CONLEY
ASSOCIATES

Memorandum

To: Roland Bartl, Town Planner

From: Leslie Grant, Transportation Engineer

CC: Planning Board

Date: October 19, 2007

Re: The Residences at Quail Ridge

In March of 2007, Conley Associates, Inc. conducted a Traffic Impact Study (TIS) for the addition of 175 units of age restricted housing (and conversion of the 18-hole golf course to a 9-hole course) to the existing Quail Ridge Country Club in Acton, Massachusetts. In June of 2007, Conley Associates, Inc. completed a supplemental memorandum detailing the traffic impact a 7,500 square foot restaurant would have on the Level of Service (LOS) results presented in the TIS. The following memorandum addresses the traffic concerns raised in the September 17, 2007 memorandum issued by the Town Planner to the Planning Board (only items 1.a. through 1.g. are traffic related items and thus addressed in this correspondence).

1. Access, Circulation, and Traffic Impacts

a. Acorn Park Special Permit

The proposal shows two routes of access to Great Road—Skyline Drive and Acorn Park Drive via Hazelnut Street and Palmer Lane. The Plan as proposed complies with this requirement.

The project will continue to meet requirements regarding two routes of Access to Great Road. However, based on concerns from residents in the Acorn Park Drive neighborhood, the site plan has been revised so that general access to site will be restricted to Skyline Drive and only emergency access will be provided via Palmer Lane.

b. Trip Generation and Volume Projections

The applicant's traffic consultant has made reasonable assumptions for the trip generation from the proposed housing units and restaurant. I am less convinced by the proposed discounting for the reduction in holes at the golf course from 18 to 9. The source citation (ITE Trip Generation Manual) notes the high volatility of their numbers due to the low sample numbers and the wide spread of data points. It seems intangibles such atmosphere, friendships, surrounding population density, setting, quality of food and services, etc. might play a larger role than the number of holes in a course.

The Planning Board finds our assumptions for the residential units and restaurant trip generation to be reasonable. The credit for the reduction in the number of

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holes on the golf course was based on the description for Land Use Code 430—Golf Course in the ITE Trip Generation Manual, 7th Edition. "The golf courses contained in this land use include 9-, 18-, 27-, and 36-hole municipal courses and private country clubs. Some sites have driving ranges and clubhouses with a pro shop and/or restaurant, lounge and banquet facilities. Many of the municipal golf courses do not have any of these facilities." Conley Associates, Inc. did not have any reliable data from other golf course facilities where a reduction in the number of holes had occurred; therefore the credit was based on the available data in ITE, which looked at 9-, 18-, 27-, and 36-hole courses.

Although it is quite likely that there will be less trips to a 9 hole golf course versus and 18 hole golf course, to address the Planning Board's concern regarding the appropriateness of the credit assumed for the 9-hole reduction, Conley Associates, Inc. recalculated the Level of Service (LOS) and delay results for the study area intersections assuming NO credit for the reduction in the number of holes and a higher growth rate as requested by the Town Planner and the Engineering Department (see next comment). In addition, MassHighway recently implemented timing improvements at the intersection of Great Road at Main Street. These timing changes include a northbound advance for Great Road (heading towards Skyline Drive) and optimized timings for each approach. It was determined that with a higher growth rate, no credit for the golf course, and with the recently updated timings that the signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions and the unsignalized approaches to Great Road will continue to operate at LOS F.

The traffic consultant's study assumes a background growth of only 0.5% per year. I find this suspect in light of the fact that all other traffic studies in recent memory have assumed a background growth of 1% or greater. In addition, recent conversations with traffic consultants during the interview process for one of the Town's own projects, several experts in the field confirmed the use of 1% per year as the appropriate number for background growth. Looking at MassHighway permanent count stations, the historic growth rate, which is used to project forward, may be different if the applicant's traffic consultant would look at the same time window that most others profess to use for their projections. The assumptions for annual background traffic growth have a significant effect on the projected level of service and capacity 5 and 10 years from now.

Conley Associates, Inc. growth rate was based on MassHighway historical data from a number of count stations located on Route 2, Route 27, Route 119/2A, and School Street in Acton as well as stations located on the Cambridge Turnpike, Route 2, and Route 62 in Concord. As stated in the TIS, the growth rate based on data from 1996 through 2005 is a negative 0.06 percent. It is unclear what the Planning Board means by "the same time window that most others profess to use for their projections." If Conley Associates, Inc. were to look at only the most recent five years of data available at these counts stations (2001 through 2004), the growth rate would be a positive 0.50 percent, the growth rate used in the TIS.

As stated in the TIS, the growth rate based on District wide data from MassHighway showed an annual growth rate of 1.40 percent but the growth rate based on counts conducted on Great Road near the site showed a growth rate of 0.58 percent per year. The available data from Automatic Traffic Recorders (ATRs) on Great Road, MassHighway permanent counts stations, and MassHighway District wide data, ranged from positive 2.87 percent to negative 0.05 percent, a wide range in growth rates. Therefore, Conley Associates, Inc. does not agree that a higher growth rate of one or two percent is more appropriate.

However, to satisfy the concerns raised by the Town Planner and Engineering Department regarding growth rates, the No Build and Build traffic volumes were recalculated using a more conservative growth rate of 1.7 percent per year. In addition, as stated in the previous section, no credit was assumed for the reduction in the number of holes on the golf course and Conley Associates, Inc. used the timing changes recently implemented by MassHighway at the signalized intersection of Great Road at Main Street.

As stated in our response to the previous comment, the signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions and the unsignalized approaches to Great Road will continue to operate at LOS F.

c. **Trip Distribution on Great Road**

It appears that the applicant's traffic consultant has assumed a directional split of traffic from the development-30% westbound on Great Road (2A/119) and 70% eastbound on Great Road. With these assumptions, the traffic study conclusion is a modest deterioration of operations with either no drop in Levels of Service (LOS) or a one-letter drop; say from C to D. Note that F is the lowest LOS category. So, an intersection or movement that is already at F (unsignalized left turns, for instance) will remain at F, but only because there is no G or H on the rating scale. Similarly, the traffic signal warrant analyses turn back negatives. What happens if the distribution assumptions need to change, as suggested in the next paragraph?

The trip distribution used in the TIS was based on existing commuting traffic patterns, which is standard engineering practice.

As stated in the TIS, the unsignalized approaches at the intersections of Great Road at Harris Street and Acorn Park Drive and Great Road at Skyline are currently operating at LOS F and will continue to operate at LOS F with or without the project in place. However, the LOS F conditions experienced by the unsignalized approaches to Great Road is not an uncommon occurrence along a busy roadway. As shown in the TIS, the through movements along Great Road are operating with little to no delay.

Conley Associates, Inc. recalculated the traffic impact of the project assuming all project traffic would only utilize Skyline Drive to access and egress the site.

Additionally, the analysis assumed a more conservative growth rate and no credit for the reduction in the number of holes on the golf course. Even with these assumptions, the exiting traffic volume on Skyline Drive does not meet the four hour or peak hour signal warrants. However, Conley Associates, Inc. recommends that the left turn lane on the Skyline Drive approach to Great Road be extended to accommodate a queue of approximately four or five vehicles.

d. Trip Distribution to and from Great Road

It is unclear what the assumption is for internal distribution, i.e., how much traffic would come and go via Skyline v. Acorn Park. It would not be the same as the directional split on Great Road. It should be provided since this assumption directly affects the Acorn Park neighborhood and streets. Traffic prediction is not an exact science; therefore they should be made with a reasonable set of assumptions that can find general acceptance given the proposed open circulation pattern.

