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Civil Penalties for Fair Housing Act Violations; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 180

[Docket No. FR–4302–I–02]

RIN 2529–AA83

Civil Penalties for Fair Housing Act Violations

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

ACTION: Interim rule.

SUMMARY: On December 18, 1997, HUD published for public comment a proposed rule that would amend HUD's regulations governing hearing procedures for civil rights matters to clarify that, in a given case, an Administrative Law Judge (ALJ) may, and in appropriate circumstances should, assess more than one civil penalty against a given respondent, where the respondent has committed separate and distinct acts of discrimination. The rule also proposed to amend these regulations to describe how ALJs are to consider housing-related hate acts under the six factors ALJs apply in determining the amount of a civil penalty to assess against a respondent found to have committed a discriminatory housing practice. This interim rule makes effective the amendments in the December 18, 1997 proposed rule, takes into consideration the public comments received on the proposed rule, and solicits additional public comments on the rule. All public comments will be taken into consideration in the development of the final rule.

DATES: *Effective date:* March 12, 1999. *Comment due date:* Comments on the interim rule are due on or before: April 12, 1999.

ADDRESSES: Interested persons are invited to submit written comments regarding this interim rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. Facsimile (FAX) comments will not be accepted.

FOR FURTHER INFORMATION CONTACT: Stephen I. Shaw, Office of Litigation and Fair Housing Enforcement, Room 10258, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; telephone (202) 708–1042 (this is not a toll-free telephone number). Hearing or speech-impaired persons may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. The December 18, 1997 Proposed Rule

On December 18, 1997 (62 FR 66488), HUD published for public comment a proposed rule that would interpret the Fair Housing Act (the Act) to allow Administrative Law Judges (ALJs) to assess a separate civil penalty for a series of acts involving housing discrimination. Under the Act, housing discrimination violations carry maximum civil penalties for first-, second-, and third-time offenders. A number of ALJs have interpreted the Act's provisions narrowly and assessed a single civil penalty against a violator, even where the violator committed more than one separate and distinct act of discrimination.

The December 18, 1997 proposed rule advised that it would amend HUD's regulations at 24 CFR part 180 (Hearing Procedures for Civil Rights Matters) to clarify that, in a given case, an ALJ may, and in appropriate circumstances should, assess more than one civil penalty against a given respondent, where the respondent has committed separate and distinct acts of discrimination. The December 18, 1997 proposed rule also advised it would amend part 180 to describe how ALJs are to consider housing-related hate acts under the six factors ALJs apply in determining the amount of a civil penalty to assess against a respondent found to have committed a discriminatory housing practice.

In addition to the substantive amendments described above, the December 18, 1997 proposed rule advised of a clarifying change to 24 CFR part 180. Specifically, the December 18, 1997 rule proposed to move the provisions governing the assessment of civil penalties found at § 180.670(b)(3)(iii)(A), (B), and (C) to a new § 180.671. HUD also proposed to make changes to certain of these provisions for purposes of clarity.

This interim rule is applicable to all fair housing cases filed with HUD on or after the effective date of this rule. This rule, however, does not state to what degree it applies to pending administrative Fair Housing Act cases as of that date. HUD intends that the rule apply to any cases it charges on or after the effective date of the rule.

The December 18, 1997 proposed rule provided additional information on the amendments to 24 CFR part 180.

II. Differences Between the December 18, 1997 Proposed Rule and This Interim Rule

This interim rule makes effective the amendments in the December 18, 1997 proposed rule and takes into consideration the public comments received on the proposed rule. HUD is making two additional changes to the proposed rule in response to public comment. First, HUD has clarified the definition of ''separate and distinct housing practice'' in § 180.671(b) (see HUD's response to the comment entitled ''Definition of 'separate and distinct housing practice' is unclear'' in section III of this preamble for additional information regarding this change). HUD has also revised the definition of ''housing-related hate act'' in § 180.671(c)(2)(ii). This revision clarifies the distinction between discriminatory housing practices that violate section 818 of the Act but would not be housing-related hate acts, and such hate acts (see HUD's response to the comment entitled ''Definition of 'housing-related hate act' is confusing'' in section III of this preamble for additional details regarding this change).

This rulemaking is part of President Clinton's ''Make 'Em Pay'' initiative, which is designed to fight housing-related acts of hate violence and intimidation with increased enforcement and monetary penalties. In order to provide additional public participation in this rulemaking, HUD is soliciting comments on this interim rule. All public comments will be taken into consideration in the development of the final rule.

III. Discussion of Public Comments on the Proposed Rule

The public comment period on the proposed rule closed on January 20, 1998. Six public comments were received by HUD. This section of the preamble presents a summary of the significant issues raised by the public commenters on the December 18, 1997 proposed rule, and HUD's responses to these comments.

A. The Public Comments, Generally

Most of the commenters expressed reservations about HUD's proposed amendments to 24 CFR part 180. Generally, the comments can be divided into four broad categories: (1) Commenters that believe the proposed rule was unclear and request additional guidance; (2) commenters that express

concern about the impact of the proposed regulations; (3) commenters that question HUD's authority or justification for issuing the rule; and (4) commenters that question whether HUD complied with the necessary rulemaking requirements in issuing the proposed regulations.

B. Commenters that Believe the Proposed Rule Was Unclear

Comment: Definition of ''housing-related hate act'' is confusing. One commenter wrote that the definition of ''housing-related hate act'' in the proposed rule included most or all discriminatory practices prohibited by the Act. According to the commenter, the proposed rule marks a sharp break with HUD's traditional practices, because it is the first time that HUD has characterized any such discrimination as ''hate.'' The commenter wrote that the new interpretation would lead to confusion in HUD's fair housing enforcement process. The commenter described three possible areas of confusion:

1. *Definition may be applied too narrowly.* First, the commenter stated that the proposed definition may result in ALJs applying the standard too narrowly:

> ALJs may mistakenly believe that the word ''hate'' in the ''housing-related hate act'' standard requires that HUD must prove that ''hate''—rather than fear, financial self-interest, amusement, or any other factor—motivated a discriminatory housing act before an ALJ can apply that standard.

HUD Response. In response to the commenter's first point, the language of the definition of ''housing-related hate act'' found in new § 180.671(c)(2)(ii) does not imply the necessity to prove a motivational factor for such an act to fall within the definition. Rather, the definition describes the objective characteristics of the act that must be found for such an act to fall within the definition (i.e., the act is characterized by a threat or the actual carrying out of violence, intimidation, coercion, assault, bodily harm, and/or harm to property). Accordingly, HUD does not believe an ALJ applying this definition would be confused into thinking that the definition's inclusion of the term ''hate'' requires proof of a respondent's internal motivation before the ALJ could find that the respondent has committed a housing-related hate act. Therefore, HUD did not revise the proposed rule as a result of this comment.

2. *Definition may be applied too broadly.* The commenter also wrote that, although the use of ''hate'' in the proposed definition could narrow its application, the lack of clarity in the definition may result in ALJs applying the standard too broadly:

> [The proposed] definition of ''housing-related hate act'' includes discriminatory housing practices that also involve ''threat[s],'' ''intimidation,'' and ''coercion,'' among other characteristics. However, those terms describe most, if not all, discriminatory housing practices. Absent any further clarification, an ALJ could determine that most or all discriminatory housing practices are ''housing-related hate acts'' favoring the imposition of maximum penalties.

HUD Response. The commenter's second concern indicates that the commenter believes that HUD's proposed definition of housing-related hate act covers all forms of housing discrimination anywhere in the Act. The definition of housing-related hate act does not include all discriminatory housing practices. For example, racial steering (i.e., discouraging a person from renting or buying a dwelling in a particular area, or encouraging a person to rent or buy in a particular area, or assigning a person to housing in a particular area, on account of that person's race, *see* 24 CFR 100.70(c)), would ordinarily not include a threat of, or actual ''violence, intimidation, assault, bodily harm, and/or harm to property.'' (*See* 24 CFR 180.671(c)(2)(ii).) As another example, a difference in the terms and conditions of rental, such as charging a tenant of a particular ethnic, national, racial or religious background more rent than other tenants, would not include the elements that HUD has identified as necessary to constitute a housing-related hate act.

