CHAPTER 3. JURISDICTION

3-1 INTRODUCTION

The term "jurisdiction" refers to the legal authority of a government body to enforce the law in a given set of circumstances. The Fair Housing Act (Act) sets forth the boundaries of the Department's jurisdiction to act on housing-related complaints of discrimination. Part of the process of investigating and evaluating a fair housing complaint includes a determination that the Department has "jurisdiction" over the particular persons and issues involved in the complaint.

The question of jurisdiction over a specific complaint is critical. If the Department mistakenly rejects a complaint over which it has jurisdiction, an individual's civil rights may be abridged. If HUD investigates a complaint over which we have no jurisdiction, we are using resources that could have been spent on a jurisdictional complaint. In addition, investigation of complaints which are not truly jurisdictional might, arguably, abridge the rights of respondents and create the potential for legal and administrative actions against the Department and individual employees.

This chapter provides guidance for the intake analyst and the investigator on how to determine whether the Department has jurisdiction to investigate any given complaint. However, this handbook cannot anticipate the full range of complex and subtle jurisdictional issues arising in the real world of housing-related transactions. Counsel should be consulted when a jurisdictional question cannot be resolved by referring only to this manual.

This chapter also provides guidance for establishing the timeliness of a complaint and the right (called "standing"), of a complainant to file a complaint; explains the statutory and regulatory sections which define the Department's jurisdiction over respondents and dwellings under the Act; examines the activities prohibited by various sections of the Act; and explains how jurisdiction over the subject matter or issue of the complaint is established.

This chapter also examines and defines the "prohibited bases" or "prohibited factors." The terms "prohibited bases" or "prohibited factors" are used interchangeably to refer to those factors which the Act states may not be the basis of housing related decisions.) These are: race, color, religion, sex, national origin, familial status and handicap.

Material in this chapter is organized according to the criteria established for jurisdiction by the Act. These are:

- The complaint must be timely filed;
- The complainant must have standing;
- The respondent and the dwelling involved (where the complaint involves a provision or denial of a dwelling) must be covered by the Act; and
- The subject matter or issue, and the bases of the alleged discrimination, must constitute illegal practices as defined by the Act.

3-2 TIMELINESS

A. The Importance of Timeliness

A threshold issue for any complaint filed under the Fair Housing Act is that it be timely. Section 810 of the Act provides HUD with jurisdiction to investigate complaints filed within one year--365 calendar days--of the alleged discrimination. Counting of the 365 days begins the day after the discriminatory act. If the one-year period has elapsed, HUD has no jurisdiction to process the complaint. The injured party may, however, retain a private attorney and file a civil suit under the Fair Housing Act up to two years after the last discriminatory action. In addition, the complainant should be advised that he or she may have the right to file under a different federal, State or local statute which may provide a longer time period for filing.

This statutory limitation providing one year within which to file a complaint, and two years for the filing of civil

suits, is called a "statute of limitations." When the time has expired, the statute is said to "have run."

B. Determining When a Complaint is Filed

In considering whether a complaint is timely, the determination of when a complaint is considered "filed" may be critical. For a discussion of when a complaint is considered filed, see Section 4-3, Chapter 4, Complaint Intake.

C. Determining When the Timeliness Period Begins

The timeliness period of an alleged violation begins as of the date of the discriminatory act, the last occurrence of the discriminatory behavior, or the last application of a discriminatory policy. For example, in a case involving alleged discriminatory refusal to sell a dwelling, the 365-day period would be counted from the day after the date upon which the aggrieved person was notified that the respondent would not sell the dwelling to the complainant. The date upon which the statute of limitations begins to run is controlled by date of the discriminatory act or acts, not by the complainant's experience of the consequences of the discrimination. To illustrate, an alleged discriminatory act is considered to have occurred when an aggrieved person is notified that his or her rental application has been rejected, not when the apartment was rented to another person, or when the aggrieved person had to rent another apartment at a higher rental rate.

