Service (TTY) at 1-800-877-8399.

SUPPLEMENTARY INFORMATION:

Information Collection Requirements

The information collection requirements contained in §§ 100.306 and 100.307 of this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and have been assigned approval number 2529-0046. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

I. Background

A. The Housing for Older Persons Act of 1995

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-3619) (the Act) exempts

"housing for older persons" from the Act's prohibitions against discrimination because of familial status. Section 807(b)(2)(C) of the Act exempts housing intended and operated for occupancy by persons 55 years of age or older which satisfies certain criteria. HUD has adopted implementing regulations further defining the "housing for older persons" exemption at 24 CFR part 100, subpart E.

The Housing for Older Persons Act of 1995 (Pub. L. 104-76, 109 Stat. 787, approved December 28, 1995) (HOPA) revised the definition of the original exemption contained in the Act for housing designed and operated for occupancy by persons who are 55 years of age or older. Section 2 of HOPA redefined this portion of the exemption to describe housing:

- (C) Intended and operated for occupancy by persons 55 years of age or older, and—
 - (i) At least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
 - (ii) The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
 - (iii) The housing facility or community complies with rules issued by the Secretary [of HUD] for verification of occupancy, which shall—
 - (I) Provide for verification by reliable surveys and affidavits; and
 - (II) Include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

The new requirements under HOPA are equivalent to the original provisions of the Fair Housing Act. Like the original section 807(b)(C) of the Act, HOPA requires that a facility or community seeking to claim the 55 and older exemption show three factors: (1) That the housing be intended and operated for persons 55 years of age or older; (2) that at least 80 percent of the occupied units be occupied by at least one person who is 55 years of age or older; and (3) the housing facility or community publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption. The housing facility or community must also comply with rules issued by HUD for the verification of occupancy.

One substantive change made by HOPA was the elimination of "significant facilities and services" previously required by the Act to meet the 55-and-older exemption. Section 807(b)(2)(C) of the Act originally required that housing designed for

persons who are 55 years of age or older provide "significant facilities and services specifically designed to meet the physical or social needs of older persons." HOPA also added the new requirement that a housing facility or community seeking the 55-and-older exemption comply with HUD regulations on verification of occupancy.

In addition, section 3 of HOPA added a new section 807(b)(5) to the Act. This new section established a good faith defense against civil money damages for a person who reasonably relies in good faith on the application of the housing for older persons exemption, even when, in fact, the housing facility or community does not qualify for the exemption. New section 807(b)(5) provides:

(5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.

(B) For purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—

- (i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and
- (ii) The facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

B. This Rule

This rule revises § 100.304, which presents an overview of the exemption, to more closely track the HOPA requirements. The rule also creates a new § 100.305, which updates the 80 percent occupancy requirements. A new § 100.306 describes how a facility or community may establish its intent to operate as housing designed for persons at least 55 years of age or older. New § 100.307 sets forth the necessary procedures for verification of the 80 percent occupancy requirements. Finally, a new § 100.308 implements the good faith defense against civil money damages.

Section 2 of HOPA requires that any implementing HUD regulations "include examples of the types of policies and procedures relevant to a determination of compliance with" the statute's intent requirement. Accordingly, paragraph (a) of § 100.306 lists several factors which HUD considers relevant in determining whether the housing facility or community intends to operate as housing for older persons. Section 100.306(b) states, however, that such

phrases such as "adult living", "adult community", or similar statements are inconsistent with the intent to establish housing for older persons. Such phrases are not evidence that the facility or community intends to operate as housing for older persons and are inconsistent with that intent. HUD, in order to make an assessment of intent, will consider all of the measures taken by the facility or community to demonstrate the intent required by the Act. Moreover, the housing facility or community may not evict or terminate leases of families with children in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.

HUD also provides guidance to assist housing facilities and communities in applying the requirements of this rule. These examples are contained in an appendix to this rule. The appendix will not be codified in title 24 of the CFR. HUD may update or revise the appendix as necessary.

C. Discussion of Public Comments on the January 19, 1997 Proposed Rule

The Housing for Older Persons Act (HOPA) was a remedial amendment to the Fair Housing Act overwhelmingly passed by Congress in an attempt to clarify the Act's senior housing exemption which Congress found was being effectively repealed by the judicial and administrative interpretation which the exemption had received.

Senator Brown described the purpose of HOPA as "making the law clearer and more workable for seniors * * * to protect seniors so that they can, if they wish to, move to housing where they are protected in their safety and their privacy." (Congressional Record, S. 18064). Senate Report #104-172 describes the purpose as a "return to the original intent of the Fair Housing Act exemption Congress created in 1988. HOPA is designed to make it easier for a housing community of older persons to determine whether they qualify for the Fair Housing Act exemption". While House Report 104-91 states "legislation is necessary to establish a workable and fair exemption to protect senior citizens who wish to live in retirement community". In short, HOPA was passed in order to protect senior housing.

HUD published a proposed rule for comment on January 14, 1997, at 62 FR 2000, and received approximately 130 comments on the proposed rule. The comments were evenly split between comments which expressed the belief that the regulation went too far in allowing the creation or continuation of senior housing and those which

generally supported the rule but felt that it should have done more to stabilize the conditions at senior housing communities or which objected to isolated provisions. Several of the specific points raised will be addressed later in the preamble and have resulted in changes and refinements to the proposed regulation. As a general response, some of the comments from each side are based upon premises with which HUD does not agree. In addition, Congress did not state that HOPA should be retroactively applied.