The commenter may have meant that HUD's proposed definition of housing-related hate act covers ''most, if not all'' of the conduct prohibited by section 818 of the Act (42 U.S.C. 3617). That provision makes it illegal for anyone to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of his or her fair housing rights, or on account of having aided another person in the exercise and enjoyment of his or her fair housing rights. Assuming that this is what the commenter meant, it seems to follow that the substance of the comment is that it is unnecessary for HUD to define housing-related hate act as being something apart from section 818 itself. In proposing and adopting this definition, HUD intends that the definition focus on (actual or threatened) violence, assault, bodily harm and property damage, as well as intimidation and coercion that contains those violent elements, so that the definition refers to the more heinous and violent acts among all the acts which violate section 818. HUD does not intend that the proposed definition of housing-related hate act include non-violent discriminatory acts which violate section 818.

HUD believes that there are clear distinctions between discriminatory housing practices that violate section 818 but would not be housing-related hate acts. In order to clarify this distinction, HUD has revised the definition of housing-related hate act in new § 180.671(c)(ii) to read as follows:

> For purposes of this section [§ 180.671], the term ''*housing-related hate act*'' means any act that constitutes a discriminatory housing practice under section 818 of the Fair Housing Act and which constitutes or is accompanied by actual violence, assault, bodily harm, and/or harm to property; intimidation or coercion that has such elements; or the threat or commission of any action intended to assist or be a part of any such act.

The following examples demonstrate conduct which violates section 818, but which would not be within the meaning of the revised definition. One example of such conduct would be where the owner or manager of an apartment complex fired an employee because he or she rented apartments to African-American and Mexican-American applicants, contrary to the instructions of the owner or manager to discriminate against such applicants (*See Smith* v. *Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975)).

Another example of a discriminatory housing practice that violates section 818 but which HUD does not intend to include in the revised definition of housing-related hate act involves a local jurisdiction using a threat of criminal prosecution to deprive members of protected classes of their housing rights. In *People Helpers* v. *City of Richmond* 789 F.Supp. 725 (E.D. Va. 1992), plaintiff was a non-profit organization whose mission was to provide affordable housing for individuals with mental and physical handicaps. It purchased a building in Richmond, VA for the purpose of providing housing to such individuals. The City undertook a variety of investigations of the plaintiff's operations and the conditions in the building. Plaintiff sued, claiming the City's investigations were motivated by animus against plaintiff's disabled clients and interfered with the enjoyment of its fair housing rights. The court ruled that plaintiff's claims stated a viable cause of action, and it was entitled to try to prove that the City's investigations interfered with the organization's fair housing rights in violation of section 818. Because the

City's actions were non-violent, they would not be housing-related hate acts.

Further, retaliating against a person because he or she has made a fair housing complaint or otherwise assisted or participated in a proceeding under the Act would violate section 818 (24 CFR 100.400). This type of retaliation, such as raising a tenant's rent because the tenant had engaged in a protected activity, would not amount to a housing-related hate act as HUD has defined that term in this interim rule.

In addition, some types of harassment directed to preventing the enjoyment of fair housing rights can also constitute a section 818 violation without constituting a housing-related hate act as HUD has defined it. One example is found in *HUD* v. *Williams* (2A Fair Housing—Fair Lending ¶ 25,007 at 25,118–19 (HUD ALJ March 22, 1991)), in which a landlord's 6:00 a.m. telephone call to a tenant with HIV inquiring about the tenant's condition was found to violate section 818. Because this activity did not involve a threat of physical violence to the tenant or his property, this act was found not to constitute a housing-related hate act.

On the other hand, although hate acts, as defined, involve violence or a threat of violence, that does not mean that a respondent must have been convicted of a hate crime before an ALJ may find that respondent has committed a housing-related hate act. *See, e.g., HUD* v. *Simpson*, 2A Fair Housing—Fair Lending ¶ 25,082 (HUD ALJ Sept. 9, 1994) (neighbors found liable in HUD fair housing case for engaging in various forms of harassment and threat against neighbors of South American origin, violating Section 818 of the Act, 42 U.S.C. 3617).

3. *Definition may lead to inquiries about motivation.* Finally, the commenter wrote that the proposed standard may shift the focus of enforcement proceedings to the motivation of the respondent:

> [A] mistaken focus on ''hate'' [in the proposed standard] may prompt ALJs to allow unwarranted inquiries into motivation during enforcement proceedings. Thus, hearings that should properly focus on discrimination—regardless of any underlying motivation for that discrimination—could instead focus on why the respondent discriminated.

HUD Response. As HUD noted above, the definition in § 180.670(c)(2)(ii) is based on objective criteria that do not require an inquiry into motivation. An ALJ, however, properly may inquire into motivation in considering whether to assess a civil penalty, and, if so, how much. For instance, an ALJ may consider motivation under the factors of degree of culpability and nature and circumstances of the violation (*see, e.g., HUD* v. *Gutleben*, 2A Fair Housing—Fair Lending ¶ 25,103 (HUD ALJ Aug. 15, 1994) (ALJ expressly considered one respondent's degree of racial animus in assessing the maximum civil penalty against him, while giving credit to another respondent's minimal culpability in declining to assess any civil penalty against her)).

Comment: Recommended substitute language for proposed § 180.671(c)(2). One commenter recommended substitute language for proposed § 180.671(c)(2), which defines ''housing-related hate act.'' According to the commenter, the suggested language tracks the relevant portion of federal criminal civil rights legislation introduced by Senators Kennedy and Specter (S. 1529) and Congressmen Schumer and McCollum (H.R. 3081), which President Clinton and the Department of Justice have endorsed. The commenter believes that the substitute language sets clear evidentiary criteria for when an ALJ should maximize a civil penalty. The commenter also recommended the substitute language because an ALJ will be able to apply the revised standard only when particularly violent discriminatory housing practices occur. The substitute provision would read:

> Where the ALJ finds any respondent to have committed a discriminatory housing practice under section 818 of the Fair Housing Act that resulted in death or bodily injury to any person, or involved an attempt, through the use of fire, a firearm, or an explosive device to cause death or bodily injury to any person, the ALJ shall take this fact into account when considering the factors listed in paragraphs (c)(iii), (iv), (v), and (vi) of this section.

HUD Response. For the reasons discussed above, HUD does not agree that the definition of ''housing-related hate act'' in 180.670(c)(2)(ii) (as revised) is too narrow, too broad, or will lead to improper inquiries regarding motivation. Rather, the nature of the act involved in committing the discriminatory housing practice is the determining factor as to whether the discriminatory housing practice is a housing-related hate act. Furthermore, the commenter's proposed definition is under-inclusive. For example, a cross burning on a minority family's front lawn, bricks thrown through the windows of a minority family's house, and hate graffiti threatening violence sprayed on a minority family's house all would fall outside the commenter's proposed definition, because they neither attempt nor result in ''death or bodily injury.'' HUD believes that each of those acts is properly included within the definition of housing-related hate act in this interim rule.

Comment: HUD should provide additional guidance on the six factors ALJs must consider in determining the civil penalty amount. Proposed § 180.671(c) described the six factors that an ALJ must consider in determining the civil penalty amount for each separate and distinct discriminatory housing practice. Two commenters recommended that HUD revise the proposed rule to provide additional guidance on the six factors. One of the commenters saw two related benefits arising from the provision of the additional guidance:

> Providing this additional clarification to the six factors will allow the ALJ to impose the maximum civil penalties when they are needed, but will not penalize, with unnecessary severity, respondents who, for example, acted unintentionally or without malice. The additional guidance will also help to ensure greater consistency among ALJs in assessing appropriate penalties.