In some cases, distinguishing between the discriminatory act and its consequences may be difficult. We might consider the case of a tenant evicted for discriminatory reason, for example, and ask the question "What is the last day upon which the evicted person may file a timely fair housing complaint?" or, to phrase the question another way, "What is the last date from which the one year statute of limitations should be counted?" In the typical eviction case there are three potential dates of discrimination: the date that the aggrieved person received the eviction notification; the date on which the landlord appeared in court and successfully argued for an order of eviction; or the date upon which the actual eviction occurred. In such a case, the complaint would be timely if filed within a year of the last discriminatory

act on the part of the landlord--i.e., the court appearance. The landlord's issuance of a notice of intent to evict is also a discriminatory act; however, the landlord's discriminatory actions towards the complainant can be said to have continued until the day that the landlord pressed his complaint in court. Thus, the issuance of the intent to evict notice would not be the **last occurrence** of the discriminatory action. On the other hand, if the complainant remained in the unit for another 6 weeks after the issuance of the court order and was only then evicted, the one-year statute of limitation would not run from the day upon which local law enforcement officers placed the complainant's furniture on the sidewalk. The actual eviction would be a consequence of the court order, rather than a discriminatory act in its own right. (For further exposition of this principle, see the employment discrimination case entitled Delaware State College v. Ricks 449 US 250, 66 L Ed 2d 431, 101 S Ct 498 (1980)). See also Havens Realty v. Coleman 455 US 363, 102 S Ct 1114 (1982).

D. Timeliness and Continuing Violations

The term "continuing violation" refers to either a series of related discriminatory acts, or a discriminatory policy that continues to affect members of a particular category. The regulations provide, at 24 CFR 103.40(c), that where a complaint alleges a continuing violation of the Act consisting of repeated occurrence of the same or related discriminatory actions, the complaint is timely if filed within one year of the last occurrence of that discriminatory behavior. For example, if a complainant was subjected to a number of instances of unwelcome sexual advances by a respondent over a period of time, her complaint would be timely as long as it was filed within one year of the last instance of this conduct. In another example, if a complainant alleges that the respondent steered a number of African-American home buyers to one neighborhood, the complaint is timely if at least one such home-seeker was steered for discriminatory reasons within one year of the date that the complaint was filed. In a case in which the complainant alleges that she is being discriminatorily charged a higher rent than other tenants, the last discriminatory act is considered to be the last date on which she paid the higher rent, because every such payment is considered to be a new act of discrimination.

A violation also is considered to be continuing in nature when it is alleged that the respondent maintains a discriminatory policy that continues to affect members of a particular class. Discriminatory zoning ordinances are one example of this type of continuing violation. A complaint which challenges an ordinance adopted several years earlier, will still be considered timely if it is filed within one year of the date upon which the complainant was adversely affected by the ordinance.

A complainant aggrieved because an otherwise covered multifamily dwelling unit was not designed and constructed to meet the Fair Housing Accessibility Guidelines, may allege a continuing violation regardless of when construction of the building was completed.

In another example of a continuing violation based upon a policy, the respondent landlord may have posted rules prohibiting children from using a swimming pool. The policy would continue to adversely affect families with children as long as they lived in the complex. A complaint might be accepted from a complainant family that had abandoned attempts to use the swimming pool more than a year earlier. In this instance, the complainant family would only need to show that the policy continues to be published or upheld by the respondent and that they have reason to believe that their children would not be permitted to use the pool. In such a case, the complaint would be timely if filed within one year of the last time the complainants might have desired to swim. The complainants' decision not to actively challenge the policy by going to the pool would not destroy the timeliness of the complaint because of the doctrine of "futile gesture," explained in this chapter at Section 3-3(C), below.

On the other hand, if the complainant family chooses to move to a different dwelling, the complainants' experience of the continuing violation would cease upon the last day of their tenancy with the discriminatory landlord. The complainant family would then need to file their complaint with HUD within one year of leaving this landlord's property in order for the complaint to be timely.

The "continuing" nature of an alleged violation will effect the scope of an investigation. Guidance on planning for and investigating continuing violation cases

is provided in the Chapter 7, Planning and Conducting the Investigation.

3-3 DETERMINING STANDING

Complaints can only be initiated by persons or groups having standing under the Act. The term "standing" means that the person or group is entitled to seek a remedy with regard to an allegedly unlawful act committed by another person, because he or she was, or is about to be, harmed as a result of that act.

Under the Act, two categories of persons have been found to have standing to file complaints. These are:

- An "aggrieved person;" and
- The Assistant Secretary of Fair Housing and Equal Opportunity, who has standing to file complaints in order to correct violations and to enforce the provisions of the Fair Housing Act.

