

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 115

[Docket No. FR-4748-F-02]

RIN 2529-AA90

**Certification and Funding of State and
Local Fair Housing Enforcement
Agencies**

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

ACTION: Final rule.

SUMMARY: This final rule revises and updates HUD's regulation implementing section 810(f) of the federal Fair Housing Act. This regulation establishes the criteria for certification of state and local fair housing laws that are substantially equivalent to the federal Fair Housing Act, as well as for decertification of state and local fair housing laws that are deemed no longer substantially equivalent. This final rule also revises the funding criteria for agencies participating in the Fair Housing Assistance Program (FHAP).

DATES: *Effective Date:* May 16, 2007.

FOR FURTHER INFORMATION CONTACT: Bryan Greene, Deputy Assistant Secretary for Enforcement and Programs, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5204, Washington, DC 20410-2000; telephone (202) 402-7078 (this is not a toll-free number). Hearing- or speech-impaired persons may contact the FHAP Division by calling (800) 290-1617, or the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On May 18, 2005, HUD published a proposed rule (70 FR 28748) for public comment that would clarify numerous issues related to substantial equivalency certification and the FHAP. Under the FHAP, a state or local agency applies for substantial equivalency certification and the Department determines whether the agency enforces a law that provides substantive rights, procedures, remedies, and judicial review provisions that are substantially equivalent to the federal Fair Housing Act. The FHAP provides support for complaint processing, training, technical assistance, education and outreach, data and information systems, and other activities that will further fair housing within the state or local agency's jurisdiction.

The proposed rule provided a comprehensive revision of 24 CFR part 115 to provide greater clarity and guidance to FHAP agencies. Among the proposed revisions were new definitions, revised and additional performance standards, and timeframes. The proposed rule also added procedures for renewal of certification and procedures for requests after withdrawal. HUD also proposed the addition of § 115.309, titled FHAP and the First Amendment, which provided that no funding made available under the FHAP may be used to investigate or prosecute any activity that may be protected by the First Amendment of the United States Constitution. Finally, HUD added § 115.310, which provided requirements for fair housing testing activities funded under the FHAP. A detailed description of the proposed rule can be found at 70 FR 28748-28751.

In addition to inviting comments on the proposed rule generally, HUD sought comment from the public on three issues in particular. First, HUD requested that FHAP agencies of varying sizes provide insight into what would constitute reasonable complaint numbers. Second, HUD sought comment on the appropriateness of enumerating timeframes by which interim and certified agencies must comply in sending out letters notifying parties of a failure to meet the 100-day (completion of investigation) or the one-year (final administrative disposition) requirements. Third, HUD invited comments from the public on whether 100 cases is still a reasonable number an agency must acceptably process in order to obtain 10 percent of the agency's total FHAP payment amount. See section III of this preamble for a summary of the issues raised by the public commenters and HUD's responses.

II. This Final Rule

This rule follows publication of the May 18, 2005, proposed rule and takes into consideration the public comments received on the proposed rule. HUD received five comments related to the May 18, 2005, proposed rule. After careful review of the public comments, HUD has made four noteworthy changes to the proposed rule.

First, this final rule adds a timeframe for FHAP agencies to send 100-day letters. Performance Standard 1, at § 115.206, requires that an agency unable to complete investigative activities with respect to a complaint within 100 days must send written notification to the parties within 110 days of the filing of a complaint.

Second, this rule revises § 115.210 of the proposed rule to clarify that HUD may suspend all types of funding (not just complaint processing funds) during suspension and withdrawal because of FHAP agency performance deficiencies.

Third, HUD proposed to remove § 115.305, the special enforcement effort (SEE) fund provisions, from the regulations but has retained the provision in this final rule. In addition to retaining the current regulatory provision, this final rule includes examples of meritorious mention, which is one of the criteria for obtaining SEE funds.

Fourth, in this final rule, HUD has further clarified the requirement that a FHAP agency spend at least 20 percent of its total annual budget on fair housing activities. Section 115.307(a)(5) of this final rule clarifies that this requirement applies only to FHAP agencies that enforce antidiscrimination laws other than a fair housing law.

III. Discussion of Public Comments on the May 18, 2005, Proposed Rule

The public comment period on the May 18, 2005, proposed rule ended on July 18, 2005. HUD received five comments. Commenters included one private fair housing organization, two current FHAP agencies, one local community affairs department, and one local housing authority. The summary of comments that follows presents the major issues and questions raised by the public comments on the proposed rule. HUD's response follows each comment.

Comment: One commenter wrote that, although some provisions strengthen FHAP agencies, the majority create unnecessary infringements that exceed HUD's authority and are better left to state agencies.

HUD Response. The commenter did not include any specific examples of provisions that create unnecessary infringements that exceed HUD's authority. Therefore, HUD cannot respond because of the lack of specificity. The authority to make the revisions contained in the proposed rule is set forth at 42 U.S.C. 3610(f) and 42 U.S.C. 3608(a).

Comment: The same commenter recommended that no agency remain certified if it processes fewer than 20 complaints in any given year after its first year of operation.

HUD Response. After careful consideration, HUD has determined that it is inappropriate to identify in a regulation a specific number of housing discrimination complaints that agencies must process. A one-size-fits-all approach is impracticable because, among other considerations, FHAP

agencies serve populations of varying sizes. An agency-by-agency analysis is a more reasonable approach. As provided in the proposed rule, this final rule identifies factors HUD will consider in determining what constitutes a reasonable number of housing discrimination complaints that a given agency should receive and process. Those factors include, but are not limited to, the jurisdiction's population; the length of time the agency has participated in the FHAP; and the number of housing discrimination complaints that the agency has received and processed in the past. If an agency fails to receive and process a reasonable number of housing discrimination complaints during a year of FHAP participation, given education and outreach efforts conducted and receipts of complaints, the final rule gives the Office of Fair Housing and Equal Opportunity (FHEO) regional director the authority to put the agency on a Performance Improvement Plan (PIP). The PIP will set forth the number of housing discrimination complaints that the agency must receive and process during subsequent years of FHAP participation.

Comment: Another commenter wrote that the determination of a reasonable number of complaints be a joint determination by HUD and the FHAP agency.

HUD Response. As noted in response to a similar comment, the determination of what constitutes a reasonable number of housing discrimination cases will be made on an agency-by-agency basis. The final rule identifies factors that HUD will consider in making such a determination for a given agency. This commenter also recommended that the determination be based on the historical number of complaints that the FHAP agency has processed. This is one of the factors HUD has enumerated in this final rule.

Comment: One commenter recommended that HUD establish a 10-day timeframe for sending out 100-day letters.

HUD Response. HUD agrees and has amended Performance Standard 1 in § 115.206 of the proposed regulation to add paragraph (e)(1)(vi), which sets forth a timeframe within which FHAP agencies must issue 100-day letters. HUD's Title VIII Complaint Intake, Investigation, and Conciliation Handbook requires HUD to prepare case status reports for a complaint at the 85th day after the complaint is filed. The completion of a case status report triggers HUD's automated complaint processing system to generate 100-day letters. Supervisors then review the case

status report, followed by the issuance of the 100-day letter. Using HUD's procedure as a guide, Performance Standard 1, in § 115.206(e)(1)(vi) establishes that 100-day letters be issued within 110 days of the filing of the complaint.

Comment: A commenter wrote that granting authority to regional FHEO directors may be an improvement; however, the authority should be accompanied by consistent national guidance about performance assessment requirements and standards to avoid inconsistent outcomes.