Access for the project has been modified. Only one access will be provided on Skyline Drive for general traffic (emergency access will be provided via Palmer Lane). Therefore, the issue of internal distribution is moot. As indicated earlier in this memorandum, the trip distribution used in the TIS was based on existing commuting traffic patterns, which is standard engineering practice.

e. Trip Distribution Alternatives

For a number of possible reasons--say, for instance, neighborhood impacts on Acorn Park; -questions concerning the adequacy of Skyline Drive or the streets in Acorn Park or both; -management of most or all turning traffic at one signalized Great Road intersection such as opposed to creating two marginally functional unsignalized intersections; - it may be more prudent to turn the directional split to and from Great Road one way or the other. So what would happen to the traffic impact analysis and its conclusion with respect to the local street and the intersections of Great Road, if Skyline Drive was the only access and egress, if Acorn Park was the only access and egress, or if the connection to Acorn Park was one-directional.

As stated earlier in this memorandum, access for the project has been modified so that Skyline Drive will be the only access and egress for general traffic. Conley Associates, Inc. then recalculated the project's traffic impacts assuming a higher growth rate, no credit for the reduction in the number of holes at the golf course, and with the new timing changes at the signalized intersection of Great Road at Main Street. As stated in previous comments, the unsignalized approaches of Acorn Park Drive, Harris Street, and Skyline Drive will continue to operate at LOS F with our without the project in place and the signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions. In addition, with two exiting lanes on Skyline Drive, the peak hour volumes exiting Skyline Drive are still not high enough to warrant a signal.

f. **Suitability of Acorn Park Streets**

For whatever level of access through Acorn Park, the applicant should evaluate the adequacy of Palmer Lane, Hazelnut Street, and Acorn Park Drive in view of the low-intensity local street standard for width and grade under which they were built.

As stated previously, the site plan layout has changed so that there will be no general vehicular access through the Acorn Park neighborhood. Skyline Drive will be the only access and egress for project traffic.

g. **Improvements**

The applicant's traffic consultant does not suggest a need for any improvements. This may be the case, but I would like to see the LOS and capacity projections with an annual growth rate of 1%. In addition, the police chief points out the need for deceleration/turning lanes on Great Road at Skyline Drive. Especially, the geometry for the right turn onto Skyline Drive, while it looked okay on paper, is not working well. Finally, guardrails should be considered along the steep slopes near the street at Skyline Drive.

Conley Associates, Inc. recalculated the project's traffic impacts assuming a 1.7 percent annual growth rate as suggested by the Engineering Department. In addition, no credit was taken for the reduction in the number of holes at the golf course and the timing changes recently implemented by MassHighway were also included in the analysis. As stated previously, the unsignalized approaches to Great Road are expected to continue to operate at LOS F with our without the project in place and the signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions. The project is expected to increase delay at the signalized intersection by approximately four seconds or less during the peak hours analyzed. Even with all of the project traffic using Skyline Drive as the only access and egress, the Skyline Drive approach to Great Road does not meet signal warrants. However, Conley Associates, Inc. recommends that the left turn lane on the Skyline Drive approach to Great Road be extended to accommodate a queue of approximately four or five vehicles.

Conley Associates, Inc. reviewed the traffic impacts of adding a right turn lane on Great Road (for vehicles turning onto Skyline Drive). From a capacity standpoint, this additional turn lanes would not improve the level of service for movements on Great Road however, it would allow through vehicles on Great Road to bypass the vehicles turning right onto Skyline Drive. The reason the right turn lane would not improve operations at the intersection is that level of service at an unsignalized intersection is determined by the movement under stop control (Skyline Drive). At this time, the proponent is not recommending the addition of a right turn lane on Great Road. The site engineer will address the comment on guard rails.

CONLEY
ASSOCIATES

Memorandum

To: Engineering Department, Town of Acton

From: Leslie Grant, Transportation Engineer

CC: Planning Board

Date: October 19, 2007

Re: The Residences at Quail Ridge

In March of 2007, Conley Associates, Inc. conducted a Traffic Impact Study (TIS) for the addition of 175 units of age restricted housing (and conversion of the 18-hole golf course to a 9-hole course) to the existing Quail Ridge Country Club in Acton, Massachusetts. In June of 2007, Conley Associates, Inc. completed a supplemental memorandum detailing the traffic impact a 7,500 square foot restaurant would have on the Level of Service (LOS) results presented in the TIS. The following memorandum addresses the traffic concerns raised in the September 19, 2007 memorandum issued by the Acton Engineering Department to the Planning Board (only items regarding the Traffic Study have been addressed in this correspondence).

Traffic Study

1. **The applicant has submitted a traffic impact study as required by Subdivision Rules and Regulations section 9.9. In summary, the study concludes that the added traffic volumes will not create unsafe conditions at the study area intersections. The study also revealed that the unsignalized intersections of Great Road, Harris Street & Acorn Park Drive and Great Road at Skyline Drive are currently operating at LOS F and will continue to operate at such with or without the project. No mitigation measures were proposed by the engineer, however, the added traffic from the proposed development plus other generated traffic from the study area's other development may expose and worsen the effects of existing deficiencies.**

   As stated in the TIS, the unsignalized approaches at the intersections of Great Road at Harris Street and Acorn Park Drive and Great Road at Skyline are currently operating at LOS F and will continue to operate at LOS F with or without the project in place. However, the LOS F conditions experienced by the unsignalized approaches to Great Road is not an uncommon occurrence along a busy roadway such as Great Road (Route 2A/119). As shown in the TIS, the through movements along Great Road are operating with little to no delay.

   Based on a site plan change, Conley Associates, Inc. recalculated the traffic impact of the project assuming all project traffic would only utilize Skyline Drive to access and egress the site. Additionally, the analysis assumed a more conservative growth rate and no credit for the reduction in the number of holes on the golf course based on comments received from the Planning Board and Engineering Department. Even with these more

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conservative assumptions, the exiting traffic volume on Skyline Drive does not meet the four hour or peak hour signal warrants. However, Conley Associates, Inc. recommends that the left turn lane on the Skyline Drive approach to Great Road be extended to accommodate a queue of approximately four or five vehicles.

2. **The Traffic Study for this project determines an annual increase for traffic to be about 0.5%. Upon our review of other recent traffic studies in North Acton, we found that the following reports were performed using a 1.7 percent or greater growth factor.**

   To satisfy the concerns raised by the Town Planner and Engineering Department regarding growth rates, the No Build and Build traffic volumes were recalculated using a more conservative growth rate of 1.7 percent per year. In addition, as stated in the previous section, no credit was assumed for the reduction in the number of holes on the golf course and Conley Associates, Inc. used the timing changes recently implemented by MassHighway at the signalized intersection of Great Road at Main Street.

   The signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions and the unsignalized approaches to Great Road will continue to operate at LOS F with or without the project in place.

3. **We recommend that the traffic engineer consider the possibility of proposing a deceleration lane for eastbound traffic on Great Road that would be turning into Skyline Drive.**

   Conley Associates, Inc. reviewed the traffic impacts of adding a right turn lane on Great Road (for vehicles turning onto Skyline Drive). From a capacity standpoint, this additional turn lanes would not improve the level of service for movements on Great Road however, it would allow through vehicles on Great Road to bypass the vehicles turning right onto Skyline Drive. The reason the right turn lane would not improve operations at the intersection is that level of service at an unsignalized intersection is determined by the movement under stop control (Skyline Drive). Because the traffic volumes on Great Road are relatively high during the peak hours, vehicles on Skyline Drive (and other stop controlled approaches along Great Road) are experiencing lengthy delays during the peak hours (level of service F conditions). At this time, the proponent is not recommending the addition of a right turn lane on Great Road.