A. Determining Standing

1. Aggrieved Person: The complainant in a Fair Housing complaint initiated outside the Assistant Secretary's office must be an "aggrieved person." The Act's definition of 'a person' includes:

   "... one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries."

   The term 'aggrieved person' is defined by the Act as:

   Any person who--

   "(1) claims to have been injured by a discriminatory housing practice; or

   (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

To establish standing the complainant need only claim to have suffered an injury as a result of the alleged discriminator's actions. It is not required that the complainant prove his or her injury as part of a showing of his or her right to file a complaint under the Act. Even in cases where the complainant should have been rejected for non-discriminatory reasons, the complainant's perception that the denial was because of his or her race, color, religion, national origin, sex, familial status, or handicap is sufficient injury to establish standing.

Example: An Hispanic couple inquires about an apartment for rent. The building manager tells them that no "Latinos" will be accepted as tenants. In this case, showing that there were no available apartments in the subject building on the day in question would not invalidate the complainants' claim of injury and would not affect the complainants' standing to file a complaint because the effect of the discriminatory statement amounts to an injury under the Act.

To establish standing a complainant may claim a tangible or an intangible injury. Moving expenses, or the cost of a home inspection or credit report, are examples of tangible damages a complainant may incur.

Other "non-economic" injuries are, however, equally legitimate in determining that an individual has been aggrieved by discrimination. Persons victimized by discrimination may feel humiliated and debased. Victims may be forced to move away from friends or elderly parents who need their care. Victims may lose the opportunity to enroll their children in the school of their choice. Either or both tangible and intangible injuries can be cited to establish a complainant's standing under the Act.

2. Parents and Guardians: Parents and legal guardians have the right to file on behalf of their minor children or wards when the children or wards are victims of prohibited discrimination. In addition, executors of an estate may have the right to file or continue to press a complaint on behalf of an aggrieved person who is deceased.

Adults do not generally have the right to file on behalf of other adults unless the individual who experienced the discrimination states in writing that the second individual will act as his or her agent in pursuing the complaint, or the individual experiencing the discrimination is the legal ward of the individual filing the complaint.

3. Persons Filing Upon Belief that a Violation is About to Occur: The Act's definition of an aggrieved person includes any person who "believe[s] that such person will be injured by a discriminatory housing practice that is about to occur." In other words, in certain cases, an individual who has a legitimate reason to believe that he or she will soon suffer an injury as the result of housing discrimination may file a complaint in advance of the discriminatory act.

   Example: A family of four, comprised of two children, a father, and a mother, live in a two-bedroom apartment. The owner of the complex posts notices advising tenants that no more than four persons would be allowed to occupy two-bedroom units in the future--no exceptions--and that violators would be evicted. If the mother becomes pregnant, the family members would have reason to believe that this standard would be applied to them in the future. This family would not be required to wait until eviction proceedings were underway before seeking protection by filing a complaint. (Note that cases in which the complainant alleges that he or she is at risk of eviction, or suffering other imminent harm, also should be evaluated to determine whether prompt judicial action would be appropriate.)

4. Testers: Persons who pose as home-seekers in order to test for prohibited discrimination also have the right to file complaints on their own behalf. Organizations employing testers also may file complaints based upon the use of their resources to test for housing discrimination or because the testing diverts resources from other fair housing activities. (See Section 5-7, "Fair Housing Testing," in Chapter 5, Special Intake Processing.)

B. All Victims of Discrimination May Claim Standing

In many complaints processed by FHEO the aggrieved person is a member of a racial minority, a woman, the parent of a minor child, or a person with disabilities who has been rejected by a housing provider. It is possible, however, for individuals to have standing to complain about discrimination even if they were not its direct target. This type of standing is commonly referred to as "derivative standing."

Derivative standing refers to the right of a person who is not the target of discrimination to legally compel a respondent to cease the discrimination and to compensate its victims. The standing is "derivative" only in the sense that the offending actions were not taken against the complainant. Complainants must still show that they are aggrieved in their own right in order to assert standing. They cannot derive standing from another person's injury.

