

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 115

[Docket No. FR-4748-P-01; HUD-2005-007]

RIN 2529-AA90

Certification and Funding of State and Local Fair Housing Enforcement Agencies

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

ACTION: Proposed rule.

SUMMARY: This proposed rule revises and updates HUD's regulation implementing section 810(f) of the federal Fair Housing Act. This regulation establishes the criteria for certification and decertification of state and local fair housing laws that are substantially equivalent to the federal Fair Housing Act. This regulation also revises the funding criteria for agencies participating in the Fair Housing Assistance Program (FHAP).

DATES: *Comment Due Date:* July 18, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Interested persons may also submit comments electronically through either:

- The Federal electronic rulemaking portal at: <http://www.regulations.gov>; or
- The HUD electronic Web site at: <http://www.epa.gov/feddocket>. Follow the link entitled "View Open HUD Dockets." Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available, without revision, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and downloading at <http://www.epa.gov/feddocket>.

FOR FURTHER INFORMATION CONTACT:

Myron P. Newry or Kenneth J. Carroll, FHAP/FHAP Support Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Room 5224, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708-2215 (this is not a toll free number). Hearing- or speech-

impaired persons may contact the FHAP/FHAP Support Division toll-free by calling (800) 290-1617, or the toll-free Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Fair Housing Act (42 U.S.C. 3601-3619) (the Act) provides that whenever a complaint alleges a discriminatory housing practice arising in the jurisdiction of a state or local agency that has been certified by the Secretary of HUD under section 810(f) of the Act, HUD shall refer the complaint to that state or local agency. HUD has implemented section 810(f) at subpart B of 24 CFR part 115, which establishes the criteria the Secretary will utilize in certifying state and local fair housing enforcement agencies.

Section 817 of the Act provides that the Secretary may reimburse state and local fair housing enforcement agencies that assist the Secretary in enforcing the Act. HUD has implemented section 817 at subpart C of 24 CFR part 115, which sets forth the requirements for participation in the FHAP. Through the FHAP, HUD provides assistance and reimbursement to certified state and local fair housing enforcement agencies. The assistance is designed to provide support for capacity building, complaint processing, training, technical assistance, data and information systems, partnerships, and other approved fair housing projects.

On August 7, 1996, HUD published a final rule, streamlining its regulations governing the certification and funding of state and local fair housing enforcement. The major revision in the rule included a consolidation of parts 111 and 115. Prior to the consolidation, 24 CFR part 111 set forth the requirements for participation in the FHAP. The consolidation permitted HUD to provide all necessary requirements for substantial equivalency certification and FHAP participation in a single part.

This proposed rule represents another revision to 24 CFR part 115. The proposed rule will further clarify numerous issues related to substantial equivalency certification and the FHAP.

II. Changes to Subpart A of 24 CFR Part 115

The following sections of subpart A (the 100 series) of 24 CFR part 115 are proposed to be revised.

Section 115.100 has been changed in the following ways. First, definitions for "the Department," "final administrative disposition," "fair housing law or law," "government technical representative,"

"government technical monitor," "interim agency," "ordinance," "FHEO regional director," "FHEO Regional Office," "statute," and "testing" have been added to the list of definitions. Second, the term "interim agency" has been distinguished from the term "certified agency". The term "certified agency" was defined in the 1996 rule to include agencies with certification and interim certification. Now, when referring to agencies with interim certification, the term "interim agency" will be used.

Section 115.101. In contrast to the 1996 rule, revised § 115.101 specifically sets forth the duties delegated to the FHEO regional director.

Section 115.102. The 1996 rule required the Assistant Secretary for Fair Housing and Equal Opportunity to solicit public comment before granting certification. The rule now states that the Assistant Secretary shall publish annually a notice that identifies all agencies that received interim certification during the prior year. The new approach will assure that HUD publishes notification and receives and responds to comments well before an agency's interim agreement has expired so the certification process will happen in a timely manner.

III. Changes to Subpart B of 24 CFR Part 115

The following sections of subpart B (the 200 series) of 24 CFR part 115 are proposed to be reorganized and revised.

Section 115.200 has been revised to more clearly set forth the purposes of subpart B.

The title of § 115.201 has been changed from "Basis of determination" to "The two phases of substantial equivalency certification." This section more clearly identifies that the first phase of substantial equivalency certification requires an adequacy of law determination and that the second phase of substantial equivalency certification requires an adequacy of performance determination.

Section 115.202 entitled "Criteria for adequacy of law" has been slightly modified. This section has been redesignated § 115.204. This section now prohibits the agency's law from placing excessive burdens on the "aggrieved person" (the term "complainant" was used in the 1996 rule). This section clarifies that if an agency's law offers an administrative hearing, the agency must also provide parties an election option substantially equivalent to the provisions of section 812 of the Act. In addition, this section provides that "The state or local law may assure that no prohibition of

discrimination because of familial status applies to housing for older persons as described in 24 CFR part 100, subpart E.” There was a similar provision in the 1996 regulation. However, the former provision required that the housing for older persons be “substantially the same” as that described in 24 CFR part 100, subpart E. The language “substantially the same” was removed to avoid a seemingly minor difference in state and federal definitions of housing for older persons resulting in a housing provider believing that it could legally discriminate against families with children if state law allowed it but federal law did not. Finally, this section now provides that if a state or local law is different than the Act in a way that does not diminish coverage of the Act, including but not limited to, the protection of additional prohibited bases, then the state or local law may still be found substantially equivalent (the Department does not provide reimbursement for complaints based solely on prohibited bases that are not covered by the Act).

Section 115.203 has been changed in several ways. This section has been redesignated § 115.206. The title of the section has been changed from “Performance standards” to “Performance assessments, performance standards.” The section was reorganized to make it easier to follow. The first two sections were added. They deal with the frequency of performance assessments during interim certification and certification. A provision was added stating that in conducting performance assessments, the FHEO regional office shall consider whether or not the agency is in compliance with § 115.306 (Requirements for participation in the FHAP), § 115.307 (Reporting and recordkeeping requirements), § 115.308 (Subcontracting under the FHAP), § 115.309 (FHAP and the First Amendment) and § 115.310 (Testing).

In the revised rule, performance standards were numbered (e.g., “Performance Standard 1”). Under Performance Standard 1, the requirement for the agency to make a determination of reasonable cause or no reasonable cause within 100 days unless it is impracticable to do so was added. The term “administratively disposes” was changed to “final administrative disposition”. “Final administrative disposition” is defined in the definition section of the proposed rule. A performance standard was added stating that administrative closures should only be utilized in limited and appropriate circumstances. Performance Standard 3 requires that during the period beginning with the filing of the

complaint and ending with the filing of a charge or dismissal, the agency will, to the extent feasible, attempt to conciliate the complaint. In Performance Standard 5, the proposed rule requires that, during the performance assessment, HUD shall identify the number of complaints that proceed to administrative hearing and the result. In addition, HUD shall identify the number of complaints that proceed to judicial proceedings and the result. Additionally, under Performance Standard 5, HUD shall review the adequacy of the relief sought and obtained in light of the issues raised by the complaint. Performance Standard 7 was added, which requires an agency to demonstrate that it receives and processes a reasonable number of complaints cognizable under both the federal Fair Housing Act and the agency’s fair housing law. HUD will determine what a reasonable number of complaints is, based on factors that include, but are not limited to, the population of the jurisdiction that the agency serves, the length of time that the agency has participated in the FHAP, and the number of complaints that the agency has received and processed in the past. If an agency does not receive and process a reasonable number of complaints during any year of participation in the FHAP, then the FHEO regional director may put the agency on a Performance Improvement Plan (PIP). Performance Standard 8 was added, which places an affirmative duty on agencies to report to HUD on the final status of complaints following reasonable cause findings. Finally, Performance Standard 9 was added, which requires the agency to conform its performance to the provisions of any written agreements executed by the agency and the Department related to interim certification or certification, including but not limited to the interim agreement or Memorandum of Understanding (MOU).

Section 115.204 has been redesignated § 115.207. The title of the section has been changed from “Consequences of certification” to “Consequences of interim certification and certification.” A sentence has been added stating that HUD shall make referrals to interim certified and certified local agencies in accordance with this section even when the local agency is located in a state with an interim certified or certified state agency.