4. **If the accesses to Palmer Lane & Hazelnut Street are restricted for emergency vehicles only, we recommend that the traffic engineer reanalyze the impacts to the intersection of Skyline at Great Road. The traffic engineer should make recommendations as to any improvements to the alignment of Skyline Drive, modifications to Great Road, etc...that might be necessary in order to maintain an acceptable level of service at this intersection. In addition, we recommend an analysis considering only one-way traffic entering the site from Palmer Lane & Hazelnut Street and its impact to Skyline Drive at Great Road.**

   Based on concerns from residents in the Acorn Park Drive neighborhood, the site plan has been revised so that vehicular access to site will be restricted to Skyline Drive and only emergency access will be provided via Palmer Lane.

The traffic analysis was recalculated assuming that Skyline Drive would be the only access and egress to and from the site. In addition, based on other concerns raised by the Planning Board and the Engineering Department, Conley Associates, Inc. used a more conservative growth rate of 1.7 percent, assumed no credit for the 9-hole golf course reduction, and used the recently updated timings completed by MassHighway at the signalized intersection of Great Road at Main Street. These timing changes include a northbound advance for Great Road (heading towards Skyline Drive) and optimized timings for each approach. It was determined that with a higher growth rate, no credit for the golf course, and with the recently updated timings that the signalized intersection of Great Road at Main Street is expected to operate at LOS D or better under all conditions and the unsignalized approaches to Great Road will continue to operate at LOS F.

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October 17, 2007

VIA HAND-DELIVERY

Acton Planning Board
472 Main Street
Acton, MA 01720

RE: The Residences at Quail Ridge, Application for a Senior Residence Special Permit (the "Project")

Dear Members of the Board,

On behalf of Quail Ridge Country Club, LLC, the Applicant of the Project, our office is hereby respectfully submitting the following responses to various Interdepartmental Communications made by Town Departments, Boards, Commissions and abutter input in connection with the Project.

Town Planner Memorandum dated September 17, 2007

7. Common Land Use & Ownership

a. No Comment Required.
b. No Comment Required.
c. Applicant will provide the Town with an enforceable use restriction on the Common Land of the Project.
d. Restaurant being proposed will be built in lieu of construction of a Clubhouse per the original approval of the golf course.
e. Applicant believes that the amenities and accessory uses being proposed with the Project comply with the controlling sections of the Section 9B of the Zoning Bylaw.
f. Applicant will provide the public uses set forth in the original approval of the golf course in connection with the Project.
g. Unit owners in the Project will each have a membership in the 9-hole golf course and related amenities. Each Unit owners will be responsible to pay a fixed fee per month towards maintenance and operational cost. Public user fees and membership dues will supplement such maintenance and operational costs.
h. The Applicant believes that the proposed restaurant may be open to the general public pursuant to Sections 9.B.3(b) and 9.B.4.7 of the Zoning Bylaw.

8. Senior Residence Deed Restriction

a. Housing for Older Persons Act of 1995 and M.G.L. Ch. 151 B are attached hereto for your consideration.
b. Senior Residence Deed Restriction shall comply with all applicable State and Federal regulations.
c. Senior Residence Deed Restriction shall comply with all applicable State and Federal regulations.
d. Senior Residence Deed Restriction shall comply with all applicable State and Federal regulations.
e. Senior Residence Deed Restriction shall comply with all applicable State and Federal regulations.
f. Applicant will include the requested restriction in the Senior Residence Deed Restriction to the maximum extent allowable by all applicable State and Federal regulations.

9. Affordable Units

a. Applicant will work with the Acton Community Housing Corporation to the extent reasonably possible to have the affordable units in the Project included in the Town's Subsidized Housing Inventory.
b. The percentage interest of ownership in the Common Areas for the affordable units will be proportionate to their value relative to the market rate units in the Project. This calculation will be made in compliance with M.G.L. Ch. 183A.
c. Condominium Fees for the affordable units in the Project will be directly proportionate to their percentage interest of ownership in the Common Areas.
d. Applicant will consider new LIP Guideline published by the Department of Housing & Community Development and work directly with the Planning Board and the Acton Community Housing Corporation in incorporating these guidelines in defining both the age and affordable housing restrictions for the Project.
e. See Comments to Acton Community Housing Corporation Memorandum
f. Applicant would consider an arrangement for off-site senior or family housing as an alternative to inclusion of affordable units in the Project.

10. Outstanding work under previous permits – existing bonds

Applicant is currently working with the Town Planner to ensure completion of the work required under the listed outstanding bonds.

11. Foot trail from Hazelnut Street to Nagog Hill Conservation Land

See Comments to Acton Land Stewardship Committee Memorandum

12. Street Maintenance during marketing phase

See Comment Responses of Stamsky & McNary, Inc.

Acton Board of Heath Memorandum dated August 9, 2007

5. Applicant will include a reference to Massachusetts Department of Environmental Protection to all sections of the Condominium Documents dealing with the wastewater treatment facility to serve the Project.

Acton Community Housing Corporation Memorandum dated August 21, 2007

1. Applicant will undertake best efforts to have the affordable units in the Project included in the Town's Subsidized Housing Inventory.

2. The percentage interest of ownership in the Common Areas for the affordable units will be proportionate to their value relative to the market rate units in the Project. This calculation will be made in compliance with M.G.L. Ch. 183A.

3. Applicant will market the affordable units in the Project at 70% AMI.

4. Applicant shall include the 2% Resale Fee in the Deed Rider for the affordable units in the Project. Applicant also agrees that Acton Community Housing Corporation shall be the Monitoring Agent for the Project, provided allowable by Department of Housing and Community Development.

5. Applicant is proposing to have the affordable units dispersed throughout the Project.

6. Applicant will work with Acton Community Housing Corporation to incorporate local preference criteria to the marketing and outreach of the affordable units in the Project.

Marketing Study

A comprehensive appraisal of the proposed Project was recently conducted. The appraiser concluded that the area will support (i.e. absorption rates and marketability) an additional age-restricted of this magnitude.

Asset Limitations

Applicant is committed to working with Acton Community Housing Corporation to request from the Department of Housing and Community Development waivers to the Asset measurements for prospective buyers of affordable units in the Project.

Board of Assessors Memorandum dated September 21, 2007

The Applicant agrees with the Board of Assessor's position that the common area in a Condominium created pursuant to M.G.L. Ch. 183A is not taxable, however the 177 Units created by the Project and the remaining 9-holes of the golf course will be taxable.

The Applicant roughly calculates the fully built out value of the Project will create $1,752,736.40 of annual tax revenue to the Town of Acton.

9 Hole Golf Course:	$42,342.60 [1]	
Single Family Dwelling	$917,989.80	(91 Units @ $690,000.00) [2]
Duplex Dwellings	$489,770.00	(50 @ $670,000.00)
Garden Style Apts.	$302,634.00	(36 @ $575,000.00)

Please contact our office with questions or concerns.

Very truly yours,

Graham & Harsip, P.C.

[1] ½ of the tax revenue of Quail Ridge Country Club
[2] Tax rate of $14.62/$1,000.00

The General Laws of Massachusetts

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PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XXI. LABOR AND INDUSTRIES

CHAPTER 151B. UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Chapter 151B: Section 1. Definitions

Section 1. As used in this chapter

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

4. The term "unlawful practice" includes only those unlawful practices specified in section four.

5. The term "employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof. Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

6. The term "employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person.

7. The term "commission", unless a different meaning clearly appears from the context, means the Massachusetts commission against discrimination, established by section fifty-six of chapter six.

8. The term "age" unless a different meaning clearly appears from the context, includes any duration of time since an individual's birth of greater than forty years.