A non-minority employee who is fired for protesting a discriminatory policy, for example, is an aggrieved person under the Act. A homeowner prevented from selling her house because of the familial status of the prospective buyer would also have standing, as would a non-minority tenant who is harassed because of his Hispanic girlfriend. A real estate agent who loses a commission as a result of a seller's discrimination against her client has been injured. In each of these cases, the complainant has been harmed by discrimination directed at someone else.

With respect to discrimination based upon handicap, the Act is explicit in prohibiting discrimination on the basis of the handicap of "any buyer or renter" or of "any person associated with that buyer or renter" (Section 804(f)1 of the Act). Therefore, a tenant denied repairs because she receives visits from a nephew with cerebral palsy, or a real estate agent prevented from closing the sale of a single-family home being purchased for use as an AIDS hospice, would both have standing to file under the Act.

A well-known example of derivative standing is the case Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). In this case White tenants sued their

landlord because he excluded minorities from the development in which they lived. Lower courts rejected the case because the tenants were not members of a minority group. The Supreme Court agreed that the tenants had been denied the social and professional benefits of living in an integrated community and had standing to file under the Civil Rights Act of 1968. In essence, the Court found that non-minority persons are also victims of discrimination, when discrimination creates barriers that divide and weaken society.

C. Futile Gesture Doctrine

In certain circumstances individuals who have never formally applied for a specific home, apartment, or real estate-related financing, may assert standing to file a complaint based upon discriminatory refusal to rent, sell, or provide financing for a dwelling. The doctrine that permits such an assertion is known as the "futile gesture" doctrine.

The futile gesture doctrine applies to cases in which the respondent's intent to discriminate is so apparent that a reasonable person of the complainant's class would realize that any attempt to secure the desired housing or financing, would be futile. In such cases, the complainant is not required to make application to the respondent prior to initiating a complaint. The complaint must usually show only that he or she was otherwise qualified for the housing or financing in question and was actively seeking housing or financing.

The U.S. Court of Appeals provided guidance on determining whether the futile gesture doctrine can be applied to the circumstances of a given complaint as summarized below.

In 1989, the U.S. Court of Appeals upheld a lower court's finding in favor of Karen Pinchback in the case Pinchback v. Armistead Homes. Pinchback's complaint grew out of her experience in responding to an advertisement for a "starter home" for sale. Pinchback contacted an independent realtor who had listed the home. After attempting to schedule an appointment to show the house, the realtor asked Pinchback whether she was Black. Pinchback stated that she was. The realtor then informed Pinchback that the home was located within a community which did not permit Black residents and Pinchback made no

further attempts to see or purchase the home. The Court agreed that Pinchback had standing based on several factors. First, Pinchback obtained the information that the subject community discriminated from a source which she might reasonably assume to be accurate--a realtor. Second, Pinchback had demonstrated a genuine interest in purchasing the property. Third, Pinchback was able to show that she would have been capable of purchasing the home absent the discriminatory policy.

In affirming Pinchback's standing, the Court relied upon the "futile gesture" doctrine established in employment discrimination cases, saying that: "The burden of humiliation occasioned by discrimination is heavy. When one has felt it as Pinchback did here, we cannot require the victim to press on meaninglessly."

D. Standing and the Housing for Older Persons Exemption

As stated earlier, homeowners, real estate agents, brokers, and mortgage initiators, may establish standing under the Act by a showing that the discriminatory housing policies of a given housing provider have caused them to lose a housing sale or commission. This type of situation arises quite frequently in relation to condominium developments, apartment buildings, and mobile home parks claiming to provide housing for older persons. Applying the logic of the futile gesture doctrine, cases alleging failure to sell or rent a dwelling on the basis of familial status may sometimes be pursued <u>even when no family with children can be shown to have sought to purchase or rent the property</u>.

In this type of familial status case, it is also unnecessary for the complainant to be a member of the class of families with children.

Complainants who allege that they have suffered an economic injury because of a policy which prohibits families with children from renting or purchasing a given dwelling, must first show that <u>they have taken affirmative steps to market the dwelling</u>.

Once this fact has been established, the complainant can show that they have been injured by a policy that discriminates against families with children in one of two ways:

- by identifying at least one family with children who tried to purchase the home, or who would have tried to purchase the home were it not for the respondent's restrictions; or

- by showing that the respondents have interfered with the complainant's ability to market the dwelling to families with children; by showing that families with children cannot reasonably be expected to express an interest in the property because of the respondents discriminatory advertising, signage, statements, etc.