Section 115.205 has been redesignated § 115.209. The term “FHEO Field Office” in this section has been changed to “FHEO regional office.”

Section 115.206 has been redesignated § 115.202. The title of the section has been changed from “Request for certification” to “Request for interim certification.” The section now specifies that a request must include all laws referenced in the jurisdiction’s fair housing law. Subsections (3), (4), and (5) have been eliminated. There is no longer a requirement for the request and supporting materials to be kept available for public examination and copying at the HUD Field Office in whose jurisdiction the state or local jurisdiction seeking certification is located. However, § 115.202 now states that the Assistant Secretary may send a copy of the request and supporting materials to the appropriate FHEO regional director so that regional staff has documents available in case the Assistant Secretary requests assistance from regional staff.

A provision has also been added providing that upon receipt of a request, HUD will analyze the agency’s fair housing law to determine whether it meets the criteria identified in § 115.204. Finally, a provision has been added stating that HUD shall review a request for interim certification from a local agency located in a state with an interim certified or certified substantially equivalent state agency if the local agency certifies that the state law does not prohibit the local agency from administering and enforcing a fair housing law within the locality.

Section 115.207 has been changed in several ways. This section has been redesignated § 115.203. The title of the section has been changed from “Procedure for interim certification” to “Interim certification procedures.” A provision has been added stating that “All regulations, rules, directives, and/or opinions of the state attorney general or the jurisdiction’s chief legal officer that are necessary for the law to be substantially equivalent on its face must be enacted and effective before the Assistant Secretary will offer the agency an interim agreement.” The Performance Improvement Plan (PIP) provision of this section was eliminated and has been added to a later section. In addition, the term “all appropriate signatories” has been defined in the proposed rule. “All appropriate signatories” includes the Assistant Secretary, the FHEO regional director, and the state or local official having principal responsibility for the administration of the state or local fair housing law.

Sections 115.208, 115.209, 115.211, and 115.212 have been incorporated into two new sections: “Performance deficiency procedures; Suspension;

Withdrawal” (which is § 115.210) and “Changes limiting effectiveness of agency’s law; Corrective actions; Suspension; Withdrawal; Consequences of repeal; Changes not limiting effectiveness” (which is § 115.211). Section 115.210 sets forth performance deficiency procedures for both interim certified and certified agencies.

Section 115.210 gives the FHEO regional directors the authority to recommend technical assistance, offer a PIP and suspend an agency’s interim certification or certification. Giving the authority to offer a PIP and suspend the agency’s interim certification or certification to the regional directors is a change in the rule. The change was made because regional directors have first hand knowledge of interim and certified agency performance since they and their staffs work with the agencies on a frequent basis, conduct performance assessments of the agencies and review agency cases for FHAP payment. Under the proposed rule, the authority to withdraw an agency’s interim certification or certification remains with the Assistant Secretary. Section 115.211 sets forth procedures HUD will follow when there are changes limiting the effectiveness of an interim certified and certified agency’s law.

Section 115.210 has been revised. This section has been redesignated § 115.205. The title of the section has been changed from “Procedure for certification” to “Certification procedures.” The Performance Improvement Plan (PIP) provision of this section was eliminated and has been added to a later section.

Two new sections have been added to subpart B of 24 CFR part 115. Section 115.208 is now titled “Procedures for renewal of certification.” This section sets forth the procedures HUD may utilize when renewing the certification of an agency due to the expiration of the agency’s MOU. Section 115.212 is now titled “Request after withdrawal.” This section enumerates procedures HUD may utilize when an agency’s interim certification or certification is withdrawn and the agency requests interim certification or certification again.

IV. Changes to Subpart C of 24 CFR Part 115

The following sections of subpart C (the 300 series) of 24 CFR part 115 are proposed to be revised.

Section 115.301 now provides a general statement indicating that all FHAP funding is subject to congressional appropriation.

Section 115.302 has been revised to state that when the fixed annual amount

of capacity building funds will not adequately compensate an agency in its first year of participation in the FHAP due to the large number of fair housing complaints, HUD may provide the agency additional funds. This section has also been revised to more clearly state that in the second and third year of the agency’s participation in the FHAP, HUD may permit the agency to receive contributions funds under § 115.303 rather than capacity building funds under this section.

Section 115.304 has been revised in several ways. The four contributions fund categories are now identified in this section: Complaint processing funds, training funds, administrative cost funds and partnership funds.

Section 115.304(b)(1) now provides that the funding cycle for complaint processing funds will be identified in the cooperative agreement between HUD and the agency. In the prior version of this section, the funding cycle for complaint processing funds was identified as “Normally * * * the previous year’s funding cycle.”

Section 115.304(b)(2) has been revised to provide that the amount of funding for agencies that are new to contributions funding will be based on the number of complaints acceptably processed during the preceding 12-month period. The prior version of this section stated that “Funding for agencies in their fourth year of participation in the FHAP will be based on the number of complaints acceptably processed by the agency during the agency’s third year of participation in the FHAP.” The section was changed because the previous version failed to account for agencies that began receiving contributions prior to the end of their third year of participation in the FHAP. This section also now provides that the FHEO regional office will determine whether or not cases are “acceptably processed” based on requirements enumerated in the Cooperative Agreement and its attachments/appendices, performance standards set forth in Section 115.206, and provisions of the interim agreement or MOU.

The new rule includes § 115.304(d). This subsection sets forth the purpose of partnership funds and the basic requirements for obtaining partnership funds.

In the 1996 rule, § 115.305 dealt with special enforcement effort (SEE) funds. The SEE funds section has been eliminated in the proposed rule. HUD is conducting research to determine the adequacy of our current reimbursement payment schedule to agencies that

investigate and process HUD complaints.

The section of the proposed rule dealing with the purpose and requirements of training funds, now located at § 115.305 has been revised. The revised version specifically states that agencies that receive capacity building funds are eligible to receive training funds. In addition, HUD’s National Fair Housing Training Academy is identified in the proposed rule.

Section 115.306, which now sets forth requirements for participation in the FHAP, has been revised. The section states that the FHEO regional office will review the agency’s compliance with the requirements of this section when it conducts on-site performance assessments in accordance with § 115.206. The section now includes the requirement that an agency that participates in the FHAP must use the Department’s official complaint data information system and must input all relevant data and information into the system in a timely manner. This section has also been revised to clarify the requirement that an agency must spend at least 20 percent of its total annual budget on fair housing activities. Revised § 115.306(5) states “[i]f an agency that participates in the FHAP has civil rights responsibilities above and beyond the administration of a fair housing law (e.g., administration of a fair employment law), the agency must annually provide a certification to HUD stating that it spends at least 20 percent of its total annual budget on fair housing activities. The term ‘total annual budget’ as used in this subsection means the entire budget assigned by the jurisdiction to the agency for carrying out all of the agency’s civil rights responsibilities.”

Sections 115.308 (Standards for FHAP program review) and 115.311 (Corrective and remedial action) from the 1996 rules have been eliminated. However, the substance of these sections has been incorporated into § 115.306.

Section 115.310 under the 1996 rule (Subcontracting under the FHAP) is now § 115.308. Two requirements have been added to this section. First, the agency must certify in writing that any subcontractor that receives FHAP funding is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal debarment or agency. Second, the agency must certify in writing that any subcontractor that receives FHAP funding uses electronic information technology that is

accessible in accordance with section 508(a)(1) of the Rehabilitation Act Amendments of 1998 (29 U.S.C. 794d).

Two new sections have been added to subpart C. Section 115.309, titled FHAP and the First Amendment, provides that no funding made available under the FHAP may be used to investigate or prosecute any activity that may be protected by the First Amendment of the United States Constitution. Section 115.310 provides requirements for fair housing testing activities funded under the FHAP.