HUD Response. The proposed regulation and the final regulation are clear, stating that HUD may utilize the performance deficiency procedures at any time that the agency does not meet one or more of the ten performance standards enumerated in § 115.206. The Department believes that these enumerated standards compose the consistent national guidance sought by the commenter. The final regulation further states that the performance deficiency procedures may be applied to agencies with either interim certification or certification. At this time, HUD will not set forth further guidance regarding deficiency procedures. HUD will, however, monitor the implementation of the performance standards and consider developing additional guidance on this issue as necessary.

Comment: Another commenter recommended that HUD provide an appeal process so that an agency that has been placed on a PIP can appeal the decision of the FHEO regional director if they have a basis to believe that they were wrongly placed on a performance improvement plan (PIP).

HUD Response. After careful consideration, HUD has determined that it will not provide in the regulation an appeal process for an agency placed on a PIP. HUD believes that an agency's interests are sufficiently protected within the performance deficiency process set forth in the final rule, which provides several opportunities for an under-performing agency to avoid involuntary withdrawal from the program. The fact that an agency has been placed on a PIP will not, in and of itself, result in an agency's inability to participate in the FHAP. If an agency fails to improve after being placed on a PIP, HUD may move to suspend the agency. If suspension is proposed, an agency is given an opportunity to respond within 30 days of receipt of the suspension notification. Suspension also does not result in an agency's inability to participate in the FHAP. If an agency fails to improve after a period

of suspension, the Assistant Secretary for Fair Housing and Equal Opportunity may propose withdrawal. If withdrawal is proposed, the agency is given the opportunity to provide information and documentation that establishes that the administration of its law meets all of the substantial equivalency certification criteria set forth in 24 CFR part 115.

Comment: A commenter suggested that HUD add mandated, on-site performance assessments at least every 24 months and a requirement that FHEO seek public input before certifying an agency. The commenter also recommended that HUD be required to investigate complaints from the public about performance.

HUD Response. The language of the final rule regarding on-site assessments, which in this respect is unchanged from the proposed rule, provides HUD with all of the authority necessary to accomplish its oversight responsibilities, while at the same time allowing HUD the flexibility to match available resources to identified priorities.

With regard to the second issue identified by the commenter, the final rule indicates, as did the proposed rule, that HUD will seek public input before certifying an agency. Section 115.102(b) states:

On an annual basis, the Assistant Secretary may publish in the **Federal Register** a notice that identifies all agencies that have received interim certification during the prior year. The notice will invite the public to comment on the state and local laws of the new interim agencies, as well as on the performance of the agencies in enforcing their laws.

With regard to the third issue, while the final rule does not require HUD to investigate public complaints about the performance of an agency, § 115.206 does require that "[A]ll [public] comments will be considered before a final decision on certification is made." Moreover, complaints about a FHAP agency will be considered and examined as part of an agency's performance assessment.

Comment: Another commenter recommended that HUD not recognize prohibited bases in any manner because these are state, county, and city rules that are "completely foreign" to HUD.

HUD Response. The proposed rule did not recognize any prohibited bases that have not already been recognized in the federal Fair Housing Act. Rather, § 115.204 simply sets forth the long-standing HUD policy that the inclusion of additional prohibited bases in a state or local law does not preclude HUD from determining that a given law is substantially equivalent to the Fair Housing Act. While a state or local law

that has additional prohibited bases may be found substantially equivalent, it is important to note that HUD has not, and will not, pay FHAP agencies for cases that are not cognizable under the federal Fair Housing Act.

Comment: A commenter recommended that HUD not change current HUD standards for administrative closures. This commenter also recommended that no more than 12 percent of cases be closed administratively.

HUD Response. Because administrative closure standards for FHAP agencies do not exist under the current regulation, HUD is in the process of developing such standards and will provide further guidance. Section 115.206 of this final rule adds Performance Standard 2, which requires that administrative closures be utilized only in appropriate and limited circumstances. In response to the second part of the comment, HUD believes it is inappropriate to mandate an across-the-board cap on administrative closures, as FHAP agencies often have little control over circumstances that may warrant administrative closures. HUD's objective in developing administrative closure guidance is not to prevent the use of administrative closures in cases in which they are warranted, but rather to prevent their use in cases where a finding on the merits would be more appropriate.

Comment: The same commenter recommended that the final rule require that FHAP agencies follow the procedures and standards for investigation set forth in the Title VIII Handbook (HUD Handbook 8024-1).

HUD Response. The Fair Housing Act, at § 810(f)(3)(A), states that the Secretary of HUD "may certify an agency * * * only if the Secretary determines that * * * the substantive rights protected by such agency * * *; the procedures followed by such agency; the remedies available to such agency; and the availability of judicial review of such agency's action * * * are *substantially* equivalent to those created by and under this title" (emphasis added). The Fair Housing Act does not require an agency's law and procedures to be identical to the Fair Housing Act. Although HUD makes the Title VIII Handbook available to FHAP agencies and recommends that it be utilized in the processing of dual-filed housing discrimination complaints, HUD has stopped short of requiring its usage. The Title VIII Handbook is based on the Fair Housing Act and its implementing regulations. Because substantially equivalent state and local laws may

deviate from the Fair Housing Act to a certain extent, certain aspects of the Title VIII Handbook might prove impracticable for some FHAP agencies.

Comment: A commenter recommended that the complaint be closed and the complainant advised to proceed through the courts if the complainant rejects an offer by the respondent to conciliation that represents full relief.

HUD Response. HUD did not accept this suggestion. The goal of conciliation is to reach a resolution of a complaint that is mutually acceptable to all parties, including the complainant, the respondent, and the FHAP agency. A conciliator may educate parties about settlement and the realities of a case. However, a conciliator must never threaten, or appear to threaten, a party with adverse consequences for failing to conciliate a complaint. In addition, a FHAP agency must never close a complaint and advise a complainant to proceed to court if a complainant rejects a respondent's offer during conciliation, even if the FHAP agency believes the offer represents full relief. Instead, if either party rejects an offer by the other party, the FHAP agency should proceed with its appropriate investigation and disposition of the complaint.

Comment: A commenter stated that, if there is a disagreement on the determination issued by the FHAP agency, HUD should pay the FHAP agency for substantial work done and reactivate the complaint for HUD's investigation.

HUD Response. If HUD disagrees with the determination, the government technical representative (GTR) may deny payment to the agency for the case, or return the case to the agency for additional work. All cases in which HUD has denied payment will be considered as factors that affect the continued interim certification and certification.

Whenever complainants or respondents disagree with the determination, they are bound by the FHAP agency's procedures. HUD has no authority to reactivate a case or reverse a decision once the FHAP agency has rendered a determination.

Comment: A commenter recommended that HUD move immediately to withdraw certification if a statutory change or judicial action "limits the effectiveness of the law" rather than wait to determine if the law is going to be changed and let cases be processed by the FHAP agency during the meantime.

HUD Response. In most cases, HUD will not immediately withdraw certification after learning that a change

to the law impacts substantial equivalence. Rather than proceeding directly to withdrawal, HUD will proceed with the progressive scheme identified in § 115.211 of the proposed rule and this final rule. It is important to note, however, that at each stage of the progressive scheme, HUD may decline to refer some or all complaints to the agency, and elect not to provide payments for complaints to the agency, as provided in § 115.211. Moreover, it is important to note that a change limiting the effectiveness of an agency's law may not necessarily impair its ability to process all types of housing discrimination complaints.

Comment: The same commenter wrote that partnerships with private fair housing organizations, including qualified fair housing organizations, be added to the list of proper partnership funds usage.