9. The term "housing or housing accommodations" includes any building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

10. The term "publicly assisted housing accommodations" includes all housing accommodations in

(a) housing constructed after July first, nineteen hundred and fifty, and

(1) which is exempt in whole or in part from taxes levied by the commonwealth or any of its political subdivisions;

(2) which is constructed on land sold below cost by the commonwealth or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred and forty-nine;

(3) which is constructed in whole or in part on property acquired or assembled by the commonwealth or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

(4) for the acquisition, construction, repair or maintenance of which the commonwealth or any of its political subdivisions or any agency thereof supplies funds or other financial assistance;

(b) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(c) housing which is offered for sale, lease or rental by a person who owns or otherwise controls the sale of the same, and which is part of a parcel of ten or more housing accommodations located on land that is contiguous, exclusive of public streets, if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance; or (2) a commitment issued by a government agency after October first, nineteen hundred and fifty-seven, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof.

11. The term "multiple dwelling" means a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family", as used herein, means (a) a person occupying a dwelling and maintaining a household either alone or with not more than four

boarders, roomers or lodgers; or (b) two or more persons occupying a dwelling, either living together and maintaining a common household, or living together and maintaining a common household with not more than four boarders, roomers or lodgers. A "boarder", "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

12. The term "contiguously located housing" means (1) housing which is offered for sale, lease or rental by a person who owns or at any time has owned, or who otherwise controls or at any time has controlled, the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), and which housing is located on such land, or (2) housing which is offered for sale, lease or rental and which at any time was one of ten or more lots of a tract whose plan has been submitted to a planning board as required by THE SUBDIVISION CONTROL LAW, as appearing in sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one.

13. The term "other covered housing accommodations" includes all housing accommodations not specifically covered under subsections 10, 11 and 12 which are directly or through an agent made generally available to the public for sale or lease or rental, by advertising in a newspaper or otherwise, by posting of a sign or signs or a notice or notices on the premises or elsewhere, by listing with a broker, or by any other means of public offering.

14. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

15. The term "housing development" means multi-apartment units operated as contiguously located housing accommodations.

16. The term "qualified handicapped person" means a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.

17. The term "handicap" means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include current, illegal use of a controlled substance as defined in section one of chapter ninety-four C.

18. The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

19. The term "handicapped person" means any person who has a handicap.

20. The term "major life activities" means functions, including, but not limited to, caring for one's self,

performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

21. The term "accessible" means that housing is functional for and can be safely and independently used by a physically or mentally handicapped person and complies with rules or regulations established by the commission.

22. The term "genetic information", shall mean any written, recorded individually identifiable result of a genetic test as defined by this section or explanation of such a result or family history pertaining to the presence, absence, variation, alteration, or modification of a human gene or genes. For the purposes of this chapter, the term genetic information shall not include information pertaining to the abuse of drugs or alcohol which is derived from tests given for the exclusive purpose of determining the abuse of drugs or alcohol.

23. The term "genetic test", shall mean any tests of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying genes or genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material. For the purposes of this chapter, the term genetic test shall not include tests given for the exclusive purpose of determining the abuse of drugs or alcohol.

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Chapter 151B: Section 2. Policies; recommendations

Section 2. The commission, as established by section fifty-six of chapter six, shall formulate policies to effectuate the purposes of this chapter and may make recommendations to agencies and officers of the commonwealth or its political subdivisions in aid of such policies and purposes.

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Chapter 151B: Section 3. Functions, powers and duties of commission

Section 3. The commission shall have the following functions, powers and duties:

1. To establish and maintain its principal office in the city of Boston and such other offices within the commonwealth as it may deem necessary.

2. To meet and function at any place within the commonwealth.

3. To appoint such attorneys, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

4. To obtain upon request and utilize the services of all executive departments and agencies.

5. To adopt, promulgate, amend, and rescind rules and regulations suitable to carry out the provisions of this chapter, and the policies and practice of the commission in connection therewith.

6. To receive, investigate and pass upon complaints of unlawful practices, as hereinafter defined, alleging discrimination because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person. The term "sexual orientation" shall mean having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality. The commission through its chairman may appoint a single commissioner to hold public hearings, as hereinafter provided, and to otherwise act on its behalf in connection therewith; provided, however, that a person aggrieved by the decision of said single commissioner may, within ten days of said decision, file an appeal for rehearing or review by the commission.

7. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners.

No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a

penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

8. To create such local or regional advisory boards as in its judgment will aid in effectuating the purposes of this chapter. Each advisory board shall consist of not less than eleven members. To the extent reasonably possible the members of each board shall include representatives of owners and brokers of residential property; major lending and credit institutions; major private employers; a local personnel or civil service administrator; local post-secondary educational institutions; local labor organizations; minority racial, ethnic and linguistic groups; women; elderly and handicapped persons; and recipients of public assistance. The members of such advisory boards shall serve without pay but shall be reimbursed for their actual and necessary expenses. The commission may provide technical and clerical assistance to the advisory boards.

9. To issue such publication and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry.

10. To render each year to the governor and to the general court a full written report of its activities and of its recommendations.

11. To adopt an official seal.

12. To give its opinion upon questions submitted to it by any employer, employment agency or labor organization concerning whether any existing or proposed requirement for employment or for membership in such organization is a bona fide occupational qualification. Copies of such opinions shall be maintained in the files of the commission at its office and shall be available during regular business hours for public inspection. An opinion, or a request therefor, given under this subsection shall not operate to interfere with any proceeding under section five.

13. To adopt, promulgate, amend, and rescind rules and regulations, jointly with the attorney general, for the purpose of carrying out the provisions of subsection 13 of section four, including special regulations applicable to neighborhoods or areas found by the commission, with the concurrence of the attorney general, to be threatened with deterioration or instability associated with the entry or prospective entry into such neighborhoods or areas of a person or persons of a particular age, race, color, religion, national or ethnic origin, or economic level.

14. To accept gifts, contributions or bequests of funds or other aid from any source, whether public or private and from federal, state or other governmental bodies for the purpose of furthering the commissions mandate; provided, however, that all amounts received pursuant to this paragraph shall be deposited with the treasurer and made available to the commission for expenditure for any purposes authorized by this chapter.

15. To set, charge and retain fees and costs, subject to section 3B of chapter 7, including, but not limited to, training fees and costs incurred responding to requests under the commonwealth's public records law; provided, that the commission may, where appropriate, provide for the waiver of the fees; to retain reasonable attorney's fees and costs awarded to a prevailing complainant, under section 5, when one of its attorneys presents the charge of discrimination before the commission on behalf of the prevailing

complainant. All amounts received under this clause shall be deposited to the General Fund.

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Chapter 151B: Section 3A. Employers' policies against sexual harassment; preparation of model policy; education and training programs

Section 3A. (a) All employers, employment agencies and labor organizations shall promote a workplace free of sexual harassment.

(b) Every employer shall:

(1) adopt a policy against sexual harassment which shall include:

(i) a statement that sexual harassment in the workplace is unlawful;

(ii) a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment;

(iii) a description and examples of sexual harassment;

(iv) a statement of the range of consequences for employees who are found to have committed sexual harassment;

(v) a description of the process for filing internal complaints about sexual harassment and the work addresses and telephone numbers of the person or persons to whom complaints should be made; and

(vi) the identity of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.

(2) provide annually to all employees an individual written copy of the employer's policy against sexual harassment; provided, however, that a new employee shall be provided such a copy at the time of his employment.

(c) The commission shall prepare and provide to employers subject to this section a model policy and poster consistent with federal and state statutes and regulations, which may be used by employers for the purposes of this section.

(d) An employer's failure to provide the information required to be provided by this section shall not, in and of itself, result in the liability of said employer to any current or former employee or applicant in any action alleging sexual harassment. An employer's compliance with the notice requirements of this

section shall not, in and of itself, protect the employer from liability for sexual harassment of any current or former employee or applicant.