V. Feedback Sought from the Public

In addition to reviewing and providing feedback on the entire proposed rule, HUD seeks comment from the public on three issues in particular:

First, HUD recognizes that a lack of fair housing complaints received and processed by an interim or a certified agency does not necessarily mean that there is community-wide compliance with the Federal Fair Housing Act or substantially equivalent fair housing laws. Such inaction may just as likely be an indication that the agency is not adequately educating the public on fair housing rights and responsibilities. In

an effort to address non-performance, Performance Standard 7, located in § 115.206 of this proposed rule, sets forth new procedures HUD will utilize when an agency fails to receive and process a reasonable number of complaints during a year of FHAP participation. Following publication of the final rule, HUD will issue guidance on the reasonable numbers of complaints that agencies should receive and process, based on factors that include, but are not limited to, the population of the jurisdiction the agency serves and the length of time the agency has participated in the FHAP. HUD requests that FHAP agencies of varying sizes comment on what reasonable complaint numbers would be, based on these factors.

Second, HUD seeks comment on the appropriateness of enumerating timeframes that interim and certified agencies must comply with in sending out letters notifying parties of a failure to meet the 100-day (completion of investigation) or the one-year (final administrative disposition) requirements. HUD also seeks feedback on what a reasonable amount of time for interim or certified agencies to issue the

letters would be, following the realization that meeting the 100-day or one year timeframe is impracticable.

Third, the proposed rule maintains the same standards as the 1996 rule in regards to administrative cost funds. The number of cases an agency must acceptably process in order to obtain 10 percent of the agency's total FHAP payment amount for the preceding year remains 100. HUD seeks guidance from the public on whether this is still a reasonable number of cases.

Findings and Certifications

Paperwork Reduction Act

The proposed new information collection requirements contained in §§ 115.202, and 115.307, have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Information on the estimated public reporting burden is provided in the following table:

Reference	Number of respondents	Frequency of response	Estimated average response time	Estimated annual burden
Request to Establish Substantial Equivalency	40	4	40	6400
Reporting and Complaint Processing	103	60	2	12,360
Totals	143	64	42	18,760

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Under the provisions of 5

CFR 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, any comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposal by name and docket number (FR-4748-P-01) and must be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Facsimile: (202) 395-6974; and Surrell Silverman, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5241, Washington, DC 20410-2000.

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled

"Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

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 proposed rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of the

Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed 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.

Environmental Impact

In accordance with HUD environmental procedures at 24 CFR 50.19(c)(3), HUD approval of this rule that regulates the certification and funding of state and local fair housing enforcement agencies is categorically excluded from the environmental assessment of the National Environmental Policy Act and is not subject to the federal laws and authorities cited in 24 CFR 50.4.

Impact on Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would revise and make clarifying changes related to substantial equivalency certification and the FHAP. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance Number is 14.401.

List of Subjects in 24 CFR Part 115

Administrative practice and procedure, Aged, Fair housing, Grant programs-housing and community

development, Individuals with disabilities, Intergovernmental relations, Mortgages, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD proposes to revise 24 CFR part 115 as follows:

PART 115—CERTIFICATION AND FUNDING OF STATE AND LOCAL FAIR HOUSING ENFORCEMENT AGENCIES

Subpart A—General

Sec.

- 115.100 Definitions.
- 115.101 Program administration.
- 115.102 Public notices.

Subpart B—Certification of Substantially Equivalent Agencies

- 115.200 Purpose.
- 115.201 The two phases of substantial equivalency certification.
- 115.202 Request for interim certification.
- 115.203 Interim certification procedures.
- 115.204 Criteria for adequacy of law.
- 115.205 Certification procedures.
- 115.206 Performance assessments; Performance standards.
- 115.207 Consequences of interim certification and certification.
- 115.208 Procedures for renewal of certification.
- 115.209 Technical assistance.
- 115.210 Performance deficiency procedures; Suspension; Withdrawal.
- 115.211 Changes limiting effectiveness of agency's law; Corrective actions; Suspension; Withdrawal; Consequences of repeal; Changes not limiting effectiveness.
- 115.212 Request after withdrawal.

Subpart C—Fair Housing Assistance Program

- 115.300 Purpose.
- 115.301 Agency eligibility criteria; Funding availability.
- 115.302 Capacity building funds.
- 115.303 Eligible activities for capacity building funds.
- 115.304 Agencies eligible for contributions funds.
- 115.305 Training funds.
- 115.306 Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements.
- 115.307 Reporting and recordkeeping requirements.
- 115.308 Subcontracting under the FHAP.
- 115.309 FHAP and the First Amendment.
- 115.310 Testing.

Authority: 42 U.S.C. 3601–19; 42 U.S.C. 3535(d).

Subpart A—General

§ 115.100 Definitions.

(a) The terms "*Fair Housing Act*", "*HUD*" and "*the Department*", as used in this part, are defined in 24 CFR 5.100.

(b) The terms "*aggrieved person*", "*complainant*", "*conciliation*",

"*conciliation agreement*", "*discriminatory housing practice*", "*dwelling*", "*handicap*", "*person*", "*respondent*", "*secretary*", and "*state*", as used in this part, are defined in Section 802 of the Fair Housing Act (42 U.S.C. 3600–3620).

(c) Other definitions. The following definitions also apply to this part:

Act means the Fair Housing Act, as defined in 24 CFR 5.100.

Assistant Secretary means the Assistant Secretary for Fair Housing and Equal Opportunity.

Certified Agency is an agency that has been granted certification by the Assistant Secretary for Fair Housing and Equal Opportunity, in accordance with the requirements of this part.

Cooperative Agreement is the instrument HUD will use to provide funds. The Cooperative Agreement includes attachments and/or appendices establishing requirements relating to the operation and performance of the agency.

Cooperative Agreement Officer (CAO) is the administrator of the funds awarded pursuant to this part and is a regional director of the Office of Fair Housing and Equal Opportunity.

Dual-Filed Complaint means a housing discrimination complaint that has been filed with both HUD and the agency that has been granted interim certification or certification by the Assistant Secretary for Fair Housing and Equal Opportunity.

FHAP means the Fair Housing Assistance Program.

FHEO means HUD's Office of Fair Housing and Equal Opportunity.

FHEO Regional Director means a regional director of the Office of Fair Housing and Equal Opportunity.

Fair Housing Law or *Law* refers to both state fair housing laws and local fair housing laws.

Final Administrative Disposition means an agency's completion of a case following a reasonable cause finding, including but not limited to an agency-approved settlement or a final, administrative decision issued by commissioners, hearing officers or administrative law judges. Final administrative disposition does not include dispositions in judicial proceedings resulting from election or appeal.

Government Technical Monitor (GTM) means the HUD staff person who has been designated to provide technical and financial oversight and evaluation of the FHAP grantee's performance.

Government Technical Representative (GTR) means the HUD staff person who is responsible for the technical

administration of the FHAP grant, the evaluation of performance under the FHAP grant, the acceptance of technical reports or projects, the approval of payments, and other such specific responsibilities as may be stipulated in the FHAP grant.

Impracticable, as used in this part, is when complaint processing is delayed by circumstances beyond the control of the interim or certified agency. Those situations include, but are not limited to, complaints involving complex issues requiring extensive investigations, complaints involving new and complicated areas of law that need to be analyzed, and where a witness is discovered late in the investigation and needs to be interviewed.

Interim Agency is an agency that has been granted interim certification by the Assistant Secretary for Fair Housing and Equal Opportunity.

Ordinance, as used in this part, means a law enacted by the legislative body of a municipality.

Statute, as used in this part, means a law enacted by the legislative body of a state.

Testing refers to the use of an individual or individuals ("testers") who, without a bona fide intent to rent or purchase a house, apartment, or other dwelling, pose as prospective renters or purchasers for the purpose of gathering information that may indicate whether a housing provider is complying with fair housing laws.

§ 115.101 Program administration.

(a) Authority and responsibility. The Secretary has delegated the authority and responsibility for administering this part to the Assistant Secretary.

(b) Delegation of Authority. The Assistant Secretary retains the right to make final decisions concerning the granting and withdrawal of substantial equivalency interim certification and certification. The Assistant Secretary delegates the authority and responsibility for administering the remainder of this part to the FHEO regional director. This includes assessing the performance of interim and certified agencies as described in § 115.206. This also includes the offering of a Performance Improvement Plan (PIP) as described in § 115.210 and the suspension of interim certification or certification due to performance deficiencies as described in § 115.210.

§ 115.102 Public notices.