Therefore, a matter involving a claim of alleged discrimination occurring *before* December 28, 1995 will be covered by those laws and regulations in effect at the time of the claimed violation. Claims of alleged discrimination occurring after December 28, 1995, but before the effective date of this regulation will be analyzed using HOPA and its legislative history.

Those who maintain that HUD's interpretation of the exemption should be narrowed ignore the history of the senior housing exemption and HOPA. Congress made explicit findings that HOPA was necessary because of the narrow construction afforded the senior housing exemption in the past. It would be contrary to the intent of the HOPA to abolish the "significant facilities and services" requirement that hindered senior housing only to construct new impediments by strictly construing the remaining requirements. At the same time, Congress provided no indication that it intended to change the usual standards applicable in judicial constructions of exemptions, and, thus, HUD believes that, as with any exemption to the Fair Housing Act, the burden will be on the housing provider to prove that it meets the requirements set forth in this regulation in order to qualify for the exemption.

Others who believed that HUD should go further in specifying exactly what must be done by each facility and community fail to take into full account the limited nature of the exemption provided under the law. The Fair Housing Act and its senior exemptions, as amended by HOPA, do not provide standards for the proper operation of a senior community; they are designed only to advise communities and facilities what will not violate the familial status provisions of the Act. Most aspects of living in a senior community are governed by private contractual agreements between senior housing developers and individuals who purchased or rented the dwelling. Other aspects may be governed by state or local ordinances, particularly regarding mobile and manufactured

homes. These private agreements and local laws, for the most part, are left undisturbed by HUD's interpretation of HOPA.

HUD has also taken into consideration the broader historical aspects of the senior housing issue. Until the advent of the familial status protection established in the Fair Housing Amendments Act of 1988, the senior housing industry was a well-established, accepted component of housing options for seniors. With no federal law directly applicable, the industry developed in a variety of configurations and circumstances. Age restrictions in individual communities started at various ages—age 40, age 45, age 50 and so forth. Many communities defined themselves as "adult" communities, but in operation served seniors. Many senior communities served mature residents who are active, participating members of their communities. State and local law, local custom, and various provisions of covenants and restrictions affected how rules for occupancy were established or changed, against whom those rules could be enforced, the senior community's interplay with state and local land use and anti-discrimination statutes, and other practical day-to-day issues of senior housing. Against the backdrop of the nearly infinite number of possible scenarios, HUD and courts attempted to enforce the 1988 provisions of the exemptions. Congress has determined that those efforts did not achieve the desired results, and amended the Act. The rules that are included here in final form have attempted to address the issue in the broadest possible terms to account for the large variety of senior communities while being sufficiently detailed to provide clear guidance on the requirements of the senior housing exemption, without dictating results which may be inconsistent with local practice or deny flexibility in a variety of circumstances.

Opposition to the proposed rule came largely from Fair Housing advocacy groups and some housing industry groups. The comments of the Northern California Fair Housing Coalition (NCFHC), a coalition of 18 fair housing groups, is a representative example of the issues raised by these groups. NCFHC urges that the rule be withdrawn or significantly altered based on a strict interpretation of the exemption which HUD believes is contrary to the clear Congressional intent. Specifically, NCFHC considers § 100.305(e)(5), the so called "transition provision," to be without legal authority and bad public policy because, they assert, it would allow communities with

no senior residents to declare themselves housing for persons who are 55 years of age or older housing and discriminate against families with children until they reach the 80% senior occupancy minimum.

A transition provision was first adopted in the August 18, 1995 final rule which was implemented prior to the passage of HOPA, but the entire final rule was withdrawn in April 1996 after Congress passed HOPA. The intent of the original transition provision was to provide a mechanism to return to senior status for those former senior communities who had abandoned, or did not achieve, senior status for fear of law suits spawned by the pre-HOPA interpretations of the exemption, especially the requirement that significant facilities and services be provided, or for other reasons which Congress found were contrary to the original intent of the exemption. As it has done in the past, HUD is promulgating a transition provision under the authority of 42 U.S.C. 3607. As HUD noted in its comments to the previous final rule, published on August 18, 1995:

The Act provides that a property "shall not fail to meet the requirements for housing for older persons by reason of * * * (B) unoccupied units * * * " 42 U.S.C. 3607. HUD believes it is justified in interpreting the Act to allow a community which, although it does not currently meet the 80 percent occupancy requirement, to reserve all unoccupied units for occupancy by a person 55 years of age or older. This may be the only way for a community which believed that it was ineligible for "housing for older persons" status, and which has therefore permitted occupancy by families, to qualify for the exemption.

HUD is concerned, however, that an overly broad transition provision may allow qualification for communities beyond those which temporarily were unable to qualify for the exemption because of the significant facilities and services provision or other interpretations of the exemption, and which would otherwise have been eligible for the exemption. For that reason, HUD has retained the transition provision, but only for a period of one year from the date on which this regulation becomes final, to allow communities which wish to qualify for the 55-and-older exemption to qualify. At the end of the one year period, the transition period will expire. HUD believes that this is a more balanced approach that achieves a common sense solution to a problem with equities on both sides. This represents the most significant change in the rule. The one year limitation period will require that

those communities seeking to meet the 80% requirement have at least 80% of their occupied units occupied by at least one person who is 55 years of age or older by the expiration of the period in order to qualify for the exemption. Vacant units reserved for occupancy by persons who are 55 of age or older may not be counted in achieving this standard. The transition provision may not be facilitated by evicting or terminating the leases of resident households with minor children.