(e) Employers and labor organizations are encouraged to conduct an education and training program for new employees and members, within one year of commencement of employment or membership, which includes at a minimum the information set forth in this section. Employers are encouraged to conduct additional training for new supervisory and managerial employees and members within one year of commencement of employment or membership, which shall include at a minimum the information set forth in subsection (b), the specific responsibilities of supervisory and managerial employees and the methods that such employees should take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints. Employers, labor organizations and appropriate state agencies are encouraged to cooperate in making such training available.

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Chapter 151B: Section 4. Unlawful practices

Section 4. It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. "Reasonable Accommodation", as used in this subsection shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words "creed or religion" mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during

the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

1D. For an employer, an employment agency, the commonwealth or any of its political subdivisions, by itself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, or ancestry of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, sexual orientation, age, genetic information, ancestry or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or

handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

[First paragraph of subsection 6 applicable only to dwelling units constructed after January 1, 2007. See 2006, 291, Sec. 3.]

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly

assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

[Subsection 7 applicable only to dwelling units constructed after January 1, 2007. See 2006, 291, Sec. 3.]

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or

accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such accommodations or land because of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that, in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person's need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirements of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, marital status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of

race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word "age" as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accommodations to discriminate against any

individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, by himself or his agent, to refuse to restore certain female employees to employment following their absence by reason of a maternity leave taken in accordance with section one hundred and five D of chapter one hundred and forty-nine or to otherwise fail to comply with the provisions of said section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to any female employee for the fiscal year during which she is absent due to a maternity leave taken in accordance with said section or to impose any other penalty as a result of a maternity leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communication with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or a handicapped person, or a person having a child;

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is

generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. For purposes of this subsection, the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to others.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:—

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the division of employment and training, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended. This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or percentage of persons of such race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employment agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit or require disclosure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members, or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership, or license on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain genetic information for non-medical purposes.

[There is no paragraph (b).]

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Chapter 151B: Section 4A. Conveyance by void instruments; penalty

Section 4A. Whoever conveys real property by an instrument which contains a provision which he knows is void under the provisions of section twenty-three B of chapter one hundred and eighty-four shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year.

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Chapter 151B: Section 5. Complaints; procedure; limitations; bar to proceeding; award of damages

Section 5. Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize, and not later than thirty days after

the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the

subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within 300 days after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action,

and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed $25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred.

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Chapter 151B: Section 6. Review of commission's order; court order for enforcement; appeals; availability of commission's copy of testimony; limitations

Section 6. Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement, in a proceeding as provided in this section. Such proceeding shall be brought in the superior court of the commonwealth within any county wherein the unlawful practice which is the subject of the commission's order occurs or wherein any person required in the order to cease and desist from an unlawful practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing before the commission, and issuance and service of an order of notice as in proceedings in equity. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission, with full power to issue injunctions against any respondent and to punish for contempt thereof. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he shows reasonable grounds for the failure to adduce such evidence before the commission. The order or decision of the commission shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. All such proceedings shall be heard and determined by the court as expeditiously as possible and shall take precedence over all other matters before it, except matters of like nature. The jurisdiction of the superior court shall be exclusive and its final order or decree shall be subject to review by the supreme judicial court in the same manner and form and with the same effect as in appeals from a final order or decree in proceedings in equity. The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of the order of the commission. The review shall be heard on the record without requirement of printing. The commission may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within thirty days after the service of the order of the commission.

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Chapter 151B: Section 7. Posting notices setting forth excerpts of statute and other information; refusal to post

Section 7. Every employer, employment agency, real estate agency, rental office, labor union, institutional creditor, proprietor of a business or of a place of public accommodation, or other person, corporation, or group subject to this chapter, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission, which shall set forth excerpts of this chapter and such other relevant information which the commission deems necessary to explain the chapter. Any employer, employment agency, real estate agency, rental office, labor union, institutional creditor, proprietor of a business or of a place of public accommodation, or other person, corporation, or group subject to this chapter, who refuses to comply with the provisions of this section shall be punished by a fine of not less than ten dollars nor more than one hundred dollars. A subsequent violation of this section by the same person, corporation, or group, if such violation occurs more than sixty days from a prior conviction for violation of this section, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars.

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CHAPTER 151B. UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Chapter 151B: Section 8. Interference with commission; violation of order

Section 8. Any person, employer, labor organization or employment agency, who or which shall wilfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of duty under this chapter, or shall wilfully violate a final order of the commission shall be punished for each offense by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

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Chapter 151B: Section 9. Construction and enforcement of chapter; inconsistent laws; exclusiveness of statutory procedure; civil remedies; speedy trial; attorney's fees and costs; damages

Section 9. This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination; but, as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section 5 shall, while pending, be exclusive; and the final determination on the merits shall exclude any other civil action, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. Any person claiming to be aggrieved by an unlawful practice relative to housing under this chapter, but who has not filed a complaint pursuant to section five, may commence a civil action in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred; provided, however, that such action shall not be commenced later than one year after the alleged unlawful practice has occurred. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section.

Any person claiming to be aggrieved by a practice concerning age discrimination in employment made

unlawful by section four may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four. The provisions set forth in the first, second and third paragraphs shall be applicable to such complaint or action to the extent that such provisions do not conflict with the provisions set forth in this paragraph.

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Chapter 151B: Section 10. Partial invalidity

Section 10. If any provision of this chapter or the application thereof to any person or circumstance, shall, for any reason, be held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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

ACTION: Final rule.

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

EFFECTIVE DATE: May 3, 1999.

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

SUPPLEMENTARY INFORMATION:

Information Collection Requirements

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

I. Background

A. The Housing for Older Persons Act of 1995

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-3619) (the Act) exempts ``housing for older persons'' from the Act's prohibitions against discrimination because of familial status. Section 807(b)(2)(C) of the Act exempts housing

intended and operated for occupancy by persons 55 years of age or older which satisfies certain criteria. HUD has adopted implementing regulations further defining the ``housing for older persons'' exemption at 24 CFR part 100, subpart E.
The Housing for Older Persons Act of 1995 (Pub. L. 104-76, 109 Stat. 787, approved December 28, 1995) (HOPA) revised the definition of the original exemption contained in the Act for housing designed and operated for occupancy by persons who are 55 years of age of older. Section 2 of HOPA redefined this portion of the exemption to describe housing:

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

The new requirements under HOPA are equivalent to the original provisions of the Fair Housing Act. Like the original section 807(b)(C) of the Act, HOPA requires that a facility or community seeking to claim the 55 and older exemption show three factors: (1) That the housing be intended and operated for persons 55 years of age or older; (2) that at least 80 percent of the occupied units be occupied by at least one person who is 55 years of age or older; and (3) the housing facility or community publish and adhere to policies and procedures that demonstrate its intent to qualify for the exemption. The housing facility or community must also comply with rules issued by HUD for the verification of occupancy.
One substantive change made by HOPA was the elimination of ``significant facilities and services'' previously required by the Act to meet the 55-and-older exemption. Section 807(b)(2)(C) of the Act originally required that housing designed for persons who are 55 years of age or older provide ``significant facilities and services specifically designed to meet the physical or social needs of older persons.'' HOPA also added the new requirement that a housing facility or community seeking the 55-and-older exemption comply with HUD

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

(5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.
(B) For purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that--
(i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and
(ii) The facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

B. This Rule

This rule revises Sec. 100.304, which presents an overview of the exemption, to more closely track the HOPA requirements. The rule also creates a new Sec. 100.305, which updates the 80 percent occupancy requirements. A new Sec. 100.306 describes how a facility or community may establish its intent to operate as housing designed for persons at least 55 years of age or older. New Sec. 100.307 sets forth the necessary procedures for verification of the 80 percent occupancy requirements. Finally, a new Sec. 100.308 implements the good faith defense against civil money damages.
Section 2 of HOPA requires that any implementing HUD regulations ``include examples of the types of policies and procedures relevant to a determination of compliance with'' the statute's intent requirement. Accordingly, paragraph (a) of Sec. 100.306 lists several factors which HUD considers relevant in determining whether the housing facility or community intends to operate as housing for older persons. Section 100.306(b) states, however, that such

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phrases such as ``adult living'', ``adult community'', or similar statements are inconsistent with the intent to establish housing for older persons. Such phrases are not evidence that the facility or community intends to operate as housing for older persons and are inconsistent with that intent. HUD, in order to make an assessment of intent, will consider all of the measures taken by the facility or community to demonstrate the intent required by the Act. Moreover, the

housing facility or community may not evict or terminate leases of families with children in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.

