



# Fair Housing for HOME Participants





# Understanding the Basics

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

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

## Relevant Federal Fair Housing Requirements

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

### Title VI of the Civil Rights Act of 1964

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

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

### Fair Housing Act

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

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

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



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

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

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

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

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

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

### Section 504 of the Rehabilitation Act of 1973

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

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

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



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

<sup>4</sup> See 24 CFR 8.4, 8.20, 8.24, and 8.33 for further requirements and guidance.

<sup>5</sup> See 24 CFR 8.4(b)(i)(iv), and 8.4(c)(1).



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

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

### Americans with Disabilities Act (ADA)

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

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

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

### Age Discrimination Act of 1975

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

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

### State and Local Fair Housing Requirements

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

## Discriminatory Housing Practices and Prohibited Actions

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

### Protected Classes

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

#### *Familial Status*

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



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

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

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

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

### ***Persons with Disabilities***

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

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

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

### **Discriminatory Housing Practices Under the Fair Housing Act<sup>9</sup>**

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

Regardless of a person’s status as a member of a protected class, however, the law does not exempt him or her from meeting lawful requirements and conditions that might be imposed in the operation of a housing program or facility.

<sup>6</sup> See 24 CFR 100.20.

<sup>7</sup> See 24 CFR 100.201.

<sup>8</sup> See 24 CFR 100.202(d).

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



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

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

These unlawful discriminatory practices are summarized as follows:

*Discrimination in the sale or rental of a dwelling*

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

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

*Discrimination in the terms and use of the housing*

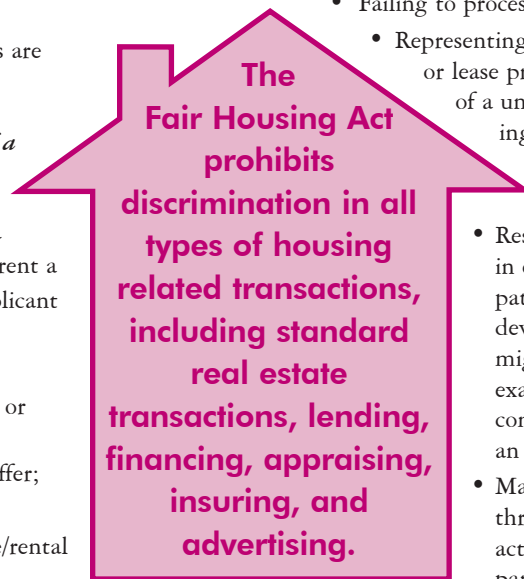
Discrimination in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with the sale or rental includes:

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

*Discriminatory conduct by members of the real estate industry*

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

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



*Discriminatory advertisements, statements, and notices*

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



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

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

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

### *Engaging in blockbusting practices*

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

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

### *Discrimination in the provision of brokerage services*

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

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

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

### *Discrimination in residential real estate-related transactions*

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

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

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

### *Retaliation and association*

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

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

## Special Considerations

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



## Affirmative Marketing

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

### Requirements

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

### Elements of Affirmative Marketing Procedures

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

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

### Affirmative Marketing for Special Needs Housing

PJs may choose to invest HOME funds in a project(s) that serves targeted populations, in order to meet the special housing needs of certain groups of residents, such as persons with disabilities, large families, the elderly, farm workers, or participants in self-sufficiency programs. Using HOME funds to provide special needs housing is eligible when the PJ has specifically articulated its plans to develop special needs housing in its Consolidated Plan in order to address a gap in benefits and services to those persons. When HOME Program funds are used in conjunction with Supportive Housing Program funds for the development of permanent housing, however, only *homeless* persons with disabilities may be assisted, in

accordance with the Supportive Housing Program rules found at 24 CFR Part 583. When HOME funds are used in special needs housing, access to this housing and/or assistance may not be denied on the basis of race, color, religion, gender, national origin, familial status, or age.

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

<sup>10</sup> See 24 CFR 92.351(a)(2).





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

### Housing for Older Persons

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

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

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

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

If an occupant who is 55 years of age or older dies and leaves his or her property to a surviving spouse or heir(s) under the age of 55, and the surviving spouse or heir remains in the unit, that unit must be “counted” in the 20 percent of the occupied units that can be occupied by persons under age 55.<sup>14</sup> Housing with occupants who are not over 55 and who first occupied the property prior to 1995 (the passage of HOPA) is not in violation of this rule, provided it was in compliance with the rule that was in effect at the time of occupancy.<sup>15</sup>

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

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

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

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

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



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

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

### Zoning and Occupancy Restrictions

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

### Discrimination Based on Drug Use

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

### Single Family Housing that is Sold by an Owner

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

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

### Accessible Housing

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

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

### Inquiries About Disability<sup>17</sup>

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

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

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

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

## Fair Housing Enforcement

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

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

<sup>16</sup> See 24 CFR 100.10.

<sup>17</sup> See 24 CFR 100.202.



### Enforcement of the Fair Housing Act

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

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

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

### Enforcement of Title VI of the Civil Rights Act of 1964

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

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

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

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

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

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



## Enforcement of Section of 504

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

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

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

### *Monitoring and Ongoing Obligations*

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

## Conclusion

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

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

## Additional Resources

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

The Fair Housing Act can be found online at [www.usdoj.gov/crt/housing/title8.htm](http://www.usdoj.gov/crt/housing/title8.htm). Its implementing regulations are at 24 CFR Part 100, et. al., and can be found online at [www.archives.gov/federal\\_register/index.html](http://www.archives.gov/federal_register/index.html).

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

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

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



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

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

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

## About the Series: Fair Housing for HOME Program Participants

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

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

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

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

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

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

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

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

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



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

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

## HOME Model Program Guides

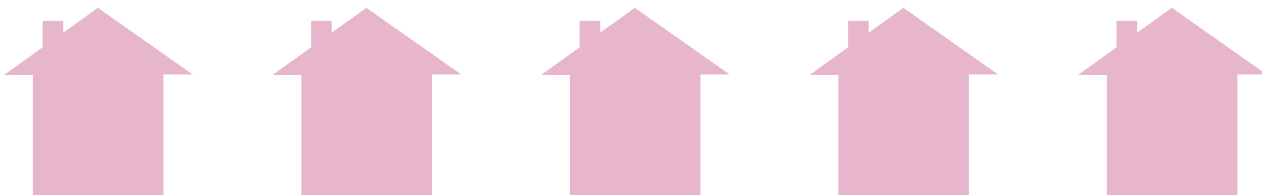
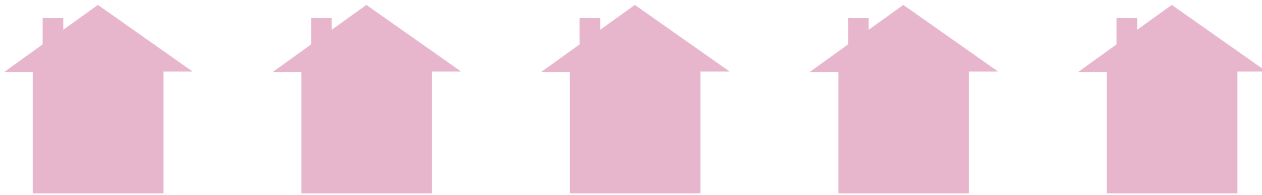
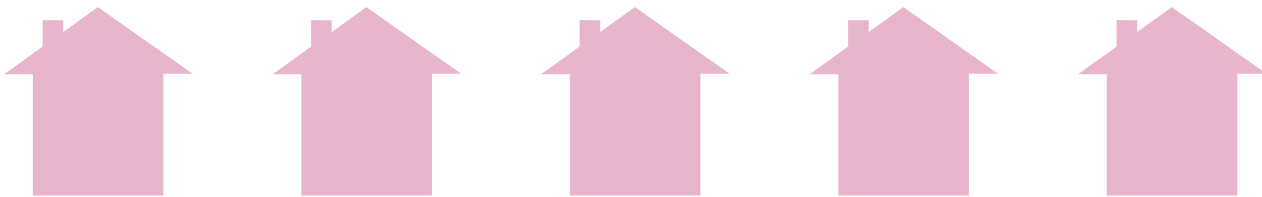
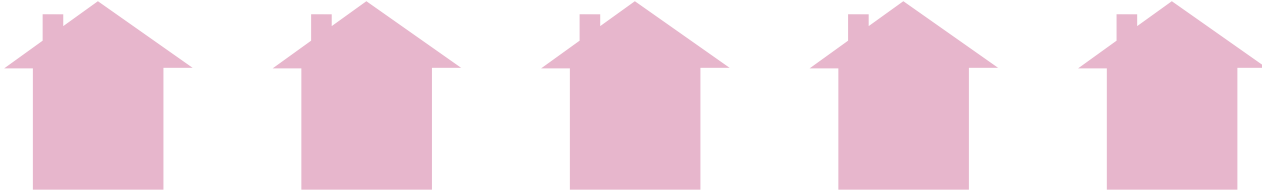
*Fair Housing for HOME Program Participants* is a HOME model program guide published by HUD's Office of Affordable Housing Programs. The HOME model program guides provide technical assistance to jurisdictions that are implementing HOME Program activities. Additional copies of any of the publications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

For more information about the HOME Program, visit [www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm).











# Affirmatively Furthering Fair Housing

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

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

## Certification to Affirmatively Further Fair Housing: Fair Housing Planning

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

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

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

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

<sup>1</sup> These three activities are often referred to as “fair housing planning.”

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



## The Analysis of Impediments

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

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

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

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

### Preparing the Analysis of Impediments

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

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

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

#### *When Must the AI Be Prepared?*

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

#### *Who Should Undertake the AI?*

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

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

#### *What is Included in the AI?*

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

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



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

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

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

*What Kind of Process Should the PJ Undertake?*

From a practical perspective, PJs should make decisions about

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

**Elements of the Analysis of Impediments**




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

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




Exhibit 1

**Consolidated Plan Elements to Consider in the Development of the AI**


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

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



The housing market analysis of the Consolidated Plan must include:

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

The Strategic Plan must include:

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

The Action Plan must include:

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



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

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

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

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

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

## Taking Actions to Overcome the Effects of Impediments

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




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

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







## Exhibit 2





**Sample Elements of a Comprehensive Analysis of Impediments****Introduction and Executive Summary of the Analysis**

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




**Background Data about the Jurisdiction**

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

**Evaluation of Jurisdiction's Current Fair Housing Status**

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

**Identification of Impediments to Fair Housing Choice**

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

**Conclusions and Recommendations**



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

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

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

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

## Common Impediments to Fair Housing and Appropriate Actions

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

### Impediments

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

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

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

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

Some common examples include:

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

### Appropriate Actions

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

<sup>4</sup> U.S. Department of Housing and Urban Development. *Fair Housing Planning Guide*. Third reprint. HUD-1582B-FHEO. March, 1996. Available online at [www.hud.gov/offices/ftheo/images/fhpg.pdf](http://www.hud.gov/offices/ftheo/images/fhpg.pdf).



following list provides some common examples:

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

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

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

## Record-keeping

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

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

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

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

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

## Using HOME Funds to Affirmatively Further Fair Housing

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





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

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

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

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

## Conclusion

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

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

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

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

## Additional Resources

*Consolidated Submissions for Community Planning and Development Programs*, 24 CFR Part 91, available online at [www.archives.gov/federal\\_register/index.html](http://www.archives.gov/federal_register/index.html). This regulation contains the requirement that PJs certify that they will affirmatively further fair housing.

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

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

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

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

## About the Series: Fair Housing for HOME Program Participants

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

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



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

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

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

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

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

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

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

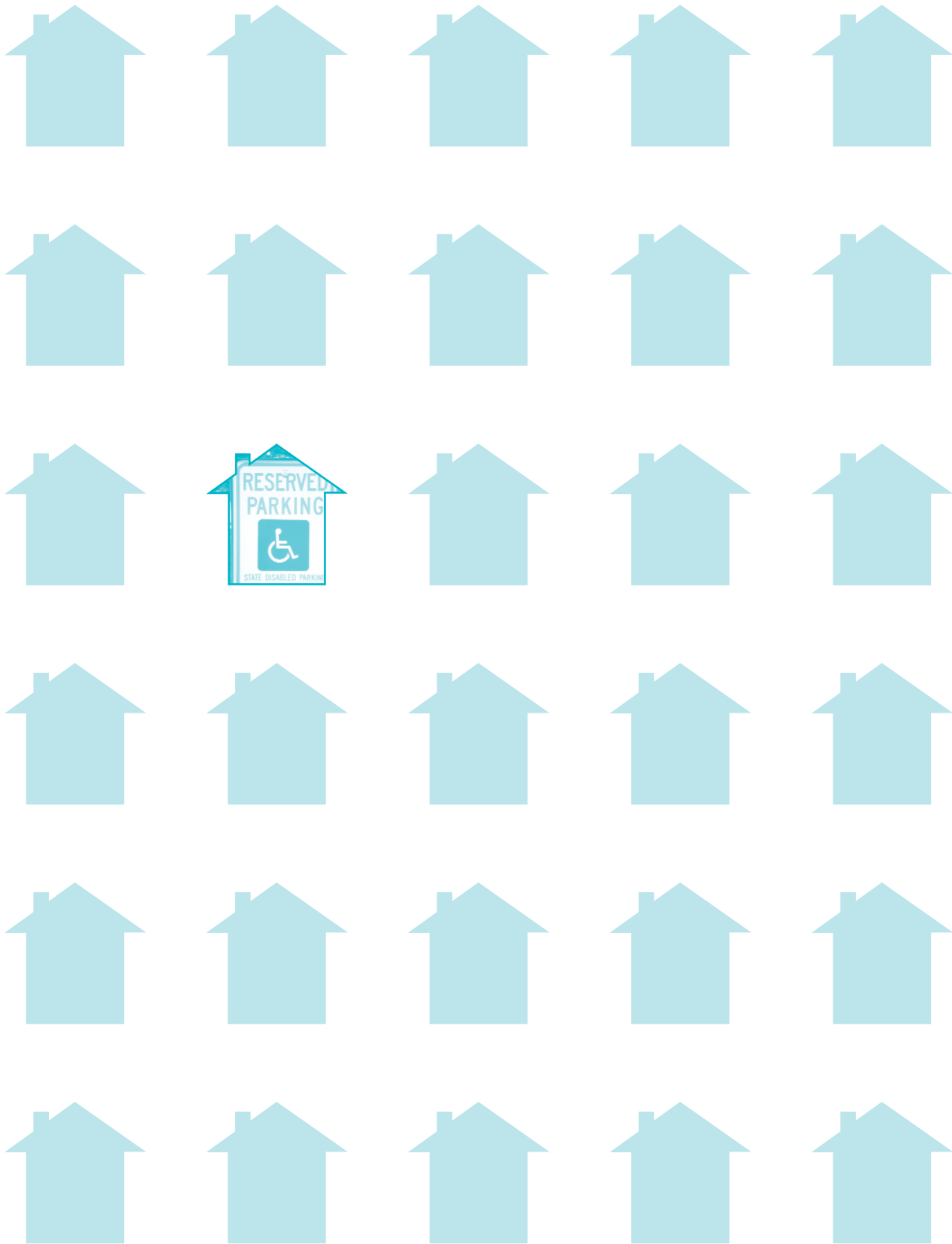
## HOME Model Program Guides

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

For more information about the HOME Program, visit [www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm).