The transition provision will expire at the end of one year from the effective date of this regulation. A community or facility which attempts to meet the exemption during the transition period, unsuccessfully, must cease reserving vacant units for persons who are 55 years of age or older at the end of that period. Even if a facility or community fails to meet the exemption during this transition period, it will not be liable for discrimination on the basis of familial status resulting from actions taken during the one year period if it complies with all of the transition requirements during that time.

The NCFHC further objects to § 100.305(c)(2) which references "temporarily vacant" dwellings. This provision is in response to the situation where individuals move into "senior parks" as summer or winter homes while others in the community remain year round. NCFHC argues that only "primary residences" should be covered. There is no support in the Congressional history or in HOPA for this interpretation. HUD has held that a "dwelling" under the Act can cover summer homes or even timeshare units. There is no reason to make a distinction for senior housing. A unit which is occupied, even if temporarily vacant while its residents are absent seasonally, on vacation, or hospitalized, for example, is still occupied by that resident. If, on the other hand, a unit is leased by its owners during their absence, its current occupants, not its owners, are considered for purposes of the exemption.

The fair housing advocates and several attorneys further objected to § 100.306(c) which addresses the effect of language in housing documents on the intent requirement. HUD has consistently held that intent is established by the totality of the facts. HUD is also aware that prior to the adoption of protection for families with children in the Fair Housing Amendments Act, housing communities and facilities had established senior housing at an age other than 55 with a prohibition against amending the covenants for a period of 25 years or

more. It would be unjust to deny such housing qualification for the exemption when it meets the intent requirement in all other ways as well as meeting the other requirements for the exemption and has done what it can to eliminate language inconsistent with the exemption for housing for persons 55 years of age or older. HUD notes, however, that in circumstances where the community holds itself out as "adult" and its legal documents describe occupancy in terms which are not consistent with the 55-and-older exemption and no action has been taken to attempt to change the applicable documents, the requisite intent requirement is not met.

Other commenters have interpreted this provision as sanctioning senior housing under federal law when state and local law prohibits or restricts the establishment of senior housing in the particular circumstances of that community. HUD has always allowed state or local laws which impose requirements in addition to, but not inconsistent with, those in the Act to apply. Moreover, to the extent that state or local law interpretations require additional or different standards, the Act's provisions must still be met to qualify for the exemption. HUD urges senior communities to consult state or local units of government to ensure that the housing community is also in compliance with all applicable state and local requirements governing senior housing.

Several commenters addressed specific actions of communities purporting to be senior housing. These include such matters as requirements that occupants join a homeowners association (HOA) or whether a community must allow an under-aged heir to reside in the community or the grandchild of a resident. None of these matters are directly affected by the rule. These types of issues are governed by private contractual agreements and local laws and practice. If there is no independent law, deed restriction or other legally enforceable requirement that an individual join a HOA, it is not required by HOPA. Additionally, although HOPA would allow under-aged heirs, or minors under the age of 18 years of age to reside in, or visit, housing for persons who are 55 years of age or older, it does not require it. HUD philosophically supports a compassionate community which has provisions allowing some flexibility where the exemption would not be destroyed by that flexibility, but there is no direct legal authority under the Act to require it.

There continues to be confusion concerning what is often referred to as the 80/20 split. HOPA states that the minimum standard to obtain housing for persons who are 55 years of age or older status is that "at least 80%" of the occupied units be occupied by persons 55 years or older. There is no requirement that the remaining 20% of the occupied units be occupied by persons under the age of 55, nor is there a requirement that those units be used only for persons where at least one member of the household is 55 years of age or older. Communities may decline to permit any persons under the age of 55, may require that 100% of the units have at least one occupant who is 55 years of age or older, may permit up to 20% of the occupied units to be occupied by persons who are younger than 55 years of age, or set whatever requirements they wish, as long as "at least 80%" of the occupied units are occupied by one person 55 years of age or older, and so long as such requirements are not inconsistent with the overall intent to be housing for older persons.

The final regulation retains the provision that a unit occupied by a person or persons as a reasonable accommodation to the disability of an occupant need not be counted in meeting the 80% requirements. This provision ensures that a community or facility seeking to authorize the reasonable accommodation for a resident who, because of a disability, requires an attendant, including family members under the age of 18, residing in a unit in order for that person to benefit from the housing will not have its exemption adversely affected by permitting the accommodation. The authority for this provision arises under the Act's requirement that reasonable accommodations be provided to persons with disabilities.

Although occupancy by a person under the age of 55 who inherits a unit or a surviving spouse who is younger than 55 years of age are the original examples cited by Congress in justifying the original 80/20 split, HUD does not consider these to be the only appropriate uses of the flexibility provided by the up to 20% allowed by the exemption, nor are protections for those groups required. HUD believes that the appropriate use of the 20%, if any, is at the discretion of the community or facility and does not intend to impose more specific requirements in this area. For example, a community could allow some percentage of its units, up to 20%, to be made available to persons over the age of 50, and, as long as the overall intent

to be senior housing remained clear, HUD would not have an objection. However, the remaining portion of units not counted for purposes of meeting the 80% requirement may not be segregated within a community or facility.