Example One: The childless owner of a condominium, who was also a real estate agent, sought to sell his unit. The condominium association had voted to declare itself housing for older persons, but the owner did not believe that the development satisfied the criteria established for the exemption. Consequently, the owner refused to market his property as a housing for older persons. The owner's advertisements made no mention of age restrictions, and, when home-seekers called the owner about the advertisement, he tried to interest <u>all</u> callers in viewing and purchasing the unit. The owner eventually attracted a single male buyer in his mid-forties. This buyer was rejected by the condominium association because of his age. The owner filed a complaint, stating that he had been injured by the respondents' discrimination on the basis of familial status.

This complaint was closed because the rejected prospective buyer did not satisfy the Act's definition of a family with children, and because there was no evidence to suggest that the owner's attempts to market his unit had been impacted by a policy which violated the Act. The condominium's rejection of a single adult tenant on the basis of age did not violate the Act.

Conversely:

Example Two: The owner of a three-bedroom mobile home in a park which had recently declared itself to be housing for older persons, alleged that he had been unable to attract a buyer because of the respondent's discriminatory refusal of families with children. The owner could not identify a family with children who wished to buy his unit; however, the owner presented a photograph of a sign posted at the entrance to the park which read: "Sunny Acres--Housing for Seniors." In addition, the owner presented a written statement from the real estate agent who had listed his property. This agent stated that she had been informed by the owner of the park that she should not show any units within the park to families. In addition, the agent stated that she was presently working with home-seeking families who were looking for housing similar in size, price and features to the unit offered by the complainant.

This information would be sufficient to establish the complainant's standing to file a fair housing complaint.

E. Advocacy Groups, Organizational Standing, and Representational Standing

Advocacy and public interest groups also may have standing to bring fair housing complaints. Groups may demonstrate that they have either:

- organizational standing

  or

- representational standing.

The characteristics of and differences between these two types of standing are described below.

1. Organizational Standing: This type of standing is based upon a claim that the group, as an organization, has been injured by the discriminatory practice.

   Complaints filed by fair housing advocacy groups are generally based upon this type of claim. In this

situation, inquiry will reveal both tangible and intangible damages that the organization has sustained as a result of the complained-of practice.

The tangible damages sustained by a fair housing group could include fees paid to testers, time spent counseling applicants rejected by the respondent for discriminatory reasons, or time spent writing to the respondent. (NOTE: Staff time is considered a tangible resource.)

In addition, fair housing groups may claim "frustration of purpose" resulting from the alleged discriminatory practice.

Example: A fair housing group might include these provisions in its statement of mission: "To help ensure equal housing opportunities for all persons regardless of race, color, religion, national origin, familial status, or handicap. To promote a culturally and technically diverse community. . . ." Such a group could then demonstrate standing by stating that a housing provider's racially discriminatory practice interfered with their goal of ensuring equal housing opportunity and encouraging diversity.

2. Representational Standing: Other advocacy groups have argued their standing to file complaints as the representatives of individuals harmed by the discriminatory practices.

According to legal precedent, an association has standing to bring suit on behalf of its members when it can show that:

- Its members would otherwise have standing to sue as individuals;
- The issues of the suit are connected to the interests the organization seeks to protect; and
- The relief sought does not require the participation of individual members.

Example: An advocacy group for persons with mental disabilities claimed standing

to file a complaint about the allegedly discriminatory cancellation of a proposed group home. The advocacy group had not been involved in planning the group home and had expended no resources in earlier efforts to win the home's approval. The group was not directly responsible for securing housing for persons with mental disabilities, so they could not argue "frustration of purpose." The group wished to file the complaint, however, because they believed it would be in the best interest of their members if they challenged the cancellation. In order to establish the representational standing of this advocacy group, the Department asked them to show whether at least one of the prospective residents of the home was a member of the group at the time the home was cancelled. In addition, the Department requested a copy of the group's charter and activities, and sought to establish whether the group's mission included the protection of housing rights, or civil rights in general, of persons with mental disabilities. Finally, the Department asked the group questions about the relief they were seeking in order to establish whether it could be granted and distributed without the participation of individual aggrieved persons. Relief such as the alteration of zoning codes which impede the creation of group homes would meet this standard. Compensation for actual monetary damages to the individuals who would have inhabited the home would not meet this test since it would require the participation of individual members in order to establish appropriate damage amounts.