# Administering Tenant-Based Rental Assistance

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

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

## Fair Housing in Tenant-Based Rental Assistance Programs

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

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

- Selecting tenants based on standard, written criteria;

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

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

## Applicant Selection Criteria

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



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

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

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

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

## Preferences for Persons with Disabilities

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

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

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

## Reasonable Modifications and Accommodations

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

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



## What is a Reasonable Accommodation?

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

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

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

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

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

### Exhibit 1

#### Assistance Animals as a Reasonable Accommodation

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

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

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

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





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

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

### What is a Modification?

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

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

Modifications might include:

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

### Who Pays for an Accommodation or Modification?

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

#### Accommodations

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

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

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

#### Modifications

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

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

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

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

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

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



provider to require a tenant or applicant to pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money (not to exceed the amount necessary) to ensure that funds are available for the agreed upon restoration(s). Interest would accrue to the tenant. The decision to require that money be placed in an escrow account should be based on the following factors: (1) the extent and nature of the proposed modification(s); (2) the expected duration of the lease; (3) the credit and tenancy history of the individual tenant; and (4) other information that may bear on the risk to the landlord that the premises will not be restored. The housing provider may *not* increase the customarily required security deposit for the tenant with a disability. Further, the housing provider cannot require the removal of modifications to public spaces and common areas.

Two examples illustrate this issue:

- A person who uses a wheelchair requests and receives permission from her landlord to widen the doorway to her bathroom. The tenant hires and pays for a contractor to make the necessary modification. When the tenant moves out, it would be unreasonable for the landlord to ask the tenant to have the doorway restored to its original condition, since the widened doorway will not interfere with a subsequent tenant's use and enjoyment of the unit.
- A person with a hearing impairment requests the installation of visual doorbells in his unit, at his own expense. The housing provider agrees. When this tenant moves out, it would be reasonable for the housing provider to ask the tenant to remove the visual doorbell, as this modification might interfere with a subsequent tenant's use and enjoyment of the unit.

The Fair Housing Act provides that covered multifamily dwellings built for first occupancy after March 13, 1991, shall be designed and constructed to meet certain minimum accessibility and adaptability standards. If the structural **alteration(s)** needed by the tenant is one that should have already existed in the unit or public and common area, then the housing provider may be responsible for providing and paying for the requested structural **alteration(s)**. However, if the requested structural **alteration(s)** is not a feature of accessible design that should have already existed in the building, pursuant to the design and construction requirements under then Fair Housing Act, then the tenant would be responsible for paying for the cost of the structural alteration(s) as a reasonable modification.

### Can an Accommodation or Modification Request Be Denied?

Housing providers are required to make reasonable accommodations, and permit modifications to the property, when these accommodations and modifications are necessary. To be "necessary," there must be an identifiable relationship, or nexus, between the requested accommodation or modification, and the individual's disability. For instance, if a tenant has difficulty walking, it would be reasonable for her to make a request that a parking space near her unit be reserved for her use. On the other hand, if this tenant were to request an accommodation in the form of an exception to the "no animals" policy in order to keep a cat, and the tenant does not provide evidence that the cat is needed as an accommodation for her disability, the request would not have an identifiable relationship to the tenant's disability, and therefore would not need to be accommodated.

In determining whether or not there is a nexus between the disability and the requested accommodation or modification, housing providers can request documentation of the existence of a disability, and the need for requested accommodations or modifications. Typically, this documentation might be in the form of a letter from a doctor or other professional. Housing providers cannot, however, ask specific questions about the nature of a person's disability. Housing providers' decisions about reasonable accommodations and modifications should be consistent, justifiable, and documented.

The PJ or its housing partner must provide accommodations unless they are determined to be unreasonable because:

- Doing so would result in a fundamental alteration in the nature of the program, changing the essential nature of the provider's operations, or
- Doing so would result in an undue financial and administrative burden. The financial resources of the housing provider, the cost of the accommodations, the benefits to the requestor of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant's or resident's needs must be considered in determining whether or not a requested accommodation poses an undue financial and administrative burden.

If a housing provider refuses the requested accommodation because it is not reasonable, the housing provider should discuss with the requestor whether there is an alternative accommodation that would effectively address the requestor's disability-related needs without a fundamental alteration of



the provider's operations and without imposing an undue financial and administrative burden. In doing so, the housing provider should give primary consideration to the accommodation requested by the tenant or applicant because the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective. If the housing provider suggests an alternative accommodation, the tenant may reject it if he or she feels it does not meet his or her needs. If an alternative accommodation would effectively meet the requestor's disability-related needs, and is reasonable, the provider must grant it.

PJs should encourage housing providers who have tenants receiving TBRA to establish and implement consistent procedures related to reasonable accommodations and modifications, or PJs may want to establish these for all participating housing providers. HUD strongly recommends that owners include statements about the right of individuals with disabilities to request reasonable accommodations in all written notices given to applicants and tenants.

### TBRA Program Accessibility

Although the housing providers in a TBRA program are not subject to Section 504, the PJ and its TBRA administrator are subject to Section 504 when they administer a TBRA program with HOME funds. The TBRA program must be administered in a manner that ensures that the program is readily accessible to, and usable by, persons with disabilities. In its administration of the TBRA program, the PJ or TBRA administrator should take the following steps to ensure that it is operating its TBRA program in a manner that makes the program accessible to persons with disabilities:

- Ensure that the in-take office of the TBRA program is in a building that is accessible to persons with mobility disabilities;
- Distribute notices of the availability of housing assistance to eligible individuals with disabilities;
- Make notices and application forms available in a variety of formats, to ensure that persons with disabilities receive information about the program, and are able to access the program (see the following section);
- Provide information about the availability of accessible units to applicants who require accessible units, where known; and
- Provide information on counseling available to help those in need of accessible units to find them.

In addition, PJs should be aware that they may need to provide reasonable accommodations to individuals with disabilities in order to make it possible for them to participate in the TBRA program. Such accommodations may include providing higher rents and sufficient assistance to enable a person with a disability who needs a live-in aide to rent a unit with an extra bedroom, in addition to that needed by the family.

### PJ Communications with Individuals with Disabilities

As recipients of Federal financial assistance, PJs are affirmatively obligated under Section 504 to take appropriate steps to ensure effective communication with applicants, beneficiaries, and members of the public who have disabilities. This obligation includes, but is not limited to, the following:

- Furnishing auxiliary aids where necessary, such as sign language interpreters, TTY devices, note readers, large-sized written materials, Braille materials, audio recordings, and other similar services and devices; and
- Having a TTY or equally effective communication system available if the PJ communicates with the public by telephone.

Note, the PJ is not required to take any action to meet this obligation, if it will result in a fundamental alteration of its program or be an undue financial and administrative burden.

### Conclusion

When administering a HOME TBRA program, PJs and their housing partners should take necessary measures to administer the program in a nondiscriminatory manner. Staff should be familiar with the fair housing requirements applicable to all private owners, and work with participating housing providers to ensure compliance to these rules. Where TBRA is used to assist special populations of the jurisdiction to meet unmet housing needs, these preferences should be publicized through the Consolidated Plan and administered in a nondiscriminatory manner. Housing providers must make all reasonable accommodations and permit tenants to make modifications that are necessary for full use and enjoyment of their dwelling. PJs should be aware of their obligations to provide reasonable accommodations to enable effective participation in their programs by persons with disabilities and their affirmative obligations to have effective communications.



## Additional Resources

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

The Fair Housing Act can be found at [www.usdoj.gov/crt/housing/title8.htm](http://www.usdoj.gov/crt/housing/title8.htm). Its implementing regulations are at 24 CFR Part 100, et. al. and can be found online at [www.archives.gov/federal\\_register/index.html](http://www.archives.gov/federal_register/index.html).

HUD's Fair Housing and Equal Opportunity Division provides ample guidance on the requirements of the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973. This information can be accessed from its homepage at [www.hud.gov/offices/fheo/index.cfm](http://www.hud.gov/offices/fheo/index.cfm) or its library listing at [www.hud.gov/library/bookshelf09/](http://www.hud.gov/library/bookshelf09/).

For guidance on provision of reasonable accommodations under the Fair Housing Act, see the Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice, *Reasonable Accommodations Under the Fair Housing Act*, issued May 17, 2004. This statement is available online at [www.hud.gov/offices/fheo/library/huddojstatement.pdf](http://www.hud.gov/offices/fheo/library/huddojstatement.pdf).

For general guidance on administering a tenant-based rental assistance program with HOME funds, see the HOME Program model guide *Tenant-Based Rental Assistance: A HOME Program Model*, U.S. Department of Housing and Urban Development, HUD 1658-CPD, January 1997. This, and all of the HOME Program model guides, are available from the Community Connections Information Center, telephone 1-800-998-9999. A complete list of available model program guides is provided on the HOME Model Program Guide website at [www.hud.gov/offices/cpd/affordablehousing/library/modelguides/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/library/modelguides/index.cfm).

## About the Series: Fair Housing for HOME Program Participants

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

general, these laws:

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

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

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



modifications under the Fair Housing Act, and program accessibility under Section 504.

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

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

The series does not provide guidance on state and local fair housing requirements, which may differ from Federal laws. PJs and their housing partners that are unfamiliar with state and local requirements can identify resources through National Fair Housing Advocate Online at

[www.fairhousing.com](http://www.fairhousing.com). Likewise, the series does not provide guidance on the Americans with Disabilities Act of 1990 (ADA) requirements, which are administered by the Department of Justice (DOJ). PJs are subject to ADA requirements, and can get more information about their obligations from the DOJ website at [www.usdoj.gov/crt/ada/adahom1.htm](http://www.usdoj.gov/crt/ada/adahom1.htm).

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

## HOME Model Program Guides

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

For more information about the HOME Program, visit [www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm).













# Creating Economic Opportunity

*The HOME Program requires that participating jurisdictions (PJs) provide equal access to the economic opportunities generated by the use of HOME Program funds for low- and very low-income residents, and firms that employ low- and very low-income residents. In addition, HOME Program funds must provide opportunities for minorities and women, entities owned by minorities and women, and minority and women business enterprises. This publication, “Creating Economic Opportunity,” provides an overview of the employment, training, and contracting requirements that apply when HOME funds are used. It provides guidance to HOME PJs on how to implement these economic opportunity requirements and reviews the PJ’s obligations to oversee their housing partners’ compliance with these laws and regulations.*

*This publication is part of the series “Fair Housing for HOME Program Participants.” The purpose of the series is to provide technical assistance to PJs and their housing partners on the fair housing laws and regulations that apply to HOME Program activities. Specifically, the series reviews the applicable Federal fair housing requirements, illustrates best practices in promoting fair housing, and highlights PJ responsibilities for ensuring compliance with fair housing requirements.*

*For purposes of this publication, the PJ’s “housing partners” include all persons and entities who use HOME Program funds, including the PJ and its recipients, state recipients, contractors, subcontractors, developers (including community housing development organizations), owners, and management agents. Unless otherwise specified, the requirements discussed herein extend to the PJ and all its housing partners. In addition, the economic opportunity requirements apply to many different sources of U.S. Department of Housing and Urban Development (HUD) assistance, however, this publication discusses these requirements in terms of the HOME Program only.<sup>1</sup>*

## Economic Opportunity Requirements Overview

HOME PJs and their housing partners must comply with Federal requirements designed to provide access to economic opportunities generated with HOME funds. Generally, economic opportunity requirements are targeted to:

- Low- and very low-income persons, and the businesses that employ them, through Section 3 of the Housing and Urban Development Act of 1968, as amended (“Section 3”) and the applicable regulations at 24 CFR Part 135;
- Minority business enterprises and women business enterprises (MBE/WBEs), through notification and solicitation activities specified in procurement regulations at 24 CFR 85.36(e), and incorporated into the HOME Program by reference at 24 CFR 92.350; and

- Minorities and women, and entities owned by minorities and women, through a minority outreach program established and overseen by the PJ, pursuant to the HOME Program regulation at 24 CFR 92.351(b).

Together, these requirements impact training, employment, and contracting activities undertaken by PJs and their housing partners. The MBE/WBE outreach requirements also govern purchasing practices. Section 3 does not apply to purchasing practices, however, unless the purchase includes labor, such as installation. Although these requirements are generally characterized collectively as “the economic opportunity requirements,” these requirements are distinct. Note, Section 3 is race neutral. It is based solely on income and geography—that is, proximity to the project site.