Some commenters offered opinions concerning the proper nomenclature for senior communities and the consequences of using the "wrong" term. HUD believes that the best practice is to refer to such housing as "Senior Housing" or "A 55 and older community" or "retirement community," and discourages the use of the terms "adult housing" or similar language. While use of adult housing or similar phrases, standing alone, do not destroy the intent requirement of HOPA, they send a clear message which is inconsistent with the intent to be housing for older persons. If a community or facility has clearly shown its intent in other ways, and meets the 80% requirement, then the intent requirement has been met even if the phrase "adult" or similar terminology is occasionally used. However, a community which describes itself as "adult" leaves itself vulnerable to complaints about its eligibility for the exemption, which could result in an investigation or litigation to determine whether the community in fact qualifies for the exemption.

Other questions on the intent requirement concerned whether HUD intended to require that all of the items in § 100.306 be provided and whether the examples of compliance with the intent requirement were mandatory. HUD does not intend to impose any rigid requirements on indicating intent. Section 100.306 only speaks to relevant factors to be considered and the examples simply illustrate what could satisfy the requirement. Intent is judged based on the common understanding of the word and whether the community or facility has established through various means whether they intend to operate housing for persons who are 55 years of age or older.

Other commenters objected to the inclusion of a "municipally zoned area" as a possible type of housing for persons who are 55 years of age or older, while others questioned the use of the terminology of "mobile home park" instead of "manufactured housing". When former Assistant Secretary Roberta Achtenberg conducted public hearings on the "55 and over" rule, HUD learned that there are a large variety of senior housing communities, organized and administered in various ways. HUD attempted to define the possibilities as broadly as possible to

include any type of housing which could qualify for the exemption.

On the issue of age verification, commenters had several diverse suggestions. Several commenters urged that only the individual resident should be able to attest to his or her age and that anyone not cooperating with the survey should be considered to be not 55 years or older. It is HUD's position that the test is whether 80% of the occupied units are, in fact, occupied by persons 55 years or older. This need only be documented through reliable survey, census or affidavit, or other documentation, a copy of which should be retained for recordkeeping purposes, and which confirms that the 80% threshold is being met. A self certification of his or her age by an individual will be adequate to meet this standard. An affidavit from someone who knows the age of the occupant(s) and states his/her basis for the knowledge is sufficiently reliable to satisfy the statute. To hold otherwise would effectively allow 21% of a senior community to destroy the exemption by not cooperating with verification procedures.

Other comments concerning verification were that the use of immigration documents should be removed from the list of possible sources of age verification lest it encourage discrimination against legal immigrants. The option remains in the rule since it is only one way of verifying age. HUD does not intend to require any particular documentation be provided as a condition of occupancy, including immigration documentation. If any individual chooses to verify by providing a drivers license or affidavit instead of an immigration document, the verification requirement will be satisfied. A summary of the information gathered in support of the occupancy verification should be retained for confirmation purposes. Copies of supporting information gathered in support of the occupancy verification may be retained in a separate file with limited access, created for the sole purpose of complying with HOPA, and not in general or resident files that may be widely accessible to employees or other residents. The segregated documents may be considered confidential and not generally available for public inspection. HUD, state or local fair housing enforcement agencies, or the Department of Justice may review this documentation during the course of an investigation.

Other commenters questioned the reference to a "census" as a source of verification, noting that the census does not specify individual names but

instead deals with "census tracts" and is often outdated. This is a misunderstanding of HUD's view. HUD was not referring to the United States Decennial Census for verification of occupancy. The reference is to household censuses which are conducted by many cities and towns. The language has been clarified.

Some commenters objected to the "re-survey" of the park every two years as being unduly burdensome, especially if the list is actively updated on an on-going basis. While HUD is sympathetic to those well-managed communities which actively update lists of residents, it does not feel that such communities would be unduly burdened by the update since the information required will be readily available in the files. HUD's experience in this area gives it reason to believe that if surveys are not required to be updated periodically the quality of the recordkeeping will deteriorate and create the opportunity for the excessive litigation Congress sought to prevent. The re-survey does not require that all supporting documents be collected again—only that the community confirm that those persons counted as occupying dwellings for purposes of meeting the 80% requirement are, in fact, still in occupancy.

There were objections to making public information contained in an age survey for fear that confidential information may be obtained by someone attempting to prey on seniors. HUD believes that this is a misinterpretation of the requirement. Only the overall survey summary is required to be available for review, not the supporting documentation. The word "summary" has been added to this section.

Some commenters felt that any affidavit should be signed under the penalty of perjury to ensure the integrity of the process. Communities which are concerned about misrepresentation of the age of occupants are free to require that affidavits from occupants about the ages of persons in their households be signed under the penalty of perjury, just as they are free, consistent with state or local law, to require that applications, leases, and other admission documents be signed under oath, or under penalty of perjury. Statements from third party individuals who have personal knowledge of the age of the occupants and setting forth the basis for such knowledge may be used when occupants decline to provide information verifying age, but such statements must be made under penalty of perjury.

There were three comments concerning the "good faith reliance" exemption from monetary damages. The first questioned whether the exemption covered just housing for persons who are 55 years of age or older or all senior housing exemptions. A review of the language of HOPA indicates the language is applicable whenever the housing for older persons exemption may be claimed. The language has been adjusted accordingly. The second comment concerned whether the term "person" covered only "natural persons" or whether it included business and corporate entities. HUD believes Congress intended the "good faith reliance defense" to be applicable only to natural persons. The legislative history of the provision indicates that Congress intended to protect individual persons, such as individual members of boards of governing homeowners associations and real estate agents relying on information provided to them by operators of senior communities, in enacting this provision. House Report 104-91, at 10, describes this portion of the amendment as being designed to allow a person engaged in the business of residential real estate to show "good faith reliance" unless the person has actual knowledge that a facility or community is *not* eligible for the exemption and describes individual real estate agents as requiring protection in this area. This language indicates that it is natural persons which Congress wished to protect from damages awards in these circumstances.