(a) Periodically, the Assistant Secretary will publish the following public notices in the **Federal Register**:

(1) A list of all interim and certified agencies; and

(2) A list of agencies to which a withdrawal of interim certification or certification has been proposed.

(b) On an annual basis, the Assistant Secretary shall publish in the **Federal Register** a notice that identifies all agencies that have received interim certification during the prior year. The notice will invite the public to comment on the state and local laws of the new interim agencies, as well as on the performance of the agencies in enforcing their laws. All comments will be considered before a final decision on certification is made.

Subpart B—Certification of Substantially Equivalent Agencies

§ 115.200 Purpose.

This subpart implements section 810(f) of the Fair Housing Act. The purpose of this subpart is to set forth:

(a) The basis for agency interim certification and certification;

(b) Procedures by which a determination is made to grant interim certification or certification;

(c) How the Department will evaluate the performance of an interim and certified agency;

(d) Procedures that the Department will utilize when an interim or certified agency performs deficiently;

(e) Procedures that the Department will utilize when there are changes limiting the effectiveness of an interim or certified agency's law;

(f) Procedures for renewal of certification; and

(g) Procedures when an agency requests interim certification or certification after a withdrawal.

§ 115.201 The two phases of substantial equivalency certification.

Substantial equivalency certification is granted if the Department determines that a state or local agency enforces a law that is substantially equivalent to the Fair Housing Act with regard to substantive rights, procedures, remedies and the availability of judicial review. The Department has developed a two-phase process of substantial equivalency certification.

(a) *Adequacy of Law*: In the first phase, the Department's Assistant Secretary for Fair Housing and Equal Opportunity will determine whether, on its face, the fair housing law that the agency administers provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the federal Fair Housing Act. An agency must obtain interim certification prior to obtaining certification.

(b) *Adequacy of Performance*: In the second phase, the Department's Assistant Secretary for Fair Housing and Equal Opportunity will determine whether, in operation, the fair housing law that the agency administers provides rights, procedures, remedies and the availability of judicial review that are substantially equivalent to those provided in the federal Fair Housing Act. An affirmative conclusion will result in the Department offering the agency certification.

§ 115.202 Request for interim certification.

(a) A request for interim certification under this subpart shall be filed with the Assistant Secretary by the state or local official having principal responsibility for the administration of the state or local fair housing law. The request shall be supported by the text of the jurisdiction's fair housing law, the law creating and empowering the agency, all laws referenced in the jurisdiction's fair housing law, any regulations and directives issued under the law, and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the jurisdiction's fair housing law. A request shall also include organizational information of the agency responsible for administering and enforcing the law.

(b) The request and supporting materials shall be filed with the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. The Assistant Secretary shall forward a copy of the request and supporting materials to the appropriate FHEO regional director. A copy of the request and supporting materials will be kept available for public examination and copying at:

(1) The office of the Assistant Secretary; and

(2) The office of the state or local agency charged with administration and enforcement of the state or local fair housing law.

(c) Upon receipt of a request, HUD will analyze the agency's fair housing law to determine whether it meets the criteria identified in § 115.204.

(d) HUD shall review a request for interim certification from a local agency located in a state with interim certified or certified substantially equivalent state agency. However, in the request for interim certification, the local agency must certify that the substantially equivalent state law does not prohibit the local agency from administering and enforcing a fair housing law within the locality.

§ 115.203 Interim certification procedures.

(a) Upon receipt of a request for interim certification filed under § 115.202, the Assistant Secretary may request further information necessary for a determination to be made under this section. The Assistant Secretary may consider the relative priority given to fair housing administration, as compared to the agency's other duties and responsibilities, as well as the compatibility or potential conflict of fair housing objectives with these other duties and responsibilities.

(b) If the Assistant Secretary determines, after application of the criteria set forth in § 115.204, that the state or local law, on its face, provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the Assistant Secretary may offer to enter into an Agreement for the Interim Referral of Complaints and Other Utilization of Services (interim agreement). The interim agreement will outline the procedures and authorities upon which the interim certification is based.

(c) Such interim agreement, after it is signed by all appropriate signatories, will result in the agency receiving interim certification. Appropriate signatories include the Assistant Secretary, the FHEO regional director and the state or local official having principal responsibility for the administration of the state or local fair housing law.

(d) Interim agreements shall be for a term of no more than three years.

(e) All regulations, rules, directives, and/or opinions of the State Attorney General or the jurisdiction's chief legal officer that are necessary for the law to be substantially equivalent on its face must be enacted and effective in order for the Assistant Secretary to offer the agency an interim agreement.

(f) Interim certification required prior to certification. An agency is required to obtain interim certification prior to obtaining certification.

§ 115.204 Criteria for adequacy of law.

(a) In order for a determination to be made that a state or local fair housing agency administers a law, which, on its face, provides rights and remedies for alleged discriminatory housing practices that are substantially equivalent to those provided in the Act, the law must:

(1) Provide for an administrative enforcement body to receive and process complaints and provide that:

(i) Complaints must be in writing;

(ii) Upon the filing of a complaint, the agency shall serve notice upon the complainant acknowledging the filing and advising the complainant of the time limits and choice of forums provided under the law;

(iii) Upon the filing of a complaint, the agency shall promptly serve notice on the respondent or person charged with the commission of a discriminatory housing practice advising of his or her procedural rights and obligations under the statute or ordinance, together with a copy of the complaint;

(iv) A respondent may file an answer to a complaint.

(2) Delegate to the administrative enforcement body comprehensive authority, including subpoena power, to investigate the allegations of complaints, and power to conciliate complaints, and require that:

(i) The agency commences proceedings with respect to the complaint before the end of the 30th day after receipt of the complaint;

(ii) The agency investigate the allegations of the complaint and complete the investigation within the time-frame established by section 810(a)(1)(B)(iv) of the Act or comply with the notification requirements of section 810(a)(1)(C) of the Act;

(iii) The agency make final administrative disposition of a complaint within one year of the date of receipt of a complaint, unless it is impracticable to do so. If the agency is unable to do so, it shall notify the parties, in writing, of the reasons for not doing so;

(iv) Any conciliation agreement arising out of conciliation efforts by the agency shall be an agreement between the respondent, the complainant, and the agency and shall require the approval of the agency;

(v) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the agency determines that disclosure is not required to further the purpose of the law.

(3) Not place excessive burdens on the aggrieved person that might discourage the filing of complaints, such as:

(i) A provision that a complaint must be filed within any period of time less than 180 days after an alleged discriminatory practice has occurred or terminated;

(ii) Anti-testing provisions;

(iii) Provisions that could subject an aggrieved person to costs, criminal penalties or fees in connection with the filing of complaints.

(4) Not contain exemptions that substantially reduce the coverage of

housing accommodations as compared to section 803 of the Act.

(5) Provide the same protections as those afforded by sections 804, 805, 806, and 818 of the Act, consistent with HUD's implementing regulations found at 24 CFR part 100.

(b) In addition to the factors described in paragraph (a) of this section, the provisions of the state or local law must afford administrative and judicial protection and enforcement of the rights embodied in the law.

(1) The agency must have the authority to:

(i) Grant or seek prompt judicial action for appropriate temporary or preliminary relief pending final disposition of a complaint if such action is necessary to carry out the purposes of the law;

(ii) Issue and seek enforceable subpoenas;

(iii) Grant actual damages in an administrative proceeding or provide adjudication in court at agency expense to allow the award of actual damages to an aggrieved person;

(iv) Grant injunctive or other equitable relief, or be specifically authorized to seek such relief in a court of competent jurisdiction;

(v) Provide an administrative proceeding in which a civil penalty may be assessed or provide adjudication in court, at agency expense, allowing the assessment of punitive damages against the respondent.

(2) If an agency's law offers an administrative hearing, the agency must also provide parties an election option substantially equivalent to the election provisions of section 812 of the Act.

(3) Agency actions must be subject to judicial review upon application by any party aggrieved by a final agency order.

(4) Judicial review of a final agency order must be in a court with authority to:

(i) Grant to the petitioner, or to any other party, such temporary relief, restraining order, or other order as the court determines is just and proper;

(ii) Affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceeding; and

(iii) Enforce the order to the extent that the order is affirmed or modified.

