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Part III

Department of Housing and Urban Development

24 CFR Part 180

Civil Penalties for Fair Housing Act Violations; Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 180

[Docket No. FR–4302–F–03]

RIN 2529–AA83

Civil Penalties for Fair Housing Act Violations

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

ACTION: Final rule.

SUMMARY: This final rule adopts revisions to HUD's regulations governing hearing procedures for civil rights matters made effective by an interim rule published on February 10, 1999. These revisions implement two important changes in the way civil penalties are assessed in fair housing cases. First, they allow an administrative law judge (ALJ) to assess a separate civil penalty against a respondent for each separate and distinct discriminatory housing practice committed by the respondent. Second, they require an ALJ to take into account, in favor of imposing a maximum civil penalty, a finding that a respondent has committed a housing-related hate act. This final rule takes into consideration public comments received on the February 10, 1999 interim rule. After careful consideration of the public comments, HUD has decided to adopt the interim rule without change.

DATES: *Effective Date:* January 27, 2000.

FOR FURTHER INFORMATION CONTACT: Office of the Associate General Counsel for Fair Housing, Room 10270, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500; telephone (202) 708–0570 (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 (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. The ''Make 'Em Pay'' Initiative

This rulemaking was initiated in response to President Clinton's ''Make 'Em Pay'' (MEP) Initiative, announced on November 10, 1997. The MEP Initiative is designed to increase enforcement of the Fair Housing Act (42 U.S.C. 3601–3619), particularly in the case of housing-related acts of violence and intimidation.

This final rule implements two aspects of the MEP Initiative. First, an administrative law judge (ALJ) may now assess a separate civil penalty against a respondent for each separate and distinct discriminatory housing practice committed by the respondent. Second, an ALJ is required to take into account, in favor of imposing a maximum civil penalty, a finding that a respondent has committed a housing-related hate act.

II. The December 18, 1997 Proposed Rule

This rulemaking was initiated by the publication of a proposed rule on December 18, 1997 (62 FR 66488). The proposed rule advised that it would amend HUD's regulations at 24 CFR part 180 (entitled ''Hearing Procedures for Civil Rights Matters'') to allow an ALJ to assess more than one civil penalty against a given respondent, where the respondent has committed separate and distinct acts of discrimination. The proposed rule also advised that it would amend part 180 to require ALJs to consider housing-related hate acts in determining the amount of a civil penalty assessed 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 proposed structural change to 24 CFR part 180. Specifically, the December 18, 1997 rule proposed to move certain provisions governing the assessment of civil penalties found at § 180.670(b)(3)(iii)(A), (B), and (C) to a new § 180.671 (entitled ''Assessing civil penalties for Fair Housing Act cases''). HUD proposed this change to make the part 180 regulations easier to understand.

III. The February 10, 1999 Interim Rule

The rulemaking process was continued with the publication of an interim rule on February 10, 1999 (64 FR 6744). During the comment period for the December 18, 1997 proposed rule, HUD received six public comments. A discussion of these public comments was published in the preamble to the interim rule. In response to the public comments, we clarified the definition of ''separate and distinct housing practice'' in § 180.671(b) and revised the definition of ''housing-related hate act'' in § 180.671(c)(2)(ii). The interim rule made the revised regulations effective as of March 12, 1999, and solicited additional public comment on the amendments to 24 CFR part 180.

IV. This Final Rule

This final rule adopts the regulations made effective by the interim rule published on February 10, 1999 without change. The public comment period for the interim rule closed on April 12, 1999. HUD received two comments, both from trade associations. We carefully considered the issues raised by the commenters and appreciate the suggestions offered by them. For the reasons discussed below, however, we chose not to implement their suggestions. This section of the preamble presents a summary of the issues raised by the public commenters and HUD's responses to their comments.

Comment—ALJs should be required to consider the amount and quality of compliance guidance supplied by HUD when determining the amount of a civil penalty. One commenter was concerned about housing providers being held responsible for violations of unclear or ambiguous fair housing regulations and guidance, and whether these respondents would receive fair and consistent assessments. The commenter suggested that an additional factor should be included in § 180.671(c) (entitled ''Factors for consideration by ALJ'') that requires ALJs to consider the amount and quality of compliance guidance supplied by HUD when determining the amount of a civil penalty.