To the extent that this interpretation may cause concern for corporate publishers which may accept a notice describing a facility or community as senior housing based on the representations of others and without personal knowledge of the actual qualifications for eligibility, HUD has already interpreted section 804(c) of the Act to exclude from liability those entities which publish advertisements regarding senior housing in good faith reliance on the assertions of others. To the extent that there is further publication based on a natural person's good faith reliance on a certification of eligibility for an exemption, HUD foresees no grounds for further liability. In other words, where the source of the information is a natural person who has the written certification described in the final regulation and further publication is based on that information, in the absence of actual knowledge that a particular community or facility is *not* eligible for the exemption, there is no liability for that publication.

The third issue identified by commenters deals with whether a claim

of "good faith" requires actual knowledge that the community had certified in writing that it was housing for persons who are 55 years of age or older. A review of the language of the Committee report indicates that the eligibility for the claim of "good faith" relies on the fact that the facility or community "has certified to that person, in writing and on oath or affirmation, that it complies with the requirements" for the exemption. (House Report 104-91 at 10) Therefore, actual knowledge of the certification is required. *Other:* It has become clear that there is confusion about the extent to which the provisions of the Fair Housing Act relating to the housing for older persons exemptions affect statutory eligibility requirements for participation in federally funded housing programs. Neither HOPA nor the Act change the definition of "elderly family" which mandates that a family include the situation where the head, spouse or sole member is age 62 or older. Neither HOPA nor the Act permit a HUD-funded public housing provider to designate a project as being for the elderly without HUD review and approval, even if the project would meet the housing for older persons exemption under the Act. Similarly, HUD-funded housing which is designated for the elderly may not admit households which are not statutorily eligible for the housing (such as limiting admissions to those who are 55 years of age or older rather than the near elderly). Finally, no public housing development funded by HUD may exclude families with children, even if at least 80% of the units are occupied by at least one person who is 55 years of age or older.

II. Findings and Certifications

Executive Order 12866

This rule was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866 on Regulatory Planning and Review, issued by the President on September 30, 1993. OMB determined that this final rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made in the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection as provided under the section of this preamble entitled **ADDRESS**.

Environmental Impact

In accordance with 24 CFR 50.19(c)(3) of the Department's regulations published in a final rule on September 27, 1996 (61 FR 50914), the policy set

forth in this final rule is categorically excluded from the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) and the authorities cited in 24 CFR 50.4.

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 final 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 rule implements the requirements of HOPA by revising the provisions for "55-or-older" housing found at 24 CFR part 100, subpart E. It effects no changes in the current relationships among the Federal government, the States and their political subdivisions in connection with HUD programs.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This rule updates HUD's regulations implementing the "housing for older persons" exemption to the Fair Housing Act. Specifically, the rule implements the statutory amendments made by HOPA. These revisions provide housing facilities and communities with a better understanding of what housing qualifies for the "55-or-older" exemption to the Fair Housing Act's prohibitions against discrimination on the basis of familial status. The final rule will not have any meaningful impact on small entities.

List of Subjects in 24 CFR part 100

Aged, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 100 is amended as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority citation for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600-3619.

2. Subpart E is amended by revising § 100.304 and by adding §§ 100.305, 100.306, 100.307, and 100.308, to read as follows:

Subpart E—Housing for Older Persons

* * * * *

§ 100.304 Housing for persons who are 55 years of age or older.

(a) The provisions regarding familial status in this part shall not apply to housing intended and operated for persons 55 years of age or older. Housing qualifies for this exemption if:

(1) The alleged violation occurred before December 28, 1995 and the housing community or facility complied with the HUD regulations in effect at the time of the alleged violation; or

(2) The alleged violation occurred on or after December 28, 1995 and the housing community or facility complies with:

(i) Section 807(b)(2)(C) (42 U.S.C. 3607(b)) of the Fair Housing Act as amended; and

(ii) 24 CFR 100.305, 100.306, and 100.307.

(b) For purposes of this subpart, *housing facility or community* means any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion or portions of a single building shall not constitute a housing facility or community. Examples of a housing facility or community include, but are not limited to:

(1) A condominium association;

(2) A cooperative;

(3) A property governed by a homeowners' or resident association;

(4) A municipally zoned area;

(5) A leased property under common private ownership;

(6) A mobile home park; and

(7) A manufactured housing community.

(c) For purposes of this subpart, *older person* means a person 55 years of age or older.

§ 100.305 80 percent occupancy.

(a) In order for a housing facility or community to qualify as housing for older persons under § 100.304, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older.

(b) For purposes of this subpart, *occupied unit* means:

(1) A dwelling unit that is actually occupied by one or more persons on the date that the exemption is claimed; or

(2) A temporarily vacant unit, if the primary occupant has resided in the unit during the past year and intends to return on a periodic basis.