(c) The requirement that the state or local law prohibit discrimination on the basis of familial status does not require that the state or local law limit the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

(d) The state or local law may assure that no prohibition of discrimination because of familial status applies to

housing for older persons as described in 24 CFR part 100, subpart E.

(e) A determination of the adequacy of a state or local fair housing law "on its face" is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law. Regulations, directives, rules of procedure, judicial decisions, or interpretations of the fair housing law by competent authorities will be considered in making this determination.

(f) A law will be found inadequate "on its face" if it permits any of the agency's decision-making authority to be contracted out or delegated to a non-governmental authority. For the purposes of this paragraph, "decision making authority" includes but is not limited to:

- (1) Acceptance of a complaint;
- (2) Approval of a conciliation agreement;
- (3) Dismissal of a complaint;
- (4) Any action specified in §§ 115.204(a)(2)(iii) or 115.204(b)(1); and
- (5) Any decision-making regarding whether a particular matter will or will not be pursued.

(g) The state or local law must provide for civil enforcement of the law by an aggrieved person by the commencement of an action in an appropriate court at least one year after the occurrence or termination of an alleged discriminatory housing practice. The court must be empowered to:

- (1) Award the plaintiff actual and punitive damages;
- (2) Grant as relief, as it deems appropriate, any temporary or permanent injunction, temporary restraining order or other order; and
- (3) Allow reasonable attorney's fees and costs.

(h) If a state or local law is different than the Act in a way that does not diminish coverage of the Act, including but not limited to the protection of additional prohibited bases, then the state or local law may still be found substantially equivalent.

§ 115.205 Certification procedures.

(a) Certification.

(1) If the Assistant Secretary determines, after application of criteria set forth in §§ 115.204, 115.206 and this section, that the state or local law, both "on its face" and "in operation," provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially

equivalent to those provided in the Act, the Assistant Secretary may enter into a Memorandum of Understanding (MOU) with the agency.

(2) The MOU is a written agreement providing for the referral of complaints to the agency and for communication procedures between the agency and HUD that are adequate to permit the Assistant Secretary to monitor the agency's continuing substantial equivalency certification.

(3) The MOU, after it is signed by all appropriate signatories, may authorize an agency to be a certified agency for a period of not more than five years. Appropriate signatories include the Assistant Secretary, the FHEO regional director and the authorized employee(s) of the agency.

(b) In order to receive certification, during the 60 days prior to the expiration of the agency's interim agreement, the agency must certify to the Assistant Secretary that the state or local fair housing law, "on its face", continues to be substantially equivalent to the Act (*i.e.*, there have been no amendments to the state or local fair housing law, adoption of rules or procedures concerning the fair housing law, or judicial or other authoritative interpretations of the fair housing law that limit the effectiveness of the agency's fair housing law).

§ 115.206 Performance assessments; performance standards.

(a) *Frequency of on-site performance assessment during interim certification:* The Assistant Secretary, through the appropriate FHEO regional office, may conduct an on-site performance assessment not later than six months after the execution of the interim agreement. An on-site performance assessment may also be conducted during the six months immediately prior to the expiration of the interim agreement. HUD has the discretion to conduct additional performance assessments during the period of interim certification, as it deems necessary.

(b) *Frequency of on-site performance assessment during certification:* During certification, the Assistant Secretary through the FHEO regional office, may conduct on-site performance assessments every 24 months. HUD has the discretion to conduct additional performance assessments during the period of certification, as it deems necessary.

(c) In conducting the performance assessment, the FHEO regional office shall determine whether the agency engages in timely, comprehensive and thorough fair housing complaint

investigation, conciliation and enforcement activities. In the performance assessment report, the FHEO regional office may recommend to the Assistant Secretary whether the agency should continue to be interim certified or certified. In conducting the performance assessment, the FHEO regional office shall also determine whether the agency is in compliance with the requirements for participation in the FHAP enumerated in §§ 115.306, 115.307, 115.308, 115.309, and 115.310 of this part. In the performance assessment report, the FHEO regional office shall identify whether the agency meets the requirements of §§ 115.306, 115.307, 115.308, 115.309, and 115.310 of this part, and therefore, should continue receiving funding under the FHAP.

(d) At a minimum, the performance assessment will consider the following to determine the effectiveness of an agency's fair housing complaint processing, consistent with such guidance as may be issued by HUD:

- (1) The agency's case processing procedures;
- (2) The thoroughness of the agency's case processing;
- (3) A review of cause and no cause determinations for quality of investigations and consistency with appropriate standards;
- (4) A review of conciliation agreements and other settlements;
- (5) A review of the agency's administrative closures; and
- (6) A review of the agency's enforcement procedures, including administrative hearings and judicial proceedings.

(e) *Performance standards:* HUD shall utilize the following performance standards while conducting performance assessments. If an agency does not meet one or more performance standard(s), HUD shall utilize the performance deficiency procedures enumerated in § 115.210.

(1) Performance Standard 1: Commence complaint proceedings, carry forward such proceedings, complete investigations, issue determinations and make final administrative dispositions in a timely manner. To meet this standard, the performance assessment will consider the timeliness of the agency's actions with respect to its complaint processing, including, but not limited to:

- (i) Whether the agency began its processing of fair housing complaints within 30 days of receipt;
- (ii) Whether the agency completes the investigative activities with respect to a complaint within 100 days from the date of receipt or, if it is impracticable

to do so, notifies the parties in writing of the reason(s) for the delay;

(iii) Whether the agency makes a determination of reasonable cause or no reasonable cause with respect to a complaint within 100 days from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay;

(iv) Whether the agency makes a final administrative disposition of a complaint within one year from the date of receipt or, if it is impracticable to do so, notifies the parties in writing of the reason(s) for the delay; and

(v) Whether the agency completed the investigation of the complaint and prepared a complete, final investigative report.

(2) Performance Standard 2: Administrative closures are only utilized in limited and appropriate circumstances. Administrative closures should be distinguished from a closure on the merits and may not be used instead of making a recommendation or determination of reasonable or no reasonable cause. HUD will provide further guidance to interim and certified agencies on the appropriate circumstances for administrative closures.

(3) Performance Standard 3: During the period beginning with the filing of a complaint and ending with filing of a charge or dismissal, the agency will, to the extent feasible, attempt to conciliate the complaint. After a charge has been issued, the agency will, to the extent feasible, continue to attempt conciliation until a hearing or a judicial proceeding has begun.

(4) Performance Standard 4: The agency conducts compliance reviews of settlements, conciliation agreements, and orders resolving discriminatory housing practices. The performance assessment shall include, but not be limited to:

(i) An assessment of the agency's procedures for conducting compliance reviews; and

(ii) Terms and conditions of agreements and orders issued.

(5) Performance Standard 5: The agency must consistently and affirmatively seek and obtain the type of relief designed to prevent recurrences of discriminatory practices. The performance assessment shall include, but not be limited to:

(i) An assessment of the agency's use of its authority to seek actual damages, as appropriate;

(ii) An assessment of the agency's use of its authority to seek and assess civil penalties or punitive damages, as appropriate;

(iii) An assessment of the types of relief sought by the agency with consideration for the inclusion of affirmative provisions designed to protect the public interest;

(iv) A review of all types of relief obtained;

(v) A review of the adequacy of the relief sought and obtained in light of the issues raised by the complaint;

(vi) The number of complaints closed with relief and the number closed without relief;

(vii) The number of complaints that proceed to administrative hearing and the result; and

(viii) The number of complaints that proceed to judicial proceedings and the result.

(6) Performance Standard 6: The agency must consistently and affirmatively seek to eliminate all prohibited practices under its fair housing law. An assessment under this standard will include, but not be limited to, an identification of the education and outreach efforts of the agency.

(7) Performance Standard 7: The agency must demonstrate that it receives and processes a reasonable number of complaints cognizable under both the federal Fair Housing Act and the agency's fair housing statute or ordinance. The reasonable number will be determined by HUD and based on all relevant circumstances including, but not limited to, the population of the jurisdiction that the agency serves, the length of time that the agency has participated in the FHAP and the number of complaints that the agency has received and processed in the past. If an agency fails to receive and process a reasonable number of complaints during a year of FHAP participation, then the FHEO regional director may offer the agency a Performance Improvement Plan (PIP), as described in § 115.210(a)(2). The PIP will set forth the number of complaints the agency must process during subsequent years of FHAP participation. After issuing the PIP, the FHEO regional office will provide the agency technical assistance on ways to increase awareness of fair housing rights and responsibilities in the jurisdiction.