HUD Response. The six factors were first included as an instruction to ALJs in the House Report on the Fair Housing Act Amendments of 1988 (H. Rep. 100–711, 100th Cong., 2nd Sess. 37 (1988), 1988 U.S. Code Cong. & Admin. News 2198). The ALJs have applied the six factors consistently in their decisions (*see, e.g., HUD* v. *Kormoczy*, 2A Fair Housing—Fair Lending ¶ 25,071 at 25,664 (HUD ALJ May 16, 1994) (listing the six factors and specifically applying the degree of culpability to lower the civil penalty assessed); *HUD* v. *Pheasant Ridge Associates, Ltd.*, 2A Fair Housing—Fair Lending ¶ 25,123 at 26,052 (HUD ALJ Oct. 25, 1996) (focusing on degree of culpability and financial resources factors to raise the civil penalty assessed); *HUD* v. *Simpson*, 2A Fair Housing—Fair Lending ¶ 25,082 at 25,764 (HUD ALJ Sept. 9, 1994) (focusing on previous violations, nature and circumstances of the violation, the goal of deterrence, and respondent's financial circumstances factors to raise the civil penalty assessed); *HUD* v. *Murphy*, 2A Fair Housing—Fair Lending ¶ 25,002 at 25,058 (July 13, 1990) (applying all the factors to reduce the civil penalty assessed). In other words, HUD is codifying the legislative history and case law relating to the six factors. HUD, therefore, finds it unnecessary to clarify their application further through a rulemaking.

Comment: HUD should expand the list of factors to be considered by an ALJ in determining the civil penalty amount. One commenter recommended that HUD add five additional factors to the

list in proposed § 180.671(c). Specifically, the commenter suggested that the ALJ should also be required to consider whether the respondent has:

(1) Admitted guilt without the need for a hearing;

(2) Already made, or begun, restitution to the victims;

(3) Unintentionally or unknowingly committed the violation;

(4) Previously attended or agreed to adopt additional training or education; or

(5) Tried to mitigate the damage caused or undertaken corrective action prior to being charged with the violation.

The commenter also suggested that the first factor listed in proposed § 180.671(c) (''whether the respondent has previously been adjudged to have committed unlawful housing discrimination''), be revised to clearly distinguish between adjudication and consent agreements (where liability has been denied), as an encouragement to the latter.

HUD Response. As stated above, the six factors derive from the legislative history and have been consistently cited and utilized in case law. Two of the factors (''nature and circumstances of the violation'' and ''other matters as justice may require'') give ALJs particularly broad discretion to weigh any matters that appropriately might affect the amount of any civil penalty to be assessed. Further, in cases where a respondent unknowingly committed a violation or made restitution without the need for a hearing, ALJs have taken these facts into account to lower the amount of civil money penalty assessed (*see, e.g., HUD* v. *Wagner,* 2A Fair Housing—Fair Lending ¶ 25,032 at 25,339 (HUD ALJ June 22, 1992) (one respondent acknowledged her error in refusing to rent to families with children and, because of that admission, was assessed a lower civil penalty than the other respondents under the need for deterrence factor); *HUD* v. *Murphy,* 2A Fair Housing—Fair Lending ¶ 25,002 at 25,058–59 (July 13, 1990) (civil penalty reduced in familial status discrimination case where respondents were ill-informed of the law and, albeit erroneously, believed that they were correctly applying an exemption for housing for older persons); *HUD* v. *Gutleben,* 2A Fair Housing Fair Lending ¶ 25,078 at 25,731 (HUD ALJ Aug. 15, 1994) (ALJ did not assess civil penalty against one respondent where she immediately curtailed her wrongful acts by rescinding an eviction notice the day after she issued it).

Indeed, it would not be possible to list in a rule all the possible mitigating factors that might appropriately affect the assessment of a civil penalty. Since the six factors established by the Congress and which the ALJs consistently apply already allow for adjustments in the assessment of civil penalties based on the individual circumstances of the case, and since ALJs do in fact rely on those factors to make such adjustments, HUD declines to adopt the commenter's suggestion to add more factors.

In response to the commenter's second suggestion, the first factor refers to whether a respondent has been ''adjudged'' to have previously committed a discriminatory housing act. A consent agreement in which liability has been denied is not a judgment of liability, but rather a settlement enforceable by court order. Therefore, there is no possibility of confusion and no need to ''clearly distinguish'' between a respondent who has been ''adjudged'' in violation of the Act and one who signs a consent agreement denying liability. Therefore, HUD declines to modify the first factor as suggested.

Comment: Definition of ''separate and distinct discriminatory housing practice'' is unclear. Two commenters wrote that the definition of ''separate and distinct discriminatory housing practice'' in the proposed rule was unclear. One commenter stated that given the ''[v]ague definition * * * each ALJ would be left to make such determinations with little guidance.'' The other commenter did not believe that the definition could be clarified: ''[I]t is impossible to draft a definition which clearly identifies the standards for defining a single discriminatory practice.''

HUD Response. HUD agrees that the definition needs to be clarified. Accordingly, HUD has revised § 180.671(b) to express HUD's intention more clearly. The revised definition reads as follows:

Definition of separate and distinct discriminatory housing practice. A separate and distinct discriminatory housing practice is a single, continuous uninterrupted transaction or occurrence that violates section 804, 805, 806 or 818 of the Fair Housing Act. Even if such a transaction or occurrence violates more than one provision of the Fair Housing Act, violates a provision more than once, or violates the fair housing rights of more than one person, it constitutes only one separate and distinct discriminatory housing practice.

The following illustrative examples are designed to help the public and ALJs distinguish between cases involving only one single discriminatory housing practice and cases involving multiple such practices that are potentially subject to the assessment of multiple civil penalties.

Example 1: An African-American family of four visits a white landlord in order to rent an apartment from him. The landlord states that she does not rent to African-Americans.

The entire transaction occurred at a single time and constitutes a single, continuous transaction, even though it affected more than one person and violated two sections of the Act, namely 42 U.S.C. 3604(a) and (c) (refusal to rent due to race and a statement indicating discrimination based on race). Under the definition, the conduct constituted a single separate and distinct fair housing practice, and an ALJ could assess a maximum of a single civil penalty only.

Example 2: A man with a mental disability seeks to rent an apartment. Although the landlord has units available, he refuses to rent to this man because of the mental disability. A few weeks later, the man's sister, who also has a mental disability, applies to rent an apartment at the same development. Again, the landlord has a unit available, but he refuses to rent to her because of her mental disability. The brother and sister together file a single fair housing complaint.

By refusing to rent to either sibling on account of disability, the landlord violated 42 U.S.C. 3604(f)(1)(A). In this case, each attempt to rent was a single, continuous, uninterrupted transaction, separate and distinct from the other. Therefore, the landlord's conduct constituted two separate and distinct discriminatory housing practices. If otherwise appropriate, an ALJ could assess two separate civil penalties against the respondent.

Example 3: A Latino family moves into a neighborhood where no Latinos had lived before. A next-door neighbor begins organizing other neighbors into a campaign to force the Latino family out of the neighborhood. At one point, the neighbors, including the next-door neighbor, throw rocks through the Latino family's window. A few weeks later, a member of the Latino family steps outside to get her mail, at the same time the next-door neighbor is raking her garden. The next-door neighbor walks over to the Latino woman, and, with her rake in both hands, holds it near the Latino woman's face in a threatening manner, and says ''if you want to live to an old age, you'd better move out now.'' A few more weeks pass, and, one evening, the same group of neighbors that threw the rocks burns a cross on the Latino family's front lawn.

In this example, there are three acts that violate 42 U.S.C. 3617 that are not

continuous, because they are interrupted by the passage of time. The entire group of neighbors committed two separate and distinct acts, and the hostile neighbor committed three such acts. Therefore, they are multiple acts and an ALJ, if otherwise appropriate, could assess a separate civil penalty for each act.

Example 4: An African-American applies for a unit in a public housing authority's public housing system. Although there is an available unit of the appropriate bedroom size in a desirable section of the public housing system, the authority, because of the applicant's race, falsely states that no such unit is available and steers the applicant to a vacancy in a less desirable section, where crime, abandoned buildings and drug activity are rampant. The applicant accepts the unit but places her name on a list of tenants interested in transferring to the more desirable section, where there are fewer abandoned buildings, the crime rate is much lower, and ''open-air'' drug activity is nonexistent. After a few months, her name comes to the top of the transfer list. She learns through friends that a unit is available in the more desirable section. However, the management, again because of her race, falsely tells her that no such unit is available and denies her transfer.