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

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

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

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

HUD published a proposed rule for comment on January 14, 1997, at 62 FR 2000, and received approximately 130 comments on the proposed rule. The comments were evenly split between comments which expressed the belief that the regulation went too far in allowing the creation or continuation of senior housing and those which generally supported the rule but felt that it should have done more to stabilize the conditions at senior housing communities or which objected to isolated provisions. Several of the specific points raised will be addressed later in the preamble and have resulted in changes and refinements to the proposed regulation. As a general response, some of the comments from each side are based upon premises with which HUD does not agree. In addition, Congress did not state that HOPA should be retroactively applied. Therefore, a matter involving a claim of alleged discrimination occurring before December 28, 1995 will be covered by those laws and regulations in effect at the time of the claimed violation. Claims of alleged discrimination occurring after December 28, 1995, but before the effective date of this regulation will be analyzed using HOPA and its legislative history.

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

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

HUD has also taken into consideration the broader historical aspects of the senior housing issue. Until the advent of the familial status protection established in the Fair Housing Amendments Act of 1988, the senior housing industry was a well-established, accepted component of housing options for seniors. With no federal law directly applicable, the industry developed in a variety of configurations and circumstances. Age restrictions in individual communities started at various ages--age 40, age 45, age 50 and so forth. Many communities defined themselves as ``adult'' communities, but in operation served seniors. Many senior communities served mature residents who are active, participating members of their communities. State and local law, local custom, and various provisions of covenants and restrictions affected how rules for occupancy were established or changed, against whom those rules could be enforced, the senior community's interplay with state and local land use and anti-discrimination statutes, and other practical day-to-day issues of senior housing. Against the backdrop of the nearly infinite number of possible scenarios, HUD and courts attempted to enforce the 1988 provisions of the exemptions. Congress has determined that those efforts did not achieve the desired results, and amended the Act. The rules that are included here in final form have attempted to the address the issue in the broadest possible

terms to account for the large variety of senior communities while being sufficiently detailed to provide clear guidance on the requirements of the senior housing exemption, without dictating results which may be inconsistent with local practice or deny flexibility in a variety of circumstances.

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

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

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

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

HUD is concerned, however, that an overly broad transition provision may allow qualification for communities beyond those which

temporarily were unable to qualify for the exemption because of the significant facilities and services provision or other interpretations of the exemption, and which would otherwise have been eligible for the exemption. For that reason, HUD has retained the transition provision, but only for a period of one year from the date on which this regulation becomes final, to allow communities which wish to qualify for the 55-and-older exemption to qualify. At the end of the one year period, the transition period will expire. HUD believes that this is a more balanced approach that achieves a common sense solution to a problem with equities on both sides. This represents the most significant change in the rule. The one year limitation period will require that those communities seeking to meet the 80% requirement have at least 80% of their occupied units occupied by at least one person who is 55 years of age or older by the expiration of the period in order to qualify for the exemption. Vacant units reserved for occupancy by persons who are 55 of age or older may not be counted in achieving this standard. The transition provision may not be facilitated by evicting or terminating the leases of resident households with minor children.

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

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

The fair housing advocates and several attorneys further objected to Sec. 100.306(c) which addresses the effect of language in housing documents on the intent requirement. HUD has consistently held that intent is established by the totality of the facts. HUD is also aware that prior to the adoption of protection for families with children in the Fair Housing Amendments Act, housing communities and facilities had

established senior housing at an age other than 55 with a prohibition against amending the covenants for a period of 25 years or more. It would be unjust to deny such housing qualification for the exemption when it meets the intent requirement in all other ways as well as meeting the other requirements for the exemption and has done what it can to eliminate language inconsistent with the exemption for housing for persons 55 years of age or older. HUD notes, however, that in circumstances where the community holds itself out as ``adult'' and its legal documents describe occupancy in terms which are not consistent with the 55-and-older exemption and no action has been taken to attempt to change the applicable documents, the requisite intent requirement is not met.

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

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

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There continues to be confusion concerning what is often referred to as the 80/20 split. HOPA states that the minimum standard to obtain housing for persons who are 55 years of age or older status is that ``at least 80%'' of the occupied units be occupied by persons 55 years or older. There is no requirement that the remaining 20% of the

occupied units be occupied by persons under the age of 55, nor is there a requirement that those units be used only for persons where at least one member of the household is 55 years of age or older. Communities may decline to permit any persons under the age of 55, may require that 100% of the units have at least one occupant who is 55 years of age or older, may permit up to 20% of the occupied units to be occupied by persons who are younger than 55 years of age, or set whatever requirements they wish, as long as ``at least 80%'' of the occupied units are occupied by one person 55 years of age or older, and so long as such requirements are not inconsistent with the overall intent to be housing for older persons.

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

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

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

itself as ``adult'' leaves itself vulnerable to complaints about its eligibility for the exemption, which could result in an investigation or litigation to determine whether the community in fact qualifies for the exemption.

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

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

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

Other comments concerning verification were that the use of immigration documents should be removed from the list of possible sources of age verification lest it encourage discrimination against legal immigrants. The option remains in the rule since it is only one way of verifying age. HUD does not intend to require any particular documentation be provided as a condition of occupancy, including immigration documentation. If any individual chooses to verify by providing a drivers license or affidavit instead of an immigration document, the verification requirement will be satisfied. A summary of the information gathered in support of the occupancy verification

should be retained for confirmation purposes. Copies of supporting information gathered in support of the occupancy verification may be retained in a separate file with limited access, created for the sole purpose of complying with HOPA, and not in general or resident files that may be widely accessible to employees or other residents. The segregated documents may be considered confidential and not generally available for public inspection. HUD, state or local fair housing enforcement agencies, or the Department of Justice may review this documentation during the course of an investigation.
Other commenters questioned the reference to a ``census'' as a source of verification, noting that the census does not specify individual names but

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instead deals with ``census tracts'' and is often outdated. This is a misunderstanding of HUD's view. HUD was not referring to the United States Decennial Census for verification of occupancy. The reference is to household censuses which are conducted by many cities and towns. The language has been clarified.
Some commenters objected to the ``re-survey'' of the park every two years as being unduly burdensome, especially if the list is actively updated on an on-going basis. While HUD is sympathetic to those well-managed communities which actively update lists of residents, it does not feel that such communities would be unduly burdened by the update since the information required will be readily available in the files. HUD's experience in this area gives it reason to believe that if surveys are not required to be updated periodically the quality of the recordkeeping will deteriorate and create the opportunity for the excessive litigation Congress sought to prevent. The re-survey does not require that all supporting documents be collected again--only that the community confirm that those persons counted as occupying dwellings for purposes of meeting the 80% requirement are, in fact, still in occupancy.
There were objections to making public information contained in an age survey for fear that confidential information may be obtained by someone attempting to prey on seniors. HUD believes that this is a misinterpretation of the requirement. Only the overall survey summary is required to be available for review, not the supporting documentation. The word ``summary'' has been added to this section.
Some commenters felt that any affidavit should be signed under the penalty of perjury to ensure the integrity of the process. Communities which are concerned about misrepresentation of the age of occupants are free to require that affidavits from occupants about the ages of persons in their households be signed under the penalty of perjury, just as they are free, consistent with state or local law, to require that applications, leases, and other admission documents be signed under oath, or under penalty of perjury. Statements from third party

individuals who have personal knowledge of the age of the occupants and setting forth the basis for such knowledge may be used when occupants decline to provide information verifying age, but such statements must be made under penalty of perjury.