3-4 RESPONDENT/DWELLING JURISDICTION

Respondents and dwellings may be exempt from Sections 804(a), 804(b), 804(d) and 804(f) from the provisions of the Act under certain circumstances. The four major categories of respondent/dwelling exemption are:

- Status as a religious organization, or private club;
- Transactions involving units within owner-occupied dwellings;
- Transactions involving private homes marketed informally and privately according to certain specific definitions; or
- Status as housing for older persons. This exemption applies only to the portion of the Act forbidding discrimination on the basis of familial status.

A discussion of each of these exemptions is provided below.

A. Exemption of Religious Organizations and Private Clubs

Section 807 of the Act provides an exemption for religious organizations and nonprofit institutions associated with religious organizations. These groups are permitted to limit the sale, rental, and occupancy of dwellings they own and operate for non-commercial reasons to persons of the same religion. The exemption is only valid, however, if membership in the religion is not restricted on the basis of race, color or national origin.

> **Example: The leader of a White supremacist group operating out of the Northwest who declared that his group's racially-exclusive beliefs had been revealed to him by God, began to hold religious services and applied for tax-exempt status as a church. At the same time, leaders of the organization began financing construction of a subdivision and sought to attach restrictive covenants to deeds to the houses which would require that all future owners and occupants be of "pure, unmixed, White caucasian race." A local fair housing group filed suit against the supremacists. As a result, the group was determined not to be exempt from the Act because its "religion" excluded all persons of other than European ancestry, and the action initiated by the fair housing group was found to be jurisdictional.**

Private clubs which provide housing for other than commercial purposes are also permitted to restrict participation in such housing to members as long as the

provision of housing is "incident[al] to its primary purpose" (24 CFR 100.10(a)(2)).

This exemption does not apply, however, to property owned by a religious organization or private club which is advertised to the public and sold or rented for a commercial purpose.

B. Exemption Of Owner-Occupied Buildings

Paragraph 803(b)(2) of the Act provides certain exemptions for:

> "...rooms or units in dwellings containing living quarter occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one such living quarters as his residence."

In other words, transactions involving apartments located within private homes or buildings containing four or fewer living units <u>in which the owners reside</u> are not covered by the Fair Housing Act. This exemption is determined entirely by the nature of the property involved in the complaint and the location of the owner's domicile. The owner's other real estate holdings or professional associations are irrelevant to an analysis of the applicability of this exemption.

Paragraph 803(b)(2) specifies that rooms or dwellings satisfying the above conditions are exempt from all of the prohibitions expressed at Section 804 <u>except</u> the prohibition against discriminatory advertising and statements found at Subsection 804(c). The exemption also does not apply to the prohibitions found at Section 818 (against interference, coercion, and intimidation) or Section 901 (against force or threat of force).

> **Example: A Cuban-born man sought to file a complaint against the owner of a duplex. The home-seeker stated that the owner lived in half of the building and had posted a "For Rent" sign in the window of the other half. When the home-seeker knocked on the owner's door and inquired about renting the unit, the owner apologized and said that the unit had already been rented. When the Cuban-born man**

walked by the unit the next day, he saw that the "For Rent" sign was still displayed. Later, this home-seeker sought to file a complaint against the owner, alleging that the owner had lied about the availability of the unit because of his national origin. The Department did not, however, have jurisdiction to investigate this complaint because owner-occupied dwellings containing fewer than four units are exempt from the sections of the Act alleged to have been violated (i.e., the prohibitions against refusal to rent and false denial of availability based on national origin).

C. Exemption of Single Family Dwellings Sold or Rented by The Owner

The Act states that none of the prohibitions expressed under Section 804 <u>except</u> the prohibition against discriminatory advertising and statements apply to a home sold or rented by the owner without the services of a real estate agent, broker, or any person in the business of buying and selling real estate.

To be exempt under this Section of the Act, the owner of the subject property must satisfy the following conditions, as applicable:

1. The owner must not own more than three such single family houses at one time; the owner's own residence, if it is a single family dwelling, must be counted as one of the dwellings considered;

2. If the subject property is being sold, either: the owner was residing in the house at the time of the sale, or was the most recent resident, or he or she sold no more than one single family home within any 24 month period.