HUD Response. HUD believes that the language of the proposed rule sufficiently addressed this concern. Section 115.304(d) states, "[s]ome examples of proper P fund usage include, but are not limited to * * * contracting with qualified organizations to conduct fair housing testing in appropriate cases * * *." The language in this final rule is unchanged from that of the proposed rule.

Comment: A commenter suggested that HUD add a provision that states that agencies under a PIP, suspension or withdrawal status are not eligible for Partnership "P" funding.

HUD Response. After considering this comment, HUD revised § 115.210. The section previously indicated that HUD may suspend only complaint processing funds during a period of suspension and/or withdrawal. Section 115.210 in this final rule is revised to state that HUD may suspend all types of funding under the FHAP during a period of suspension and withdrawal.

Comment: A commenter recommended that HUD reinstate SEE (Special Enforcement Effort) funding.

HUD Response. After considering this comment, HUD has decided to retain SEE funds in this final rule. It is important to recognize, however, that identifying funding in the final regulation does not guarantee that it will be available to FHAP agencies, since funding is subject to the annual congressional appropriations process.

In reincorporating SEE funds at § 115.305, HUD has added examples to clarify the current regulation. This final rule more fully defines what is meant by the meritorious mention criteria (which is one of the criteria for obtaining SEE funds identified in the regulation).

Comment: A commenter suggested that HUD remove the deduction provision or change it to specify that training funds will be deducted if the agency does not participate in HUD-approved training.

HUD Response. HUD agrees with this commenter and has revised § 115.306(b) of the final rule to state, “* * * [i]f the agency does not participate in mandatory HUD-approved or HUD-sponsored training, training funds will be deducted from the agency’s overall training amount.”

Comment: Several commenters noted that funding for other agency components is often beyond a FHAP agency’s control. The commenters suggested that if an agency performs adequately, it should not matter what the percentage of its budget is for fair housing.

HUD Response. It is important to HUD that a substantially equivalent state or local agency demonstrate a commitment to fair housing enforcement by devoting financial resources to its fair housing program and that those resources be comparable to amounts devoted to the enforcement of other antidiscrimination laws. Therefore, HUD will not eliminate the 20 percent requirement. HUD has, however, revised § 115.306(a)(5) to further clarify that this requirement applies only when an agency enforces antidiscrimination laws other than a fair housing law.

Comment: A commenter wrote that HUD should not, and does not, fund local agencies to enforce HUD’s fair housing responsibilities and suggested that the funds would be better used for the operating fund.

HUD Response. Under section 810(f) of the Fair Housing Act, 42 U.S.C. 3610(f) (“the Act”), the Secretary of HUD is required to refer housing discrimination complaints to state and local agencies that administer fair housing laws certified as substantially equivalent to the Act. The Secretary is further authorized by § 817 of the Act, 42 U.S.C. 3616, to reimburse such agencies for services rendered in assisting HUD’s enforcement of the Act.

Comment: A commenter wrote that First Amendment provisions should not be incorporated into this rule because some agencies will have different state constitutional provisions.

HUD Response. The provision at § 115.310 is unchanged in this final rule. The purpose of FHAP is to provide assistance and reimbursement to certified state and local fair housing enforcement agencies. The intent of this funding program is to build a coordinated intergovernmental

enforcement effort to further fair housing, within constitutional limitations. HUD will not accept for filing any housing discrimination complaint in which the alleged discriminatory acts are protected by the First Amendment to the Constitution of the United States. This necessarily means that such complaints will not be dual-filed, and concomitantly, that FHAP agencies cannot and will not be reimbursed by HUD for any work related to the processing, investigation, or enforcement of such complaints.

Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2529–0005. This rule does not revise these information collection requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a valid control number.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). OMB determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the

Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Environmental Impact

This final rule involves a policy document that sets out enforcement procedures and provides for fair housing enforcement assistance. Accordingly, under 24 CFR 50.19(c)(3), this final rule is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321).

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule revises and makes clarifying changes related to substantial equivalency certification and the FHAP. Specifically, this rule is limited to providing clear timeframes, procedures, and concise explanations to assist FHAP agencies in complying with the regulations and successfully administering their agencies. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number is 14.401.

List of Subjects in 24 CFR Part 115

Administrative practice and procedure, Aged, Fair housing, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Mortgages, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, HUD revises 24 CFR part 115 to read as follows:

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

Subpart A—General

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115.100 Definitions.
115.101 Program administration.
115.102 Public notices.

Subpart B—Certification of Substantially Equivalent Agencies

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115.206 Performance assessments; Performance standards.
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115.209 Technical assistance.
115.210 Performance deficiency procedures; Suspension; Withdrawal.
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Subpart C—Fair Housing Assistance Program

- 115.300 Purpose.
115.301 Agency eligibility criteria; Funding availability.
115.302 Capacity building funds.
115.303 Eligible activities for capacity building funds.
115.304 Agencies eligible for contributions funds.
115.305 Special enforcement effort (SEE) funds.
115.306 Training funds.
115.307 Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements.
115.308 Reporting and recordkeeping requirements.
115.309 Subcontracting under the FHAP.
115.310 FHAP and the First Amendment.
115.311 Testing.

Authority: 42 U.S.C. 3601–19; 42 U.S.C. 3535(d).

Subpart A—General

§ 115.100 Definitions.

- (a) The terms “Fair Housing Act,” “HUD,” and “the Department,” as used in this part, are defined in 24 CFR 5.100.
(b) The terms “aggrieved person,” “complainant,” “conciliation,” “conciliation agreement,” “discriminatory housing practice,” “dwelling,” “handicap,” “person,”

“respondent,” “secretary,” and “state,” as used in this part, are defined in Section 802 of the Fair Housing Act (42 U.S.C. 3602).

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

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

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

Certified agency is an agency that has been granted certification by the Assistant Secretary in accordance with the requirements of this part.

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

Cooperative agreement officer (CAO) is the administrator of the funds awarded pursuant to this part and is a regional director of the Office of Fair Housing and Equal Opportunity.

Dual-filed complaint means a housing discrimination complaint that has been filed with both HUD and the agency that has been granted interim certification or certification by the Assistant Secretary.

FHAP means the Fair Housing Assistance Program.

FHEO means HUD's Office of Fair Housing and Equal Opportunity.

FHEO regional director means a regional director of the Office of Fair Housing and Equal Opportunity.

Fair housing law or *Law* refers to both state fair housing laws and local fair housing laws.

Final administrative disposition means an agency's completion of a case following a reasonable cause finding, including, but not limited to, an agency-approved settlement or a final, administrative decision issued by commissioners, hearing officers or administrative law judges. Final administrative disposition does not include dispositions in judicial proceedings resulting from election or appeal.

Government Technical Monitor (GTM) means the HUD staff person who has been designated to provide technical and financial oversight and evaluation of the FHAP grantee's performance.

Government Technical Representative (GTR) means the HUD staff person who is responsible for the technical administration of the FHAP grant, the evaluation of performance under the FHAP grant, the acceptance of technical reports or projects, the approval of payments, and other such specific responsibilities as may be stipulated in the FHAP grant.

Impracticable, as used in this part, is when complaint processing is delayed by circumstances beyond the control of the interim or certified agency. Those situations include, but are not limited to, complaints involving complex issues requiring extensive investigations, complaints involving new and complicated areas of law that need to be analyzed, and where a witness is discovered late in the investigation and needs to be interviewed.

Interim agency is an agency that has been granted interim certification by the Assistant Secretary.

Ordinance, as used in this part, means a law enacted by the legislative body of a municipality.

Statute, as used in this part, means a law enacted by the legislative body of a state.

Testing refers to the use of an individual or individuals (“testers”) who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.

§ 115.101 Program administration.