The commenter proposed the following language for this additional factor: ''Whether HUD has given notice previous to the allegations in this case, through a promulgated rule or regulation, and has made clear in that rule or regulation the act, transaction, or occurrence that constitutes the alleged separate and distinct discriminatory housing practice.''

The commenter also suggested that HUD undertake a thorough review of our fair housing regulations and guidance to ensure that they are clear and understandable to the broader regulated community.

HUD Response. We believe that § 180.671(c) provides substantial protections for respondents with differing circumstances and levels of culpability. Among the six factors laid out in § 180.671(c), four address the commenter's concerns. Section 180.671(c)(iii) requires an ALJ to consider the nature and circumstance of the violation. Section 180.671(c)(iv) specifically requires an ALJ to consider a respondent's degree of culpability when determining the amount of a civil penalty. Section 180.671(c)(v) requires an ALJ to consider the goal of deterrence. Finally, § 180.671(c)(vi) requires the ALJ to consider other matters as justice may require.

The cumulative effect of these provisions is to provide an ALJ with the opportunity to consider the fairness of any penalty. An ALJ may consider the

level of intent a respondent had in violating the Fair Housing Act. The ALJ may also consider whether the respondent was provided with sufficient guidance. Determining appropriate justice, as with any judicial proceeding, is a complex process. This final rule provides an ALJ with substantial flexibility to fashion an appropriate remedy.

Regarding the suggestion that HUD should undertake a thorough review of its fair housing regulations and guidance, we appreciate the suggestion and agree that clear guidance is very important. While we are not in a position to institute a complete formal review of all our fair housing regulations at this time, it should be emphasized that HUD is committed to producing clear guidance, and, therefore, we strive on a continuing basis to ensure that all of our fair housing regulations and guidance are clear and understandable.

For example, in the case of the regulations adopted by this final rule, we reviewed part 180 in its entirety during the development of the proposed rule. As a result of this review, we simplified § 180.670 by creating a new § 180.671. The purpose of this change was to make the part 180 regulations easier to understand. In addition, we revised the definitions of the terms ''separate and distinct housing practice'' and ''housing-related hate act'' in response to public comments on the proposed rule. The revised definitions were also designed to improve the clarity of the regulations.

Comment—HUD must address subtitle B of the Small Business Regulatory Enforcement Fairness Act. One commenter wrote that HUD had not adequately addressed subtitle B of the Small Business Regulatory Enforcement Fairness Act (SBREFA). In particular, the commenter wrote that ALJs must be informed of SBREFA's civil penalty reduction/waiver provisions and that ALJs must be required to consider these provisions when determining the amount of a civil penalty.

HUD Response. This issue was raised in a comment to the December 19, 1997 proposed rule and was addressed in the preamble to the February 10, 1999 interim rule. As stated in HUD's response in the interim rule, we believe that the six factors that ALJs consider when determining the amount of a civil penalty are consistent with subtitle B of SBREFA. Section 223, the relevant section 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.

This final rule addresses this requirement in § 180.671(c)(1)(ii), which requires an ALJ to consider the respondent's financial resources when determining the amount of a civil penalty. To the extent a small entity may have less financial ability to pay a civil penalty, § 180.671(c)(1)(ii) permits an ALJ to assess a lower civil penalty.

In addition, HUD is cognizant that section 222 of SBREFA requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel.''

To implement this statutory provision, the Small Business Administration has requested that agencies include the following language on agency publications and notices which are provided to small businesses concerns at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

> The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], call 1–888–REG–FAIR (1–888–734–3247).

As HUD stated in our notice describing HUD's actions on implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD intends to work with the Small Business Administration to provide small entities with information on the Fairness Boards and National Ombudsman program, at the time enforcement actions are taken, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

Comment—HUD should clarify that publishing the same discriminatory advertisement on multiple days constitutes only one act of housing discrimination. One commenter was concerned that, under the revisions adopted by this final rule, a newspaper publisher would be held liable for multiple civil penalties for publishing the same discriminatory advertisement on multiple days. The commenter noted that: (1) Newspapers receive a high volume of daily telephone calls requesting the placement of classified advertisements; (2) newspaper employees taking those calls often only have a brief period in which to take the pertinent information; and (3) usually, advertisers placing real estate advertisements ask that they be published multiple times.