<sup>1</sup> Section 3 “covered assistance” includes Public and Indian housing development assistance provided pursuant to Sections 5, 9 and/or 14 of the 1937 Act; and assistance provided under any HUD housing or community development program that meets the applicability criteria described in this publication, in accordance with 24 CFR 135.5.



## Section 3

The purpose of Section 3 of the Housing and Urban Development Act of 1968, as amended (“Section 3”) is to ensure that “the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, particularly those who are recipients of government assistance for housing.”<sup>2</sup>

The implementing regulations for Section 3 are found at 24 CFR Part 135. Every HOME PJ must certify that it will comply with Section 3 as part of its Consolidated Plan.

### Applicability

Section 3 applies to projects that are a certain scope and size (in terms of dollar amount), as follows:

#### Scope

Section 3 requirements apply to work arising in connection with the construction or rehabilitation of a HOME project, regardless of how the HOME dollars are actually spent.

Once construction is completed, contracts related to the *operation* (that is, the rental management) of the completed housing development are *not* subject to Section 3. In addition, Section 3 is not applicable when HOME Program funds are invested in direct assistance to homebuyers, tenant-based rental assistance, and administration because these are not construction activities. Further, Section 3 does not apply to homeowner rehabilitation projects because the low-income homeowner is the beneficiary of HOME assistance, not a recipient.

#### Size

Two monetary thresholds apply to Section 3:

- A PJ or its state recipient or subrecipient invests more than \$200,000 in HOME funds (or HOME funds in combination with other Section 3 covered assistance, such as Community Development Block Grant funds) for a HOME new construction or rehabilitation project; and

- A contractor or subcontractor is awarded a contract for work arising in connection with a HOME new construction or rehabilitation project in an amount that exceeds \$100,000.

If the HOME Program investment (alone or in combination with other Section 3 covered assistance) in a new construction or rehabilitation project exceeds \$200,000 but no single contractor is awarded more than \$100,000, then the Section 3 requirements apply to the training, employment, and contracting activities of the PJ, state recipient, or subrecipient but not to those of the contractor. This means the hiring and contracting by the PJ, state recipient, or subrecipient that is related to work arising in connection with the HOME new construction or rehabilitation project would be subject to the Section 3 rules.

Once it is determined that Section 3 applies to a project, the requirements apply to **all** contracts for work arising in connection with a HOME new construction or rehabilitation project over \$100,000, including those that are not funded with HOME funds.

Exhibit 1 provides a number of examples to illustrate the applicability of Section 3 to HOME new construction and rehabilitation activities.

### Section 3 Goals

The regulations implementing Section 3 establish minimum employment and contracting goals which, if met, and no evidence to the contrary exists, constitute compliance with Section 3.

#### Training and Employment Goals

PJs, state recipients, contractors, and subcontractors commit to employ Section 3 residents for 30 *percent* of the aggregate number of *new hires* for each year over the duration of the project.<sup>3</sup>

Within the group identified as Section 3 residents, priority consideration must be given, where possible, in the following order:

- Category 1: Section 3 residents (as defined in Exhibit 2) who live in the neighborhood in which the

<sup>2</sup> See 12 U.S.C. 1701u(b), Section 3 of the Housing and Urban Development Act, as amended.

<sup>3</sup> Section 3 requirements do not supersede the prevailing wage rules under Davis-Bacon Act (40 USC 276a-276a-7) and articulated at 24 CFR 92.354 of the HOME rule, including rules about trainees and apprenticeships, in accordance with 24 CFR 135.11.



Exhibit 1



**Examples to Illustrate Section 3 Applicability to HOME-Assisted New Construction and Rehabilitation**

Project	Funding	Section 3 Applicability
<b>New Construction—</b> homeownership	\$750,000 HOME funds for construction \$250,000 private funds for site acquisition, demolition, environmental remediation	<b>Applies</b> to all contracts for work that exceed \$100,000, including the privately funded contracts for site acquisition, demolition, and remediation.
<b>New Construction—</b> rental	\$1.5 million HOME funds \$800,000 private funds	<b>Applies</b> to all contracts for work that exceed \$100,000 during course of project (including contracts issued prior to construction start). <b>Does not apply</b> to maintenance and management contracts once facility is operational.
<b>Rehabilitation—</b> housing to be sold to homebuyers after rehabilitation	\$250,000 HOME funds for site acquisition \$750,000 private funds for construction	<b>Applies</b> to all contracts that exceed \$100,000, including the privately funded construction contract.
<b>Rehabilitation—</b> rental	\$150,000 HOME funds \$150,000 CDBG funds \$1.5 million construction loan financed by state housing development agency	<b>Applies</b> to all contracts for work that exceed \$100,000 because the PJ has invested more than \$200,000 (in HOME and CDBG funds combined).
<b>New construction—</b> homeownership, where PJ enters into contract with one contractor to undertake site preparation activities	\$150,000 HOME funds for the site preparation activity \$900,000 private funds for construction	<b>Does not apply</b> to any contract because the PJ has invested less than \$200,000 in HOME funds.
<b>Rehabilitation—</b> homeowner-occupied	\$200,100 HOME funds in rehabilitation program—all individual contracts are less than \$100,000	<b>Does not apply</b> to any contract because Section 3 does not apply to homeowner rehabilitation.

Exhibit 2

**What is a “Section 3 Resident?”**

For the purposes of the HOME Program, a Section 3 resident is:

-  A low-income resident (whose annual household income is at or below 80 percent of area median income as determined by HUD) of the metropolitan area or non-metropolitan county in which the HOME Program funds are expended.
-  A very low-income resident (whose annual household income is at or below 50 percent of area median income as determined by HUD) of the metropolitan area or non-metropolitan county in which the HOME Program funds are expended.<sup>4</sup>

<sup>4</sup> See 24 CFR 135.5.



HOME-funded project is located. For purposes of the HOME Program, the neighborhood is the geographic location designated in the jurisdiction’s comprehensive plans, ordinances, or other local documents. It cannot encompass the entire area of a unit of local government, unless the local government has a population less than 25,000.<sup>5</sup>

- **Category 2:** Participants in HUD Youthbuild programs (programs receiving assistance under subtitle D of Title IV of the Cranston-Gonzalez National Affordable Housing Act, as amended).
- **Category 3:** Other Section 3 residents. This would include low-income residents of the metropolitan area or non-metropolitan county who do not reside in the neighborhood, as defined in Category 1.<sup>6</sup>

**Contracting Goals**

PJs and their state recipients, subrecipients, contractors, and subcontractors must commit to award contracts to Section 3 business concerns (as defined in Exhibit 3), as follows:

- At least ten percent of the total dollar amount of all Section 3 covered contracts over \$100,000, for building trades work arising in connection with HOME rehabilitation and new construction projects; and
- At least three percent of the total dollar amount of all other Section 3 covered contracts—that is, contracts for any work other than building trade work. This might include, for example, landscaping or professional services contracts such as architectural, environmental, or legal services.

PJs, state recipients, subrecipients, contractors, subcontractors, owners, and developers (Section 3 covered entities) must give priority consideration, where possible, to Section 3 business concerns, in the following order of preference:

- **Category 1:** Section 3 business concerns that provide economic opportunities for Section 3 residents in the neighborhood in which the HOME-funded project is located.
- **Category 2:** Applicants selected to carry out HUD Youthbuild programs.
- **Category 3:** Other Section 3 business concerns.<sup>7</sup>




**Failure to Meet Section 3 Goals**

HUD holds the PJ accountable for compliance with Section 3. In its written agreement with its housing partners, the PJ should be sure to articulate the partners’ Section 3 obligations and establish a monitoring and enforcement mechanism. When a PJ or its housing partner is unable to meet Section 3 goals, HUD places the burden of proving compliance with Section 3 on the PJ. The PJ will be expected to demonstrate why it was not feasible to meet the goals. The PJ has some flexibility in how it will demonstrate its efforts to meet these requirements, and monitor its housing partners. Ultimately, HUD will evaluate the PJ based on its ability to describe the efforts that it took to meet the hiring and contracting requirements and the impediments incurred despite actions taken. At a minimum, it is recommended that if a PJ and its housing partners are unable to meet their Section 3 hiring and contracting goals, the PJ should sponsor or participate in upward

Exhibit 3

**What is a Section 3 Business Concern?**

A Section 3 business concern is a business entity that is formed in accordance with state law, and licensed under state, county, or municipal law to engage in the type of business activity for which it was formed. This may include nonprofit organizations. It must meet one of the following criteria:

-  The business is 51 percent or more owned by Section 3 residents; or
-  The business’ permanent, full-time employees include persons, at least 30 percent of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents; or
-  The business may provide evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth above.

<sup>5</sup> See 24 CFR 92.2.

<sup>6</sup> See 24 CFR 135.34(a)(2).

<sup>7</sup> See 24 CFR 135.36(c)(2)



mobility programs, hire eligible residents in trainee positions with regard to training and employment, or form Section 3 joint ventures with regard to contracting.

## Outreach to Minorities and Women

The HOME Program regulations require PJs to establish and oversee a minority outreach program to ensure the inclusion of minorities and women, and entities owned by minorities and women, in the participation of contracting opportunities with the PJ. In addition, procurement requirements applicable to the HOME Program require PJs to undertake specific outreach activities to notify minority and women business enterprises (MBE/WBE) of contracting opportunities. Although similar, these requirements differ in some ways. PJs should, however, be able to develop one outreach program that readily addresses both requirements.

### Definitions

The PJ has the discretion to define both “entities owned by minorities and women” and “minority business enterprise” and “women business enterprise.” The PJ can adopt different definitions for each target group, but for practical reasons, it is highly recommended that the PJ use the same definition, such that an “entity owned by a minority” is the same as an “MBE;” and an “entity owned by a woman/women” is the same as a “WBE.” The PJ can develop and adopt its own definition(s) for these terms, or use established Federal, state, local, or quasi-governmental definitions.

### Outreach and Notification Activities

Unlike Section 3, the MBE/WBE outreach activities specified in the procurement rules at 24 CFR 85.36(e) apply to *all* contracting opportunities facilitated by HOME-funded activities, including contracts related to construction, rental assistance, direct homebuyer assistance, and HOME Program administration. There are no monetary thresholds to trigger these requirements; they apply to contracts of all sizes.

To ensure that MBEs/WBEs are afforded every opportunity to participate in HOME-generated contracts, the notification process is regulated. The minimum required affirmative steps for PJs and their housing partners are:<sup>8</sup>

- Placing minorities and women on solicitation lists;
- Assuring that MBE and WBE firms are solicited whenever they are potential sources;
- Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business enterprises, and women business enterprises;
- Where the requirement permits, establishing delivery schedules that encourage participation by small and minority business enterprises, and women business enterprises;
- Using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- Requiring the prime contractor, if subcontracts are to be let, to take all the same affirmative steps listed here.

### Development of Outreach Procedures

In addition to the specific notification and solicitation steps described in the preceding section, the HOME Program requires each PJ “to establish and oversee a minority outreach program within its jurisdiction to ensure the inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women. . .”<sup>9</sup>

Further, the HOME Program specifies that the PJ’s minority outreach program must ensure the inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women in the following professions:

- Real estate;
- Construction;
- Appraisals;
- Management;
- Banking/Finance;
- Investment banking;
- Underwriters;
- Accountants; and
- Law.

These outreach procedures should be designed to ensure that minorities and women, and entities owned by minorities and women who are eligible to perform work generated by the expenditure of HOME funds, are made aware that contracting opportunities are being generated. PJs have considerable discretion in how they establish and implement these procedures.

<sup>8</sup> These required steps are based on 24 CFR 85.36(e), incorporated into the HOME Program by reference at 24 CFR 92.351(b).

<sup>9</sup> See 24 CFR 92.351(b).



For most PJs, the required MBE/WBE outreach activities described in the preceding section will be incorporated into the PJ's minority outreach program. Hereafter, for the purposes of this publication, the terminology of the HOME Program ("minorities and women" and "entities owned by minorities and women") will be used to refer to both sets of requirements, unless otherwise noted.

Effective outreach procedures will:

**Articulate the goals and scope of the minority outreach program.** The PJ should determine the goals and scope of its outreach program and develop procedures to implement it. The outreach process should describe how eligible minorities and women, and entities owned by minorities and women, should be notified of every contracting opportunity that results from the expenditure of HOME Program funds.

**Expand beyond the minimum MBE/WBE notification and solicitation requirements.** In addition to the MBE/WBE procurement requirements described in the preceding section, PJs might choose to incorporate additional notification and solicitation activities in their outreach program, such as:

- Identifying minority and women business enterprises through a number of locally-based agencies, such as state and local small business support centers, labor unions, and employment centers;
- Generating new contacts at job fairs targeted to minorities and women; and/or
- Requiring all contractors to notify the PJ, in advance, of any subcontracting opportunities that may be generated on HOME Program projects.

**Be based on the participation needs in the jurisdiction.** An effective minority outreach program should be based on specific knowledge of the pool of potential minority and women contractors and the contracting opportunities that future HOME Program projects will generate.

**Articulate roles and responsibilities.** The minority outreach program should be clear about who is responsible for carrying out each part of the outreach process. For instance, the PJ may wish to retain responsibility for conducting ongoing general outreach in order to (a) increase participation of minorities and women, and entities owned by minorities and women; and (b) recruit prospective participants from industries and professions that have not participated extensively in the past. The PJ may also ask its contractors to conduct more project-specific outreach to generate participation in specific contracting opportunities.

Many jurisdictions find that simply making minorities and women and entities owned by minorities and women aware of contracting opportunities does not necessarily result in a significant level of participation by them. In addition, minorities and women are frequently underrepresented in certain professions, such as engineering and architecture, and outreach alone may not increase participation. With an understanding of the local labor pool and needs, PJs may choose to develop an outreach program that provides technical assistance to entities owned by minorities and women, and to minorities and women in the field, in an effort to increase these segments of the labor and contracting pool. Such activities might include:

- Providing technical assistance in the certification and government procurement processes to entities owned by minorities and women; or
- Seeking creative solutions to problems that small businesses might have, such as in securing required bonding or insurance.