3. It must be demonstrated that the owner has no interest in the proceeds from the sale or rental of more than three single family houses at any one time;

4. The house must have been sold or rented without the aid of any real estate broker, agent, or sales person, or any person in the business of selling real estate as defined in Subsection 803(c) of the Act; and

5. The house must have been sold or rented without the posting, mailing, or publication of any written notice in violation of 804(c).

The owner loses the exemption attached to the sale of his or her home if he or she is in the business of buying and selling real estate. The Act defines the phrase "a person in the business of buying and selling real estate" at Subsection 803(c). The definition includes, among others, real estate agents and brokers, and any person who owns a dwelling intended for use or occupied by five or more families.

Example: A man filed a complaint alleging that his neighbor, a single female physician, had refused to sell her home to him for use by his son and daughter-in-law because his son had married inter-racially. The man stated that he had learned at a cocktail party that the physician had accepted a position in another state. The man stated that he had then gone to the physician and offered to pay her market price for the home in order that he might rent it to his son and daughter-in-law. The man stated that the physician had refused his offer and later quietly sold the house to an associate for $10,000 less than the man had offered.

The Department's initial inquiry into the above complaint demonstrated that the subject house had been sold without the use of a real estate agent and that the house had been her actual residence. The Department then sought to determine whether the doctor was a "person in the business of selling or renting dwellings," as defined by the Act. Clearly, the physician was not primarily a real estate professional. If, however, research had revealed that she owned a six-unit apartment building, or that she was a major investor in the development of a new housing subdivision, her holdings would qualify her as a "person in the business of selling or renting dwellings" under the Act, and the exemption would be lost. If, however, research had revealed that the home in question was the only real property owned by the physician, she would be

exempt from the Act insofar as this transaction was concerned.

D. Exemption of Housing for Older Persons

1. Limitations of the Housing for Older Persons Exemption. Subsection 807(b) of the Act describes the exemption for "housing for older persons" and defines what is meant by the term under the Act. This exemption differs from the other three described in several ways. First, the exemption applies only to the Act's prohibitions against discrimination on a single basis, namely, familial status. The providers of housing for older persons are not exempt from allegations of discriminatory housing practices based upon race, color, religion, sex, national origin, or handicap.

   In addition, the housing for older persons exemption differs from other exemptions in that an investigation--including an on-site visit--is usually necessary to determine whether the respondent has the right to claim this exemption.

2. Types of Housing for Older Persons. The Act defines three types of housing for older persons:

   a. Government Sponsored Housing: Housing provided under any State or Federal program that the Secretary determines is designed and operated to assist elderly persons (as defined in the State or Federal program) is exempt from the familial status provisions of the Act.

      In many instances, government-funded housing will not qualify for a 62 or older or 55 or older exemption, because of statutory or funding constraints. Congress indicated, however, that some types of government sponsored housing could be eligible for this portion of the exemption. Requests for consideration under this portion of the exemption may be made to the Assistant Secretary and are decided by the General Counsel.

   b. Housing for Persons 62 or Older: Housing intended for, and solely occupied by, persons 62 years of age or older, is also exempt from the Act's familial status provisions. To claim this exemption, a housing

provider must maintain documentation of the age of all residents.

Note that this exemption applies to every member of every household.

The Act and implementing regulations do, however, outline two exceptions to the 62 or older requirement, which permit certain persons under the age of 62 to live within the community without causing the exemption to be lost. Paragraph 807(b)(3) states that housing for older persons "shall not fail to meet the requirements" for exemption because of persons who were residing in the community as of the effective date of the Act, as long as all new occupants accepted after the effective date are 62 or older. The Act does not require housing providers to evict current tenants under the age of 62 in order to obtain the exemption. (Note, however, that housing providers who satisfy all other aspects of the exemption are permitted under the Act to evict residents on the basis of being under 62.)

The implementing regulations further state that persons who work for the housing community may reside in the community even if they are under 62 years of age, so long as they "perform substantial duties directly related to the management or maintenance of the housing" (24 CFR 100.303(3)).

c. Housing for Persons 55 and Older. To claim this exemption, defined in the Act at Subparagraph 807(b)(2)(c), the housing provider must show:

- that the community provides significant facilities and services specifically designed to meet the physical or social needs of older persons, or, if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

- that at least 80% of the units are occupied by at least one person 55 years of age or older per unit; and

- the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

As with housing for persons 62 and older, the community may include younger members who were residents at the time of the Act's passage as well as younger resident employees, without risking loss of the exemption.