(c) For purposes of this subpart, *occupied by at least one person 55 years of age or older* means that on the date the exemption for housing designed for

persons who are 55 years of age or older is claimed:

(1) At least one occupant of the dwelling unit is 55 years of age or older; or

(2) If the dwelling unit is temporarily vacant, at least one of the occupants immediately prior to the date on which the unit was temporarily vacated was 55 years of age or older.

(d) Newly constructed housing for first occupancy after March 12, 1989 need not comply with the requirements of this section until at least 25 percent of the units are occupied. For purposes of this section, newly constructed housing includes a facility or community that has been wholly unoccupied for at least 90 days prior to re-occupancy due to renovation or rehabilitation.

(e) Housing satisfies the requirements of this section even though:

(1) On September 13, 1988, under 80 percent of the occupied units in the housing facility or community were occupied by at least one person 55 years of age or older, provided that at least 80 percent of the units occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.

(3) There are units occupied by employees of the housing facility or community (and family members residing in the same unit) who are under 55 years of age, provided the employees perform substantial duties related to the management or maintenance of the facility or community.

(4) There are units occupied by persons who are necessary to provide a reasonable accommodation to disabled residents as required by § 100.204 and who are under the age of 55.

(5) For a period expiring one year from the effective date of this final regulation, there are insufficient units occupied by at least one person 55 years of age or older, but the housing facility or community, at the time the exemption is asserted:

(i) Has reserved all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and

(ii) Meets the requirements of §§ 100.304, 100.306, and 100.307.

(f) For purposes of the transition provision described in § 100.305(e)(5), a housing facility or community may not evict, refuse to renew leases, or

otherwise penalize families with children who reside in the facility or community in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.

(g) Where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.

(h) Each housing facility or community may determine the age restriction, if any, for units that are not occupied by at least one person 55 years of age or older, so long as the housing facility or community complies with the provisions of § 100.306.

§ 100.306 Intent to operate as housing designed for persons who are 55 years of age or older.

(a) In order for a housing facility or community to qualify as housing designed for persons who are 55 years of age or older, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. The following factors, among others, are considered relevant in determining whether the housing facility or community has complied with this requirement:

- (1) The manner in which the housing facility or community is described to prospective residents;
- (2) Any advertising designed to attract prospective residents;
- (3) Lease provisions;
- (4) Written rules, regulations, covenants, deed or other restrictions;
- (5) The maintenance and consistent application of relevant procedures;
- (6) Actual practices of the housing facility or community; and
- (7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.

(b) Phrases such as "adult living", "adult community", or similar statements in any written advertisement or prospectus are not consistent with the intent that the housing facility or community intends to operate as housing for persons 55 years of age or older.

(c) If there is language in deed or other community or facility documents which is inconsistent with the intent to provide housing for persons who are 55 years of age or older housing, HUD shall consider documented evidence of a good faith attempt to remove such language in determining whether the housing facility or community complies with the requirements of this section in

conjunction with other evidence of intent.

(d) A housing facility or community may allow occupancy by families with children as long as it meets the requirements of §§ 100.305 and 100.306(a).

(Approved by the Office of Management and Budget under control number 2529-0046)

§ 100.307 Verification of occupancy.

(a) In order for a housing facility or community to qualify as housing for persons 55 years of age or older, it must be able to produce, in response to a complaint filed under this title, verification of compliance with § 100.305 through reliable surveys and affidavits.

(b) A facility or community shall, within 180 days of the effective date of this rule, develop procedures for routinely determining the occupancy of each unit, including the identification of whether at least one occupant of each unit is 55 years of age or older. Such procedures may be part of a normal leasing or purchasing arrangement.

(c) The procedures described in paragraph (b) of this section must provide for regular updates, through surveys or other means, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years. A survey may include information regarding whether any units are occupied by persons described in paragraphs (e)(1), (e)(3), and (e)(4) of § 100.305.

(d) Any of the following documents are considered reliable documentation of the age of the occupants of the housing facility or community:

- (1) Driver's license;
- (2) Birth certificate;
- (3) Passport;
- (4) Immigration card;
- (5) Military identification;
- (6) Any other state, local, national, or international official documents containing a birth date of comparable reliability; or

(7) A certification in a lease, application, affidavit, or other document signed by any member of the household age 18 or older asserting that at least one person in the unit is 55 years of age or older.

(e) A facility or community shall consider any one of the forms of verification identified above as adequate for verification of age, provided that it contains specific information about current age or date of birth.

(f) The housing facility or community must establish and maintain appropriate policies to require that occupants

comply with the age verification procedures required by this section.

(g) If the occupants of a particular dwelling unit refuse to comply with the age verification procedures, the housing facility or community may, if it has sufficient evidence, consider the unit to be occupied by at least one person 55 years of age or older. Such evidence may include:

- (1) Government records or documents, such as a local household census;
- (2) Prior forms or applications; or
- (3) A statement from an individual who has personal knowledge of the age of the occupants. The individual's statement must set forth the basis for such knowledge and be signed under the penalty of perjury.

(h) Surveys and verification procedures which comply with the requirements of this section shall be admissible in administrative and judicial proceedings for the purpose of verifying occupancy.

(i) A summary of occupancy surveys shall be available for inspection upon reasonable notice and request by any person.

(Approved by the Office of Management and Budget under control number 2529-0046)

§ 100.308 Good faith defense against civil money damages.

(a) A person shall not be held personally liable for monetary damages for discriminating on the basis of familial status, if the person acted with the good faith belief that the housing facility or community qualified for a housing for older persons exemption under this subpart.