## Implementation of the Economic Opportunity Requirements

PJs can assure smooth implementation of the economic opportunity requirements with adequate planning, consistent communication with partners, and careful record-keeping. This section reviews the implementation issues for training and employment requirements, and for contracting under Section 3, MBE/WBE outreach, and minority outreach programs.

### Section 3 Training and Employment Requirements

There are several steps required of the PJ in its implementation of the training and employment requirements of Section 3:

#### 1. Determine Section 3 Eligibility of Applicant

The PJ must establish guidelines for itself and its state recipients, contractors, and subrecipients to guide applicant eligibility determinations, apply priority preferences, and articulate record-keeping needs. The guidelines should:

- Explain that a Section 3 resident is a low- or very low-income person and a resident of the metropolitan area or non-metropolitan county, at a minimum.
- Articulate that the priority preferences for hiring are



those who live in the neighborhood of the HOME-assisted project and participants of Youthbuild. The PJ should provide any additional guidance it chooses to clarify how these preferences should be applied.

- Define the neighborhood boundaries of each HOME project. The PJ might choose an established, commonly understood boundary (such as a zip code), for administrative ease.

Next, the PJ should determine the level of documentation that it will collect, and that it will require contractors to collect, from job applicants and employees to determine that the person meets the low- or very low-income criteria. At a minimum, HUD expects employed applicants to provide evidence such as pay stubs or W-2s. Unemployed applicants can provide proof of receipt of unemployment compensation or other forms of public assistance to demonstrate income eligibility. PJs can use delivered mail as evidence of residency. PJs can impose a higher standard of documentation if desired.

PJs need not require contractors to submit this documentation for review. However, since PJs are responsible to ensure that these requirements are met, PJs are strongly encouraged to monitor contractor files on a periodic basis. Contracts with contractors should include a clause that gives the PJ and HUD the right to inspect all records related to the project.

## 2. *Determine the Population of “New Hires”*

The Section 3 hiring goal applies to new hires only. New hires are all full-time employees, for permanent, temporary, or seasonal employment opportunities. In most instances, such permanent, temporary, or seasonal workers were not employed by the hiring entity at the time that entity was selected to receive HOME Program funds or a HOME-funded contract. PJs should specify that point in time for their housing partners. All parties should retain payroll records to document their determination of new hires.

## 3. *Recruit Section 3 Applicants*

Since the nature of Section 3 is to employ project area residents if there are any new employment opportunities, recruiting and hiring strategies are typically neighborhood-based. PJs and their partners can share this responsibility. For

construction jobs, signs at the upcoming construction site are typically an effective means of notifying potential applicants of opportunities with general contractors. Unions<sup>10</sup> can be especially effective at getting the word out, as well.

Additional outreach is needed, however, as the employment goals apply to *all* jobs and contracts for work that is related to a HOME new construction or rehabilitation project, not only the construction jobs. Section 3 applicants must also be recruited for management and administrative positions-architectural, engineering, or related professional services required to prepare plans, drawings, specifications, or work write-ups; and jobs directly related to administrative support of this work. Places to advertise to fill these types of positions might include:

- Job fairs;
- Faith-based organizations;
- Community centers;
- Related businesses in the neighborhood;
- Social services groups;
- Employment centers; and
- Civic associations.

Section 3 residents should meet the qualifications of the position to be filled, just like other new hires. PJs and their contractors are not required to employ persons who are not qualified to meet the requirements of the position to be filled. However, if a contractor provides apprenticeships and training opportunities for other new hires, these same opportunities should be provided to the Section 3 residents.

If a contractor is unable to meet the Section 3 hiring goals, it should consider offering alternative economic opportunities as a means for demonstrating that it has met the Section 3 requirements “to the greatest extent feasible.”<sup>11</sup> Under such a program, the PJ puts in place economic opportunities other than training or employment that promote compliance with Section 3 requirements. For example, as part of the effort to meet the 30 percent hiring goal, a PJ can set up a training fund, use “upward mobility” or “bridge” positions to fill vacancies, or start a mentoring program to help residents acquire the needed skills to qualify for certain employment opportunities.

<sup>10</sup> Contracts awarded on Section 3 governed projects are made without regard to affiliation to any Collective Bargaining Unit.

<sup>11</sup> See 24 CFR 135.40.





## Section 3 and Minority/Women Outreach and Contracting Requirements

Both Section 3 and MBE/WBE outreach requirements have significant impacts on a PJ's contracting activities and processes, as well as those of its partners. The MBE/WBE outreach requirements provide specific guidelines on the *process* of contracting while Section 3 focuses on *results*. The PJ-developed minority outreach program may do one or both of these things. However, since it is locally-developed, this section will focus only on the Federal requirements. There are several steps required of the PJ in its implementation of the requirements affecting contracting, for Section 3 and MBE/WBE outreach:

### 1. *Determine Firm Eligibility*

The first step in soliciting either of the targeted populations is identifying who is qualified.

Section 3. Businesses seeking Section 3 preferences are responsible for documenting their eligibility. Unless the PJ has reason to doubt a firm's eligibility (for instance, as the result of a complaint), it can accept the firm's own certification of eligibility in the form of a notarized statement. The PJ must retain the certification for monitoring purposes. The PJ is ultimately responsible to provide this documentation to HUD should it be monitored.

Outreach to minorities and women. As previously discussed, the PJ has the discretion to define "minorities," and "entities owned by minorities" and "entities owned by women" for the purposes of establishing and overseeing a minority outreach program, and to establish the criteria on which it will base eligibility. In addition, the PJ has the discretion to define an "MBE" and "WBE" for the purposes of meeting the procurement requirements. In most jurisdictions, state and local governments, and quasi-governmental agencies certify MBEs and WBEs in accordance with state and local requirements and definitions. If the PJ chooses to use these definitions, these certifications are sufficient documentation of the eligibility of an entity owned by minorities or women, and an MBE or WBE for the HOME Program.

### 2. *Advertise and Make Solicitations to Targeted Audiences*

PJs, state recipients, subrecipients, and contractors should maintain and solicit lists of qualified Section 3 firms, MBEs and WBEs, and entities owned by minorities and women, and make these firms aware of opportunities to bid for HOME-related work. New businesses are created and existing

businesses change over time. Every new project and contracting opportunity should be used as an opportunity to recruit new firms to participate, and to update and maintain existing contact lists. Since there is substantial overlap in these lists in most jurisdictions, outreach efforts for these two groups should be conducted in a coordinated fashion to provide for an efficient use of resources.

## Implementation Steps for All Economic Opportunity Requirements

Certain steps in the implementation process can be streamlined for all of the economic opportunity requirements:

### 1. *Make Contractors Aware of Their Obligations*

PJs must be sure that their housing partners understand the Section 3, MBE/WBE, and the minority outreach requirements, as it is the PJ that is held accountable for whether or not these requirements are met. PJs should take every opportunity throughout the contracting process to inform potential bidders and selected contractors of their obligations. It is recommended that, at a minimum, these requirements be reviewed at the following stages of the contracting process:

- Bid solicitations and requests for proposals;
- Pre-bid meetings; and
- Pre-construction conferences.

### 2. *Execute a Contract*

Once a contractor is selected, the PJ can assist the contractor in identifying and using the services of minorities and women, entities owned by minorities and women, MBE/WBEs, and Section 3 residents and firms.

In addition, all contracts subject to the requirements of Section 3 must include the Section 3 clause verbatim that is contained at 24 CFR 135.38 and provided as Exhibit 4. It is advisable to also include contract language that specifies the MBE/WBE and minority outreach requirements.

Generally, the PJ must rely on reports from its partners to document that it is in compliance with Section 3, MBE/WBE, and the minority outreach requirements. It is advisable for PJs to include contract language that specifies what reports must be submitted by the contractor, what records the contractor must retain, and for how long. The contract should also specify the PJ's remedies in the event that the contractually required reports have not been submitted and the required records have not been maintained in the entity's offices.



Exhibit 4  
**Section 3 Clause**

All Section 3 covered contracts must include the following clause:

- A. The work to be performed under this contract is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (Section 3). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted project covered by Section 3, shall, to the greatest extent feasible, be directed to low- and very low- income persons, particularly persons who are recipients of HUD assistance for housing.
- B. The parties to this contract agree to comply with HUD's regulations in 24 CFR Part 135, which implement Section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual other impediment that would prevent them from complying with the part 135 regulations.
- C. The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers' representative of the contractor's commitments under this Section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment practices can see the notice. The notice shall describe the Section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.
- D. The contract agrees to include this Section 3 clause in every subcontract subject to compliance with regulations in 24 CFR part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this Section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR part 135. The contractor will not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR part 135.
- E. The contractor will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected, but before the contract is executed, and (2) with persons other than those to whom the regulation of 24 CFR part 135 require employment opportunities to be directed, were not filled to circumvent the contractor's obligations under 24 CFR part 135.
- F. Noncompliance with HUD's regulations in 24 CFR Part 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD-assisted contracts.
- G. With respect to work performed in connection with Section 3 covered Indian housing assistance, Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this contract. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this contract that are subject to the provisions of Section 3 and Section 7(b) agree to comply with Section 3 to the maximum extent feasible, but not in derogation of compliance with Section 7(b).<sup>12</sup>

<sup>12</sup> This paragraph (G) is not applicable to the HOME Program; nonetheless, the regulations require that the Section 3 clause be included verbatim in all contracts subject to the requirements of Section 3.



### 3. Maintain Records

Two types of records should be kept:

1. Documentation of *efforts* made by the PJ and its housing partners to comply with Section 3, MBE/WBE, and minority outreach requirements. This might include copies of direct mail solicitations, formal advertisements, flyers or brochures about meetings; sign-in lists from job fairs and other public meetings; and agendas and/or meeting notes from meetings with contractors.
2. Documentation of actual Section 3 hiring and all contracting activity. The section below, *PJ Oversight Responsibilities*, provides specific data that should be collected to document performance on meeting Section 3, MBE/WBE, and minority and women contracting requirements. This data might be found in the form of reports from contractors; periodic payroll record review (on-site, or submitted to the PJ); certification identification numbers, or other identifying documentation; and copies of executed contracts.

### Procurement Requirements and Economic Opportunity

The implementation of Section 3, MBE/WBE, and minority outreach requirements must be conducted in conformance with applicable procurement rules. All procurement transactions carried out by PJs, their subrecipients, and state recipients are subject to 24 CFR Part 85 and must be conducted in a manner that provides for and ensures fair and open competition. Project owners and contractors, on the other hand, are not subject to the procurement rules of Part 85.

#### *Meeting Economic Opportunity Requirements for PJs, State Recipients, and Subrecipients*

There are many ways PJs, state recipients, and subrecipients can conduct competitive procurement processes and also comply with the Section 3, MBE/WBE, and minority outreach requirements. Solicitations should serve to (1) communicate all applicable requirements to potential bidders; and (2) create an open, competitive process through which the bidding agency can select the lowest, most qualified bidder.

Selected bidders must be capable of performing the work needed, in conformance with all applicable requirements, *including economic opportunity requirements*. The selection process must be designed to provide PJs with sufficient evidence to make this determination. If a contractor cannot demonstrate an ability to meet these requirements, it should not be select-

ed to perform HOME-funded work. At an absolute minimum, PJs must not enter into any contracts with a contractor upon notification by HUD that the contractor has been in violation of the Section 3 regulations.

In order to communicate applicable economic opportunity requirements, PJs, state recipients, and subrecipients should be sure that all contract solicitations clearly state:

- Criteria for determining the eligibility of minorities and women; entities owned by minorities and women; MBE/WBEs, if different; or Section 3 firms, as defined above;
- PJ's preferences for contracting with Section 3 businesses;
- Selected contractor's hiring and contracting obligations, as they relate to Section 3 and minority outreach; and
- Selected contractor's reporting obligations, as they relate to Section 3 and minority outreach.

In the context of a sealed bidding process, in order to determine whether or not a contractor is likely to meet the economic opportunity requirements, PJs should ask contractors to describe their qualifications in this area as part of the bid submission. Such evidence might include a description of successful past performance with Section 3 firms and participation of MBEs and WBEs. Absent a track record in this area, an acceptable plan of action to include these firms should be provided by the contractor. A knowledgeable staff person should review these submissions.

When seeking competitive proposals where selection criteria other than price will also be considered, at a minimum, PJs should make a determination that a contractor is able to meet the economic opportunity requirements. However, PJs may wish to evaluate and compare the quality of these efforts in its ranking of proposals. In these types of solicitations, PJs should request additional information, such as:

- A description of past performance in the area of Section 3 and MBE/WBE compliance;
- A description of the contractor's intended efforts to advertise or solicit participation of MBEs, WBEs, and Section 3 firms;
- Specific commitments by the contractor to contract with MBEs, WBEs, and Section 3 firms; and
- A plan to partner with others or structure project activities to facilitate participation by MBE, WBE and Section 3 firms.

Again, a knowledgeable staff person should review these submissions.



*Meeting Economic Opportunity Requirements for Contractors*

Although contractors are not subject to the procurement rules at 24 CFR Part 85, they must comply with Section 3 rules and they are required to follow the minority outreach procedures established by the PJ. This means that even if a contractor does not publicly bid out contracts, to the maximum extent possible, it must make every effort to publicize and maximize contracting opportunities in order to ensure participation by Section 3 firms and MBE/WBEs. In addition, it must follow the procedures established by the PJ to ensure that minorities and women and entities owned by minorities and women are afforded contracting opportunities generated by the use of HOME funds. With regard to Section 3 compliance, the PJ can implement other economic opportunities to establish, stabilize, or expand Section 3 business concerns.<sup>13</sup>

## PJ Oversight Responsibilities

The PJ must comply with Section 3, MBE/WBE, and minority outreach requirements in its own operations, and ensure compliance with these requirements by its housing partners. In order to meet these requirements and goals, PJs need to have a system in place to collect appropriate data and submit annual reports to HUD, monitor activities and record-keeping by their partners to ensure they are in compliance with the economic opportunity requirements, and investigate any complaints related to hiring and contracting activity.