In this example, the public housing authority violated 42 U.S.C. 3604(a) (refusal to rent a particular unit) and 3604(d) (falsely representing that a unit is unavailable) on each of the occasions mentioned in the example. The first incident, which was a form of racial steering, constituted a single discriminatory housing act under the definition, although the conduct violated two subsections of the Act. The second incident, a refusal to transfer, also constituted a single discriminatory housing practice that violated two subsections of the Act. The two incidents, however, were separate and distinct from each other and, therefore, under the definition, each constituted a separate and distinct discriminatory housing practice. Accordingly, the ALJ has the discretion to assess a civil penalty for each separate and distinct discriminatory housing practice, but not one for each of the two violations of the Act that occurred within each discriminatory housing practice (*see HUD* v. *Las Vegas Housing Authority*, 2A Fair Housing—Fair Lending ¶ 25,116 (HUD ALJ Nov. 6, 1995)).

Example 5: A group of people that objects to people of foreign national origin gathers at the home of a family that recently arrived from Russia and, over a 10-minute period, throws several rocks through the family's window in an attempt to intimidate them into moving. At the time of the rock throwing, there are four people in the house: a husband and wife and their two children. Each person who was home when this occurred was traumatized by the rock throwing. The husband was standing by the window and was struck by a rock. The wife was standing next to him and was cut by glass. The children suffered emotional harm.

In this example, each member of the group committed a single violation of 42 U.S.C. 3617, even though more than one rock was thrown and four people were affected, because the conduct was a single, continuous occurrence. The ALJ could at most assess one civil penalty against each respondent.

Comment: HUD should clarify its fair housing regulations and guidance before increasing the civil penalties for violating them. One commenter suggested that before HUD amends its fair housing civil penalty regulations, it should review its fair housing regulations and guidance for clarity. The commenter wrote that ''[s]imple notions of fairness should clearly indicate that it is unreasonable for the Department to subject housing providers to multiple civil penalties for violations of unclear or ambiguous fair housing regulations and guidance.''

HUD Response. During development of the December 18, 1997 proposed rule, HUD reviewed 24 CFR part 180 in its entirety for purposes of clarity. As a result of this review, the proposed rule included a clarifying amendment to part 180, which has been made effective by this rule. Specifically, this interim rule moves the lengthy provisions governing the assessment of civil penalties found at § 180.670(b)(3)(iii)(A), (B), and (C) to a new § 180.671. The transfer of these provisions to § 180.671 does not involve any substantive revisions to part 180, but is designed solely to make the part 180 regulations easier to understand.

Further, the public was afforded an opportunity to comment on the clarity of HUD's proposed amendments to part 180. HUD has made two clarifying changes to the proposed rule in response to public comment. First, HUD has clarified the definition of ''separate and distinct housing practice'' in § 180.671(b). HUD has also revised the definition of ''housing-related hate act'' in § 180.671(c)(2)(ii) to clarify the distinction between discriminatory housing practices that violate section 818 of the Act but would not be housing-related hate acts.

C. Commenters Expressing Concerns About Impact of Rule

Comment: Hate violence will not be stemmed by increasing civil penalties. One commenter doubted that increased civil penalties would deter housing-related acts of hate violence and intimidation. As the commenter wrote: ''Violence and other hate crimes carry criminal penalties. If these criminal penalties do not deter the crime, we fail to understand how an increase in a civil fine will deter these actions.''

HUD Response. The potential increase in civil money penalties to which the commenter refers applies to all multiple, separate acts of housing discrimination, not only to those with criminal penalties. Thus, criminal penalties will not necessarily be involved in these cases. Furthermore, not all potentially criminal violations of the Act are prosecuted as such. Finally, there is no rule of law requiring HUD to choose one form of deterrence over another. Some persons will be deterred by the threat of criminal prosecution, others may be more deterred by harm to the pocketbook. The President and the Secretary of HUD have determined to use all civil and criminal means at their disposal to deter housing discrimination.

Comment: The proposed rule threatens the balance between judicial and administrative enforcement of the Act. Two commenters wrote that the Act establishes a careful balance between the benefits of a timely administrative process and the rights of parties to have their cases heard in federal court before a jury. One of the commenters wrote that the standards for imposition of a civil penalty are lower than those for punitive damages in a federal district court, and therefore result in additional exposure for a respondent charged of discrimination. This commenter noted that the administrative civil penalties are capped to provide a level of certainty and to offset the additional exposure faced by respondents. The two commenters stated that, by authorizing increased civil penalties, the proposed rule would upset the balance between administrative and judicial enforcement of the Act. As one of the commenters wrote:

> If multiple penalties are available in the administrative process, we believe the majority of respondents would elect to go to federal court rather than subject themselves to the possibility of multiple civil penalties....Although defending a case in federal court is likely to be more costly and time consuming than defending the case in the administrative process, the lack of civil penalties in federal court will increase the

attractiveness of having the case defended in federal court by a jury of peers.

The second commenter wrote:

Any proposed change in administrative procedure should weight [sic] any effect it might have on whether it might encourage a party to elect [to have the action heard in federal court.] The proposed rule ignores any effect and should therefore be withdrawn.

HUD Response. Both commenters perceive that the Act established a ''balance'' between cases that proceed before ALJs and those in which one or more of the parties elects that the case be heard in federal court. In responding to this comment, some background may prove useful. Historically, either a complainant or respondent in a majority of fair housing cases in which HUD has issued a Determination of Reasonable Cause and a Charge have elected to have the case heard in federal court. For the period 1989 (when the Fair Housing Act Amendments of 1988 became effective) through 1997, the percentage of fair housing cases in which HUD found reasonable cause and where a respondent or complainant elected to have the case heard in federal court was 67%.

The first commenter's concern that a particular respondent may face higher monetary exposure to civil penalties under the proposed rule is not without basis. In administrative cases in which a respondent is charged with having committed more than one separate and distinct act of housing discrimination, there is a potential for a higher total monetary civil penalty assessment against that respondent as a result of HUD's interpretation explicitly allowing an ALJ to assess multiple civil penalties in an appropriate case. The commenter's further concerns, however (i.e., this exposure renders respondents' exposure ''uncertain'' where before it was ''capped,'' and that this uncertainty would upset the delicate balance between administrative and federal court adjudication), are unfounded.

With regard to the first concern, a respondent's potential total exposure to civil penalties still would be capped. This is so because HUD's Charge of Discrimination would set out the allegations as to the separate and distinct discriminatory housing practices, and, since there is a statutory cap on how large a civil penalty an ALJ can assess per discriminatory housing practice, the respondent would know its total possible civil penalty exposure. Therefore, the rule does not create the uncertainty about which the commenter expressed concern.

With regard to the second concern, since there is no uncertainty, that cannot be a basis to upset the delicate balance to which the commenter refers. On the other hand, since the total monetary cap on civil penalties in the administrative forum in cases alleging multiple discriminatory housing practices would be potentially higher, it is possible that difference might cause some respondents to elect to have their cases heard in federal court, where they might not have done so otherwise. This conclusion, however, is purely speculative.

Furthermore, there are countervailing factors that are likely to curtail a significant increase in respondents electing to have their cases heard in federal court. For example, civil penalties cannot be assessed in the typical federal court fair housing case (*But see* 42 U.S.C. 3614(d)(1)(C)). On the other hand, punitive damages are potentially available in federal court, but not in the administrative forum (*Compare* 42 U.S.C. 3612(o)(3) and 3613(c) *with* 42 U.S.C. 3612(g)(3)).

In addition, the only cases in which an ALJ may impose multiple civil penalties against a single respondent will be those in which the respondent is alleged to have committed multiple acts of discrimination. Thus, everything else being equal, these are likely to be more egregious cases—the same cases in which punitive damages are more likely to be awarded if heard in federal court. There seem to be no inherent reasons why respondents in these types of cases would choose to avoid the administrative forum only to face a possible award of punitive damages in federal court that has the potential of being much higher than the respondents' total civil penalty exposure in the administrative forum. Hence, HUD does not believe that the rule will necessarily affect the rate of respondents' electing to have their fair housing act cases heard in federal court.

