

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

[Docket No. FR-4031-I-01]

RIN 2529-AA79

Office of the Assistant Secretary for Fair Housing and Equal Opportunity; Revision of HUD's Fair Housing Complaint Processing

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

ACTION: Interim rule.

SUMMARY: This interim rule amends HUD's regulations governing fair housing complaint processing. Specifically, this rule removes the provision allowing a respondent to request a subpoena during a fair housing investigation. The removal of this provision will eliminate the delays associated with subpoena requests and expedite the investigation process. Further, the rule will prevent the appearance of a conflict of interest between HUD's dual role as investigator and impartial arbiter of discovery disputes between complainants and respondents. This interim rule will also conform HUD's investigation practices with those of other Federal administrative agencies.

DATES: Effective date: September 9, 1996.

Comments due date: October 7, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding the interim rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m. Eastern Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Susan Forward, Deputy Assistant Secretary for Enforcement and Investigations, Room 5106, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone number (202) 708-4211. For hearing- and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339. (With the exception of the

"800" number, these numbers are not toll free.)

SUPPLEMENTARY INFORMATION:**I. Background****A. Respondent's Right to Request Subpoena**

The Fair Housing Amendments Act of 1988 amended section 811 of the Fair Housing Act (title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601 *et seq.*) (the Act). Section 811, as amended, authorizes the Secretary of HUD to issue subpoenas and order discovery in aid of fair housing investigations and hearings. The Secretary has delegated this investigative authority to the Assistant Secretary for Fair Housing and Equal Opportunity. The Secretary's authority to conduct hearings has been delegated to HUD's administrative law judges.

Prior to the Fair Housing Amendments Act of 1988, the Act did not contain an administrative hearing process with discovery available to the parties. However, the original language of section 811(b) of the Act permitted a respondent to request the issuance of a subpoena during a fair housing investigation:

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

Subpoenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request. 42 U.S.C. 3611(b) (1969).

The Fair Housing Amendments Act of 1988 removed the above-quoted provision from the Act and granted the Secretary sole authority for conducting discovery during fair housing investigations. However, HUD's regulation at 24 CFR 103.215, published on January 23, 1989, includes a provision which permits a respondent to request a subpoena during an investigation. HUD's regulations do not provide a complaining party with the opportunity to request issuance of a subpoena. However, the complainant is permitted to request that the Assistant Secretary for Fair Housing and Equal Opportunity revoke, quash or modify a respondent's subpoena. This difference was based, in part, on the assumption that HUD would be representing the interests of the complaining party, and therefore the respondent should be offered the ability to discover information in its own defense.

A recent Department of Justice memorandum¹ calls that assumption into question. The memorandum states that the responsibility of the government in the conduct of fair housing cases is not to advocate for the complainant, but to serve the government's goals of doing justice and correcting societal wrongs. Consequently, HUD's role in a fair housing investigation is to objectively consider the facts and determine whether cause exists to believe that a violation of the Act has occurred, not to represent the interests of the complainant.

B. Revision of 24 CFR 103.215

The lack of statutory support discussed above has prompted HUD to publish this interim rule, which revises § 103.215 to delete the requirement that HUD issue a subpoena at the request of a respondent. There are additional reasons for HUD's decision to take this action:

1. Prevents Appearance of Conflict of Interest

This interim rule prevents the appearance of a conflict of interest between the Assistant Secretary's dual roles as investigator and as impartial arbiter of discovery disputes between complainants and respondents by removing the requirement that HUD engage in discovery at the direction of one of the parties. The refereeing of these disputes is a function more properly allocated to the administrative law judges in the context of administrative hearings, or district court judges in the context of elected federal litigation.

2. Expedites Investigation Process

This interim rule eliminates delays in the investigation process which are associated with processing subpoena requests from respondents. The Act charges HUD with completing all fair housing investigations within a 100-day period, if practicable. If the fair housing investigation cannot be completed within that time, the Secretary is required to notify the complainant and the respondent of the reasons for the delay. (42 U.S.C. 3610(a)(1).) However, the United States Commission on Civil Rights noted, in its report on enforcement of the Act, that the complexity of some cases and the heavy caseload burden on investigative staff

¹ Assistant Attorney General Walter Dellinger, memorandum to Deval L. Patrick, Assistant Attorney General for Civil Rights, *The Relationship Between Department Attorneys and Persons on Whose Behalf the United States Initiates Cases Under the Fair Housing Act* (January 20, 1995).

bore out the observation that HUD frequently is not able to close complaints or make determinations in 100 days.² HUD has determined that pursuing discovery at the direction of the respondent, in addition to the discovery that HUD determines is necessary to the investigation, is not necessary to a fair and impartial determination and can actually impede HUD's efforts to complete the investigation in a timely manner.