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

(b) *Delegation of Authority.* The Assistant Secretary retains the right to make final decisions concerning the granting and withdrawal of substantial equivalency interim certification and certification. The Assistant Secretary delegates the authority and responsibility for administering the remainder of this part to the FHEO regional director. This includes assessing the performance of interim and certified agencies as described in § 115.206. This also includes the offering of a Performance Improvement Plan (PIP) as described in § 115.210 and the suspension of interim certification or certification due to performance deficiencies as described in § 115.210.

§ 115.102 Public notices.

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

(1) A list of all interim and certified agencies; and

(2) A list of agencies to which a withdrawal of interim certification or certification has been proposed.

(b) On an annual basis, the Assistant Secretary may publish in the **Federal Register** a notice that identifies all agencies that have received interim certification during the prior year. The

notice will invite the public to comment on the state and local laws of the new interim agencies, as well as on the performance of the agencies in enforcing their laws. All comments will be considered before a final decision on certification is made.

Subpart B—Certification of Substantially Equivalent Agencies

§ 115.200 Purpose.

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

- (a) The basis for agency interim certification and certification;
- (b) Procedures by which a determination is made to grant interim certification or certification;
- (c) How the Department will evaluate the performance of an interim and certified agency;
- (d) Procedures that the Department will utilize when an interim or certified agency performs deficiently;
- (e) Procedures that the Department will utilize when there are changes limiting the effectiveness of an interim or certified agency's law;
- (f) Procedures for renewal of certification; and
- (g) Procedures when an agency requests interim certification or certification after a withdrawal.

§ 115.201 The two phases of substantial equivalency certification.

Substantial equivalency certification is granted if the Department determines that a state or local agency enforces a law that is substantially equivalent to the Fair Housing Act with regard to substantive rights, procedures, remedies, and the availability of judicial review. The Department has developed a two-phase process of substantial equivalency certification.

(a) *Adequacy of Law.* In the first phase, the Assistant Secretary will determine whether, on its face, the fair housing law that the agency administers provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the federal Fair Housing Act. An affirmative conclusion may result in the Department offering the agency interim certification. An agency must obtain interim certification prior to obtaining certification.

(b) *Adequacy of Performance.* In the second phase, the Assistant Secretary will determine whether, in operation, the fair housing law that the agency administers provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the federal Fair

Housing Act. An affirmative conclusion will result in the Department offering the agency certification.

§ 115.202 Request for interim certification.

(a) A request for interim certification under this subpart shall be filed with the Assistant Secretary by the state or local official having principal responsibility for the administration of the state or local fair housing law. The request shall be supported by the text of the jurisdiction's fair housing law, the law creating and empowering the agency, all laws referenced in the jurisdiction's fair housing law, any regulations and directives issued under the law, and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the jurisdiction's fair housing law. A request shall also include organizational information of the agency responsible for administering and enforcing the law.

(b) The request and supporting materials shall be filed with the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-2000. The Assistant Secretary shall forward a copy of the request and supporting materials to the appropriate FHEO regional director. A copy of the request and supporting materials will be kept available for public examination and copying at:

- (1) The office of the Assistant Secretary; and
- (2) The office of the state or local agency charged with administration and enforcement of the state or local fair housing law.

(c) Upon receipt of a request, HUD will analyze the agency's fair housing law to determine whether it meets the criteria identified in § 115.204.

(d) HUD shall review a request for interim certification from a local agency located in a state with an interim certified or certified substantially equivalent state agency. However, in the request for interim certification, the local agency must certify that the substantially equivalent state law does not prohibit the local agency from administering and enforcing its own fair housing law within the locality.

§ 115.203 Interim certification procedures.

(a) Upon receipt of a request for interim certification filed under § 115.202, the Assistant Secretary may request further information necessary for a determination to be made under this section. The Assistant Secretary may consider the relative priority given to fair housing administration, as compared to the agency's other duties

and responsibilities, as well as the compatibility or potential conflict of fair housing objectives with these other duties and responsibilities.

(b) If the Assistant Secretary determines, after application of the criteria set forth in § 115.204, that the state or local law, on its face, provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the Assistant Secretary may offer to enter into an Agreement for the Interim Referral of Complaints and Other Utilization of Services (interim agreement). The interim agreement will outline the procedures and authorities upon which the interim certification is based.

(c) Such interim agreement, after it is signed by all appropriate signatories, will result in the agency receiving interim certification. Appropriate signatories include the Assistant Secretary, the FHEO regional director, and the state or local official having principal responsibility for the administration of the state or local fair housing law.

(d) Interim agreements shall be for a term of no more than three years.

(e) All regulations, rules, directives, and/or opinions of the State Attorney General or the jurisdiction's chief legal officer that are necessary for the law to be substantially equivalent on its face must be enacted and effective in order for the Assistant Secretary to offer the agency an interim agreement.

(f) Interim certification required prior to certification. An agency is required to obtain interim certification prior to obtaining certification.

§ 115.204 Criteria for adequacy of law.

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

- (1) Provide for an administrative enforcement body to receive and process complaints and provide that:
 - (i) Complaints must be in writing;
 - (ii) Upon the filing of a complaint, the agency shall serve notice upon the complainant acknowledging the filing and advising the complainant of the time limits and choice of forums provided under the law;
 - (iii) Upon the filing of a complaint, the agency shall promptly serve notice on the respondent or person charged with the commission of a discriminatory housing practice advising of his or her

procedural rights and obligations under the statute or ordinance, together with a copy of the complaint;

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

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

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

(ii) The agency investigates the allegations of the complaint and complete the investigation within the timeframe established by section 810(a)(1)(B)(iv) of the Act or comply with the notification requirements of section 810(a)(1)(C) of the Act;

(iii) The agency make final administrative disposition of a complaint within one year of the date of receipt of a complaint, unless it is impracticable to do so. If the agency is unable to do so, it shall notify the parties, in writing, of the reasons for not doing so;

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

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

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

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

(ii) Anti-testing provisions;

(iii) Provisions that could subject an aggrieved person to costs, criminal penalties, or fees in connection with the filing of complaints.

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

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

(b) In addition to the factors described in paragraph (a) of this section, the provisions of the state or local law must afford administrative and judicial

protection and enforcement of the rights embodied in the law.

(1) The agency must have the authority to:

(i) Grant or seek prompt judicial action for appropriate temporary or preliminary relief pending final disposition of a complaint, if such action is necessary to carry out the purposes of the law;

(ii) Issue and seek enforceable subpoenas;

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

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

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

(2) If an agency's law offers an administrative hearing, the agency must also provide parties an election option substantially equivalent to the election provisions of section 812 of the Act.

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

(4) Judicial review of a final agency order must be in a court with authority to:

(i) Grant to the petitioner, or to any other party, such temporary relief, restraining order, or other order as the court determines is just and proper;

(ii) Affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceeding; and

(iii) Enforce the order to the extent that the order is affirmed or modified.

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

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

(e) A determination of the adequacy of a state or local fair housing law "on its face" is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law. Regulations, directives, rules

of procedure, judicial decisions, or interpretations of the fair housing law by competent authorities will be considered in making this determination.

(f) A law will be found inadequate "on its face" if it permits any of the agency's decision-making authority to be contracted out or delegated to a non-governmental authority. For the purposes of this paragraph, "decision-making authority" includes but is not limited to:

(1) Acceptance of a complaint;

(2) Approval of a conciliation agreement;

(3) Dismissal of a complaint;

(4) Any action specified in § 115.204(a)(2)(iii) or (b)(1); and

(5) Any decision-making regarding whether a particular matter will or will not be pursued.