### Data Collection and Reporting

PJs are required to submit data annually to HUD that document all MBE, WBE, and Section 3 activities undertaken by themselves and their housing partners. MBE and WBE participation data is captured on Part III of the Annual Performance Report (Form HUD-40107). Section 3 data is captured on the Section 3 Summary Report (Form HUD-60002). The PJ submits both forms to HUD with the Consolidated Annual Performance and Evaluation Report (CAPER). To facilitate completion of these annual reports, PJ managers should become familiar with the data collection and reporting requirements and review progress reports on a regular basis, to monitor the PJ's progress in meeting these goals. These forms are available online at [http://www.hudclips.org/sub\\_nonhud/html/forms.htm](http://www.hudclips.org/sub_nonhud/html/forms.htm). The HUD-60002 forms are submitted online or by mail to the Office of Fair Housing and








Equal Opportunity, Economic Opportunity Division, 451 7th Street, S.W., Washington, D.C. 20410.

Since much of the same type of data is required for MBE, WBE, and Section 3 reporting, a single database can be maintained to capture this information. It should include information on eligible MBE, WBE, and Section 3 firms; all their contracts and subcontracts awarded; the value; and to whom they were awarded: all employees hired, each employee's place of domicile, and his or her eligibility as a Section 3 resident. Additional data collection may be desired to facilitate implementation of the local minority outreach program.

Exhibit 5 lists the data PJs should collect to meet their reporting requirements.

Exhibit 5

**List of Data Needed to Monitor Progress and Meet Reporting Requirements**

-  By Project/Activity and location, each contract and subcontract awarded:
  - To whom the contract was awarded
    - Company name
    - Address
    - Trade
-  Determination of eligibility as an MBE, WBE, or Section 3 firm
  - Who made determination?
  - When?
-  Award date
-  Contract value
-  Trade or profession
-  Employee data
  - List of new hires
    - Address
    - Eligibility as low-income or very low-income
    - Race, ethnicity, and gender
-  List of all subcontracts, if applicable

In addition to reporting on the use of MBE and WBE contractors, PJs must maintain and report to HUD on data reflecting the participation of Minority Owners of Rental

<sup>13</sup> See the regulations at 24 CFR 135.40(c) for examples of such economic opportunities.



Property in the HOME Program. This data is captured in Part IV of the Annual Performance Report (Form HUD-40107). Specifically, PJs must provide information on the number of HOME-assisted rental property owners, by race, and the amount of HOME funds invested in the property.

## Monitoring

PJs are responsible for maintaining documentation to demonstrate their compliance with the economic opportunity requirements. In addition to the files that will substantiate the data collected in the reports, PJs should maintain a copy of their minority outreach programs and procedures, and any documentation that demonstrates program implementation.

In order to ensure compliance by their housing partners, PJs should periodically monitor their activities and performance. The monitoring should include an evaluation of:

- Actual hiring, in relation to goals;
- Actual contracting (in terms of numbers of contracts and contract value), in relation to goals; and
- Efforts to meet the requirements.

If reporting is done consistently and accurately, review and analysis of the submitted data should give the PJ a very good picture of the status of its partners' compliance with the economic opportunity requirements. When determining which of its partners might benefit most from an on-site visit, a PJ should consider:

- Whether the housing partner is meeting the Section 3 goals;
- Whether the agency's participation of minorities and women, and entities owned by minorities and women, reflects the demographics of the jurisdiction, or the PJ's perception of available firms if the contract is trade or profession-specific;
- Whether the dollar amount of the contract is large;
- Whether the contract is likely to generate jobs or business contract opportunities; and
- Whether or not complaints against that contractor have been raised.

## Corrective Action

HUD will review the PJ's performance in these areas as part of its monitoring of HOME Program activities. Instances of noncompliance will be addressed in the context of standard monitoring procedures: PJs will be given an opportunity to respond to findings or concerns identified by HUD, and will be expected to take corrective action as needed.

In the event the PJ has evidence that a housing partner has not met the applicable economic opportunity requirements, it is expected that the PJ will pursue appropriate remedies. In addition, the PJ has the responsibility to refer the possible noncompliance with Section 3 to HUD's Fair Housing and Equal Opportunity Office, Economic Opportunity Division for further review.

## Additional Resources

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

The regulations governing economic opportunity can be found at 24 CFR Part 135. These regulations can be accessed through the Government Printing Office website at <http://www.gpoaccess.gov/cfr/index.html>.

The HUD website for economic opportunities can be found at [www.hud.gov/offices/fheo/section3/section3.cfm](http://www.hud.gov/offices/fheo/section3/section3.cfm). This site includes a link to a data collection summary form that can be submitted online by recipients.

The Minority Business Development Agency, Department of Commerce website is [www.mbdba.gov/](http://www.mbdba.gov/). This site provides information that is useful to minority businesses.

The American Business Women's Association website is [www.abwa.org/](http://www.abwa.org/). This is a membership organization of businesses owned and operated by women.

The Native American Business Development Center website is [www.nabdc.org/partners.htm](http://www.nabdc.org/partners.htm). This group supports businesses that are owned and operated by Native Americans.

The Women Contractors Association website is [www.womencontractors.org/](http://www.womencontractors.org/). This group provides information and assistance to women in construction and construction-related industries.

The National Minority Supplier Development Council website is <http://www.nmsdcus.org>. This site includes a national directory of minority and women business enterprises.

The National Resource Site for Minority and Women Business Enterprises website is [www.mwbe.com](http://www.mwbe.com).



## About the Series: Fair Housing for HOME Program Participants

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

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

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

- *Fair Housing for HOME Program Participants: Understanding the Basics*. This publication identifies the protected classes, describes the nondiscrimination provisions of the fair housing laws, and defines prohibited discriminatory actions. In addition, it briefly discusses issues related to affirmatively furthering fair housing and the provision of housing for persons with disabilities. (These topics are explored in greater detail in subsequent publications of the series.) All subsequent publications are based on the assumption that the reader is familiar with the fundamental requirements outlined in this publication.
- *Fair Housing for HOME Program Participants: Affirmatively Furthering Fair Housing* describes a PJ's obligation to affirmatively further fair housing and reviews eligible uses of HOME Program funds to promote fair housing.
- *Fair Housing for HOME Program Participants: Creating Economic Opportunity* reviews the requirements designed to create economic opportunities for minorities and women, minority and women business enterprises, and low- and very-low-income residents living in HOME project areas.

- *Fair Housing for HOME Program Participants: Promoting Fair and Accessible Housing Opportunities in HOME Projects* describes the applicability of fair housing laws to rental and homeownership housing development, new construction, and rehabilitation. This publication provides guidance on site and neighborhood standards, record-keeping, and design and construction requirements to ensure accessibility.
- *Fair Housing for HOME Program Participants: Tenant-Based Rental Assistance* discusses tenant selection criteria and procedures and reasonable accommodations and modifications under the Fair Housing Act and program accessibility under Section 504.

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

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

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



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

## **HOME Model Program Guides**

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

For more information about the HOME Program, visit [www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm).









# Promoting Fair and Accessible Housing Opportunities in HOME Projects

*When undertaking new construction and rehabilitation development activities with HOME Program funds, participating jurisdictions (PJs) and their housing partners must strive to create housing units that provide real choice to low- and very low-income residents through thoughtful site selection and architectural design decisions. Newly constructed rental housing must be located in areas that meet specific site and neighborhood standards. In addition, newly constructed and rehabilitated housing must meet certain accessibility standards to ensure access by persons with disabilities. This publication reviews these fair housing requirements that apply to development activity undertaken with HOME funds.*

*This publication is part of the series “Fair Housing for HOME Program Participants.” The series provides technical assistance to PJs and their housing partners on the fair housing requirements that apply to HOME Program activities. Specifically, the series reviews the applicable Federal fair housing laws and regulations, illustrates best practices in promoting fair housing, and highlights PJ responsibilities for ensuring compliance with fair housing requirements. For purposes of this series, the PJ’s “housing partners” include all persons and entities who use HOME Program funds, including the PJ and its recipients, state recipients, contractors, developers (including Community Housing Development Organizations), owners, and management agents. Unless otherwise specified, the fair housing requirements extend to the PJ and all its housing partners.*

## Promoting Greater Housing Choice

At its core, fair housing is based on the concept that all Americans should have equal housing choice. In a housing market with equal housing choice, members of each of the protected classes have a range of housing options similar to the range of options afforded to those who are not members of a protected class. For instance, all low-income residents would have the same housing choices, in terms of neighborhoods, housing design, tenure type, accessibility, and bedroom size.

All housing assisted with HOME funds must be developed in a manner that facilitates *greater choice of housing opportunities*, in accordance with 24 CFR 92.202(a). In promoting greater housing choice, PJs and their housing partners must, at a minimum, ensure that HOME-assisted housing is open and free from unlawful discrimination. In addition, PJs should examine local housing markets and design affordable housing programs in a way that fosters greater housing choice for all its low- and very low-income residents. This may mean that PJs take affirmative action(s) to overcome or remove the consequences of prior discriminatory actions in the housing market.

Many factors influence housing choices, but location affects the desirability and marketability of a property above all else. The location of HOME-funded housing may impact on the choices low- and very low-income persons have in selecting suitable housing. By siting HOME-assisted housing in locations that meet the site and neighborhood standards (found at 24 CFR 92.202), particularly in housing markets where there is limited affordable housing or where affordable housing is concentrated in a limited number of neighborhoods in the jurisdiction, PJs can improve the range of housing choices available to low- and very low-income residents.

PJ strategies for increasing housing options for its low- and very low-income residents should be driven by the jurisdiction’s existing occupancy patterns for low- and very low-income residents and protected class members. The PJ should describe these occupancy patterns in its Consolidated Plan.

Some suggestions for increasing housing choice with HOME funds in jurisdictions with common housing patterns include:

- Jurisdictions that have undue concentrations of low- and very low-income residents in a limited number of neighborhoods might consider expanding housing choices of their low-income residents by developing



affordable housing in neighborhoods with greater numbers of middle- and upper-income residents.

- Assistance can be provided in ways to promote desegregation in jurisdictions with housing patterns that are highly segregated by race or ethnicity. For instance, PJs might target homebuyer assistance or soft second mortgages to low-income buyers in certain neighborhoods to promote diversity.
- In order to promote neighborhood racial and ethnic diversity, jurisdictions with housing patterns that are highly segregated by race or ethnicity might conduct affirmative fair housing marketing to the population least likely to apply for the housing. This might be accomplished by using minority press and media to advertise the availability of units or homes in non-minority neighborhoods. Note, this type of affirmative marketing is required in HOME projects with five or more assisted units.
- Jurisdictions whose existing assisted housing is located almost exclusively in areas of minority concentration might consider ways to expand choice to other neighborhoods, such as by providing tenant-based rental assistance. Where HOME housing development funds are invested, HOME-assisted housing should be sited in areas that do not reinforce and perpetuate patterns of existing segregation. The following section on site selection of newly constructed rental housing provides a more detailed discussion of this issue as it relates to the rental housing market.
- Jurisdictions with a limited supply of accessible housing might consider providing a greater number of fully accessible housing units than the minimum number required by Section 504 of the Rehabilitation Act of 1973 (“Section 504”). (These requirements are discussed in the section entitled *Accessible Housing: Design and Construction Requirements* in this publication.) These jurisdictions might also choose to address the “visitability” of housing to ensure that persons with disabilities who occupy the fully accessible units are able to visit their neighbors. These concepts are discussed more fully later in this publication.

## Site Selection

Consistent with the general requirement that all housing be developed to promote greater housing choice, there are specific requirements that relate to site selection for Federally assisted properties that are designed to ensure that sites are selected to provide maximum housing choice to members of protected classes. Section 504 prohibits the selection of sites where the result might exclude persons with disabilities, and the HOME Program regulations require that new construction rental projects meet site and neighborhood standards.

## Site Selection and Accessibility

Section 504 prohibits recipients of Federal funds from taking any actions, including making any site selections, that have the purpose or effect of excluding qualified individuals with disabilities from, denying benefits of, or otherwise subjecting them to discrimination under, any program or activity that receives Federal financial assistance. In order to ensure that they do not have the effect of excluding individuals with disabilities from participation in, or denying them the benefits of the HOME Program, PJs must determine that the sites they select for the development of affordable housing are available and accessible to persons with disabilities. This requirement applies to all housing development site selections, including in housing rehabilitation programs, where the configuration of an existing site may preclude the feasibility of incorporating accessibility features. For instance, rowhouses with little or no setback may not be able to accommodate an entrance ramp for a person in a wheelchair. Likewise, it might not be possible to create an accessible entrance route on a property that is situated on rugged or steep terrain. Under Section 504, if a site cannot be made accessible to persons with disabilities, it should not be selected for project funding. In addition, when purchasing an existing building that was built after March 13, 1991, it is wise to determine whether the building was built to comply with the design and construction requirements of the Fair Housing Act. For more information on these requirements, see the discussion that follows in this publication in the section entitled *Accessible Housing: Design and Construction Requirements*.

## Site and Neighborhood Standards for New Construction of Rental Housing

The HOME Program requires the PJ to conduct a “site and neighborhood standards” review when it proposes new construction of rental housing or land acquisition for new rental construction. The HOME Program rule at 24 CFR 92.202(b) requires that the PJ make a determination that each site proposed for the new construction of rental housing meets the site and neighborhood standards that are articulated at 24 CFR 983.6(b). The purposes of the site and neighborhood standards are to ensure that (1) newly constructed rental housing is located in areas that promote greater housing choice for low- and very low-income persons in accordance with Title VI of the Civil Rights Act of 1964 and the Fair Housing Act, and (2) investments in areas of minority concentration or undue concentrations of low-income persons are made in the context of an overall revitalization program.



