

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 103**

[Docket No. FR-4031-F-02]

RIN 2529-AA79

Revision of HUD's Fair Housing Complaint Processing

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

ACTION: Final rule.

SUMMARY: On August 8, 1996 (61 FR 41480), HUD published an interim rule amending its regulations governing fair housing complaint processing. Specifically, the rule removed a provision allowing a respondent to request a subpoena during a fair housing investigation. This rule finalizes the policies and procedures set forth in the August 8, 1996 interim rule and takes into consideration the public comments received on the interim rule. HUD has decided to adopt the interim rule without change.

EFFECTIVE DATE: May 2, 1997.

FOR FURTHER INFORMATION CONTACT: Susan Forward, Deputy Assistant Secretary for Enforcement and Investigations, Room 5106, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone number (202) 708-4211. For hearing or speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339. (With the exception of the "800" number, these numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:**I. Interim Rule Finalized Without Change**

The public comment period on the August 8, 1996 interim rule expired on October 7, 1996. Only ten public comments were received. HUD has decided not to make any changes as a result of public comment. Section III. of the preamble presents a summary of the significant issues raised by the public commenters on the interim rule, and HUD's responses to these comments.

II. The August 8, 1996 Interim Rule

The Fair Housing Amendments Act of 1988 (Pub. L. 100-430, 102 Stat. 1619) (1988 Act) amended section 811 of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601 *et seq.*). Section 811, as amended, authorizes the Secretary of

HUD to issue subpoenas and order discovery in aid of fair housing investigations and hearings. Prior to the 1988 Act, section 811(b) of the Fair Housing Act permitted a respondent to request the issuance of a subpoena during a fair housing investigation:

Upon written application to the Secretary, a respondent shall be entitled to the issuance of a reasonable number of subpoenas by and in the name of the Secretary to the same extent and subject to the same limitations as subpoenas issued by the Secretary himself.

42 U.S.C. 3611(b) (1969).

The 1988 Act removed the above-quoted provision for the Fair Housing Act and granted the Secretary sole authority for conducting discovery during fair housing investigations. HUD's regulations at 24 CFR part 103 (Fair Housing Complaint Processing), however, included a provision which permitted a respondent to request a subpoena during an investigation. On August 8, 1996 (61 FR 41480), HUD published an interim rule amending § 103.215(b) to remove this provision. This rule finalizes the policies and procedures set forth in the August 8, 1996 interim rule and takes into consideration the public comments received on the interim rule. The August 8, 1996 interim rule provided additional details on the amendments to 24 CFR 103.215(b).

III. Discussion of Public Comments on the August 8, 1996 Interim Rule**Statutory Support for Subpoena Requests by Respondents**

Comment. Four commenters believe that revised section 811 of the Fair Housing Act does not prohibit a respondent from requesting the issuance of a subpoena during a fair housing investigation. These commenters noted in support of this argument that section 811 refers to witness fees which are payable by a party requesting a subpoena.

These commenters also cited language from the House Judiciary Committee Report on the 1988 Act: "The Committee intends that the Secretary will subpoena all relevant witnesses and that in most instances parties will not have to request subpoenas" (House Report No. 100-711, 100th Cong., 2d Sess. 36 (1988)). The commenters believe that the language of the statute, as well as its legislative history, supports their contention that the Congress intended to permit parties to request subpoenas during both investigations and hearings under the Fair Housing Act.

HUD response. Section 811(a) of the Fair Housing Act states:

The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this title. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

42 U.S.C. 3611 (1996).

As the commenters noted, section 811 does not prohibit the issuance of subpoenas to complainants or respondents during investigations; however, neither does it provide complainants or respondents the right to request subpoenas or conduct discovery during investigations. Section 811 grants to the Secretary the right to issue subpoenas and order discovery in the same manner as such subpoenas could be granted or discovery ordered by a United States district court. In granting this authority to the Secretary, the Congress authorized the issuance of subpoenas upon the request of a party to a hearing before an administrative law judge, as provided for in section 812(c) of the Fair Housing Act: "At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 811" (42 U.S.C. 3612(c) (1996)).

The language of the House Report relied upon by the commenters further supports HUD's interpretation of section 811. The sentence in the House Report immediately prior to the one cited by the commenters states: "The Committee intends that subpoenas and discovery be available and ordered to the same extent as allowed in the U.S. district courts."