(8) Performance Standard 8: The agency must report to HUD on the final status of all dual-filed complaints where a determination of reasonable cause was made. The report must identify, at a minimum, how complaints were resolved (e.g., settlement, judicial proceedings, or administrative hearing), when they were resolved, the forum in which they were resolved and types and amounts of relief obtained.

(9) Performance Standard 9: The agency must conform its performance to the provisions of any written agreements executed by the agency and the Department related to substantial equivalency certification, including but not limited to, the interim agreement or MOU.

§ 115.207 Consequences of interim certification and certification.

(a) Whenever a complaint received by the Assistant Secretary alleges violations of a fair housing law administered by an agency that has been interim certified or certified as substantially equivalent, the complaint will be referred to the agency, and no further action shall be taken by the Assistant Secretary with respect to such complaint except as provided for by the Act, this part, 24 CFR part 103, subpart C, and any written agreements executed by the Agency and the Assistant Secretary. HUD shall make referrals to interim certified and certified local agencies in accordance with this section even when the local agency is located in a state with an interim certified or certified state agency.

(b) If HUD determines that a complaint has not been processed in a timely manner in accordance with the performance standards set forth in § 115.206, HUD may reactivate the complaint, conduct its own investigation and conciliation efforts, and make a determination consistent with 24 CFR part 103.

(c) Notwithstanding paragraph (a) of this section, whenever the Assistant Secretary has reason to believe that a complaint demonstrates a basis for the commencement of proceedings against any respondent under section 814(a) of the Act or for proceedings by any governmental licensing or supervisory authorities, the Assistant Secretary shall transmit the information upon which such belief is based to the Attorney General, federal financial regulatory agencies, other federal agencies, or other appropriate governmental licensing or supervisory authorities.

§ 115.208 Procedures for renewal of certification.

(a) If the Assistant Secretary affirmatively concludes that the agency's law and performance have complied with the requirements of this part in each of the five years of certification, the Assistant Secretary may renew the certification of the agency.

(b) In determining whether to renew the certification of an agency, the Assistant Secretary's review may include, but is not limited to:

(1) Performance assessments of the agency conducted by the Department during the five years of certification;

(2) The agency's own certification that the state or local fair housing law continues to be substantially equivalent both "on its face" and "in operation;" (i.e., there have been no amendments to the state or local fair housing law, adoption of rules or procedures concerning the fair housing law, or judicial or other authoritative interpretations of the fair housing law that limit the effectiveness of the agency's fair housing law); and

(3) Any and all public comments regarding the relevant state and local law and the performance of the agency in enforcing the law.

(c) If the Assistant Secretary decides to renew an agency's certification, the Assistant Secretary will offer the agency either a new MOU or an Addendum to the Memorandum of Understanding (addendum). The new MOU or addendum will extend and update the MOU between HUD and the agency.

(d) The new MOU or addendum, when signed by all appropriate signatories, will result in the agency's certification being renewed for five years from the date on which the previous MOU was to expire. Appropriate signatories include the Assistant Secretary, the FHEO regional director and the authorized employee(s) of the agency.

(e) The provisions of this section may be applied to an agency that has an expired MOU or an expired addendum.

§ 115.209 Technical assistance.

(a) The Assistant Secretary, through the FHEO regional office, may provide technical assistance to the interim and certified agencies at any time. The agency may request such technical assistance or the FHEO regional office may determine the necessity for technical assistance and require the agency's cooperation and participation.

(b) The Assistant Secretary, through FHEO headquarters or regional staff, will require that the agency participate in training conferences and seminars that will enhance the agency's ability to process complaints alleging discriminatory housing practices.

§ 115.210 Performance deficiency procedures; Suspension; Withdrawal.

(a) HUD may utilize the following performance deficiency procedures if it determines at any time that the agency does not meet one or more of the performance standards enumerated in § 115.206. The performance deficiency procedures may be applied to agencies with either interim certification or

certification. If an agency fails to meet performance standard 7, HUD may bypass the technical assistance performance deficiency procedure and proceed to the PIP.

(1) *Technical assistance:* After discovering the deficiency, the FHEO regional office should immediately inform the agency and provide the agency with technical assistance.

(2) *Performance improvement plan:* If, following technical assistance, the agency does not bring its performance into compliance with § 115.206 within a time period identified by the FHEO regional director, the FHEO regional director may offer the agency a PIP.

(i) The PIP will outline the agency's performance deficiencies, identify the necessary corrective actions, and include a timetable for completion.

(ii) If the agency receives a PIP, funding under the FHAP may be suspended for the duration of the PIP.

(iii) Once the agency has implemented the corrective actions to eliminate the deficiencies, and such corrective actions are accepted by the FHEO regional director, funding may be restored.

(iv) The FHEO regional office may provide the agency with technical assistance during the period of the PIP, if appropriate.

(b) *Suspension:* If the agency does not agree to implement the PIP or does not implement the corrective actions identified in the PIP within the time allotted, then the FHEO regional director may suspend the agency's interim certification or certification.

(1) The FHEO regional director shall notify the agency in writing of the specific reasons for the suspension and provide the agency with an opportunity to respond within 30 days.

(2) Suspension shall not exceed 180 days.

(3) During the period of suspension, HUD will not refer complaints to the agency.

(4) If an agency is suspended, the FHEO regional office may elect not to provide payment for complaints processed within that period of time unless and until the Assistant Secretary determines that the agency is fully in compliance with § 115.206.

(5) HUD may provide the agency with technical assistance during the period of suspension, if appropriate.

(6) No more than 60 days prior to the end of suspension, the FHEO regional office shall conduct a performance assessment of the agency.

(c) *Withdrawal:* If, following the performance assessment conducted at the end of suspension, the Assistant Secretary determines that the agency

has not corrected the deficiencies, the Assistant Secretary may propose to withdraw the interim certification or certification of the agency.

(1) The Assistant Secretary shall proceed with withdrawal unless the agency provides information or documentation that establishes that the agency's administration of its law meets all of the substantial equivalency certification criteria set forth in 24 CFR Part 115.

(2) The Assistant Secretary shall inform the agency in writing of the reasons for the withdrawal.

§ 115.211 Changes limiting effectiveness of agency's law; Corrective actions; Suspension; Withdrawal; Consequences of repeal; Changes not limiting effectiveness.

(a) *Changes limiting effectiveness of agency's law.*

(1) If a state or local fair housing law that HUD has previously deemed substantially equivalent to the Act is amended; or rules or procedures concerning the fair housing law are adopted; or judicial or other authoritative interpretations of the fair housing law are issued, the interim certified or certified agency must inform the Assistant Secretary of such amendment, adoption, or interpretation within 60 days of its discovery.

(2) The requirements of this section shall apply equally to the amendment, adoption, or interpretation of any related law that bears on any aspect of the effectiveness of the agency's fair housing law.

(3) The Assistant Secretary may conduct a review to determine if the amendment, adoption, or interpretation limits the effectiveness of the interim agency's fair housing law.

(b) *Corrective actions.*

(1) If the review indicates that the agency's law no longer meets the criteria identified in § 115.204, the Assistant Secretary will so notify the agency in writing. Following notification, HUD may take appropriate actions, including, but not limited to any or all of the following:

(i) Declining to refer some or all complaints to the agency unless and until the fair housing law meets the criteria identified in § 115.204;

(ii) Electing not to provide payment for complaints processed by the agency unless and until the fair housing law meets the criteria identified in § 115.204;

(iii) Providing technical assistance and/or guidance to the agency to assist the agency in curing deficiencies in its fair housing law.

(2) *Suspension based on changes in the law:* If the corrective actions

identified in subsection (b)(1)(i)–(iii) above fail to bring the state or local fair housing law back into compliance with the criteria identified in § 115.204 within the time-frame identified in HUD's notification to the agency, the Assistant Secretary may suspend the agency's interim certification or certification based on changes in the law or a related law.