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

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

The third issue identified by commenters deals with whether a claim of ``good faith'' requires actual knowledge that the community had certified in writing that it was housing for persons who are 55 years of age or older. A review of the language of the Committee report indicates that the eligibility for the claim of ``good faith'' relies on the fact that the facility or community ``has certified to that person, in writing and on oath or affirmation, that it complies with

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

II. Findings and Certifications

Executive Order 12866

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

Environmental Impact

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

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

Executive Order 12612, Federalism

The General Counsel, as the Designated Official, under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this final rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule implements the requirements of HOPA by revising the provisions for ``55-or-older'' housing found at 24 CFR part 100, subpart E. It effects no changes in the current relationships among the Federal government, the States and their political subdivisions in connection with HUD programs.

Regulatory Flexibility Act

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

List of Subjects in 24 CFR part 100

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

Accordingly, 24 CFR part 100 is amended as follows:

PART 100--DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

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

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

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

Subpart E--Housing for Older Persons

* * * * *

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

(a) The provisions regarding familial status in this part shall not apply to housing intended and operated for persons 55 years of age or older. Housing qualifies for this exemption if:
(1) The alleged violation occurred before December 28, 1995 and the housing community or facility complied with the HUD regulations in effect at the time of the alleged violation; or
(2) The alleged violation occurred on or after December 28, 1995 and the housing community or facility complies with:
(i) Section 807(b)(2)(C) (42 U.S.C. 3607(b)) of the Fair Housing Act as amended; and
(ii) 24 CFR 100.305, 100.306, and 100.307.
(b) For purposes of this subpart, housing facility or community means any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion or portions of a single building shall not constitute a housing facility or community. Examples of a housing facility or community include, but are not limited to:
(1) A condominium association;
(2) A cooperative;
(3) A property governed by a homeowners' or resident association;
(4) A municipally zoned area;
(5) A leased property under common private ownership;
(6) A mobile home park; and
(7) A manufactured housing community.
(c) For purposes of this subpart, older person means a person 55 years of age or older.

Sec. 100.305 80 percent occupancy.

(a) In order for a housing facility or community to qualify as housing for older persons under Sec. 100.304, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older.
(b) For purposes of this subpart, occupied unit means:
(1) A dwelling unit that is actually occupied by one or more persons on the date that the exemption is claimed; or
(2) A temporarily vacant unit, if the primary occupant has resided in the unit during the past year and intends to return on a periodic basis.
(c) For purposes of this subpart, occupied by at least one person 55 years of age or older means that on the date the exemption for housing designed for persons who are 55 years of age or older is claimed:
(1) At least one occupant of the dwelling unit is 55 years of age or older; or
(2) If the dwelling unit is temporarily vacant, at least one of the

occupants immediately prior to the date on which the unit was temporarily vacated was 55 years of age or older.
(d) Newly constructed housing for first occupancy after March 12, 1989 need not comply with the requirements of this section until at least 25 percent of the units are occupied. For purposes of this section, newly constructed housing includes a facility or community that has been wholly unoccupied for at least 90 days prior to re-occupancy due to renovation or rehabilitation.
(e) Housing satisfies the requirements of this section even though:
(1) On September 13, 1988, under 80 percent of the occupied units in the housing facility or community were occupied by at least one person 55 years of age or older, provided that at least 80 percent of the units occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.
(2) There are unoccupied units, provided that at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.
(3) There are units occupied by employees of the housing facility or community (and family members residing in the same unit) who are under 55 years of age, provided the employees perform substantial duties related to the management or maintenance of the facility or community.
(4) There are units occupied by persons who are necessary to provide a reasonable accommodation to disabled residents as required by Sec. 100.204 and who are under the age of 55.
(5) For a period expiring one year from the effective date of this final regulation, there are insufficient units occupied by at least one person 55 years of age or older, but the housing facility or community, at the time the exemption is asserted:
(i) Has reserved all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and
(ii) Meets the requirements of Secs. 100.304, 100.306, and 100.307.
(f) For purposes of the transition provision described in Sec. 100.305(e)(5), a housing facility or community may not evict, refuse to renew leases, or

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otherwise penalize families with children who reside in the facility or community in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.
(g) Where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.
(h) Each housing facility or community may determine the age restriction, if any, for units that are not occupied by at least one

person 55 years of age or older, so long as the housing facility or community complies with the provisions of Sec. 100.306.

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

(a) In order for a housing facility or community to qualify as housing designed for persons who are 55 years of age or older, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. The following factors, among others, are considered relevant in determining whether the housing facility or community has complied with this requirement:
(1) The manner in which the housing facility or community is described to prospective residents;
(2) Any advertising designed to attract prospective residents;
(3) Lease provisions;
(4) Written rules, regulations, covenants, deed or other restrictions;
(5) The maintenance and consistent application of relevant procedures;
(6) Actual practices of the housing facility or community; and
(7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.
(b) Phrases such as ``adult living'', ``adult community'', or similar statements in any written advertisement or prospectus are not consistent with the intent that the housing facility or community intends to operate as housing for persons 55 years of age or older.
(c) If there is language in deed or other community or facility documents which is inconsistent with the intent to provide housing for persons who are 55 years of age or older housing, HUD shall consider documented evidence of a good faith attempt to remove such language in determining whether the housing facility or community complies with the requirements of this section in conjunction with other evidence of intent.
(d) A housing facility or community may allow occupancy by families with children as long as it meets the requirements of Secs. 100.305 and 100.306(a).

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

Sec. 100.307 Verification of occupancy.

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

and affidavits.
(b) A facility or community shall, within 180 days of the effective date of this rule, develop procedures for routinely determining the occupancy of each unit, including the identification of whether at least one occupant of each unit is 55 years of age or older. Such procedures may be part of a normal leasing or purchasing arrangement.
(c) The procedures described in paragraph (b) of this section must provide for regular updates, through surveys or other means, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years. A survey may include information regarding whether any units are occupied by persons described in paragraphs (e)(1), (e)(3), and (e)(4) of Sec. 100.305.
(d) Any of the following documents are considered reliable documentation of the age of the occupants of the housing facility or community:
(1) Driver's license;
(2) Birth certificate;
(3) Passport;
(4) Immigration card;
(5) Military identification;
(6) Any other state, local, national, or international official documents containing a birth date of comparable reliability; or
(7) A certification in a lease, application, affidavit, or other document signed by any member of the household age 18 or older asserting that at least one person in the unit is 55 years of age or older.
(e) A facility or community shall consider any one of the forms of verification identified above as adequate for verification of age, provided that it contains specific information about current age or date of birth.
(f) The housing facility or community must establish and maintain appropriate policies to require that occupants comply with the age verification procedures required by this section.
(g) If the occupants of a particular dwelling unit refuse to comply with the age verification procedures, the housing facility or community may, if it has sufficient evidence, consider the unit to be occupied by at least one person 55 years of age or older. Such evidence may include:
(1) Government records or documents, such as a local household census;
(2) Prior forms or applications; or
(3) A statement from an individual who has personal knowledge of the age of the occupants. The individual's statement must set forth the basis for such knowledge and be signed under the penalty of perjury.
(h) Surveys and verification procedures which comply with the requirements of this section shall be admissible in administrative and judicial proceedings for the purpose of verifying occupancy.