Had the Congress intended to provide respondents with the right to request subpoenas during investigations, it could have retained the original text of section 811(b) of the Fair Housing Act, which expressly established such a right. The deletion of that provision by the 1988 Act indicates that the Congress did not intend to create such a right.

The statement from the House Committee Report, which sets forth the Committee's intent to make subpoenas and discovery available to the same extent as in Federal district court, the language of section 811, as amended in 1988 to eliminate the provisions allowing respondents to request subpoenas, and section 812, which authorizes parties to an administrative hearing to obtain the issuance of subpoenas, clearly indicate that the Congress intended that parties to a hearing before an administrative law judge under the Fair Housing Act have

the same rights to discovery that would be available were the action to be brought in Federal district court. By amending its regulations to restrict the issuance of subpoenas in support of discovery to the enforcement proceeding itself, HUD is complying with the expressed intent of the Congress.

Furthermore, to allow respondents to conduct and compel discovery during an investigation as well as during a hearing before an administrative law judge or a trial in Federal district court would, in effect, allow respondents "double discovery" during investigations and enforcement. HUD believes that formal judicial discovery is more properly limited to the judicial proceeding occurring after a Charge has been issued. HUD interprets the Fair Housing Act's delegation of judicial authority to provide for discovery by complainants and respondents during an enforcement hearing before an administrative law judge only.

Respondent's Ability To Prepare Defense

Comment. The preamble to the August 8, 1996 interim rule emphasized that the interim rule did not compromise a respondent's ability to conduct its own investigation of the facts and prepare its own defense. Four commenters disagreed with this point. These commenters believe that the interim rule would prevent a respondent from requesting that HUD obtain information which could lead to a Determination of No Reasonable Cause in that respondent's case. The commenters believe that it would be improper for respondents to have no opportunity to challenge the accuracy of the allegations underlying a complaint. One commenter complained that it would be unfair "to allow one side, the complainant, to gather information through the use of [HUD's] investigative powers," without providing similar investigative means to the respondent.

HUD response. HUD has responsibility for conducting a fair and impartial investigation into the facts surrounding alleged violations of the Fair Housing Act. To that end, it will consider and evaluate all information received, from whatever source. If a respondent knows of information that will be of assistance to HUD in reaching its determination, the respondent should make that information known to the investigator. Similarly, should a respondent wish to challenge the accuracy of information possessed by HUD, it may present all information at its disposal to do so. This rule does not affect a respondent's ability to make

HUD aware of information for its own investigative purposes or challenge information possessed by HUD, and it authorizes HUD to act on information provided by complainants and respondents in determining whether HUD should issue a subpoena.

Delays in HUD's Investigation Process

Comment. The preamble to the August 8, 1996 interim rule stated HUD was issuing this rule in part to eliminate delays in investigations which are associated with subpoena requests and streamline the investigative process. Two commenters disagreed that the interim rule would expedite HUD's investigation of fair housing complaints. One of these commenters referred to statistical data included in the report on the enforcement of the 1988 Amendments Act prepared by the United States Commission on Civil Rights (Report):¹

During fiscal year 1990, 64 percent of the complaints were closed in more than the target 100 days; in 1991 the figure dropped to 62 percent; in 1992, it dropped further to 40 percent; and in 1993, the last year reported, it dropped to 39 percent. Accordingly, over these years, while the respondent had the ability to request subpoenas, HUD's performance in closing cases was improved. Report at 41. (Emphasis in the original.)

The commenter wrote that the cited Report language demonstrated that there are other reasons for the delay in fair housing investigations.

Another commenter disagreed, stating that processing subpoena requests can delay the investigative process. This commenter acknowledged that it is in the interest of both complainants and respondents to avoid such delays.

HUD response. As the commenters recognized, HUD has made a serious effort to reduce the amount of time involved in investigations and to improve its own performance in expeditiously closing cases. In accordance with the President's initiative on regulatory reform, HUD has undertaken to streamline further its complaint processing procedures. In the past, subpoena processing has significantly affected case closing periods in only a limited number of cases; however, HUD believes that the public interest in reducing regulatory burdens is best served by eliminating obstacles to the prompt processing of complaints wherever those obstacles may be found. While there are other considerations that support amending this rule, such as fairness to both

complainants and respondents, the proper role of HUD in investigations, and conforming Departmental practice to that of other agencies enforcing civil rights laws, HUD has also determined that this final rule will improve HUD's performance and reduce the overall burden of its regulations on respondents and complainants alike.