3. Conforms HUD's Investigative Practices to Other Federal Agencies

This interim rule will conform HUD's investigation practices with those of other Federal administrative agencies, which do not provide for discovery by parties during the investigation of civil rights complaints. HUD's review of the relevant regulations of the Equal Employment Opportunity Commission for Title VII of the Civil Rights Act of 1968 (29 CFR part 1601), the Americans with Disabilities Act (29 CFR part 1630), the Equal Pay Act (29 CFR part 1620), and the Age Discrimination in Employment Act (29 CFR part 1626) revealed that a respondent does not have an opportunity to request a subpoena during the government's investigation of a civil rights complaint under any of these regulations. Similar regulations governing the Department of Education's enforcement of Title IX of the Education Amendments of 1972 (34 CFR part 106), and the Department of Justice's enforcement of the Immigration Reform and Control Act of 1986 (28 CFR part 44) also do not contain any provisions authorizing a respondent to request a subpoena during a civil rights investigation under these statutes.

HUD believes that the experience of other Federal administrative agencies provides positive guidance for this decision to streamline and simplify the investigation process.

C. Respondent's Ability To Prepare Its Defense

HUD believes it is important to emphasize that this interim rule does not compromise a respondent's ability to prepare its own defense. A respondent may continue to conduct an independent investigation of the facts underlying the fair housing complaint and may obtain the Final Investigative Report on which HUD's determination is based. This interim rule does not change a respondent's ability to compel discovery or request a subpoena from an administrative law judge during the

administrative hearing process. (See 24 CFR 104.500–104.590.) This interim rule only affects the ability of a respondent to compel the use of HUD's resources to subpoena evidence independent of the evidence which HUD has determined is necessary to the investigation.

II. Justification for Interim Rulemaking

HUD generally publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking in 24 CFR part 10. However, part 10 provides for exceptions to the general rule if the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1). HUD finds that in this case prior public comment is contrary to the public interest, since immediate implementation of this interim rule will benefit the public.

This interim rule removes a respondent's right to request a subpoena during the course of a fair housing investigation. HUD's processing of these subpoena requests may delay, and often has delayed, its investigation of complaints alleging discriminatory housing practices. By eliminating these delays, this interim rule expedites HUD's investigations and its ability to enforce the Act. Further, the rule prevents the appearance of a conflict of interest between HUD's dual roles as investigator and impartial arbiter of discovery disputes between complainants and respondents. Such an appearance weakens HUD's ability to conduct fair housing complaint investigations.

This interim rule does not compromise a respondent's ability to prepare its own defense. Respondents will still be able to compel discovery or request subpoenas during the administrative hearing process. The rule only affects the ability of a respondent to compel use of HUD's resources to subpoena evidence over and above the information which HUD has determined is necessary to a full and fair investigation.

Although HUD believes issuing this interim rule for immediate effect will benefit the public, HUD welcomes public comment. All comments will be considered in the development of the final rule.

III. Other Matters

A. Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule streamlines HUD's regulations governing fair housing complaint processing. The rule will have no adverse or disproportionate economic impact on small businesses.

B. Environmental Impact

This rulemaking does not have an environmental impact. This rulemaking amends an existing regulation by streamlining provisions and does not alter the environmental effect of the regulations being amended. A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the time of development of regulations implementing the Act. That finding remains applicable to this rule, and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC.

C. Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. No programmatic or policy changes will result from this rule that would affect the relationship between the Federal Government and State and local governments.

D. Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this rule will not have the potential for significant impact on family formation, maintenance, or general well-being, and thus is not subject to review under the Order. No significant change in existing HUD policies or programs will result from promulgation of this rule.

² United States Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, at 40–42 (1994).

E. Executive Order 12866, Regulatory Planning and Review

This interim rule was reviewed by the Office of Management and Budget under Executive Order 12866, *Regulatory Planning and Review*. Any changes made to the interim rule as a result of that review are clearly 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.

List of Subjects in 24 CFR Part 103

Administrative practice and procedure, Aged, Fair housing, Individuals with disabilities, Intergovernmental relations,

Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 103 is amended as follows:

PART 103—FAIR HOUSING—COMPLAINT PROCESSING

1. The authority citation for 24 CFR part 103 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601-3619.

2. Section 103.215 is amended by revising paragraph (b) to read as follows:

§ 103.215 Conduct of investigations.

* * * * *

(b) The Assistant Secretary may conduct and order discovery in aid of

the investigation by the same methods and to the same extent that discovery may be ordered in an administrative proceeding under 24 CFR part 104, except that the Assistant Secretary shall have the power to issue subpoenas described in 24 CFR 104.590 in support of the investigation. Subpoenas issued by the Assistant Secretary must be approved by the General Counsel as to their legality before issuance.

Dated: April 23, 1996.

Elizabeth K. Julian,

Deputy Assistant Secretary for Policy and Initiatives.

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