Prior to investing HOME Program funds in a new construction rental project, PJs need to determine that the site meets the site and neighborhood standards, as follows:

- The site must be appropriate for the housing proposed. The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed; and adequate utilities (water, sewer, gas, and electricity) and streets must be available, or be made available, to service the site.
- The location of the proposed housing must facilitate and further full compliance with the applicable provisions of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, Executive Order 11063, and implementing HUD regulations.
- A project cannot be located in an area of minority concentration, except under certain circumstances (described in the following bullet), and must not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area. Note, PJs must define “areas of minority concentration” in their Consolidated Plans.
- The project may be located in an area of minority concentration only when:
  - Sufficient, comparable housing opportunities exist for housing minority families, in the income range to be served by the proposed project, outside of areas of minority concentration; or
  - The project is necessary to meet overriding housing needs that cannot otherwise be met in the housing market area.
  - Exhibit 1 provides guidance on the application of these two criteria.
- The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.
- The neighborhood must not be one that is seriously detrimental to family life or in which substandard dwellings or other undesirable conditions predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.
- The housing must be accessible to social, recreation, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those more typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.
- Except for new construction designed for older persons, travel time and cost via public transportation or private automobile, from the proposed neighborhood to places of employment providing a range to jobs for lower-income workers, must not be excessive.

## Accessible Housing: Design and Construction Requirements

Once a site has been selected, PJ staff and their housing partners can turn their attention to design and construction issues. For homeownership and rental housing development, fair housing design and construction issues focus on accessibility for persons with disabilities. PJs and their housing partners must comply with Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act, and HUD’s implementing regulations at 24 CFR Parts 8 and 100, respectively. These laws and regulations prohibit discrimination based on disability and establish requirements for physical accessibility in connection with housing programs. These accessibility requirements apply to HOME-financed development regardless of the form in which assistance is provided (such as deferred payment loans, equity investments, interest-bearing loans, advances, or grants).

This section describes (1) the scope of applicability and the accessibility standard that applies to HOME financed rental and homeownership housing under Section 504; (2) the scope of applicability and the accessibility standard that applies under the Fair Housing Act; (3) the scope and applicable standards, and how to apply them, when both Section 504 and the Fair Housing Act apply to a particular project. This section concludes with a discussion of “visitability” and the standards that would create additional accessibility in all units, so that any occupant might be able to entertain friends or relatives who use a wheelchair or enable a resident to “age in place.”

Since accessibility requirements are defined in technical specifications that might dictate construction to the inch, attention to detail often makes the difference between achieving access and excluding persons with disabilities. Further, inaccurate or faulty construction might create a potentially hazardous situation for a person with a disability. Failure to comply with the accessibility requirements can result in findings of housing discrimination with assessments of both punitive and compensatory damages. Needless to say, mistakes in the design and construction of housing are likely to be difficult, time-consuming, and costly to rectify.

PJs must ensure that their programs are administered in full compliance with the accessibility requirements. PJs should establish policies and practices to monitor compliance of all covered development that is carried out by their state



Exhibit 1

**Considerations in Applying the Sufficient and Comparable Opportunities Test of the Site and Neighborhood Standards**

To apply the site and neighborhood standards with respect to the existence of sufficient and comparable housing opportunities outside areas of minority concentration, PJs must assess the *overall* impact of assisted housing on the availability of housing choices for low-income minority families in and outside areas of minority concentration. In order to develop newly constructed rental housing in areas of minority concentration, PJs must determine that either (1) sufficient, comparable opportunities exist for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, **or** (2) the project is necessary to meet overriding housing needs that cannot be met in the housing market area. In making this assessment, PJs should be guided by the following questions:

**Do Sufficient and Comparable Opportunities Exist?**

- 🏠 Is there a reasonable distribution of assisted units such that each year, and over a period of several years, the area will offer an appropriate balance of housing choices within and outside areas of minority concentration?
  - An appropriate balance in any jurisdiction must be determined in light of local conditions affecting the range of housing choices available for low-income minority families and in relation to the racial mix of the locality's population.
  - "Sufficient" does not require that in every locality there be an equal number of assisted units within and outside the areas of minority concentration.
- 🏠 Are the units that are within and outside of areas of minority concentrations "comparable opportunities?" That is:
  - Do they serve the same household type (such as elderly, persons with disabilities, family, large family)?
  - Do they have the same tenure type (owner/renter)?
  - Do they require approximately the same tenant contribution towards rent?
  - Do they serve the same income group?
  - Are they located in the same housing market?
  - Are they in standard condition?
- 🏠 When assessing the overall impact of HUD-assisted housing on the availability of housing choices for low-income minority families in and outside areas of minority concentration, can the PJ answer the following questions affirmatively?
  - Are a significant number of assisted housing units available outside areas of minority concentration?
  - Is there significant integration of assisted housing projects constructed or rehabilitated in the past ten years, relative to the racial mix of the eligible population?
  - Are there racially integrated neighborhoods in the locality?
  - Does the locality operate programs to assist minority families that wish to find housing outside areas of minority concentration?
  - Have minority families benefited from local activities undertaken to expand choice for minority families (such as, acquisition and write-down of sites, tax relief programs for homeowners, acquisitions of units for use as assisted housing units) outside of areas of minority concentration?
  - Has a significant proportion of minority households been successful in finding units in non-minority areas under the Section 8 programs?
  - Have comparable housing opportunities been made available outside areas of minority concentration through other programs?

**Is the Project Necessary to Meet an Overriding Housing Need?**

- 🏠 Is the proposed project an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood?
- 🏠 Are proposed sites in a neighborhood experiencing significant private investment that is demonstrably changing the economic character of the area (in other words, is the neighborhood a "revitalizing area")?
- 🏠 Are sites outside areas of minority concentration free from discrimination on the basis of race, color, religion, sex, national origin, age, familial status, or disability?

Note, the overriding need criteria cannot serve as the basis for finding a site to be acceptable if such discrimination renders sites outside of areas of minority concentration unavailable or if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice.



recipients, subrecipients, contractors, developers, owners, and their agents.

The *Additional Resources* section at the end of this publication provides information on how to obtain copies of all of the relevant technical standards.

## Section 504 Design and Construction Standard

For people with disabilities, housing choice is impacted significantly by the physical design of housing. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against persons with disabilities in the operation of programs receiving Federal financial assistance and imposes requirements to build accessible housing. Section 504 states that:

No otherwise qualified individual with a disability in the United States. . . shall, solely by reason of his/her disability, be . . . excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or any program or activity conducted by any Executive agency. . .<sup>1</sup>

HUD regulations implementing Section 504 (found at 24 CFR Part 8) contain accessibility requirements for new construction and rehabilitation of multifamily housing and homeownership housing development, and requirements for ensuring that housing programs themselves are operated in a manner that is accessible to and usable by persons with disabilities. The accessibility requirements established in the Fair Housing Act are discussed in the following section of this publication, *Fair Housing Act Design and Construction Standards*.

## Scope of Coverage for Development Activities

The Section 504 regulations impose program accessibility requirements for three types of activity that are often undertaken by HOME Program participants: new construction of rental multifamily projects; rehabilitation (also referred to as “alterations”) of existing multifamily rental projects; and homeownership development. Under Section 504, a multifamily housing project is defined as a project containing five or

more dwelling units. A project is defined as the whole of one or more residential structures and related common spaces (such as parking lots) which are covered by a single contract, or designated as a whole for processing purposes, whether or not all the units are located in the same building, or on a common site. In accordance with this definition, five single family homes covered by a single contract or a single building with five units each constitute a multifamily housing project.

For HOME-funded *rental* housing development (new construction and rehabilitation) programs, in a project where not all the units are HOME-assisted units, it is the total number of units in the development—not the number of HOME-assisted units—that is used as the basis for determining the number of units that must be made fully accessible. The accessible units may be either HOME-assisted, or not HOME-assisted. In projects that have a combination of HOME-assisted and non-assisted units, PJs can choose to designate HOME-assisted units as “floating.” This means that rather than identifying specific units that will always be the HOME-assisted units throughout the period of affordability, property owners maintain a specified *proportion* of units as HOME-assisted units. These units in the project are comparable in design, size, and level of amenities.<sup>2</sup> In projects that have “floating” HOME-assisted units, the accessible units “float” in and out of the HOME inventory, as do the other units in the development. Since many individuals with disabilities are also low-income, as much as practical, HOME property managers should make every effort to ensure that some accessible units remain in the HOME-assisted inventory.

### *Newly Constructed Rental Housing*

The regulations at 24 CFR 8.22 state that for new construction of multifamily rental projects, a minimum of five percent of the dwelling units in a project (but not fewer than one unit) must be accessible to individuals with mobility impairments in accordance with the Uniform Federal Accessibility Standards (UFAS). UFAS is the standard that applies to facilities that are designed, built, or altered with Federal funds. An additional two percent of the dwelling units (but not fewer than one unit) must be accessible to individuals with hearing or vision impairments.<sup>3</sup>

<sup>1</sup> See 29 USC 794.

<sup>2</sup> See HUD Notice CPD 98-2, *Allocating costs and identifying HOME-assisted units in multifamily projects*, for a more detailed explanation of “fixed” and “floating” HOME-assisted units. This notice is available online at [www.hud.gov/offices/cpd/affordablehousing/lawsandregs/notices/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/lawsandregs/notices/index.cfm).

<sup>3</sup> HUD can prescribe a higher number of required accessible units pursuant to 24 CFR 8.22(c).



### ***Rental Housing with Substantial Alterations***

The regulations at 24 CFR 8.23(a) state that if alterations are undertaken in a project containing fifteen or more units, and the cost of the alterations is 75 percent or more of the replacement cost of the completed development, then the owner must follow the new construction provisions (of 24 CFR 8.22, described in the preceding paragraph): a minimum of five percent of the units (but not less than one unit) must be made accessible to persons with mobility impairments, in accordance with UFAS. In addition, a minimum of two percent of the units (but not less than one unit) must be made accessible to persons with hearing or visual impairments.

### ***Rental Housing with Other Alterations***

The regulations at 24 CFR 8.23(b) apply when alterations are not substantial, as described in the preceding paragraph. Under 24 CFR 8.23(b), alterations to multifamily dwelling units shall, to the maximum extent feasible, be made readily accessible to and usable by individuals with disabilities. If alterations to single elements or spaces of a dwelling unit, when considered together, amount to an alteration of a dwelling unit, then the entire unit must be made accessible. At a minimum, HUD considers alteration of an entire unit to take place when at least all of the following individual elements are replaced:

- Renovation of whole kitchens, or at least replacement of kitchen cabinets;
- Renovation of the bathroom, if at least a bathtub or shower is replaced or added, or a toilet and flooring is replaced; and
- Entrance door jams are replaced.

When the entire unit is not being altered, 100 percent of the single elements being altered must be made accessible. However, HUD strongly encourages a recipient to make the entire unit(s) accessible to and usable by individuals with mobility impairments. Doing so avoids having to make every element altered accessible, which may result in having partially accessible units that are of little or no value for persons with mobility impairments. It is also more likely that the cost of making the units accessible up-front will be less than making each and every element altered accessible. Once five percent (5%) or the higher minimum percentage prescribed by HUD, of the housing units are accessible to and usable by individuals with disabilities, the PJ no longer has to make additional units or elements of units accessible.

Alterations to common areas or parts of facilities that affect accessibility of existing housing facilities must also be made to be accessible to and usable by individuals with disabilities, to the maximum extent feasible.

All alterations must meet the applicable sections of the UFAS that govern alterations. Further, alterations that require removing or altering load-bearing structural members are not required.

### ***Newly Constructed and Rehabilitated Homeownership Housing***

The regulations at 24 CFR 8.29 state that any for-sale housing developed with Federal funds must be made accessible upon the request of the prospective buyer if an expected occupant has a disability that requires accessibility features. PJs and their housing partners must remember that a buyer might request accessible features, and the design must be able to accommodate such a request. Should a prospective buyer request a modification to make a unit accessible, the developer must work with the buyer to provide the specific features that meet the need(s) of the particular homebuyer or occupant. If the design features are covered in the accessibility standard (UFAS, described below), those features must comply with the standard. The developer shall be permitted, however, to depart from the standard in order to have the buyer/occupant's needs met. Note, if the design of a housing unit precludes the developer from making requested changes, the PJ may be in violation of the Section 504 requirement that the HOME-funded program be made usable and accessible to persons with disabilities. The requirements for program accessibility are discussed later in this publication. PJs can also choose to follow the requirements of 24 CFR 8.22 and make five percent of the for-sale units accessible at construction.

The HOPE VI Program has developed technical guidance on how to design and build homeownership structures without elevators (including town homes) in a way that provides accessibility. The designs support diverse architectural features, and the single family nature of neighborhoods. HUD's publication, *Strategies for Providing Accessibility and Visitability in HOPE VI and Mixed Income Homeownership Development* is available online through HUD User at [www.huduser.org/publications/pubasst/strategies.html](http://www.huduser.org/publications/pubasst/strategies.html).



## Accessibility Standard

The UFAS are a set of design standards that apply to facilities designed, built, or altered with Federal funds, regardless of which Federal agency provides funding.<sup>4</sup> HUD has adopted the UFAS standard as the accessibility standard under Section 504.<sup>5</sup> A PJ may choose to use a different standard, provided that it can achieve substantially equivalent or greater access to and usability of the housing. However, the burden is on the PJ to establish that the standard meets the minimum regulatory requirements of 24 CFR Part 8 and the accessibility requirements of UFAS. UFAS contains requirements for scoping (which describe which elements and how many elements are required to be accessible) and the technical specifications that dictate the level of accessibility that must be achieved.