(i) The Assistant Secretary will notify the agency in writing of the specific reasons for the suspension and provide the agency with an opportunity to respond within 30 days.

(ii) During the period of suspension, the Assistant Secretary has the discretion to not refer some or all complaints to the agency unless and until the agency's law meets the criteria identified in § 115.204.

(iii) During suspension, HUD may elect not to provide payment for complaints processed unless and until the agency's law meets the criteria identified in § 115.204.

(iv) During the period of suspension, if the fair housing law is brought back into compliance with the criteria identified in § 115.204, and the Assistant Secretary determines that the fair housing law remains substantially equivalent to the Act, the Assistant Secretary will rescind the suspension and reinstate the agency's interim certification or certification.

(3) *Withdrawal based on changes in the law:* If the Assistant Secretary determines that the agency has not brought its law back into compliance with the criteria identified in § 115.204 during the period of suspension, the Assistant Secretary may propose to withdraw the agency's interim certification or certification.

(i) The Assistant Secretary will proceed with withdrawal unless the agency provides information or documentation that establishes that the agency's current law meets the criteria of substantial equivalency certification identified in § 115.204.

(ii) The Assistant Secretary will inform the agency in writing of the reasons for the withdrawal.

(c) If, following notification from HUD that its fair housing law no longer meets the criteria identified in § 115.204, an interim certified or certified agency unequivocally expresses to HUD that its fair housing law will not be brought back into compliance, the Assistant Secretary may forgo suspension and proceed directly to withdrawal of the agency's interim certification or certification.

(d) *Consequences of repeal:* If a state or local fair housing law that HUD has previously deemed substantially

equivalent to the Act is repealed, in whole or in part, or a related law that bears on any aspect of the effectiveness of the agency's fair housing law is repealed, in whole or in part, the Assistant Secretary may immediately withdraw the agency's interim certification or certification.

(e) *Changes not limiting effectiveness:* Nothing in this section is meant to limit the Assistant Secretary's authority to determine that a change to a fair housing law does not jeopardize the substantial equivalency interim certification or certification of an agency.

(1) Under such circumstances, the Assistant Secretary may proceed in maintaining its existing relationship with the agency, as set forth in the interim agreement or MOU.

(2) Alternatively, the Assistant Secretary may decide not to refer certain types of complaints to the agency. The Assistant Secretary may elect not to provide payment for these complaints and may require the agency to refer such complaints to the Department for investigation, conciliation and enforcement activities.

(3) When the Assistant Secretary determines that a change to a fair housing law does not jeopardize an agency's substantial equivalency certification, the Assistant Secretary need not proceed to suspension or withdrawal if the change is not reversed.

§ 115.212 Request after withdrawal.

(a) An agency that has had its interim certification or certification withdrawn, either voluntarily or by the Department, may request substantial equivalency interim certification or certification.

(b) The request shall be filed in accordance with section 202 of this part.

(c) The Assistant Secretary shall determine whether the state or local law, on its face, provides substantive rights, procedures, remedies, and judicial review procedures for alleged discriminatory housing practices that are substantially equivalent to those provided in the Federal Fair Housing Act. To meet this standard, the state or local law must meet the criteria enumerated in section 204 of this part.

(d) Additionally, if the agency had documented performance deficiencies that contributed to the past withdrawal, then the Department shall consider the agency's performance and any steps the agency has taken to correct performance deficiencies and to prevent them from reoccurring in determining whether to grant interim certification or certification. The review of the agency's performance shall include HUD

conducting a performance assessment in accordance with section 206 of this part.

Subpart C—Fair Housing Assistance Program

§ 115.300 Purpose.

The purpose of the Fair Housing Assistance Program (FHAP) is to provide assistance and reimbursement to state and local fair housing enforcement agencies. The intent of this funding program is to build a coordinated intergovernmental enforcement effort to further fair housing and to encourage the agencies to assume a greater share of the responsibility for the administration and enforcement of fair housing laws.

The financial assistance is designed to provide support for:

(a) The processing of dual filed complaints;

(b) Training under the Fair Housing Act and the agencies' fair housing law;

(c) The provision of technical assistance;

(d) The creation and maintenance of data and information systems; and

(e) The development and enhancement of fair housing education and outreach projects, special fair housing enforcement efforts, fair housing partnership initiatives, and other fair housing projects.

§ 115.301 Agency eligibility criteria; funding availability.

An agency with certification or interim certification under subpart B of this part, and which has entered into a MOU or interim agreement, is eligible to participate in the FHAP. All FHAP funding is subject to congressional appropriation.

§ 115.302 Capacity building funds.

(a) Capacity building (CB) funds are funds that HUD may provide to an agency with interim certification.

(b) CB funds will be provided in a fixed annual amount to be utilized for the eligible activities established pursuant to § 115.303. When the fixed annual amount will not adequately compensate an agency in its first year of participation in the FHAP due to the large number of fair housing complaints that the agency reasonably anticipates processing, HUD may provide the agency additional funds.

(c) HUD may provide capacity building funds during an agency's first three years of participation in the FHAP. However, in the second and third year of the agency's participation in the FHAP, HUD has the option to permit the agency to receive contribution funds under § 115.303, instead of CB funds.

(d) In order to receive CB funding, agencies must submit a statement of work prior to the signing of the cooperative agreement. The statement of work must identify:

(1) The objectives and activities to be carried out with the CB funds received;

(2) A plan for training all of the agency's employees involved in the administration of the agency's fair housing law;

(3) A statement of the agency's intention to participate in HUD-sponsored training in accordance with the training requirements set out in the cooperative agreement;

(4) A description of the agency's complaint processing data and information, or alternatively, whether the agency plans to use CB funds to purchase and install a data system;

(5) A description of any other fair housing activities that the agency will undertake with its CB funds. All such activities must address matters affecting fair housing enforcement that are cognizable under the Fair Housing Act. Any activities that do not address the implementation of the agency's fair housing law, and that are therefore not cognizable under the Fair Housing Act, will be disapproved.

§ 115.303 Eligible activities for capacity building funds.

The primary purposes of capacity building funding are to provide for complaint activities and to support activities that produce increased awareness of fair housing rights and remedies. All such activities must support the agency's administration and enforcement of its fair housing law and address matters affecting fair housing that are cognizable under the Fair Housing Act.

§ 115.304 Agencies eligible for contributions funds.

(a) An agency that has received CB funds for one to three consecutive years may be eligible for contributions funding. Contributions funding consists of four categories:

(1) Complaint processing (CP) funds;

(2) Training funds (§ 115.305 of this part sets forth the requirements for training funds).

(3) Administrative cost (AC) funds;

(4) Partnership (P) funds; and

(b) CP funds.

(1) Agencies receiving CP funds will receive such support based solely on the number of complaints processed by the agency and accepted for payment by the FHEO regional director during a consecutive, specifically identified, 12-month period. The 12-month period will be identified in the cooperative

agreement between HUD and the agency. The FHEO regional office shall determine whether or not cases are acceptably processed based on requirements enumerated in the Cooperative Agreement and its attachments/appendices, performance standards set forth in 24 CFR 115.206 and provisions of the interim agreement or MOU.

(2) The amount of funding to agencies that are new to contributions funding will be based on the number of complaints acceptably processed by the agency during the specifically identified 12-month period preceding the signing of the cooperative agreement.

(c) *AC funds.*

(1) Agencies that acceptably process 100 or more cases will receive no less than 10 percent of the agency's total FHAP payment amount for the preceding year, in addition to CP funds, contingent on fiscal year appropriations. Agencies that acceptably process fewer than 100 cases will receive a flat rate contingent on fiscal year appropriations.

(2) Agencies will be required to provide HUD with a statement of how they intend to use the AC funds. HUD may require that some or all AC funding be directed to activities designed to create, modify, or improve local, regional, or national information systems concerning fair housing matters (including the purchase of state of the art computer systems, obtaining and maintaining internet access, etc.).