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

(1) Award the plaintiff actual and punitive damages;

(2) Grant as relief, as it deems appropriate, any temporary or permanent injunction, temporary restraining order or other order; and

(3) Allow reasonable attorney's fees and costs.

(h) If a state or local law is different than the Act in a way that does not diminish coverage of the Act, including, but not limited to, the protection of additional prohibited bases, then the state or local law may still be found substantially equivalent.

§ 115.205 Certification procedures.

(a) *Certification.* (1) If the Assistant Secretary determines, after application of criteria set forth in §§ 115.204, 115.206, and this section, that the state or local law, both "on its face" and "in operation," provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the Assistant Secretary may enter into a Memorandum of Understanding (MOU) with the agency.

(2) The MOU is a written agreement providing for the referral of complaints to the agency and for communication procedures between the agency and HUD that are adequate to permit the Assistant Secretary to monitor the agency's continuing substantial equivalency certification.

(3) The MOU, after it is signed by all appropriate signatories, may authorize an agency to be a certified agency for a period of not more than five years. Appropriate signatories include the Assistant Secretary, the FHEO regional director, and the authorized employee(s) of the agency.

(b) In order to receive certification, during the 60 days prior to the expiration of the agency's interim agreement, the agency must certify to the Assistant Secretary that the state or local fair housing law, "on its face," continues to be substantially equivalent to the Act (i.e., there have been no amendments to the state or local fair housing law, adoption of rules or procedures concerning the fair housing law, or judicial or other authoritative interpretations of the fair housing law that limit the effectiveness of the agency's fair housing law).

§ 115.206 Performance assessments; Performance standards.

(a) *Frequency of on-site performance assessment during interim certification.* The Assistant Secretary, through the appropriate FHEO regional office, may conduct an on-site performance assessment not later than six months after the execution of the interim agreement. An on-site performance assessment may also be conducted during the six months immediately prior to the expiration of the interim agreement. HUD has the discretion to conduct additional performance assessments during the period of interim certification, as it deems necessary.

(b) *Frequency of on-site performance assessment during certification.* During certification, the Assistant Secretary through the FHEO regional office, may conduct on-site performance assessments every 24 months. HUD has the discretion to conduct additional performance assessments during the period of certification, as it deems necessary.

(c) In conducting the performance assessment, the FHEO regional office shall determine whether the agency engages in timely, comprehensive, and thorough fair housing complaint investigation, conciliation, and enforcement activities. In the performance assessment report, the FHEO regional office may recommend to the Assistant Secretary whether the agency should continue to be interim certified or certified. In conducting the performance assessment, the FHEO regional office shall also determine whether the agency is in compliance with the requirements for participation in the FHAP enumerated in §§ 115.307,

115.308, 115.309, 115.310, and 115.311 of this part. In the performance assessment report, the FHEO regional office shall identify whether the agency meets the requirements of §§ 115.307, 115.308, 115.309, 115.310, and 115.311 of this part, and, therefore, should continue receiving funding under the FHAP.

(d) At a minimum, the performance assessment will consider the following to determine the effectiveness of an agency's fair housing complaint processing, consistent with such guidance as may be issued by HUD:

(1) The agency's case processing procedures;

(2) The thoroughness of the agency's case processing;

(3) A review of cause and no cause determinations for quality of investigations and consistency with appropriate standards;

(4) A review of conciliation agreements and other settlements;

(5) A review of the agency's administrative closures; and

(6) A review of the agency's enforcement procedures, including administrative hearings and judicial proceedings.

(e) *Performance standards.* HUD shall utilize the following performance standards while conducting performance assessments. If an agency does not meet one or more performance standard(s), HUD shall utilize the performance deficiency procedures enumerated in § 115.210.

(1) *Performance Standard 1.* Commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations, and make final administrative dispositions in a timely manner. To meet this standard, the performance assessment will consider the timeliness of the agency's actions with respect to its complaint processing, including, but not limited to:

(i) Whether the agency began its processing of fair housing complaints within 30 days of receipt;

(ii) Whether the agency completes the investigative activities with respect to a complaint within 100 days from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay;

(iii) Whether the agency makes a determination of reasonable cause or no reasonable cause with respect to a complaint within 100 days from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay;

(iv) Whether the agency makes a final administrative disposition of a complaint within one year from the date

of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay; and

(v) Whether the agency completed the investigation of the complaint and prepared a complete, final investigative report.

(vi) When an agency is unable to complete investigative activities with respect to a complaint within 100 days, the agency must send written notification to the parties, indicating the reason(s) for the delay, within 110 days of the filing of the complaint.

(2) *Performance Standard 2.* Administrative closures are utilized only in limited and appropriate circumstances. Administrative closures should be distinguished from a closure on the merits and may not be used instead of making a recommendation or determination of reasonable or no reasonable cause. HUD will provide further guidance to interim and certified agencies on the appropriate circumstances for administrative closures.

(3) *Performance Standard 3.* During the period beginning with the filing of a complaint and ending with filing of a charge or dismissal, the agency will, to the extent feasible, attempt to conciliate the complaint. After a charge has been issued, the agency will, to the extent feasible, continue to attempt settlement until a hearing or a judicial proceeding has begun.

(4) *Performance Standard 4.* The agency conducts compliance reviews of settlements, conciliation agreements, and orders resolving discriminatory housing practices. The performance assessment shall include, but not be limited to:

(i) An assessment of the agency's procedures for conducting compliance reviews; and

(ii) Terms and conditions of agreements and orders issued.

(5) *Performance Standard 5.* The agency must consistently and affirmatively seek and obtain the type of relief designed to prevent recurrences of discriminatory practices. The performance assessment shall include, but not be limited to:

(i) An assessment of the agency's use of its authority to seek actual damages, as appropriate;

(ii) An assessment of the agency's use of its authority to seek and assess civil penalties or punitive damages, as appropriate;

(iii) An assessment of the types of relief sought by the agency with consideration for the inclusion of affirmative provisions designed to protect the public interest;

(iv) A review of all types of relief obtained;

(v) A review of the adequacy of the relief sought and obtained in light of the issues raised by the complaint;

(vi) The number of complaints closed with relief and the number closed without relief;

(vii) The number of complaints that proceed to administrative hearing and the result; and

(viii) The number of complaints that proceed to judicial proceedings and the result.

(6) *Performance Standard 6.* The agency must consistently and affirmatively seek to eliminate all prohibited practices under its fair housing law. An assessment under this standard will include, but not be limited to, an identification of the education and outreach efforts of the agency.

(7) *Performance Standard 7.* The agency must demonstrate that it receives and processes a reasonable number of complaints cognizable under both the federal Fair Housing Act and the agency's fair housing statute or ordinance. The reasonable number will be determined by HUD and based on all relevant circumstances including, but not limited to, the population of the jurisdiction that the agency serves, the length of time that the agency has participated in the FHAP, and the number of complaints that the agency has received and processed in the past. If an agency fails to receive and process a reasonable number of complaints during a year of FHAP participation, given education and outreach efforts conducted and receipts of complaints, then the FHEO regional director may offer the agency a Performance Improvement Plan (PIP), as described in § 115.210(a)(2). The PIP will set forth the number of complaints the agency must process during subsequent years of FHAP participation. After issuing the PIP, the FHEO regional office will provide the agency with technical assistance on ways to increase awareness of fair housing rights and responsibilities in the jurisdiction.

(8) *Performance Standard 8.* The agency must report to HUD on the final status of all dual-filed complaints where a determination of reasonable cause was made. The report must identify, at a minimum, how complaints were resolved (e.g., settlement, judicial proceedings, or administrative hearing), when they were resolved, the forum in which they were resolved, and types and amounts of relief obtained.