(b)(1) A person claiming the good faith belief defense must have actual knowledge that the housing facility or community has, through an authorized representative, asserted in writing that it qualifies for a housing for older persons exemption.

(2) Before the date on which the discrimination is claimed to have occurred, a community or facility, through its authorized representatives, must certify, in writing and under oath or affirmation, to the person subsequently claiming the defense that it complies with the requirements for such an exemption as housing for persons 55 years of age or older in order for such person to claim the defense.

(3) For purposes of this section, an authorized representative of a housing facility or community means the individual, committee, management company, owner, or other entity having the responsibility for adherence to the requirements established by this subpart.

(4) For purposes of this section, a person means a natural person.

(5) A person shall not be entitled to the good faith defense if the person has actual knowledge that the housing facility or community does not, or will not, qualify as housing for persons 55 years of age or older. Such a person will be ineligible for the good faith defense regardless of whether the person received the written assurance described in paragraph (b) of this section.

Dated: March 25, 1999.

Eva M. Plaza,

Assistant Secretary for Fair Housing and Equal Opportunity.

Note: This Appendix will not be Codified in Title 24 of the CFR.

Appendix

Examples of Applications of HUD's Regulations Governing the Exemption for Housing for Persons 55 Years of Age or Older to the Fair Housing Act

Sections

1. Purpose.
2. 80 percent occupancy.
3. Intent to operate as housing for persons who are 55 years of age or older.
4. Verification of occupancy.
5. Future revisions to this appendix.

1. Purpose.

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601–3619) (the Act) exempts “housing for older persons” from the prohibitions against discrimination because of familial status. Section 807(b)(2)(C) of the Act exempts housing intended and operated for occupancy by persons 55 years of age or older that satisfies certain criteria. HUD has implemented the “housing for older persons” exemption at 24 CFR part 100, subpart E. Specifically, §§ 100.304, 100.305, 100.306, and 100.307 set forth the requirements for housing seeking to qualify for the exemption. The purpose of this appendix is to provide guidance to housing facilities or communities in applying these HUD requirements.

2. 80 Percent Occupancy.

Section 100.305 provides that in order for a housing facility or community to qualify for the exemption, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older. This occupancy requirement must be met at the time of any alleged violation of the Act. Paragraph (f) of § 100.305 states that where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.

Example: A community or facility contains 63 occupied units. Eighty percent of 63 units equals 50.4. Under § 100.305(d), 51 units would require occupancy by at least one person 55 years of age or older to qualify as 55 and older housing.

Section 100.305 also sets forth the other requirements a housing facility or

community must follow in calculating occupancy. The following examples illustrate these requirements:

Example 1:

Buena Vista is a condominium association of 120 units. On September 13, 1988, twenty (20) of the occupied units are not occupied by at least one person 55 years of age or older.

On April 1, 1998, Buena Vista declares itself to be housing for persons 55 years of age or older. On that date:

- (1) The twenty (20) persons described above are still residing at Buena Vista;
- (2) Ten (10) units of the total 120 units are unoccupied;
- (3) One (1) of the units is occupied by the association's maintenance supervisor; and
- (4) Two (2) units are occupied only by live-in health aides who provide reasonable accommodations to residents with disabilities and who are under the age of 55.

How many of the occupied units must be occupied by at least one person 55 years of age or older in order for Buena Vista to qualify as 55-or-older housing?

Under § 100.305(e), Buena Vista would calculate its compliance with the 80 percent occupancy requirement by subtracting the following units from the total 120 units:

- (1) The 20 units not occupied by at least one person 55 years of age or older on September 13, 1988 (See § 100.305(e)(1));
- (2) The ten (10) unoccupied units (See § 100.305(e)(2));
- (3) The one (1) unit occupied by the maintenance person (See § 100.305(e)(3)); and
- (4) The two (2) units occupied by the health aides (See 42 U.S.C. 3607 (b)(3)(A) and 42 § 100.305(e)(4)).

Subtracting these 33 units from the total of 120 units leaves 87 units. At least 80 percent of these 87 units must be occupied by at least one person 55 years of age or older. Eighty percent of 87 equals 69.6. Due to § 100.305(d), 70 units must be occupied by at least one person 55 years of age or older. This example assumes that the community also meets the requirements of §§ 100.306 and 100.307.

Example 2:

Topaz House is a cooperative of 100 units. On January 20, 1998, Topaz House announces its intent to be 55-or-older housing and publishes policies and procedures sufficient to satisfy § 100.306. On that date, of the 100 total units:

- (1) Sixty (60) of the occupied units are occupied by at least one person 55 years of age or older;
- (2) Thirty (30) of the occupied units do not have occupants 55 years of age or older; and
- (3) Ten (10) units are unoccupied.

Since 60 out of the 90 occupied units are occupied by at least one person 55 years of age or older, the Topaz House only has 67 percent of its occupied units occupied by at least one person 55 years of age or older.

Under § 100.305(e)(5), Topaz House may still qualify for the 55-or-older exemption if, during a period which is one year from the effective date of this regulation, it:

- (1) Reserves all unoccupied units for occupancy by at least one person 55 years of

age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and

- (2) Meets the requirements of §§ 100.304, 100.305, 100.306, and 100.307 and

- (3) Within the one year period achieves occupancy of at least 80% of its occupied units by at least one person who is 55 years of age or older.