Appearance of Conflict of Interest

Comment. HUD promulgated this rule in part to prevent the appearance of a conflict between the Department's dual roles as investigator and as arbiter of discovery disputes between complainants and respondents. One commenter acknowledged that the current rule creates the improper appearance that the investigation is an adversarial process in which HUD and the complainant share the same interest. The commenter recognized that this is not the case and that HUD conducts each investigation to determine objectively whether the Fair Housing Act has been violated. For this reason, the commenter supported amending the rule to correct that improper appearance of partiality.

Five commenters expressed their doubt that the interim rule would prevent the appearance of such a conflict. These commenters believe that the rule, by not granting to respondents the right to request a subpoena during investigations, created the appearance that HUD was conducting investigations, not as an impartial arbiter, but as an advocate of the complainant. One commenter noted that many complaints are filed by "testers" funded by HUD through programs such as the Fair Housing Initiatives Program (FHIP). The commenter believes that in cases where HUD has played such an active role in generating the complaint, the impartiality of HUD's investigation would benefit from having the full participation of the respondent when inquiring into the testing procedures used.

HUD response. HUD provides funding under the FHIP program to state and local governments and public or private nonprofit organizations to conduct fair housing education, outreach, and enforcement activities throughout the country. (See 42 U.S.C. 3616 note.) Complaints submitted by organizations receiving such grants are investigated with the same impartial consideration as all other alleged Fair Housing Act violations.

Hindrance to Conciliation Efforts

Comment. Three commenters believe the interim rule would hinder HUD's efforts to conciliate fair housing

¹ United States Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* (1994).

complaints. These commenters noted that some fair housing complaints do not provide sufficient information regarding the substance of the particular alleged discriminatory behavior. The commenters wrote that most respondents would be hesitant to conciliate or settle a fair housing complaint before having the opportunity to investigate fully its underlying facts.

HUD response. This amendment in no way limits any person's ability to conduct an investigation of the facts surrounding any alleged violation of the Fair Housing Act. This rule only limits a respondent's ability to use HUD's authority to compel discovery during an investigation. Nothing prevents respondents from conducting their own investigations of the underlying facts and respondents may choose to delay conciliating complaints until their own investigations are completed. In the vast majority of complaints that have been conciliated, conciliation has been accomplished without respondents resorting to formal discovery measures or requesting subpoenas. This rule will not significantly affect the resolution of Fair Housing Act complaints through conciliation, which will continue to be an important tool for resolving complaints.

Respondent's Right to Conduct Discovery

Comment. Four of the commenters objected to the description of the interim rule as announced in its preamble. The commenters believe that HUD should have announced more clearly that the interim rule effectively eliminated all discovery rights of the respondent during the investigative stage, not merely the right to have a subpoena issued at its request.

HUD response. HUD intends this rule to conform its investigative process to the practice of other Federal agencies enforcing civil rights laws and to simplify and streamline the investigative process; therefore, this rule no longer provides that respondents may use HUD's resources to compel formal discovery during an investigation. However, it should be noted that both complainants and respondents retain the ability to conduct their own investigations of the facts surrounding any complaint. Only the use of formal compulsory discovery procedures during an administrative investigation has been eliminated by this rule. HUD has emphasized in this Preamble that the effect of this final rule is to end "double discovery" and limit a respondent's ability to request subpoenas or conduct discovery to hearings before administrative law

judges or civil trials in Federal district court.

In deciding whether to amend the existing rule, HUD looked to the experience of other Federal agencies enforcing civil rights laws for guidance on this issue. A review of the relevant regulations of such other agencies, including the Equal Employment Opportunity Commission, the Department of Education, and the Department of Justice, revealed that none of them provide for such "double discovery" during both investigations and enforcement proceedings as was provided for in HUD's existing regulation. The Department believes that the experience of other Federal administrative agencies provides positive guidance for this decision to streamline and simplify the investigation process.