In the final analysis, however, even if the commenters' speculation were to turn out to be correct, HUD believes that its interpretation of the Act's civil penalty provisions is correct and comports with Congressional intent. Therefore, even if some higher percentage of respondents were to choose to have their fair housing cases heard in federal court, that also would comport with Congressional intent.

Comment: Rule may unfairly penalize large housing providers. One commenter stated that the proposed rule would unfairly penalize large housing providers with many employees. These housing providers may be firmly committed to fair housing principles, but employ individuals who engage in discriminatory conduct. The commenter noted that a significant amount of time may elapse before the housing provider becomes aware of the discriminatory actions committed by an employee. If the employee committed several discriminatory acts within a short period of time, the housing provider would be assessed multiple penalties before it could take remedial action. The commenter wrote:

[W]e have a firm policy of not tolerating any discriminatory acts by our personnel and we provide on-going education and training to our personnel. However, we have over 500 employees that interact with the public. With the large number of employees, it is extremely difficult for us to be made immediately aware that one employee, out of hundreds, may be engaging in discriminatory practices. Multiple offenses could occur in a very short time frame before we were made aware of the discriminatory practice and before we could take the necessary corrective action.

HUD Response. Under the Act, an ALJ is not obligated to assess a civil penalty in an appropriate case (*see, e.g., HUD* v. *George,* 2A Fair Housing—Fair Lending ¶ 25,010 at 25,169 (HUD ALJ Aug. 16, 1991) (ALJ assessed civil penalty against company but not individual who was company's Secretary and part owner, because ''the evidence does not show that [he] was personally responsible in fact for the discriminatory conduct of [the company]. Rather, it appears he merely implemented company policy.'' *Id.*). The December 18, 1997 rule did not propose to change that. Moreover, while the rule made clear that the Act allows an ALJ to assess multiple civil penalties in appropriate circumstances, the rule did not, and could not have, proposed to mandate the assessment of multiple civil penalties whenever the ALJ finds multiple acts of discrimination in a single case, because the Act makes civil penalties discretionary (*see* 42 U.S.C. 3612(g)(3) (''Such order *may,* to vindicate the public interest, assess a civil penalty . . .'') (emphasis added)).

Thus, where an ALJ finds multiple discriminatory housing practices, under the six factors for determining civil penalties codified by this interim rule, ALJs will consider the nature and circumstances of the violation, each respondent's degree of culpability, and other factors as justice may require in determining the amount to assess for each violation. Accordingly, if a rogue employee in an otherwise law-abiding management firm were responsible for repeated fair housing violations unbeknownst to company officials and contrary to their instructions, the ALJ could take that fact into consideration when determining the number of civil penalties, if any, to be assessed against each respondent, and the amount of

each. Because firms have a duty to exercise supervision over their work force to ensure that its members do not violate the Act, an ALJ might assess some civil penalty against the company even in that situation (*see* the example in the response to the comment ''Proposed amendments may be abused by testers'').

Comment: Multiple penalties may unfairly penalize small housing providers. One commenter expressed concern that HUD's proposal to permit the assessment of multiple civil penalties would have an unfair impact on small housing providers. The commenter wrote that when a housing discrimination case involves multiple violations it is generally associated with a single property or individual. The commenter also wrote:

> [A]ccording to the 1990 U.S. Census, of the more than 40,455 firms that reported their business as ''operators of apartment buildings,'' 39,903, or 98% are small businesses. With small businesses one penalty is generally sufficient to change discriminatory housing behavior.

The commenter also questioned why the proposed rule did not address Subtitle B of the Small Business Regulatory Enforcement and Fairness Act of 1996 (Pub.L. 104–121, approved March 29, 1996; 5 U.S.C. 601 note *et seq.*) (SBREFA). Section 223, the only relevant substantive provision of Subtitle B, provides in part that:

> Each agency regulating the activities of small entities shall establish a policy or program . . . to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.

HUD Response. First, the commenter provided no basis for its statement that ''with small businesses one penalty is generally sufficient to change discriminatory housing behavior.''

Second, whether a business is large or small, the Act prohibits it from committing housing discrimination not only on multiple occasions, but also single occasions. (*But see* Section 803(b) of the Act, 42 U.S.C. 3603(b), exempting from certain provisions of the Act specified small entities). Nevertheless, under the rule, ALJs are to consider six factors in assessing civil penalties, including the financial ability of respondent to pay, the nature and circumstances of the violation, and other factors as justice may require. HUD believes that the codification of these factors within the proposed rule provides assurance that the changes will not unfairly burden small housing providers with respect to the assessment of civil penalties against them. (*See, e.g., HUD* v. *Gaultney,* 2A Fair Housing—Fair Lending ¶ 25,013 (HUD ALJ Sept. 27, 1991) (in race discrimination case, respondent's civil penalty reduced due to consideration of his financial circumstances). On the other hand, ALJs have consistently held that a respondent has the legal burden of proving that its financial resources are inadequate to pay a civil penalty. *HUD* v. *Dellipoali,* 2A Fair Housing—Fair Lending ¶ 24,127 (HUD ALJ Jan. 7, 1997) at 26090. HUD does not intend to alter that burden by its codification of the six factors.

With regard to the commenter's second concern, SBREFA requires that an agency establish a policy regarding the reduction and, if appropriate, the waiver of civil penalties for violations of a statutory or regulatory requirement by a small entity. Section 223(a) of SBREFA provides that, under appropriate circumstances, an agency may consider a small entity's ability to pay in determining the amount of any civil penalty to be assessed against it. In addition, section 223(b) of SBREFA specifically allows an agency to exclude from its civil penalty reduction/waiver policy entities that have been subject to multiple enforcement actions by the agency and those that have committed willful violations of law.

HUD believes the six factors that ALJs consider when assessing civil penalties, which this interim rule codifies, are consistent with these SBREFA provisions. Under the rule, ALJs may consider the financial ability of a respondent to pay when assessing a civil penalty. To the extent that a small entity may have less financial ability to pay a civil penalty than a large one, an ALJ may assess a lower civil penalty against a small entity, when to do so would otherwise be appropriate under this factor. (*See HUD* v. *Gaultney,* 2A Fair Housing—Fair Lending ¶ 25,013 at 25,195 (HUD ALJ Sept. 27, 1991). On the other hand, under SBREFA, an agency can exclude entities that have committed wilful violations of the law from its civil penalty reduction policy. In cases heard by ALJs, where an ALJ finds that a respondent wilfully committed a series of discriminatory housing practices, the ALJ, applying, inter alia, the culpability factor, would more likely assess multiple and higher penalties for such acts than otherwise. If the ALJ did so, that would not offend the civil penalty reduction/waiver provisions of the SBREFA. Likewise, an ALJ can assess a higher civil penalty against a respondent who has been adjudged previously to have committed discriminatory housing practices. Because the SBREFA allows for an exclusion for entities that have been subject to multiple enforcement actions by the agency, assessing a higher civil penalty against a prior bad actor also would not offend the civil penalty reduction/waiver provisions.

Comment: Proposed amendments may be abused by fair housing testers. One commenter stated that the proposed amendments might be abused by unscrupulous or overzealous fair housing testers:

> We are also concerned that testing organizations could target an individual employee and trap them into making multiple acts of discrimination in order to financially hurt an owner or manager who may be firmly committed to Fair Housing.

HUD Response. Fair housing testing has a long-standing history as a method of gathering evidence as to whether landlords, real estate agents, or others in the housing industry are discriminating on the basis of protected class. Such testing has been consistently upheld against challenge. (See, e.g., *Havens Realty Corp.* v. *Coleman,* 455 U.S. 363, 373–74 (1982) (''a tester who has been the object of a misrepresentation made unlawful under 804(d) has suffered an injury in precisely the form the statute was intended to guard against''); accord, *Chicago* v. *Matchmaker Real Estate Sales Center,* 982 F.2d 1086, 1095 (7th Cir. 1992).) Indeed, such testing is perhaps the best way, and sometimes the only way, to prove the existence of discrimination, because it directly compares a housing provider's treatment of similarly situated minority and non-minority applicants. A district court commenting on Havens made a similar observation (see *Independent Living Resources* v. *Oregon Arena Group,* 982 F.Supp. 698, 761 n.86 (D. Ore. 1997) (''Testing was the most effective method—and perhaps the only method—of enforcing the FHA'')).