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

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

Sec. 100.308 Good faith defense against civil money damages.

(a) A person shall not be held personally liable for monetary damages for discriminating on the basis of familial status, if the person acted with the good faith belief that the housing facility or community qualified for a housing for older persons exemption under this subpart.
(b)(1) A person claiming the good faith belief defense must have actual knowledge that the housing facility or community has, through an authorized representative, asserted in writing that it qualifies for a housing for older persons exemption.
(2) Before the date on which the discrimination is claimed to have occurred, a community or facility, through its authorized representatives, must certify, in writing and under oath or affirmation, to the person subsequently claiming the defense that it complies with the requirements for such an exemption as housing for persons 55 years of age or older in order for such person to claim the defense.
(3) For purposes of this section, an authorized representative of a housing facility or community means the individual, committee, management company, owner, or other entity having the responsibility for adherence to the requirements established by this subpart.

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

Dated: March 25, 1999.
Eva M. Plaza,
Assistant Secretary for Fair Housing and Equal Opportunity.

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

Appendix

Examples of Applications of HUD'S Regulations Governing the

Exemption for Housing for Persons 55 Years of Age or Older to the Fair Housing Act

Sections

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

1. Purpose.

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

2. 80 Percent Occupancy.

Section 100.305 provides that in order for a housing facility or community to qualify for the exemption, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older. This occupancy requirement must be met at the time of any alleged violation of the Act. Paragraph (f) of Sec. 100.305 states that where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.
Example: A community or facility contains 63 occupied units. Eighty percent of 63 units equals 50.4. Under Sec. 100.305(d), 51 units would require occupancy by at least one person 55 years of age or older to qualify as 55 and older housing.
Section 100.305 also sets forth the other requirements a housing facility or community must follow in calculating occupancy. The following examples illustrate these requirements:

Example 1:

Buena Vista is a condominium association of 120 units. On

September 13, 1988, twenty (20) of the occupied units are not occupied by at least one person 55 years of age or older.
On April 1, 1998, Buena Vista declares itself to be housing for persons 55 years of age or older. On that date:
(1) The twenty (20) persons described above are still residing at Buena Vista;
(2) Ten (10) units of the total 120 units are unoccupied;
(3) One (1) of the units is occupied by the association's maintenance supervisor; and
(4) Two (2) units are occupied only by live-in health aides who provide reasonable accommodations to residents with disabilities and who are under the age of 55.
How many of the occupied units must be occupied by at least one person 55 years of age or older in order for Buena Vista to qualify as 55-or-older housing?
Under Sec. 100.305(e), Buena Vista would calculate its compliance with the 80 percent occupancy requirement by subtracting the following units from the total 120 units:
(1) The 20 units not occupied by at least one person 55 years of age or older on September 13, 1988 (See Sec. 100.305(e)(1));
(2) The ten (10) unoccupied units (See Sec. 100.305(e)(2));
(3) The one (1) unit occupied by the maintenance person (See Sec. 100.305(e)(3)); and
(4) The two (2) units occupied by the health aides (See 42 U.S.C. 3607 (b)(3)(A) and 42 Sec. 100.305(e)(4)).
Subtracting these 33 units from the total of 120 units leaves 87 units. At least 80 percent of these 87 units must be occupied by at least one person 55 years of age or older. Eighty percent of 87 equals 69.6. Due to Sec. 100.305(d), 70 units must be occupied by at least one person 55 years of age or older. This example assumes that the community also meets the requirements of Secs. 100.306 and 100.307.

Example 2:

Topaz House is a cooperative of 100 units. On January 20, 1998, Topaz House announces its intent to be 55-or-older housing and publishes policies and procedures sufficient to satisfy Sec. 100.306. On that date, of the 100 total units:
(1) Sixty (60) of the occupied units are occupied by at least one person 55 years of age or older;
(2) Thirty (30) of the occupied units do not have occupants 55 years of age or older; and
(3) Ten (10) units are unoccupied.
Since 60 out of the 90 occupied units are occupied by at least one person 55 years of age or older, the Topaz House only has 67 percent of its occupied units occupied by at least one person 55 years of age or older.

Under Sec. 100.305(e)(5), Topaz House may still qualify for the 55-or-older exemption if, during a period which is one year from the effective date of this regulation, it:
(1) Reserves all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and
(2) Meets the requirements of Secs. 100.304, 100.305, 100.306, and 100.307 and
(3) Within the one year period achieves occupancy of at least 80% of its occupied units by at least one person who is 55 years of age or older.
There is no requirement that Topaz House take any action concerning the residents under 55 years of age who are occupying units on the date the building declares its intent to be 55-or-older housing. Topaz may not evict, or terminate the leases of households containing children under the age of 18, in order to qualify for the exemption.

Example 3:

Snowbird City is a mobile home community in Texas with 100 units. Snowbird City complies with all other requirements of 55-or-older housing, but is uncertain of its compliance with the 80 percent occupancy rule.
Fifty out of the 100 units are occupied year round. Of these fifty units, 12 units are not occupied by at least one person 55 years of age or older. Of the remaining 50 units, 5 are unoccupied and offered for sale, and the remaining 45 are occupied by at least one person 55 years of age or older each winter on a routine and reoccurring basis.
If a complaint of familial status discrimination is filed in December, the community meets the 80 percent occupancy requirement because 83 out of the 95 occupied units (87 percent), are occupied by at least one person 55 years of age or older. If the complaint is filed in July, Snowbird City still meets the requirement. Under Sec. 100.305(b), a temporarily vacant unit is considered occupied by a person 55 years of age or older if:
(1) The primary occupant has resided in the unit during the past year; and
(2) The occupant intends to return on a periodic basis.

Example 4:

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

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

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

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

Example 1:

A mobile home park which takes the following actions satisfies the intent requirement:
(1) Posts a sign indicating that the park is 55-or-older housing;
(2) Includes lease provisions stating that the park intends to operate as 55-or-older housing; and
(3) Has provided local realtors with copies of the lease provisions.

Example 2:

An area zoned by a unit of local government as ``senior housing'' satisfies the intent requirement if:
(1) Zoning maps containing the ``senior housing'' designation are available to the public;
(2) Literature distributed by the area describes it as ``senior housing'';
(3) The ``senior housing'' designation is recorded in accordance with local property recording statutes; and

(4) Zoning requirements include the 55-or-older requirement or a similar provision.

Example 3:

A condominium association satisfies the intent requirement if it has:
(1) Adopted, through its rules and regulations, restrictions on the occupancy of units consistent with HUD's regulations governing 55-or-older housing at 24 CFR part 100, subpart E;
(2) Has distributed copies of the rules to all occupants; and
(3) Has notified local realtors of the restrictions.
The following is an example of a housing facility which has failed to satisfy the intent requirement described in Sec. 100.306:

Example 4:

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

4. Verification of occupancy.

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

Example 1:

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

Example 2: Sample certification

I, (name), am 18 years of age or older and a member of the household that resides at (housing facility or community), (unit number or designation). I hereby certify that I have personal knowledge of the ages of the occupants of this household and that at least one occupant is 55 years of age or older.
Paragraph (e) of Sec. 100.307 requires that the housing facility or community establish appropriate policies to require that all occupants comply with the age verification procedures. The following examples illustrate acceptable policies:

Example 1:

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

Example 2:

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

Example 3:

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

5. Future revisions to this appendix.

HUD may update or revise this appendix as necessary.

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