The UFAS-accessible housing standard requires full accessibility of the dwelling unit,<sup>6</sup> and the common areas and includes technical specifications to ensure accessibility for mobility and sensory impaired persons. Some of the major requirements included in the UFAS specifications for accessible dwelling units are:

- An accessible dwelling unit shall be on an accessible route;
- At least one full bathroom must be fully accessible, including toilet, mirror, lavatory, medicine cabinet, and bathtub or shower;
- Kitchens must have accessible or adaptable features on ovens, refrigerator/freezers, dishwashers, storage, and work surfaces;

- All laundry facilities, whether in the unit or in a common laundry room, must be on an accessible route. Washers and dryers in a common space must be front-loading; washers and dryers in a dwelling unit may be top-loading, but controls must be accessible;
- Living and dining areas must be accessible and on an accessible route;
- Sleeping areas (the bedroom in a one bedroom unit, and at least two bedrooms in units with two or more bedrooms) must be accessible and on an accessible route;
- Common spaces and facilities serving individual accessible dwelling units must be accessible, including entry walks, parking and public transportation stops (if provided), trash disposal facilities, and mail boxes;
- Storage, including cabinets, shelves, closets, and drawers must be accessible;
- All controls for the unit must be in accessible locations, including heating, ventilation, and air conditioning controls, and electrical outlets; and
- All accessible spaces must include a 60-inch turning space (a “T-turn”), including bathrooms and kitchens.

**NOTE:** This list is not all-inclusive. Architects and developers must use the actual accessibility specifications of UFAS to ensure that their housing developments fully comply with Section 504 and UFAS.

## Common Use Facilities and Accessible Routes Under UFAS

In order to provide accessibility to the extent needed for persons with disabilities to have full use and enjoyment of the

<sup>4</sup> On July 23, 2004, the U.S. Access Board issued new Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Guidelines that cover new construction and alteration of a broad range of facilities in the private and public sectors and serve as the basis for enforceable accessibility standards issued by Federal Agencies, including HUD. These Guidelines, once adopted by HUD, will replace the current Uniform Federal Accessibility Standards (UFAS). However, they will only apply to new construction and planned alterations and generally will not apply to existing facilities except where altered. HUD recipients are not required to comply with the new guidelines until such time as HUD adopts them as enforceable standards; however, recipients are free to use them before they are adopted in lieu of the current UFAS. Information about the new guidelines may be obtained from the Access Board website at: <http://www.access-board.gov/ada-aba.htm>

<sup>5</sup> See 24 CFR 8.32.

<sup>6</sup> For those units that are required to be UFAS-accessible in accordance with 24 CFR 8.22(b) and 8.23, Section 504 includes the concept of *adaptability* (defined at 24 CFR 8.3) which means the ability of certain elements of a dwelling unit, such as kitchen counters, sinks, and grab bars, to be added to, raised, lowered or otherwise altered, to accommodate the needs of persons with or without disabilities, or to accommodate the needs of persons with different types or degrees of disability. However, to ensure that occupants know the existence of adaptable features, UFAS requires that consumer information be provided in each adaptable dwelling unit available for occupancy. As set forth in UFAS, the requisite consumer information should contain, at a minimum: (1) notification of the alternate heights available for the kitchen counter and sink, and the existence of removable cabinets and bases, if provided, under counters, sinks, and lavatories; (2) notification of the provisions for the installation of grab bars at toilets, bathtubs, and showers; (3) notification that the dwelling unit is equipped to have a visual emergency alarm installed; (4) identification of the location where information and instruction are available for changing the height of counters, removing cabinets and bases, installing a visual emergency alarm system, and installing grab bars; (5) notification that the dwelling unit has been designed in accordance with Uniform Federal Accessibility Standards. See UFAS §§ 4.34.3-4.34.4 (1)-(5). However, if a HUD-assisted provider chooses to build UFAS-adaptable units instead of UFAS-accessible units, the housing provider is responsible for making the unit fully accessible as soon as it is needed by a person with a disability, at the housing provider's expense. When developing adaptable units, housing providers should plan and budget for their possible conversion to full accessibility.





dwelling, newly constructed and rehabilitated multifamily HOME projects that are subject to Section 504 must have accessible routes into and throughout the property and must provide accessibility to the common areas that are available for use by residents without disabilities, including parking, reception and common areas, laundry facilities, mailboxes, and public transportation stops (if provided). This means that owners and/or developers must ensure that all elements of the development are accessible to and usable by persons with disabilities. This includes the units, accessible routes, and common use areas as well as one-of-a-kind amenities or facilities such as the management office, a single public restroom in the lobby, or the mailroom, if these amenities are provided.

In making physical changes to common areas, facilities, and parking, PJs and their housing partners must follow the UFAS, or use other methods that provide substantially equivalent or greater access to and usability of the building. In addition to the accessibility requirements for UFAS-accessible units, UFAS sets forth accessibility standards for common use areas. The following highlight some of the common area accessibility provisions of UFAS:

- If provided, elevators must be on an accessible route and must contain features to accommodate those with mobility and sensory impairments when accessible units are located above or below accessible grade level.
- Entrances that connect by an accessible route to public transportation stops, to accessible parking and passenger loading zones, and to public streets or sidewalks if available must be made accessible. For housing with one to four-family dwellings where accessible entrances would be extraordinarily costly due to site conditions or local code restrictions, accessible entrances are required only to those buildings containing accessible dwelling units.
- The project must have at least one accessible route to connect the accessible entrances with all accessible spaces and elements within the dwelling units.
- At least one of each type of common area and amenity in each project must be accessible and must be located on an accessible route to any accessible dwelling unit.

Mechanical rooms and other spaces need not be made accessible, when their intended use does not require accessibility by the public, by tenants, or by employees with physical disabilities.

**NOTE: This list is not all-inclusive. Architects and developers must use the actual accessibility specifications of UFAS to ensure that their housing developments fully comply with Section 504 and UFAS.**

The Section 504 regulations also dictate that, to the maximum extent feasible, accessible units must be distributed throughout the project and sites, and must be made available in a sufficient range of sizes and amenities so as not to limit choice.<sup>7</sup> For example, if a project has one-, two-, and three-bedroom units, there should be accessible units of each size throughout the project site.

In order to ensure that plans for new construction or rehabilitation of rental housing meet the full accessibility standards, PJs and their housing partners should only contract with architects, developers and building contractors who are experienced in the accessibility provisions of UFAS, and the accessibility provisions of the Fair Housing Act Guidelines.

### Fair Housing Act Design and Construction Standard

The Fair Housing Act also establishes accessibility requirements for residential housing to ensure a minimum degree of accessibility for persons with disabilities. These requirements apply to all newly constructed housing built for first occupancy after March 13, 1991.<sup>8</sup> For housing that is developed with HOME funds, these requirements apply together with, not in lieu of, the Section 504 accessibility requirements.

#### *Scope of Coverage for Development Activities*

The Fair Housing Act's design and construction standards apply to new construction of "covered multifamily dwellings" built for first occupancy after March 13, 1991. First occupancy is defined as "a building that has never before been used for any purpose." However, the Act's requirements would also apply to an addition of five or more dwelling units as long as this is a new addition to a building and not rehabilitation.<sup>9</sup> "Covered multifamily dwellings" is defined as "(1) buildings having four or more units, if such buildings have one or more elevators; and (2) ground floor units in other buildings consisting of four or more units." This means that in buildings with elevators, all of the units, that is 100 percent, are covered. In buildings without elevators, only the ground floor

<sup>7</sup> See 24 CFR 8.26.

<sup>8</sup> See 100.200 et. seq.

<sup>9</sup> See 100.200 et. seq.



units are covered, but this means 100 percent of the ground floor units. Note, there can be more than one ground floor in a development. For example, a building built into a hill with at-grade entrances on the first and second floor, would have two ground floors that must meet the Fair Housing Act requirements.

The Fair Housing Act requirements apply to privately-owned housing as well as housing that receives state or Federal funds, and applies to both rental and homeownership units, as long as there are four or more units in the building. Types of dwelling units covered include housing where there may be sleeping units and shared toilet or kitchen facilities. Examples of covered units that may be funded by the HOME Program include apartments, condominiums, single-story townhouses, assisted living facilities, and single-room occupancy units. Transitional housing units are considered residences covered by the Fair Housing Act. Note, however, that non-elevator townhouses which are multi-story, that have finished living space on more than one floor, are not typically covered. Such units are not considered covered multifamily dwellings unless they have elevators.

Since the Fair Housing Act applies to both privately-owned and Federally assisted housing, coverage is determined based on which dwelling units are “covered multifamily dwellings” and not whether the project is HOME-assisted. Note, the Fair Housing Act design and construction requirements do not apply to rehabilitated housing.

### ***Accessibility Standard***

The Fair Housing Act’s accessible design and construction requirements consist of seven basic requirements. These requirements are found in the regulations at 24 CFR 100.205(c):

1. At least one accessible building entrance on an accessible route;
2. Accessible and usable public and common use areas;
3. Doors that allow passage into and within all premises being wide enough to allow passage by persons using wheelchairs;
4. Accessible routes into and through the covered unit(s);
5. Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
6. Reinforced walls in bathrooms for later installation of grab bars; and
7. Usable kitchens and bathrooms.

The Fair Housing Act does not specify a standard for accessible design; however, the Act and the implementing regulations state that compliance with the appropriate requirements of the American National Standards Institute (ANSI) A117.1 standard satisfies the Act’s accessibility requirements. On March 6, 1991 HUD published the final Fair Housing Accessibility Guidelines in the *Federal Register* to provide technical guidance on how to meet the specific accessibility and adaptability design requirements of the Fair Housing Act. These guidelines, largely based on the ANSI A117.1 standard, provide guidance on what HUD believes meet the minimum expectations for compliance under the Fair Housing Act. The Guidelines are not mandatory, but provide a safe harbor that will illustrate acceptable methods of compliance with the Fair Housing Act.

### ***Other Safe Harbors Under the Fair Housing Act***

Currently HUD recognizes the following eight documents as providing a safe harbor for compliance with the Fair Housing Act’s design and construction requirements to ensure accessibility:

- Fair Housing Accessibility Guidelines published on March 6, 1991 by HUD, and the “Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines,” published June 28, 1994.
- Fair Housing Act Design Manual, published by HUD in 1996 and updated in 1998.
- ANSI A 117.1-1986 (American National Standard for Buildings and Facilities: Providing Accessibility and Usability for Physically Handicapped People), when used with the scoping requirements contained in the Fair Housing Act, HUD’s implementing regulations, and the Guidelines.
- CABO/ANSI A 117.1-1992. (Guidelines for Accessible and Usable Buildings and Facilities), when used with the scoping requirements contained in the Fair Housing Act, HUD’s implementing regulations, and the Guidelines.
- ICC/ANSI A 117.1-1988 (Accessible and Usable Buildings and Facilities), when used with the scoping requirements contained in the Fair Housing Act, HUD’s implementing regulations, and the Guidelines.
- Code Requirements for Housing Accessibility (CRHA), published by the International Code Council, October 2000.
- International Building Code 2000 (IBC), published by the International Code Council, as amended by the 2001 Supplement to the International Codes.



- International Building Code 2003 (IBC), published by the International Code Council. Use of the IBC 2003 as a safe harbor is conditioned on the following clarification:
  - International Code Council interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7.

Because the three editions of the ANSI A117.1 standard includes only technical requirements, it is necessary to use these standards with the Fair Housing Act, HUD's implementing regulations, and the Fair Housing Accessibility Guidelines for the scoping requirements.

More information on the technical requirements of the Fair Housing Act's design and construction standards is available at HUD's Fair Housing and Equal Opportunity (FHEO) division website at [www.hud.gov/offices/fheo](http://www.hud.gov/offices/fheo), and on the Fair Housing Accessibility First website at [www.fairhousingfirst.org](http://www.fairhousingfirst.org). For additional information specifically about these model building codes as safe harbors under the Fair Housing Act, see [www.hud.gov/offices/fheo/disabilities/modelcodes/modelcodesfinal.pdf](http://www.hud.gov/offices/fheo/disabilities/modelcodes/modelcodesfinal.pdf) and [www.hud.gov/offices/fheo/disabilities/modelcodes/ibcdraft03.pdf](http://www.hud.gov/offices/fheo/disabilities/modelcodes/ibcdraft03.pdf).

### *Common Use Facilities and Accessible Entrances Under Fair Housing Act*

The Fair Housing Accessibility Guidelines, Fair Housing Act Design Manual, and ANSI 117.1 provide technical guidance on meeting the accessibility requirements for units as well as common use facilities, entrances, and accessible routes.

Accessible building entrances ensure access into the property. The Fair Housing Act requires all covered multifamily dwellings built for first occupancy after March 13, 1991 to have at least one building entrance on an accessible route. The Fair Housing Act implementing regulations define the term "accessible route" as a "continuous unobstructed path connecting accessible elements and spaces in a building or

within a site that can be negotiated by a person with disabilities using a wheelchair and usable by persons with other types of disabilities." These comprise both interior and exterior accessible routes. The Fair Housing Accessibility Guidelines specify one very narrow exception to this requirement: when an accessible route is infeasible because of the nature of the terrain surrounding the site (or other unusual site characteristics). The requirements for site impracticality are described in the Guidelines, and the burden is on the developer to establish that the site falls within these requirements. In addition to the accessible entrance, housing must include accessible routes into and through the covered unit(s).

Public and common use areas must be readily accessible to and usable by persons with disabilities.<sup>10</sup> This includes the requirement that all doors of the project (in the public spaces, as well as in the dwelling unit itself) must allow passage into and within all premises, being wide enough to allow passage by persons using wheelchairs.