The commenter's suggestion of a fair housing group ''targeting'' an employee of an apartment owner or manager who is ''firmly committed to Fair Housing'' does not withstand analysis. Nothing in the regulation would make such a scenario more likely to occur than before. First, multiple civil penalties against a respondent who committed multiple discriminatory housing practices were not prohibited by regulation previously, and, in fact, under some circumstances an ALJ would assess them. (See, e.g., *HUD* v. *Las Vegas Housing Authority,* 2A Fair Housing—Fair Lending ¶ 25,116 (HUD ALJ Nov. 6, 1995).) Second, due process before a neutral ALJ stands between the charges of discrimination HUD issues as a result of complaints a fair housing

organization (or any other complainant) files and an ALJ's assessment of any civil penalty. In this situation, if the evidence showed that a complaining testing organization conducted one or more of its tests improperly or unfairly, HUD, if it found such evidence during the investigation, would take that into account in making its determination of reasonable cause or no reasonable cause. If the cases proceeded to hearing and the ALJ determined that there was malfeasance by the testing organization, the ALJ would take that into account in deciding whether to find liability with respect to such tests, much less assess a penalty (and, if so, how large). Third, the hypothetical fair housing group that this commenter imagines, if it had a goal of wanting to hurt the owner or manager financially without the possibility of assessments of multiple civil penalties for multiple violations, alternatively, could bring a series of separate cases, each based on one of a series of multiple incidents, and seek not only to have a series of civil penalties assessed against them, but possibly to have the later ones enhanced pursuant to clauses 812(g)(3)(B) & (C) of the Act (42 U.S.C. 3612(g)(3)(B) and (C)). Accordingly, HUD does not believe that the rule presents the potential problem the commenter raises.

On the other hand, under the law, a business owner or other principal can be held vicariously liable for the acts of employees or agents in the scope of their employment, even if the owner did not know or approve of them; this regulation does nothing to alter that preexisting legal truism. (See, *Walker* v. *Crigler* 976 F.2d 900, 904 (4th Cir. 1992) (where owner did not know of gender discrimination by property manager, owner held liable because ''the duty of a property owner not to discriminate in the sale or leasing of that property is non-delegable'').) (See also, *Marr* v. *Rife,* 503 F.2d 735, 742 (6th Cir. 1974) (applying principals of respondeat superior liability to Fair Housing Act violation)). Therefore, it is the responsibility of apartment owners, managers, real estate brokers, lenders, etc. who are ''firmly committed to fair housing'' to supervise and train their employees properly so that they do not commit a single act of housing discrimination.

D. Commenters That Questioned HUD's Authority or Justification for Issuing the Proposed Rule

Comment: HUD's reliance on FBI statistics is questionable. The preamble to the proposed rule cited to FBI statistics indicating that 27% of hate crimes committed in 1996 were housing related (62 FR 66488). One commenter questioned these statistics. The commenter wrote that the FBI ''does not collect information on how many hate crimes involve housing discrimination, only on how many of these crimes are 'crimes against property' such as cross-burnings on the front lawn of a house or anti-Semitic graffiti on other property such as an automobile.'' The commenter went on to write:

> Interestingly, of the 3,330 crimes against property included in the 1996 FBI statistics, *only two* of those crimes reportedly implicated acts involving multiple bias. Of those two incidents covering all of 1996, one of the two was a car theft. Thus it appears from the most recent source of statistics of the type that were relied upon by HUD to explain the necessity of the new rule and to justify the exigency of acting on an expedited basis, that there was only *one* reported property incident in *the entire United States* that could have *possibly* involved the type of conduct that the proposed rule is intended to deter. (Emphasis in original.)

HUD Response. The commenter is correct in that the FBI's reported hate crime statistics do not have a category that equates precisely with discriminatory acts that violate the Act. Nevertheless, HUD believes there is a correlation between hate acts committed against someone's property which the FBI reports and discriminatory housing practices under the Act. Accordingly, the citation to those statistics in the preamble to the proposed rule provides some insight into the number of hate crimes reported to the FBI that violated the Act.

HUD assumes that the commenter does not suggest that the commenter's examples of burning a cross on someone's lawn or scrawling anti-Semitic graffiti on their automobile, if done for the purpose of forcing that person to move out of the neighborhood because of that person's membership in a protected class, would not violate section 818 of the Act (42 U.S.C. 3617), as such acts, indeed, would violate that section. (*See, e.g., Stackhouse* v. *DeSitter,* 620 F.Supp. 208, 210–211 (N. D. Ill. 1985) (firebombing of plaintiff's car for the purpose of driving him out of his home because of his race violates section 818); *Seaphus* v. *Lilly,* 691 F.Supp. 127, 131, 138–9 (N.D. Ill. 1988) (setting fire to African-American condominium owner's front door, slashing his tires, damaging the paint on his car, and barricading his door with heavy objects and other acts of vandalism designed to coerce the condominium owner to move because of his race violated section 818); *cf. HUD* v. *Lashley,* 2A Fair Housing—Fair Lending ¶ 25,039 (HUD ALJ Dec. 7, 1992) (respondent found liable under section 818 of the Act for placing a bottle containing a flammable liquid and wick under the home of an African-American family).)

The commenter also appears to believe that only those acts involving ''multiple bias'' would provide justification for an ALJ to assess multiple civil penalties under the proposed rule. This is not correct. It is the commission of multiple acts, not an act based on multiple bias, that would provide such justification.

Comment: The rule improperly proposed to broaden a penalty provision without express direction from the Congress. The preamble to the proposed rule stated that the Act and its legislative history are ambiguous with respect to the issue of whether an ALJ may assess multiple civil penalties for multiple discriminatory housing practices. The preamble stated that, under the United States Supreme Court decision in *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984), the interpretation of the agency in such cases of statutory ambiguity will be upheld if it is ''based on a permissible construction of the statute'' (62 FR 66488). One commenter questioned HUD's reliance on the *Chevron* decision. Specifically, the commenter cited case-law which appears to require that the civil penalty provisions of the Act be narrowly construed. The commenter wrote:

> HUD's approach fails to consider the well-settled principle of construction that ''penal statutes are to be construed strictly,'' *Commissioner* v. *Acker,* 361 U.S. 87, 91 (1959), and to temper its proposed approach to an expanded interpretation of the [Act] accordingly. In this regard, we note that the federal courts have made clear that the rule of narrow interpretation is not limited to criminal sanctions, but also is to be applied to penal provisions ''involving civil penalties.'' *First National Bank of Gordon* v. *Department of the Treasury,* 911 F.2d 57, 65 (8th Cir. 1990).

HUD Response. This commenter seeks to apply the rule of strict construction of penal statutes to resolve the statutory ambiguity HUD identified in the preamble to the proposed rule. The commenter invokes the maxim that an ambiguity in a penal statute should be resolved in the defendant's favor (often referred to as the ''rule of lenity'') to argue that HUD should resolve the statutory ambiguity against finding that an ALJ can assess multiple civil penalties against a single respondent when the ALJ has found that respondent committed multiple separate and distinct acts of housing discrimination

in a single case. The rule of lenity, however, does not apply in the manner that the commenter suggests.

''The rule of lenity . . . is not applicable unless there is an 'ambiguity or uncertainty in the language and structure of the Act,' '' (*Chapman* v. *United States* 500 U.S. 453, 463, *citing Huddleston* v. *United States,* 415 U.S. 814, 831 (1974)). The rule of lenity is applied, if necessary, at the end of the process of statutory construction, not at the beginning i.e., after considering the traditional methods of statutory construction (language, structure, legislative history and motivating policies of the statute) to resolve the issue, and then only if these considerations have not been successful (*Chapman, supra; United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992)). Where consideration of these other factors resolves the ambiguity, the rule of lenity does not apply as there is no reason to resort to it (*Chapman, supra,* at 464).