(9) *Performance Standard 9.* The agency must conform its performance to the provisions of any written agreements executed by the agency and

the Department related to substantial equivalency certification, including, but not limited to, the interim agreement or MOU.

§ 115.207 Consequences of interim certification and certification.

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

(b) If HUD determines that a complaint has not been processed in a timely manner in accordance with the performance standards set forth in § 115.206, HUD may reactivate the complaint, conduct its own investigation and conciliation efforts, and make a determination consistent with 24 CFR part 103.

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

§ 115.208 Procedures for renewal of certification.

(a) If the Assistant Secretary affirmatively concludes that the agency's law and performance have complied with the requirements of this part in each of the five years of certification, the Assistant Secretary may renew the certification of the agency.

(b) In determining whether to renew the certification of an agency, the Assistant Secretary's review may include, but is not limited to:

(1) Performance assessments of the agency conducted by the Department during the five years of certification;

(2) The agency's own certification that the state or local fair housing law continues to be substantially equivalent both "on its face" and "in operation;" (i.e., there have been no amendments to the state or local fair housing law, adoption of rules or procedures concerning the fair housing law, or judicial or other authoritative interpretations of the fair housing law that limit the effectiveness of the agency's fair housing law); and

(3) Any and all public comments regarding the relevant state and local laws and the performance of the agency in enforcing the law.

(c) If the Assistant Secretary decides to renew an agency's certification, the Assistant Secretary will offer the agency either a new MOU or an Addendum to the Memorandum of Understanding (addendum). The new MOU or addendum will extend and update the MOU between HUD and the agency.

(d) The new MOU or addendum, when signed by all appropriate signatories, will result in the agency's certification being renewed for five years from the date on which the previous MOU was to expire. Appropriate signatories include the Assistant Secretary, the FHEO regional director, and the authorized employee(s) of the agency.

(e) The provisions of this section may be applied to an agency that has an expired MOU or an expired addendum.

§ 115.209 Technical assistance.

(a) The Assistant Secretary, through the FHEO regional office, may provide technical assistance to the interim and certified agencies at any time. The agency may request such technical assistance or the FHEO regional office may determine the necessity for technical assistance and require the agency's cooperation and participation.

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

§ 115.210 Performance deficiency procedures; Suspension; Withdrawal.

(a) HUD may utilize the following performance deficiency procedures if it determines at any time that the agency does not meet one or more of the performance standards enumerated in § 115.206. The performance deficiency procedures may be applied to agencies with either interim certification or certification. If an agency fails to meet performance standard 7, HUD may bypass the technical assistance

performance deficiency procedure and proceed to the PIP.

(1) *Technical assistance.* After discovering the deficiency, the FHEO regional office should immediately inform the agency and provide the agency with technical assistance.

(2) *Performance improvement plan.* If, following technical assistance, the agency does not bring its performance into compliance with § 115.206 within a time period identified by the FHEO regional director, the FHEO regional director may offer the agency a PIP.

(i) The PIP will outline the agency's performance deficiencies, identify the necessary corrective actions, and include a timetable for completion.

(ii) If the agency receives a PIP, funding under the FHAP may be suspended for the duration of the PIP.

(iii) Once the agency has implemented the corrective actions to eliminate the deficiencies, and such corrective actions are accepted by the FHEO regional director, funding may be restored.

(iv) The FHEO regional office may provide the agency with technical assistance during the period of the PIP, if appropriate.

(b) *Suspension.* If the agency does not agree to implement the PIP or does not implement the corrective actions identified in the PIP within the time allotted, then the FHEO regional director may suspend the agency's interim certification or certification.

(1) The FHEO regional director shall notify the agency in writing of the specific reasons for the suspension and provide the agency with an opportunity to respond within 30 days.

(2) Suspension shall not exceed 180 days.

(3) During the period of suspension, HUD will not refer complaints to the agency.

(4) If an agency is suspended, the FHEO regional office may elect not to provide funding under the FHAP to the agency during the period of suspension, unless and until the Assistant Secretary determines that the agency is fully in compliance with § 115.206.

(5) HUD may provide the agency with technical assistance during the period of suspension, if appropriate.

(6) No more than 60 days prior to the end of suspension, the FHEO regional office shall conduct a performance assessment of the agency.

(c) *Withdrawal.* If, following the performance assessment conducted at the end of suspension, the Assistant Secretary determines that the agency has not corrected the deficiencies, the Assistant Secretary may propose to

withdraw the interim certification or certification of the agency.

(1) The Assistant Secretary shall proceed with withdrawal, unless the agency provides information or documentation that establishes that the agency's administration of its law meets all of the substantial equivalency certification criteria set forth in 24 CFR part 115.

(2) The Assistant Secretary shall inform the agency in writing of the reasons for the withdrawal.

(3) During any period after which the Assistant Secretary proposes withdrawal, until such time as the agency establishes that administration of its law meets all of the substantial equivalency certification criteria set forth in 24 CFR part 115, the agency shall be ineligible for funding under the FHAP.

§ 115.211 Changes limiting effectiveness of agency's law; Corrective actions; Suspension; Withdrawal; Consequences of repeal; Changes not limiting effectiveness.

(a) *Changes limiting effectiveness of agency's law.* (1) If a state or local fair housing law that HUD has previously deemed substantially equivalent to the Act is amended; or rules or procedures concerning the fair housing law are adopted; or judicial or other authoritative interpretations of the fair housing law are issued, the interim-certified or certified agency must inform the Assistant Secretary of such amendment, adoption, or interpretation within 60 days of its discovery.

(2) The requirements of this section shall apply equally to the amendment, adoption, or interpretation of any related law that bears on any aspect of the effectiveness of the agency's fair housing law.

(3) The Assistant Secretary may conduct a review to determine if the amendment, adoption, or interpretation limits the effectiveness of the interim agency's fair housing law.

(b) *Corrective actions.* (1) If the review indicates that the agency's law no longer meets the criteria identified in § 115.204, the Assistant Secretary will so notify the agency in writing. Following notification, HUD may take appropriate actions, including, but not limited to, any or all of the following:

(i) Declining to refer some or all complaints to the agency unless and until the fair housing law meets the criteria identified in § 115.204;

(ii) Electing not to provide payment for complaints processed by the agency unless and until the fair housing law meets the criteria identified in § 115.204;

(iii) Providing technical assistance and/or guidance to the agency to assist

the agency in curing deficiencies in its fair housing law.

(2) *Suspension based on changes in the law.* If the corrective actions identified in paragraph (b)(1)(i) through (iii) of this section fail to bring the state or local fair housing law back into compliance with the criteria identified in § 115.204 within the timeframe identified in HUD's notification to the agency, the Assistant Secretary may suspend the agency's interim certification or certification based on changes in the law or a related law.

(i) The Assistant Secretary will notify the agency in writing of the specific reasons for the suspension and provide the agency with an opportunity to respond within 30 days.

(ii) During the period of suspension, the Assistant Secretary has the discretion to not refer some or all complaints to the agency unless and until the agency's law meets the criteria identified in § 115.204.

(iii) During suspension, HUD may elect not to provide payment for complaints processed unless and until the agency's law meets the criteria identified in § 115.204.

(iv) During the period of suspension, if the fair housing law is brought back into compliance with the criteria identified in § 115.204, and the Assistant Secretary determines that the fair housing law remains substantially equivalent to the Act, the Assistant Secretary will rescind the suspension and reinstate the agency's interim certification or certification.