Department of Justice Memorandum

Comment. The preamble to the August 8, 1996 interim rule referred to a Department of Justice opinion to support the amendments made to § 103.215(b) (61 FR 41480).² Three commenters questioned HUD's reliance on this opinion. These commenters believe that the opinion was not directed to the issues contained in the interim rule, but rather was directed to the narrow question of whether an attorney-client relationship exists between Department of Justice attorneys and complainants under the Fair Housing Act. According to the commenters, the memorandum does not address the question of HUD's role in fair housing investigations, nor does it define the relationship between HUD and a complainant during the investigation stage of a fair housing proceeding.

HUD response. The commenters are correct in stating that the opinion did not reach the nature of HUD's relationship with a complainant during Fair Housing Act investigations. To the extent that the opinion supported HUD's interpretation of its role in the investigation as being neutral and impartial, it did so only by analogy. HUD relies on that opinion in support of this rule only to the extent that it states that even after a Charge of Discrimination has been issued and the government is prosecuting a case on the complainant's behalf, a government attorney's obligation is to enforce the law, *not* to advocate for either

complainants or respondents. This is consistent with the current investigatory procedure of HUD and that of other agencies enforcing civil rights laws. HUD's duty in both investigations and enforcement proceedings is to enforce the law, not to advocate for either side, and its regulations must reflect that role.

HUD's Justification for Interim Rulemaking

Comment. Five of the commenters believe that HUD should have solicited public comment prior to issuing the August 8, 1996 rule for effect. These commenters questioned the justification for interim rulemaking provided by HUD in the preamble to the August 8, 1996 rule.

HUD response. HUD's regulations at 24 CFR part 10 (Rulemaking Policy and Procedures) authorize HUD to issue a rule for immediate effect if the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1). In this case, the public interest in reducing the burdens of HUD's regulations and expediting Fair Housing Act investigations has been served through promulgation of the interim rule.

HUD has not received any requests for subpoenas by respondents subsequent to the effective date of the August 8, 1996 interim rule. HUD carefully reviewed and considered all comments received on the interim rule. Accordingly, the interim rule has not impacted a respondent's ability to request a subpoena prior to HUD's consideration of the public comments and the publication of this final rule.

III. Findings and Certifications

Regulatory Flexibility Act. The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule streamlines HUD's regulations governing fair housing complaint processing (24 CFR part 103). Specifically, the final rule removes a provision which allows a respondent to request a subpoena during a fair housing investigation. The removal of this provision will eliminate the delays associated with subpoena requests and expedite the investigation process. The rule will also conform HUD's investigative practices with those of other Federal administrative agencies. The rule will have no adverse or

² Assistant Attorney General Walter Dellinger, memorandum to Deval L. Patrick, Assistant Attorney General for Civil Rights, *The Relationship Between Department Attorneys and Persons on Whose Behalf the United States Initiates Cases Under the Fair Housing Act* (January 20, 1995).

disproportionate economic impact on small businesses.

Environmental Impact. In accordance with 24 CFR 50.19(c)(3) of the HUD regulations, the policies and procedures contained in this rule set out nondiscrimination standards and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule is solely concerned with HUD's processing of complaints under the Fair Housing Act. No programmatic or policy changes will result from this rule that would affect the relationship between the Federal government and State and local governments.

Executive Order 12606, The Family. The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this

rule will not have the potential for significant impact on family formation, maintenance, or general well-being, and thus is not subject to review under the Order. The only amendments made by this final rule are to HUD's regulations governing fair housing complaint processing. This final rule streamlines these regulations by removing the provision which authorizes a respondent to request the issuance of a subpoena during an investigation. No significant change in existing HUD policies or programs would result from promulgation of this final rule, as those policies and programs relate to family concerns.

Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, 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 final rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh

Street, SW, Washington, DC 20410-0500.

Unfunded Mandates Reform Act. The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this rule does not impose a Federal mandate that will result in the expenditure of State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

List of Subjects in 24 CFR Part 103

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

Accordingly, the interim rule published at 61 FR 41480, August 8, 1996, amending 24 CFR part 103 is adopted as final without change.

Dated: February 13, 1997.

Susan M. Forward,

Deputy Assistant Secretary for Enforcement and Investigations.

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