The commenter urged HUD to revise the final rule to clarify that: (1) the publication of a discriminatory advertisement multiple times does not constitute multiple acts of discrimination; and (2) an ALJ may not assess multiple civil penalties against the publisher of the newspaper.

HUD Response. HUD believes that the final rule provides sufficient protection for newspaper publishers. First, under HUD's advertising guidelines,[1] newspapers will only be held responsible for publishing an advertisement that violates the Fair Housing Act, if the advertisement is discriminatory on its face. For example, an advertisement that states ''whites only'' would constitute an advertisement that is discriminatory on its face. We believe that it is reasonable to require that even large and busy newspapers avoid publishing such explicitly discriminatory advertisements.

Second, in response to this comment, we considered adding a ''bright line'' standard to the rule that would dictate the exact circumstances when publishing the same discriminatory advertisements on multiple occasions would be considered multiple acts of housing discrimination. We concluded, however, that because of the myriad of possible scenarios that might occur, the determination should be made by the ALJ hearing the case, based upon the specific facts of the case. We believe that an ALJ is in the best position to make the determination as to which cases are suitable for such treatment. As the final rule does not *require* an ALJ to assess multiple civil penalties, even in cases that clearly involve multiple

[1] Memorandum from Roberta Achtenberg, former HUD Assistant Secretary for Fair Housing and Equal Opportunity, to FHEO Office Directors, Enforcement Directors, Staff, Office of Investigations, Field Assistant General Counsel, Subject: Guidance Regarding Advertisements Under § 804(c) of the Fair Housing Act (Jan. 9, 1995). This Guidance memorandum is publicly available on the National Fair Housing Advocate's WWW site at http://www.fairhousing.com/hud_resources/hudguid2.htm (current as of the date of publication of this rule).

separate and distinct discriminatory housing practices, a respondent faced with possible multiple civil penalties may present any possible arguments to the ALJ.

Comment—Newspaper publishers should be given the opportunity to correct discriminatory advertisements. One commenter urged HUD to consider changing its regulations to require a prospective aggrieved person to notify a newspaper publisher of an alleged violation to give the publisher an opportunity to contact the advertiser and request revisions to the advertisement before HUD accepts and investigates the aggrieved person's allegations.

HUD Response. We appreciate the commenter's suggestion. The suggestion, however, requests changes to HUD's procedures for accepting and investigating fair housing complaints. This final rule only concerns revisions to HUD's regulations covering the assessment of civil penalties. The suggestion, therefore, is outside the scope of this rulemaking and was not considered in the preparation of this final rule.

V. Findings and Certifications

Environmental Impact

In accordance with 40 CFR 1508.4 of the Council on Environmental Quality regulations and 24 CFR 50.19(c)(3) of the HUD regulations, the policies and procedures contained in this final rule are determined not to have the potential of having a significant impact on the human environment and are therefore exempt from further environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Federalism Impact

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute, or preempts State law, unless the relevant requirements of section 6 of the Executive Order are met. This final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

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 the final rule is not anticipated to have a significant economic impact on a substantial number of small entities. This final rule explicitly interprets the Fair Housing Act to allow ALJs to assess a separate civil penalty against a respondent who has been found to have committed separate and distinct acts of discrimination. 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 have committed multiple violations of the Fair Housing Act and whose cases are then heard before an ALJ. The ALJ may or may not then assess multiple civil penalties against the provider 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 small.

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 fewer 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 involved 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.

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 final 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.

VI. 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.

PART 180—HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

Accordingly, the interim rule amending 24 CFR part 180, which was published at 64 FR 6744 on February 10, 1999, is adopted as a final rule without change.

Dated: December 17, 1999.

Eva M. Plaza,

Assistant Secretary for Fair Housing and Equal Opportunity.

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