(3) *Withdrawal based on changes in the law.* If the Assistant Secretary determines that the agency has not brought its law back into compliance with the criteria identified in § 115.204 during the period of suspension, the Assistant Secretary may propose to withdraw the agency's interim certification or certification.

(i) The Assistant Secretary will proceed with withdrawal unless the agency provides information or documentation that establishes that the agency's current law meets the criteria of substantial equivalency certification identified in § 115.204.

(ii) The Assistant Secretary will inform the agency in writing of the reasons for the withdrawal.

(c) (1) If, following notification from HUD that its fair housing law no longer meets the criteria identified in § 115.204, an interim-certified or certified agency unequivocally expresses to HUD that its fair housing law will not be brought back into compliance, the Assistant Secretary may forgo suspension and proceed directly

to withdrawal of the agency's interim certification or certification.

(2) During any period after which the Assistant Secretary proposes withdrawal, until such time as the agency establishes that administration of its law meets all of the substantial equivalency certification criteria set forth in 24 CFR part 115, the agency shall be ineligible for funding under the FHAP.

(d) *Consequences of repeal.* If a state or local fair housing law that HUD has previously deemed substantially equivalent to the Act is repealed, in whole or in part, or a related law that bears on any aspect of the effectiveness of the agency's fair housing law is repealed, in whole or in part, the Assistant Secretary may immediately withdraw the agency's interim certification or certification.

(e) *Changes not limiting effectiveness.* Nothing in this section is meant to limit the Assistant Secretary's authority to determine that a change to a fair housing law does not jeopardize the substantial equivalency interim certification or certification of an agency.

(1) Under such circumstances, the Assistant Secretary may proceed in maintaining the existing relationship with the agency, as set forth in the interim agreement or MOU.

(2) Alternatively, the Assistant Secretary may decide not to refer certain types of complaints to the agency. The Assistant Secretary may elect not to provide payment for these complaints and may require the agency to refer such complaints to the Department for investigation, conciliation, and enforcement activities.

(3) When the Assistant Secretary determines that a change to a fair housing law does not jeopardize an agency's substantial equivalency certification, the Assistant Secretary need not proceed to suspension or withdrawal if the change is not reversed.

§ 115.212 Request after withdrawal.

(a) An agency that has had its interim certification or certification withdrawn, either voluntarily or by the Department, may request substantial equivalency interim certification or certification.

(b) The request shall be filed in accordance with § 115.202.

(c) The Assistant Secretary shall determine whether the state or local law, on its face, provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the federal Fair Housing

Act. To meet this standard, the state or local law must meet the criteria enumerated in § 115.204.

(d) Additionally, if the agency had documented performance deficiencies that contributed to the past withdrawal, then the Department shall consider the agency's performance and any steps the agency has taken to correct performance deficiencies and to prevent them from recurring in determining whether to grant interim certification or certification. The review of the agency's performance shall include HUD conducting a performance assessment in accordance with § 115.206.

Subpart C—Fair Housing Assistance Program

§ 115.300 Purpose.

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

The financial assistance is designed to provide support for:

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

§ 115.301 Agency eligibility criteria; Funding availability.

An agency with certification or interim certification under subpart B of this part, and which has entered into a MOU or interim agreement, is eligible to participate in the FHAP. All FHAP funding is subject to congressional appropriation.

§ 115.302 Capacity building funds.

(a) Capacity building (CB) funds are funds that HUD may provide to an agency with interim certification.

(b) CB funds will be provided in a fixed annual amount to be utilized for the eligible activities established pursuant to § 115.303. When the fixed annual amount will not adequately compensate an agency in its first year of

participation in the FHAP due to the large number of fair housing complaints that the agency reasonably anticipates processing, HUD may provide the agency with additional funds.

(c) HUD may provide CB funds during an agency's first three years of participation in the FHAP. However, in the second and third year of the agency's participation in the FHAP, HUD has the option to permit the agency to receive contribution funds under § 115.304, instead of CB funds.

(d) In order to receive CB funding, agencies must submit a statement of work prior to the signing of the cooperative agreement. The statement of work must identify:

(1) The objectives and activities to be carried out with the CB funds received;

(2) A plan for training all of the agency's employees involved in the administration of the agency's fair housing law;

(3) A statement of the agency's intention to participate in HUD-sponsored training in accordance with the training requirements set out in the cooperative agreement;

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

(5) A description of any other fair housing activities that the agency will undertake with its CB funds. All such activities must address matters affecting fair housing enforcement that are cognizable under the Fair Housing Act. Any activities that do not address the implementation of the agency's fair housing law, and that are therefore not cognizable under the Fair Housing Act, will be disapproved.

§ 115.303 Eligible activities for capacity building funds.

The primary purposes of capacity-building funding are to provide for complaint activities and to support activities that produce increased awareness of fair housing rights and remedies. All such activities must support the agency's administration and enforcement of its fair housing law and address matters affecting fair housing that are cognizable under the Fair Housing Act.

§ 115.304 Agencies eligible for contributions funds.

(a) An agency that has received CB funds for one to three consecutive years may be eligible for contributions funding. Contributions funding consists of five categories:

- (1) Complaint processing (CP) funds;

(2) Special enforcement effort (SEE) funds (see § 115.305);

(3) Training funds (see § 115.306);

(4) Administrative cost (AC) funds; and

(5) Partnership (P) funds.

(b) *CP funds.* (1) Agencies receiving CP funds will receive such support based solely on the number of complaints processed by the agency and accepted for payment by the FHEO regional director during a consecutive, specifically identified, 12-month period. The 12-month period will be identified in the cooperative agreement between HUD and the agency. The FHEO regional office shall determine whether or not cases are acceptably processed based on requirements enumerated in the cooperative agreement and its attachments/appendices, performance standards set forth in 24 CFR 115.206, and provisions of the interim agreement or MOU.

(2) The amount of funding to agencies that are new to contributions funding will be based on the number of complaints acceptably processed by the agency during the specifically identified 12-month period preceding the signing of the cooperative agreement.

(c) *AC funds.* (1) Agencies that acceptably process 100 or more cases will receive no less than 10 percent of the agency's total FHAP payment amount for the preceding year, in addition to CP funds, contingent on fiscal year appropriations. Agencies that acceptably process fewer than 100 cases will receive a flat rate, contingent on fiscal year appropriations.

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

(d) *P funds.* The purpose of P funds is for an agency participating in the FHAP to utilize the services of individuals and/or public, private, for-profit, or not-for-profit organizations that have expertise needed to effectively carry out the provisions of the agency's fair housing law. P funds are fixed amounts and shall be allocated based on the FHAP appropriation. Agencies must consult with the CAO and GTR in identifying appropriate usage of P funds for the geographical area that the agency services. Some examples of proper P fund usage include, but are not limited to:

(1) Contracting with qualified organizations to conduct fair housing testing in appropriate cases;

(2) Hiring experienced, temporary staff to assist in the investigation of complex or aged cases;

(3) Partnering with grassroots, faith-based or other community-based organizations to conduct education and outreach to people of different backgrounds on how to live together peacefully in the same housing complex, neighborhood, or community;

(4) Contracting with individuals outside the agency who have special expertise needed for the investigation of fair housing cases (e.g., architects for design and construction cases or qualified individuals from colleges and universities for the development of data and statistical analyses).

§ 115.305 Special enforcement effort (SEE) funds.