### **Applying Both Section 504 and the Fair Housing Act Requirements**

Section 504 and the Fair Housing Act have different requirements as they relate to both the scope of applicability, and the technical specifications to be met to attain accessibility. In general, Section 504 requires that a fewer number of units must be made accessible, but the technical specifications apply a much stricter standard of accessibility. The Fair Housing Act, on the other hand, has a broader scope and applies to a larger number of units; in general, it imposes a less strict technical standard.

However, some elements of the Fair Housing Act requirements are stricter than UFAS, and when both Section 504 and Fair Housing Act requirements apply to the same units in a project, one cannot presume that compliance with UFAS also ensures compliance with the Fair Housing Act. The following are the most significant differences between the two:

- When using Fair Housing Act Guidelines Bathroom Specification A, then, in addition to meeting Specification A requirements for the bathroom, **all other** bathrooms in the unit, if any, must **also** meet the maneuvering and clear floor space requirements; be on an accessible route; and have usable doors, reinforcements in the walls for grab bars, and accessible switches and outlets.<sup>11</sup> UFAS, on the other hand, requires only

<sup>10</sup> See 24 CFR 100.205(a) and (c)(1).

<sup>11</sup> Note, when using Bathroom Specification B under the Fair Housing Act Guidelines, there are no additional requirements imposed on any other bathrooms in the unit because Specification B provides for a higher level of accessibility than Specification A. However, a Specification B bathroom is not as accessible as a UFAS bathroom, and thus in an UFAS-accessible unit, Specification B is not a substitute for the UFAS requirements.



one bathroom to be fully accessible. The full accessibility standard is more stringent than that imposed by the Guidelines for Bathroom Specification A. UFAS does not require that the other bathrooms in the unit be on an accessible route; have accessible doors, light switches, and outlets; or have reinforced walls for grab bars.

- In dwelling units with two or more bedrooms, UFAS requires at least two accessible bedrooms; however, the Fair Housing Act requires an accessible route throughout the unit, including into all bedrooms. The Fair Housing Act also requires doors and switches and outlets in all bedrooms to comply.

When a project is subject to both Section 504 and the Fair Housing Act, steps must be taken to ensure that the five percent UFAS-complying units also meet these additional requirements of the Fair Housing Act.

**When will both standards apply?**  
When HOME funds are invested in new construction of multifamily rental projects with five or more units, the project must meet the design and construction requirements of both the Fair Housing Act and Section 504. In addition to the UFAS complying units, in elevator buildings, all units must comply with the Fair Housing Act standards; in non-elevator buildings, only the ground floor units must comply. Common spaces must be accessible in accordance with both standards.

Where two or more accessibility standards apply, the housing provider is required to apply both standards, so that the maximum accessibility is obtained. Therefore, newly constructed projects that are served by an elevator, and all ground floor units in a non-elevator building of four or more units must meet the Fair Housing Act design and construction requirements **and**, if the project has five or more attached or detached units, under Section 504, the project must also include full accessibility (UFAS standard) for mobility-impaired persons in a minimum of five percent of its total units, but no fewer than one unit, whichever is greater. It must also include accessibility for persons with hearing or vision impairments in an additional two percent of the total units (but no fewer than one unit, whichever is greater) in accordance with 24 CFR 8.23(a). UFAS units would also have to be dispersed in terms of unit size and location.

**Examples to Demonstrate How to Apply Both Standards**

**Scenario 1:** A 40-unit rental building with an elevator is newly constructed with HOME Program funding. All units are two-bedroom.

*How to apply the standards:* This building is required to have a minimum of five percent of its total dwelling units (two units) be built to be fully accessible (UFAS standard) to persons with mobility impairments in accordance with Section 504. The remaining dwelling units (38 units) must comply with the design and construction standards of the Fair Housing Act. Two percent of the units (one of the 38) must also be made accessible for persons with vision and hearing impairments. In addition, common use and common facilities must be made accessible in accordance with both UFAS and the Fair Housing Act standard.

Note: If this building were **rehabilitated** with HOME funds, the Fair Housing Act design and construction standards would not apply.

**Scenario 2:** A 100-unit, two-story garden apartment development with no elevator is newly constructed with HOME Program funds. The building is comprised of one- and two-bedroom units. Half of its dwelling units (50 units) are on the ground floor and half (50 units) are on the second floor.

*How to apply the standards:* Under the requirements of Section 504, this building is required to have a minimum of five percent of the total number of units (five units) made to be fully accessible (UFAS standard) to persons with mobility impairments in accordance with Section 504. Since the building does not have an elevator, these five units must be located on the ground floor in order to have an accessible route. An additional two percent of the total dwelling units (two units) must be made accessible for people with vision and hearing impairments. These units may be located anywhere in the building. In addition, **all** ground floor units must comply with the Fair Housing Act design and construction standards, including those made accessible for persons with mobility impairments under UFAS, and those made accessible to persons with vision or hearing impairments if they are located on the ground floor. Common use and common facilities must be made accessible in accordance with both UFAS and the Fair Housing Act standard.

**Scenario 3:** A PJ constructs 50 two-story rental townhouses with HOME Program funds.

*How to apply the standards:* A minimum of five percent of the units in this building (three units) must be built to be accessible to persons with mobility impairments in accordance with the UFAS standard, and an additional two percent of the units (one unit) must be made to be accessible to persons with a sensory impairment. Common use and common facilities must be made accessible in accordance with UFAS. However, this development is not a covered multifamily dwelling for purposes of the design and construction requirements of the Fair Housing Act since two-story dwellings are not considered ground floor units. The builder is free to make the required accessible units single story. The builder is not required to use a design that includes an elevator.

Note: If the townhouses were single-story townhouses (and therefore all ground floor units), the project would have to comply with both Section 504 and the Fair Housing Act design and construction requirements.



To meet both sets of requirements, the units (five percent) designed to be accessible for persons with mobility impairments using the UFAS standard will meet a stricter degree of accessibility than what is required under the Fair Housing Act. In most respects, the UFAS standards exceed the Fair Housing Act standards. However, these units also need to incorporate those elements that are stricter under the Fair Housing Act, as previously discussed. In addition, the two percent of the units that are made accessible to those with hearing and/or vision impairments as required under Section 504 must **also** be made accessible to those with mobility impairments, to the extent required by the Fair Housing Act.

### Visitability

It is recommended that all design, construction, and alterations incorporate, whenever practical, the concept of “visitability” for any units not subject to either the requirements of Section 504 and/or the Fair Housing Act. (i.e., most town homes). In simple terms, increasing accessibility to all housing stock in the nation’s neighborhoods enables all persons to have visitors by friends, family, and neighbors who have a disability. In addition, residents who live in a visitable unit can “age in place”—that is, they are able to stay in their unit as they grow older and in need of an accessible home.

A visitable dwelling unit is one that provides:

- At least one entrance at-grade (no steps), approached by an accessible route, such as a sidewalk. While the front entrance is preferable, a side or back entrance is workable; and
- An entrance door and all interior passage doors that are at least two feet, ten inches wide, offering 32 inches of clear passage space.

HUD strongly encourages all recipients to use these construction standards for as many units as possible within a project, whenever it is feasible to do so. Although it is not required, constructing units to meet a very minimal standard of accessibility that might be needed by a visitor or aging resident generally adds very little cost to housing development. Not only does this standard improve the quality of life and opportunity for independence for persons with disabilities, it expands the availability of housing options for individuals who may require

some, but not complete, accessibility. It will assist project owners in making reasonable accommodations and reduce, in some cases, the need for structural modifications or transfers when individuals become disabled in place. Visitability can also improve the marketability of units.

The design and construction requirements under Section 504 or the Fair Housing Act do not apply to homeowner-occupied rehabilitation programs.<sup>12</sup> That said, however, when PJs invest HOME funds in homeowner-occupied rehabilitation programs, HUD encourages PJs and their housing partners to build in accessible design features during rehabilitation to create at least a minimal level of accessibility to the unit, and to help owners understand the benefits of adaptable design. It is important because it creates additional accessible units in the PJ’s housing stock. It also ensures “visitability.”

### Program Accessibility

In addition to its nondiscrimination and physical accessibility requirements, Section 504 requires that a recipient’s program, when viewed in its entirety, is usable and accessible to persons with disabilities. This obligation applies to the PJ and its housing partners. It includes, but is broader than, the obligation to provide accessible units in accordance with 24 CFR 8.22 and 8.23. This obligation also includes ensuring that:

- All activities, including public hearings, tenant briefings, and meetings are held in locations that are accessible to persons with disabilities.
- Information about all programs and activities is disseminated in a manner that is accessible to persons with disabilities. Auxiliary aids and special communication systems should be used for program outreach, public hearings related to housing programs, and other program activities.
- Reasonable steps are taken to provide information about available accessible units to eligible persons with disabilities. A PJ and its housing partners must see that rental agents make a good faith effort to offer available, accessible units to persons with disabilities before offering them to applicants who do not have disabilities. Accessible units should be offered first to persons with disabilities residing in the development in a non-accessible unit; second, to persons with disabilities on a waiting list; and third, to others.

<sup>12</sup> The Section 504 regulations apply to recipients of Federal financial assistance, including a state or political subdivision of a state, any public or private agency, institution, organization, or other entity or any persons to which Federal financial assistance is extended for any program or activity. However, the ultimate beneficiary of the assistance is not considered a recipient. Thus, a family that receives HOME funds for the rehabilitation of an owner-occupied unit is not subject to the Section 504 requirements since it is the beneficiary of the HOME funds, not the recipient.



- Rules, policies, practices, procedures, and facilities are modified, as needed, to ensure that persons with disabilities have an opportunity to make effective use of the housing program, unless such modifications constitute a financial and administrative burden, or are a fundamental alteration of the housing program.

PJs and their housing partners are strongly encouraged to conduct self-evaluations of their programs and activities, or update previously conducted self-evaluations in order to evaluate their compliance with these requirements. Such evaluations are referenced at 24 CFR 8.51. Initially, such self-evaluations were required under Section 504. Although the regulatory deadlines are long past, self-evaluation continues to be an excellent management tool for ensuring that a recipient's current policies and procedures comply with the requirements of Section 504. The self-evaluation process should involve persons with disabilities, as well as agencies or other experts who work regularly with accessibility standards. A self-evaluation should include a review of current policies and practices to determine if they adversely affect the full participation of individuals with disabilities in programs, activities, and services.

## Conclusion

The siting, design, and construction of affordable housing assisted with HOME Program funds must be executed in a manner that promotes greater choice of housing opportunities to ensure that low-income members of each of the protected classes has a range of housing options similar to the range of options afforded other low-income households. Newly constructed rental housing can be built only in locations that meet specific site and neighborhood standards, as determined by the PJ. Housing that is constructed with HOME Program funds must be designed and constructed to be accessible to persons with disabilities, in accordance with the requirements of both Section 504 and the Fair Housing Act.

## Additional Resources

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

The Fair Housing Act can be found at [www.usdoj.gov/crt/housing/title8.htm](http://www.usdoj.gov/crt/housing/title8.htm). Its implementing regulations are at 24 CFR Part 100, et. al.

Section 504 of the Rehabilitation Act of 1973 can be found online at [www.hud.gov/offices/fheo/disabilities/504keys.cfm](http://www.hud.gov/offices/fheo/disabilities/504keys.cfm). Its implementing regulations are at 24 CFR Part 8. Frequently asked questions about real-life application of Section 504 can be found at [www.hud.gov/offices/fheo/disabilities/sect504faq.cfm](http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm).

The Fair Housing Accessibility Guidelines can be found online at [www.hud.gov/library/bookshelf09/fhefhag.cfm](http://www.hud.gov/library/bookshelf09/fhefhag.cfm).

A copy of the Uniform Federal Accessibility Standard (UFAS) is available online at [www.access-board.gov/ufas/ufashtml/ufas.htm](http://www.access-board.gov/ufas/ufashtml/ufas.htm).

HUD has issued two reports that analyze the model building codes that have been identified as safe harbors for compliance with the Fair Housing Act. For more information, see:

- *Final Report of HUD's Review of Model Building Codes*, published in the *Federal Register* on March 23, 2000. It is available online at [www.hud.gov/offices/fheo/disabilities/modelcodes/modelcodesfinal.pdf](http://www.hud.gov/offices/fheo/disabilities/modelcodes/modelcodesfinal.pdf); and
- *Report on the U.S. Department of Housing and Urban Development's Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code*. Issued August 6, 2004. It is available online at [www.hud.gov/offices/fheo/disabilities/modelcodes/ibcdraft03.pdf](http://www.hud.gov/offices/fheo/disabilities/modelcodes/ibcdraft03.pdf).

Fair Housing Accessibility FIRST, sponsored by HUD, promotes compliance with the Fair Housing Act design and construction requirements by housing professionals. More information can be found at [www.fairhousingfirst.org](http://www.fairhousingfirst.org).

The Access Board is an independent Federal agency devoted to promoting accessibility for people with disabilities. More information about its activities, the UFAS standard, and links to resources for accessible development can be found at [www.access-board.gov/](http://www.access-board.gov/).

The Center for Universal Design is a national research, information, and technical assistance center that evaluates, develops, and promotes universal design in housing, public and commercial facilities, and related products. More information can be found at [www.design.ncsu.edu/cud/index.html](http://www.design.ncsu.edu/cud/index.html)

## About the Series: Fair Housing for HOME Program Participants

The *Fair Housing for HOME Program Participants* series is designed to help PJs and their housing partners understand



and comply with Federal fair housing laws and regulations in the implementation of their HOME Program activities. In general, these laws:

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

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

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

- *Fair Housing for HOME Program Participants: Tenant-Based Rental Assistance* discusses tenant selection criteria and procedures and reasonable accommodations and modifications under the Fair Housing Act and program accessibility under Section 504.

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

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

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

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

## HOME Model Program Guides

*Fair Housing for HOME Program Participants* is a HOME model program guide published by the U.S. Department of Housing and Urban Development's Office of Affordable Housing



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

For more information about the HOME Program, visit [www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm](http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm).







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# Fair Housing Focus for Home Participations



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