HUD has considered this commenter's arguments, and believes that the rule of lenity is inapplicable to the statutory ambiguity in question. This is so because consideration of the language, purpose, legislative history and structure of the civil penalty provisions of the Act resolves the statutory ambiguity in favor of HUD's interpretation.

First, the language itself is easily read to authorize the potential assessment of a civil penalty against a respondent for each separate and distinct discriminatory housing practice an ALJ finds that the respondent committed, rather than limiting an ALJ to a single civil penalty assessment for all such practices the ALJ finds the respondent committed:

> If the administrative law judge finds that a respondent has engaged or is about to engage in *a* discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent. * * * (42 U.S.C. 3617(g)(3) (emphasis added).)

The structure of the Act also supports HUD's interpretation. The Act, at 42 U.S.C. 3602(f), defines a ''discriminatory housing practice'' as a singular ''act'' that is unlawful under sections 804, 805, 806 of the Act (42 U.S.C. 3604, 3605, 3606, and 3617, respectively). Since a single case can involve more than one such ''act,'' it follows that a single case can involve more than one discriminatory housing practice. Applying the general statutory definition of ''discriminatory housing practice'' to the language of the civil penalty subsection supports the reading of that provision as authorizing ALJs to assess more than one civil penalty against a single respondent, where the ALJ has found that respondent to have committed more that one separate and distinct discriminatory housing practice.

The Act's purpose, as demonstrated in its legislative history, supports HUD's interpretation as well. The House Report stated, ''[t]wenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive'' (H.R. No. 100–711 at 15, 1988 U.S. Code Cong. & Admin. News 2176). Congress found that pervasive discrimination continued to exist because it perceived a ''void'' in fair housing enforcement. Congress attempted to fill that void, in part, by creating a more effective enforcement system (H.R. No. 100–711, 100th Cong., 2d Sess., at 13 (1988), 1988 U.S. Code Cong. & Admin. News 2174).

A principal component of the more effective mechanism that the Congress created was the administrative adjudication of fair housing cases, and an important aspect of that administrative process was authorizing ALJs to assess civil penalties where appropriate. In making this authorization, the Congress recognized that civil penalties serve to deter (H.R. No. 100–711 at 37, 1988 U.S. Code Cong. & Admin. News 2198 (deterrence one of the factors an ALJ to consider when assessing civil penalties)) (*See also Hudson* v. *United States,* 118 S.Ct. 488, 496 (1997) (imposition of civil penalties will deter others from emulating the conduct that gave rise to the penalties)).

HUD considers it intuitively obvious that the greater authority and flexibility ALJs have in assessing civil penalties increases the potential of deterring discriminatory housing practices. This rule is designed to ensure that the Act's civil penalty provisions will be applied, when appropriate, to reach more powerfully the repeat wrongdoer, and serve to deter even more effectively other potential wrongdoers. Thus, the Congressional goal of deterrence is enhanced by reading the Act's civil penalty provision to authorize ALJs to assess multiple civil penalties in cases involving multiple discriminatory housing practices. Since the standard methods of statutory construction resolve the identified statutory ambiguity in favor of the proposed rule, it is not appropriate to apply the ''rule of lenity.'' Accordingly, HUD declines to adopt this commenter's approach to construction of the Act.

Furthermore, the proposed rule is not accurately described as an ''expanded interpretation'' of the Act, as the commenter says. The proposed rule merely made explicit what some HUD ALJs have already construed the Act to mean. In *HUD* v. *Las Vegas Housing Authority* 2A Fair Housing—Fair Lending ¶ 25,116 (HUD ALJ Nov. 6, 1995), the respondent, for discriminatory reasons, first told the complainant that a particular housing unit was not available, and then, some months later, when complainant requested a transfer, refused to approve the transfer, also for discriminatory reasons. These two separate violations of the Act comprised a single case. The ALJ assessed two separate civil penalties against the respondent, one for each violation of the Act (*Id.* at 26,010–11). In *HUD* v. *Sams* (2A Fair Housing—Fair Lending 25,070 (HUD ALJ March 11, 1994), *aff'd on other grounds,* 76 F.3d 375 (4th Cir. 1996)), the ALJ implicitly acknowledged that the Act authorizes multiple civil penalty assessments against a single respondent for that respondent's commission of multiple separate and distinct discriminatory housing practices. The ALJ, however, declined to assess more than one in the case before him because the ALJ viewed each of the discriminatory acts involved as part of a series comprising a single transaction and, therefore, a single discriminatory housing practice for which the ALJ could only assess a single civil penalty. This construction is incorporated in HUD's definition of separate and distinct fair housing practice, which recognizes that a series of acts may constitute a single discriminatory housing practice, if they are continuing and part of the same transaction.

Comment: HUD's proposed interpretation contradicts the plain language of the Act. One commenter questioned HUD's proposed interpretation of the Act. The commenter wrote that HUD mistakenly relied on the definition of ''discriminatory housing practice'' in section 802 of the Act to justify the proposed amendments. According to the commenter, the proposed rule contradicts the plain meaning of section 812 of the Act (42 U.S.C. 3612). As the commenter wrote:

> The most obvious fault in HUD's analysis lies in 42 U.S.C. 3612(g)(3)(A) [section 812(g)(3)(A) of the Act] which HUD inadvertently did not quote in the proposed rule. HUD ignores the temporal aspect and ignores Congress' requirement that the respondent have been *adjudged* to have committed a prior discriminatory. The proper construction of the intent of Congress is

evident. In any one proceeding, a respondent who has not previously been found to have violated 42 U.S.C. 3604, 42 U.S.C. 3605, 42 U.S.C. 3606 and 42 U.S.C. 3617 [sections 804, 805, 806, 818 of the Act] cannot be fined more than $10,000. (Emphasis in original.)

HUD Response. Subparagraphs 812(g)(3)(A–C) of the Act (42 U.S.C. 3612(g)(3)(A–C)), state that the maximum civil penalty that an ALJ can assess can increase if the respondent has been adjudged to have previously committed one or two or more prior discriminatory housing practices within specified time frames. The commenter reads into this language additional language that is not there *i.e.*, the idea that ''in any one proceeding'' a respondent, who has not been previously adjudged to have committed a discriminatory housing practice, cannot be assessed a total of more than $10,000 in civil penalties, regardless of how many separate and distinct discriminatory housing practices the respondent committed in the case at hand. (Indeed, the commenter's phrase ''in any one proceeding'' is absent from the Act's civil penalty provisions.) Rather, the Act ties the assessment of a civil penalty to a respondent's commission of ''a discriminatory housing practice;'' and the Act places no explicit limitation on the number of such penalties that may be assessed ''in any one proceeding,'' if the number of separate and distinct discriminatory housing practices found to have been committed and the surrounding circumstances otherwise warrant (42 U.S.C. 3612(g)(3)). In other words, for a single discriminatory housing practice, an ALJ may assess a respondent without prior adjudicated violations a civil penalty up to $10,000; and if a similar respondent committed more than one separate and distinct discriminatory housing practice in a single case, the ALJ would have the discretion to assess against the respondent a civil penalty up to $10,000 for each such practice.

E. Commenters That Questioned HUD's Compliance With Rulemaking Requirements

Comment: HUD should extend the public comment period. One commenter wrote that given the importance of establishing effective fair housing enforcement procedures, HUD should have provided the customary 60-day public comment period for the proposed rule. The commenter recommended that HUD provide the public with an additional 30-days to comment on the proposed amendments. The commenter wrote:

We . . . respectfully request that comment period be extended for a minimum additional period of thirty (30) days to permit a meaningful review of the current record and to provide adequate time for submission of comments that can be useful to HUD in more accurately assessing the scope of the perceived problem and measures appropriate to addressing it.

HUD Response. HUD recognizes the value and necessity of public comment in the regulatory process, and HUD is providing the public with an additional 60-days to comment on the amendments made by this interim rule. HUD welcomes public comment on this interim rule. All comments will be taken into consideration in the development of the final rule.