(a) SEE funds are funds that HUD may provide to an agency to enhance enforcement activities of the agency's fair housing law. SEE funds will be a maximum of 20 percent of the agency's total FHAP cooperative agreement for the previous contract year, based on approval of eligible activity or activities, and contingent upon the appropriation of funds. All agencies receiving contributions funds are eligible to receive SEE funds if they meet three of the six criteria set out in paragraphs (a)(1) through (a)(6) of this section:

(1) The agency enforced a subpoena or made use of its prompt judicial action authority within the past year;

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

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

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

(5) The agency's administration of its fair housing law received meritorious mention for its fair housing complaint processing or other fair housing activities that were innovative. The meritorious mention criterion may be met by an agency's successful fair housing work being identified and/or published by a reputable source. Examples of meritorious mention include, but are not limited to:

(i) An article in a minority newspaper or a newspaper of general circulation that identifies the agency's role in the successful resolution of a housing discrimination complaint;

(ii) A letter from a sponsoring organization of a fair housing conference or symposium that identifies the agency's successful participation and presentation at the conference or symposium;

(iii) A letter of praise, proclamation, or other formal documentation from the mayor, county executive, or governor recognizing the fair housing achievement of the agency.

(6) The agency has completed the investigation of at least 10 fair housing complaints during the previous funding year.

(b) Regardless of whether an agency meets the eligibility criteria set forth in paragraph (a) of this section, an agency is ineligible for SEE funds if:

(1) Twenty percent or more of an agency's fair housing complaints result in administrative closures; or

(2) The agency is currently on a PIP, or its interim certification or certification has been suspended during the federal fiscal year in which SEE funds are sought.

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

§ 115.306 Training funds.

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

(b) Each agency must send staff to mandatory FHAP training sponsored by HUD, including, but not necessarily limited to, the National Fair Housing Training Academy and the National Fair Housing Policy Conference. If the agency does not participate in mandatory HUD-approved and HUD-sponsored training, training funds will be deducted from the agency's overall

training amount. All staff of the agency responsible for the administration and enforcement of the fair housing law must participate in HUD-approved or HUD-sponsored training each year.

§ 115.307 Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements.

(a) Agencies that participate in the FHAP must meet the requirements enumerated in this section. The FHEO regional office shall review the agency's compliance with the requirements of this section when it conducts on-site performance assessments in accordance with § 115.206. The requirements for participation in the FHAP are as follows:

(1) The agency must conform to all reporting and record maintenance requirements set forth in § 115.308, as well as any additional reporting and record maintenance requirements identified by the Assistant Secretary.

(2) The agency must agree to on-site technical assistance and guidance and implementation of corrective actions set out by the Department in response to deficiencies found during the technical assistance or performance assessment evaluations of the agency's operations.

(3) The agency must use the Department's official complaint data information system and must input all relevant data and information into the system in a timely manner.

(4) The agency must agree to implement and adhere to policies and procedures (as the agency's laws allow) provided to the agency by the Assistant Secretary, including, but not limited to, guidance on investigative techniques, case file preparation and organization, and implementation of data elements for complaint tracking.

(5) If an agency that participates in the FHAP enforces antidiscrimination laws other than a fair housing law (e.g., administration of a fair employment law), the agency must annually provide a certification to HUD stating that it spends at least 20 percent of its total annual budget on fair housing activities. The term "total annual budget," as used in this subsection, means the entire budget assigned by the jurisdiction to the agency for enforcing and administering antidiscrimination laws, but does not include FHAP funds.

(6) The agency may not co-mingle FHAP funds with other funds. FHAP funds must be segregated from the agency's and the state or local government's other funds and must be used for the purpose that HUD provided the funds.

(7) An agency may not unilaterally reduce the level of financial resources

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

(8) The agency must comply with the provisions, certifications, and assurances required in any and all written agreements executed by the agency and the Department related to participation in the FHAP, including, but not limited to, the cooperative agreement.

(9) The agency must draw down its funds in a timely manner.

(10) The agency must be audited and receive copies of the audit reports in accordance with applicable rules and regulations of the state and local government in which it is located.

(11) The agency must participate in all required training, as described in § 115.306(b).

(12) If the agency subcontracts any activity for which the subcontractor will receive FHAP funds, the agency must conform to the subcontracting requirements of § 115.309.

(13) If the agency receives a complaint that may implicate the First Amendment of the United States Constitution, then the agency must conform to the requirements of § 115.310.

(14) If the agency utilizes FHAP funds to conduct fair housing testing, then the agency must conform to the requirements of § 115.311.

(b) *Corrective and remedial action for failing to comply with requirements.* The agency's refusal to provide information, assist in implementation, or carry out the requirements of this section may result in the denial or interruption of its receipt of FHAP funds. Prior to denying or interrupting an agency's receipt of FHAP funds, HUD will put the agency on notice of its intent to deny or interrupt. HUD will identify its rationale for the denial or interruption and provide the agency with an opportunity to respond within a reasonable period of time. If, within the time period requested, the agency does not provide information or documentation indicating that the requirement(s) enumerated in this section is/are met, HUD may proceed with the denial or interruption of FHAP funds. If, at any time following the denial or interruption, HUD learns that the agency meets the requirements enumerated in this section, HUD may opt to reinstate the agency's receipt of FHAP funds.

§ 115.308 Reporting and recordkeeping requirements.

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

(1) Its financial administration of FHAP funds; and

(2) Its performance under the FHAP.

(b) The agency will provide to the FHEO regional director reports maintained pursuant to paragraph (a) of this section. The agency will provide reports to the FHEO regional director in accordance with the frequency and content requirements identified in the cooperative agreement. In addition, the agency will provide reports on the final status of complaints following reasonable cause findings, in accordance with Performance Standard 8 identified in § 115.206.

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

(d) The Secretary, Inspector General of HUD, and the Comptroller General of the United States or any of their duly authorized representatives shall have access to all pertinent books, accounts, reports, files, and other payments for surveys, audits, examinations, excerpts, and transcripts as they relate to the agency's participation in FHAP.

(e) All files will be kept in such fashion as to permit audits under applicable Office of Management and Budget circulars, procurement regulations and guidelines, and the Single Audit requirements for state and local agencies.

§ 115.309 Subcontracting under the FHAP.

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

(a) Using services, facilities, and electronic information technologies that are accessible in accordance with the Americans with Disability Act (ADA) (42 U.S.C. 12101), Section 504 of the 1973 Rehabilitation Act (29 U.S.C. 701), and Section 508(a)(1) of the Rehabilitation Act amendments of 1998;

(b) Complying with the standards of Section 3 of the Housing and Urban Development Act of 1968 (42 U.S.C. 1441);

(c) Affirmatively furthering fair housing in the provision of housing and housing-related services; and

(d) Not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal debarment or agency.

§ 115.310 FHAP and the First Amendment.

None of the funding made available under the FHAP may be used to investigate or prosecute any activity engaged in by one or more persons, including the filing or maintaining of a non-frivolous legal action, that may be protected by the First Amendment of the United States Constitution. HUD guidance is available that sets forth the procedures HUD will follow when it is asked to accept and dual-file a case that

may implicate the First Amendment of the United States Constitution.

§ 115.311 Testing.

The following requirements apply to testing activities funded under the FHAP:

(a) The testing must be done in accordance with a HUD-approved testing methodology;

(b) Testers must not have prior felony convictions or convictions of any crimes involving fraud or perjury.

(c) Testers must receive training or be experienced in testing procedures and techniques.

(d) Testers and the organizations conducting tests, and the employees and agents of these organizations may not:

(1) Have an economic interest in the outcome of the test, without prejudice to

the right of any person or entity to recover damages for any cognizable injury;

(2) Be a relative or acquaintance of any party in a case;

(3) Have had any employment or other affiliation, within five years, with the person or organization to be tested; or

(4) Be a competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.

Dated: April 5, 2007.

Kim Kendrick,

Assistant Secretary for Fair Housing and Equal Opportunity.

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