(d) *P funds.* The purpose of P funds is for an agency participating in the FHAP to utilize the services of individuals and/or public, private, for profit, not-for-profit organizations that have expertise needed to effectively carry out the provisions of the agency's fair housing law. P funds are fixed amounts and shall be allocated based on the FHAP appropriation. Agencies must consult with the CAO and GTR in identifying appropriate usage of P funds for the geographical area that the agency services. Some examples of proper P fund usage include, but are not limited to:

(1) Contracting with qualified organizations to conduct fair housing testing in appropriate cases;

(2) Hiring experienced, temporary staff to assist in the investigation of complex or aged cases;

(3) Partnering with grassroots, faith-based or other community based organizations to conduct education and outreach to people of different backgrounds on how to live together peacefully in the same housing complex, neighborhood or community;

(4) Contracting with individuals outside the agency who have special

expertise needed for the investigation of fair housing cases (e.g., architects for design and construction cases or qualified individuals from colleges and universities for the development of data and statistical analyses).

§ 115.305 Training funds.

(a) All agencies, including agencies that receive capacity building funds, are eligible to receive training funds. Training funds are fixed amounts based on the number of agency employees to be trained. Training funds shall be allocated based on the FHAP appropriation. Training funds may be used only for HUD-approved or HUD-sponsored training. Agency initiated training or other formalized training may be included in this category. However, such training must first be approved by the CAO and the GTR. Specifics on the amount of training funds that an agency will receive and, if applicable, amounts that may be deducted, will be set out in the cooperative agreement each year.

(b) Each agency must send staff to mandatory FHAP training sponsored by HUD, including, but not necessarily limited to, the National Fair Housing Training Academy. If the agency does not participate in the mandatory HUD-sponsored training, training funds will be deducted from the agency's overall training amount. All staff of the agency responsible for the administration and enforcement of the fair housing law must participate in HUD-approved or HUD-sponsored training each year.

§ 115.306 Requirements for participation in the FHAP; Corrective and remedial action for failing to comply with requirements.

(a) Agencies that participate in the FHAP must meet the requirements enumerated in this section. The FHEO regional office shall review the agency's compliance with the requirements of this section when it conducts on-site performance assessments in accordance with § 115.206. The requirements for participation in the FHAP are as follows:

(1) The agency must conform to all reporting and record maintenance requirements set forth in § 115.307 as well as any additional reporting and record maintenance requirements identified by the Assistant Secretary.

(2) The agency must agree to on-site technical assistance and guidance and implementation of corrective actions set out by the Department in response to deficiencies found during the technical assistance or performance assessment evaluations of the agencies operations.

(3) The agency must use the Department's official complaint data

information system and must input all relevant data and information into the system in a timely manner.

(4) The agency must agree to implement and adhere to policies and procedures (as the agency's laws allow) provided to the agency by the Assistant Secretary, including but not limited to guidance on investigative techniques, case file preparation and organization, and implementation of data elements for complaint tracking.

(5) If an agency that participates in the FHAP has civil rights responsibilities above and beyond the administration of a fair housing law (e.g., administration of a fair employment law), the agency must annually provide a certification to HUD stating that it spends at least twenty (20) percent of its total annual budget on fair housing activities. The term "total annual budget" as used in this subsection means the entire budget assigned by the jurisdiction to the agency for carrying out all of the agency's civil rights responsibilities but does not include FHAP funds.

(6) The agency may not co-mingle FHAP funds with other funds. FHAP funds must be segregated from the agency's and the state or local government's other funds and must be used for the purpose that HUD provided the funds.

(7) An agency may not unilaterally reduce the level of financial resources currently committed to fair housing activities (budget and staff reductions or other actions outside the control of the agency will not, alone, result in a negative determination for the agency's participation in the FHAP).

(8) The agency must comply with the provisions, certifications and assurances required in any and all written agreements executed by the agency and the Department related to participation in the FHAP, including but not limited to the Cooperative Agreement.

(9) The agency must draw down its funds in a timely manner.

(10) The agency must be audited and receive copies of the audit reports in accordance with applicable rules and regulations of the state and local government in which it is located.

(11) The agency must participate in all required training, as described in § 115.305 (b).

(12) If the agency subcontracts any activity for which the subcontractor will receive FHAP funds, the agency must conform to the subcontracting requirements of § 115.308.

(13) If the agency receives a complaint that may implicate the First Amendment of the United States Constitution, then the agency must

conform to the requirements of § 115.309.

(14) If the agency utilizes FHAP funds to conduct fair housing testing, then the agency must conform to the requirements of § 115.310.

(b) Corrective and remedial action for failing to comply with requirements:

The agency's refusal to provide information, assist in implementation, or carry out the requirements of this section may result in the denial or interruption of its receipt of FHAP funds. Prior to denying or interrupting an agency's receipt of FHAP funds, HUD will put the agency on notice of its intent to deny or interrupt. HUD will identify its rationale for the denial or interruption and provide the agency an opportunity to respond within a reasonable period of time. If, within the time period requested, the agency does not provide information or documentation indicating that the requirement(s) enumerated in this section is/are met, HUD may proceed with the denial or interruption of FHAP funds. If, at any time following the denial or interruption, HUD learns that the agency meets the requirements enumerated in this section, HUD may opt to reinstate the agency's receipt of FHAP funds.

§ 115.307 Reporting and record keeping requirements.

(a) The agency shall establish and maintain records demonstrating:

(1) Its financial administration of FHAP funds; and

(2) Its performance under the FHAP.

(b) The agency will provide to the FHEO regional director reports maintained pursuant to paragraph (a) of this section. The agency will provide reports to the FHEO regional director in accordance with the frequency and content requirements identified in the cooperative agreement. In addition, the agency will provide reports on the final status of complaints following reasonable cause findings, in accordance with Performance Standard 8 identified in § 115.206.

(c) The agency will permit reasonable public access to its records consistent with the jurisdiction's requirements for release of information. Documents relevant to the agency's participation in the FHAP must be made available at the agency's office during normal working hours (except that documents with respect to ongoing fair housing complaint investigations are exempt from public review consistent with federal and/or state law).

(d) The Secretary, Inspector General of HUD, and the Comptroller General of the United States or any of their duly

authorized representatives, shall have access to all pertinent books, accounts, reports, files, and other payments for surveys, audits, examinations, excerpts, and transcripts as they related to the agency's participation in FHAP.

(e) All files will be kept in such fashion as to permit audits under applicable Office and Management and Budget circulars, procurement regulations and guidelines and the Single Audit requirements for state and local agencies.

§ 115.308 Subcontracting under the FHAP.

If an agency subcontracts to a public or private organization any activity for which the organization will receive FHAP funds, the agency must ensure and certify in writing that the organization is:

(a) Using services, facilities and electronic information technologies that are accessible in accordance with the Americans with Disability Act (ADA) (42 U.S.C. 12101), Section 504 of the 1973 Rehabilitation Act (29 U.S.C. 701), and Section 508(a)(1) of the Rehabilitation Act amendments of 1998;

(b) Complying with the standards of Section 3 of the Housing and Urban Development Act of 1968 (42 U.S.C. 1441);

(c) Affirmatively furthering fair housing in the provision of housing and housing-related services; and

(d) Not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal debarment or agency.

§ 115.309 FHAP and the First Amendment.

None of the funding made available under the FHAP may be used to investigate or prosecute any activity engaged in by one or more persons, including the filing or maintaining of a non-frivolous legal action, that may be protected by the First Amendment of the United States Constitution. HUD guidance is available that sets forth the procedures HUD will follow when it is asked to accept and dual-file a case that may implicate the First Amendment of the United States Constitution.

§ 115.310 Testing.

The following requirements apply to testing activities funded under the FHAP:

(a) The testing must be done in accordance with a HUD-approved testing methodology;

(b) Testers must not have prior felony convictions or convictions of any crimes involving fraud or perjury.

(c) Testers must receive training or be experienced in testing procedures and techniques.

(d) Testers and the organizations conducting tests, and the employees and agents of these organizations may not:

(1) Have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury;

(2) Be a relative or acquaintance of any party in a case;

(3) Have had any employment or other affiliation, within five years, with the person or organization to be tested; or

(4) Be a competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.

Dated: March 21, 2005.

Carolyn Peoples,

Assistant Secretary for Fair Housing and Equal Opportunity.

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