Comment: The preamble did not adequately explain proposed definition of ''separate and distinct discriminatory housing practice.'' One commenter wrote that the preamble to the proposed rule did not adequately explain the definition of ''separate and distinct discriminatory housing practice'' in the regulatory text. According to the commenter, HUD's failure to explain the definition violates the requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA). The commenter wrote:

[Proposed §]180.671(b) states that not only will a respondent be potentially liable for $10,000 [for] each separate practice, the number of complainants will also serve to multiply any potential fine, and the number of times that a separate violation occurs will multiply each potential fine. No explanation is given for this interpretation unless HUD's observation that such interpretation is not prohibited and HUD's conclusory statement that such an interpretation is reasonable is meant to show that the interpretation [is] a justified interpretation of the statute. If [this] is the case, HUD has misunderstood its legislative mandate and ignored its duty under [section 553 of the APA] to state the statutory basis for the rule and give a description of the subjects and issues involved.

HUD Response. HUD does not agree with the assertions made by the commenter. Specifically, HUD believes that the preamble to the December 18, 1997 proposed rule provided a thorough discussion of HUD's rationale and statutory basis for the proposed amendments to the regulations at 24 CFR part 180. Further, HUD believes that the December 18, 1997 proposed rule complied with all applicable statutory and regulatory rulemaking requirements.

IV. Findings and Certifications.

Environmental Impact

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

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this interim rule will have no federalism implications, and that the policies are not subject to review under the Order. The interim rule amends HUD's regulations governing the assessment of civil penalties for Fair Housing Act cases. The rule is exclusively concerned with the rules of practice and procedure applicable to administrative proceedings before an ALJ under the Fair Housing Act. No programmatic or policy changes will result from this rule that would affect the relationship between the Federal government and State and local governments.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this interim rule, and in so doing certifies that the interim rule is not anticipated to have a significant economic impact on a substantial number of small entities. This interim rule explicitly interprets the Act to allow ALJs, where a respondent has been found to have committed separate and distinct acts of discrimination, to assess a separate civil penalty against the respondent for each such act. The rule also amends 24 CFR part 180 to describe how ALJs are to consider housing-related hate acts under the six factors ALJs apply in determining the amount of a civil penalty to assess against a respondent found to have committed a discriminatory housing practice.

The rule will affect only those few small-entity housing providers who are respondents in cases where HUD determines that there is reasonable cause to believe that they committed multiple violations of the Fair Housing Act and whose cases are then heard before an ALJ, who may or may not then assess multiple civil penalties against them after a hearing comporting with due process requirements. To date, the number of entities who actually become respondents in Fair Housing Act cases before ALJs is extremely few. For example, in FY 1994, the year when the most administrative fair housing cases (through 1997) were docketed, of the 325 cases HUD charged, 220 elected to be heard in federal court, leaving only 115 to be heard by the ALJs. Of these

cases, civil penalties were only assessed against an even lesser number: after hearings in 15 cases, and as part of a consent order in another 12 cases, for a total of 27 cases, or 8.3% of the cases docketed. The average civil penalty was $3,727.77. Only a few of these cases involve multiple acts of housing discrimination.

Furthermore, ALJs have had the authority to assess multiple civil penalties in instances where respondents have been found to commit multiple discriminatory housing practices, and have done so in appropriate circumstances. Thus, the economic impact of the rule on small entities should not be substantially greater than that already inherent in the Fair Housing Act.

Finally, the rule will not have a significant economic impact on a substantial number of small entities because it requires ALJs to consider each respondent's ability to pay when assessing one or more civil penalties. Thus, everything else being equal, smaller entities with diminished ability to pay would be subject to lower penalties.

Notwithstanding HUD's determination that this rule does not have a significant economic impact on a substantial number of small entities, HUD specifically invites comment regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Unfunded Mandates Reform Act

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

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this interim rule under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this interim rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the interim rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number for this program is 14.400.

List of Subjects in 24 CFR Part 180

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

Accordingly, 24 CFR part 180 is amended as follows:

PART 180—HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

1. The authority citation for 24 CFR part 180 continues to read as follows:

Authority: 29 U.S.C. 794; 42 U.S.C. 2000d–1, 3535(d), 3601–3619, 5301–5320, and 6103.

2. Section 180.670 is amended by revising paragraph (b)(3)(iii) introductory text to read as follows:

§ 180.670 Initial decision of ALJ.

* * * * *

(b) * * *

(3) * * *

(iii) Assessing a civil penalty against any respondent to vindicate the public interest in accordance with § 180.671.

* * * * *

3. Section 180.671 is added to read as follows:

§ 180.671 Assessing civil penalties for Fair Housing Act cases.

(a) *Amounts.* The ALJ may assess a civil penalty against any respondent under § 180.670(b)(3) for each separate and distinct discriminatory housing practice (as defined in paragraph (b) of this section) that the respondent committed, each civil penalty in an amount not to exceed:

(1) $11,000, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State or local governmental agency, to have committed any prior discriminatory housing practice.

(2) $27,500, if the respondent has been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act, or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, to have committed one other discriminatory housing practice and the adjudication was made during the five-year period preceding the date of filing of the charge.

(3) $55,000, if the respondent has been adjudged in any administrative hearings or civil actions permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, to have committed two or more discriminatory housing practices and the adjudications were made during the seven-year period preceding the date of the filing of the charge.

(b) *Definition of separate and distinct discriminatory housing practice.* A separate and distinct discriminatory housing practice is a single, continuous uninterrupted transaction or occurrence that violates section 804, 805, 806 or 818 of the Fair Housing Act. Even if such a transaction or occurrence violates more than one provision of the Fair Housing Act, violates a provision more than once, or violates the fair housing rights of more than one person, it constitutes only one separate and distinct discriminatory housing practice.

(c) *Factors for consideration by ALJ.* (1) In determining the amount of the civil penalty to be assessed against any respondent for each separate and distinct discriminatory housing practice the respondent committed, the ALJ shall consider the following six (6) factors:

(i) Whether that respondent has previously been adjudged to have committed unlawful housing discrimination;

(ii) That respondent's financial resources;

(iii) The nature and circumstances of the violation;

(iv) The degree of that respondent's culpability;

(v) The goal of deterrence; and

(vi) Other matters as justice may require.

(2)(i) Where the ALJ finds any respondent to have committed a housing-related hate act, the ALJ shall take this fact into account in favor of imposing a maximum civil penalty under the factors listed in paragraphs (c)(1)(iii), (iv), (v), and (vi) of this section.

(ii) For purposes of this section, the term ''*housing-related hate act*'' means any act that constitutes a discriminatory housing practice under section 818 of the Fair Housing Act and which constitutes or is accompanied or characterized by actual violence,

assault, bodily harm, and/or harm to property; intimidation or coercion that has such elements; or the threat or commission of any action intended to assist or be a part of any such act.

(iii) Nothing in this paragraph shall be construed to require an ALJ to assess any amount less than a maximum civil penalty in a non-hate act case, where the ALJ finds that the factors listed in paragraphs (c)(1)(i) through (vi) of this section warrant the assessment of a maximum civil penalty.

(d) *Persons previously adjudged to have committed a discriminatory housing practice.* If the acts constituting the discriminatory housing practice that is the subject of the charge were committed by the same natural person who has previously been adjudged, in any administrative proceeding or civil action, to have committed acts constituting a discriminatory housing practice, the time periods in paragraphs (a) (2) and (3) of this section do not apply.

(e) *Multiple discriminatory housing practices committed by the same respondent; multiple respondents.* (1) In a proceeding where a respondent has been determined to have engaged in, or is about to engage in, more than one separate and distinct discriminatory housing practice, a separate civil penalty may be assessed against the respondent for each separate and distinct discriminatory housing practice.

(2) In a proceeding involving two or more respondents who have been determined to have engaged in, or are about to engage in, one or more discriminatory housing practices, one or more civil penalties, as provided under this section, may be assessed against each respondent.

Dated: January 12, 1999.

Andrew Cuomo,

Secretary.

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