There is no requirement that Topaz House take any action concerning the residents under 55 years of age who are occupying units on the date the building declares its intent to be 55-or-older housing. Topaz may not evict, or terminate the leases of households containing children under the age of 18, in order to qualify for the exemption.

Example 3:

Snowbird City is a mobile home community in Texas with 100 units. Snowbird City complies with all other requirements of 55-or-older housing, but is uncertain of its compliance with the 80 percent occupancy rule.

Fifty out of the 100 units are occupied year round. Of these fifty units, 12 units are not occupied by at least one person 55 years of age or older. Of the remaining 50 units, 5 are unoccupied and offered for sale, and the remaining 45 are occupied by at least one person 55 years of age or older each winter on a routine and reoccurring basis.

If a complaint of familial status discrimination is filed in December, the community meets the 80 percent occupancy requirement because 83 out of the 95 occupied units (87 percent), are occupied by at least one person 55 years of age or older. If the complaint is filed in July, Snowbird City still meets the requirement. Under § 100.305(b), a temporarily vacant unit is considered occupied by a person 55 years of age or older if:

- (1) The primary occupant has resided in the unit during the past year; and
- (2) The occupant intends to return on a periodic basis.

Example 4:

The King Philip Senior Community is a newly renovated building originally built in 1952. It has been vacant for over one year while extensive renovations were completed. The building contains 200 units. The King Philip Senior Community is intended to be operated as a 55-or-older community.

Under § 100.305(d), newly constructed housing need not comply with the 80 percent occupancy requirement until 25 percent of the total units are occupied. For purposes of § 100.305(d), newly constructed housing includes housing that has been unoccupied for at least 90 days due to renovation or rehabilitation. Accordingly, the King Philip Senior Community need not comply with the 80 percent occupancy requirement until 50 out of its 200 units (25 percent) are occupied. Subsequent to occupancy of the 50th unit, however, the building will have to satisfy the 80 percent occupancy rule in order to qualify as 55-or-older housing.

3. Intent to operate as housing for persons who are 55 years of age or older.

Section 100.306 provides that in order for a housing facility or community to qualify as housing for persons 55 years of age or older, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. Section 100.306 also details the factors HUD will utilize to determine whether a housing facility or community has met this intent requirement. The following are examples of housing facilities and communities which satisfy the intent requirement described in § 100.306:

Example 1:

A mobile home park which takes the following actions satisfies the intent requirement:

- (1) Posts a sign indicating that the park is 55-or-older housing;
- (2) Includes lease provisions stating that the park intends to operate as 55-or-older housing; and
- (3) Has provided local realtors with copies of the lease provisions.

Example 2:

An area zoned by a unit of local government as "senior housing" satisfies the intent requirement if:

- (1) Zoning maps containing the "senior housing" designation are available to the public;
- (2) Literature distributed by the area describes it as "senior housing";
- (3) The "senior housing" designation is recorded in accordance with local property recording statutes; and
- (4) Zoning requirements include the 55-or-older requirement or a similar provision.

Example 3:

A condominium association satisfies the intent requirement if it has:

- (1) Adopted, through its rules and regulations, restrictions on the occupancy of

units consistent with HUD's regulations governing 55-or-older housing at 24 CFR part 100, subpart E;

- (2) Has distributed copies of the rules to all occupants; and
- (3) Has notified local realtors of the restrictions.

The following is an example of a housing facility which has failed to satisfy the intent requirement described in § 100.306:

Example 4:

A homeowners association has failed to meet the intent requirement if it has Covenants, Conditions and Restrictions which refer to an "adult community," has posted a sign stating "A 40 and over community" and has restricted visiting children to a maximum of two weeks, but contains no similar restriction for visiting adults.

4. Verification of occupancy.

Section 100.307 provides that in order for a housing facility or community to qualify as 55-or-older housing, it must be able to produce, in response to a complaint alleging a violation of the Act, verification of compliance with § 100.305 through reliable surveys and affidavits. Paragraph (d)(7) of § 100.307 includes self-certifications in a list of documents considered reliable documentation of the age of occupants. The self-certification may be included in a lease or other document, and must be signed by an adult member of the household asserting that at least one person in the unit is 55 years of age or older. The following examples provide acceptable provisions to demonstrate a self-certification process:

Example 1:

All new leases, new purchase agreements, or new applications contain a provision directly above the signatory line for lessees, asserting that at least one occupant of the dwelling will be 55 years of age or older. In addition, the community surveys all current residents for their occupancy status in

compliance with the 55-or-older requirements.

Example 2: Sample certification

I, (name), am 18 years of age or older and a member of the household that resides at (housing facility or community), (unit number or designation). I hereby certify that I have personal knowledge of the ages of the occupants of this household and that at least one occupant is 55 years of age or older.

Paragraph (e) of § 100.307 requires that the housing facility or community establish appropriate policies to require that all occupants comply with the age verification procedures. The following examples illustrate acceptable policies:

Example 1:

A condominium association establishes a rule that the board of directors must approve all new occupants. One criteria for approval is that new occupants of each unit inform the condominium association whether at least one person occupying the unit is 55 years of age or older.

Example 2:

A homeowners association amends its Covenants, Conditions and Restrictions, and records them at the appropriate government recording office. The amendments require applicants to state whether at least one occupant is 55 years of age or older.

Example 3:

The owner of a mobile home park where the residents own the coach but rent the land requires a statement of whether at least one occupant is 55 years of age or older before any sublease or new rental.

5. Future revisions to this appendix.

HUD may update or revise this appendix as necessary.

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