The preamble to the implementing regulations to the Fair Housing Act, contains a lengthy and helpful discussion of the public comment and Congressional intent surrounding this exemption.

This exemption is frequently claimed as an affirmative defense to a discrimination complaint. Determining the appropriateness of applying this exemption to a given community requires a careful record review, interviewing, and observation. Guidance on investigating and evaluating a community's claim to be housing for persons 55 and older is provided in Chapter 8, Analysis of Specific Cases.

E. Advertising, Discriminatory Statements and Respondent/Dwelling Exemptions

The use of advertising and the making of statements and representations in the course of selling or renting a property should be considered carefully when evaluating a respondent's coverage under the Act. The provisions of the Act regarding different types of advertising and statements are described below.

1. Discriminatory Advertising and Statements. Subsection 803(b) of the Act provides that prohibitions against the making of discriminatory statements are not covered by the provisions for the "Mrs. Murphy" or single-family home exemptions. In other words, discriminatory advertising, statements, or notices related to real estate transactions, may be prohibited even where the underlying transaction is exempt.

Example: A homeowner sold his home himself, without the assistance of a real estate agent or multiple-listing service. The homeowner was the last

occupant of the home and the home was the only property in which he had an ownership interest. Prior to the sale, a couple with an Iranian surname found out that the home was on the market and stopped by to view the property. The homeowner questioned the couple about the origin of their name and about their religion. Upon learning that the couple had recently immigrated from Iran and that they were Muslim, the homeowner denounced the beliefs, habits, and politics of Muslim persons. The homeowner then refused to permit them to view the property because they were Muslims from Iran.

In the above example, the Department would not have jurisdiction to investigate an allegation of the refusal to sell the property. The Department could, however, investigate an allegation of discriminatory advertisements, statements, or notices.

2. Impact of Certain Types of Advertising Upon Claims of Exemption from 804(a) and 804(b). On the other hand, a dwelling which would otherwise be exempt from most provisions of Section 804 of the Act will lose its exemption if advertised for sale or lease through an agent or a multiple-listing service. The Act exempts single family dwellings sold or rented by their owners if the sale is accomplished without the use "in any manner, of the sales or rental facilities or the sale or rental services of any real estate broker, agent, or salesman" (see Paragraph 803(b)(1) of the Act). The use of a multiple-listing service or any advertising avenue organized by a real estate agency would, therefore, destroy the exemption. This would be true whether the advertisements and listing were discriminatory or not.

Example: A homeowner decided to sell his home himself through flyers, newspaper advertisements, and word-of-mouth. Three months passed without a prospect and the owner grew impatient. The owner contracted with a real estate agency which specialized in assisting homeowners to sell their own properties. The agency supported the homeowner's efforts by publishing a listing of houses in the surrounding area which were for sale by their owners and by pre-qualifying interested buyers.

Despite the limited involvement of the real estate agency, the homeowner's participation in the listing service would destroy his right to claim the exemption.

3. Impact of Discriminatory Advertising upon the Claim to Single Family Home Exemption. Persons who would otherwise have the right to claim the exemption for the sale or rental of their own single family homes, lose that right if they publish or cause to be published any written notice which is discriminatory. The Act explicitly includes posted notices and mailings under this prohibition. This is one way in which the single family home exemption differs from the "Mrs. Murphy exemption," as illustrated by the examples below:

Example One: A woman owns and resides in an inner-city townhouse with a rental unit in the basement. The woman publishes an advertisement specifying that the unit is available for rent to "A Childless Single or Couple." The woman may be investigated and charged for a violation of Subsection 804(c), but continues to have the right to claim to the "Mrs. Murphy" exemption from the Act's prohibitions against refusal to rent and discriminatory terms and conditions.

Example Two: A man owns two houses, one of them a vacation cottage. The man decides to handle renting the cottage himself and save money on commissions. He distributes flyers all over town which read "Adorable Vacation Cottage available for monthly lease to all-adult groups." The owner in this instance would lose the right to claim the "single family home" exemption because of the discriminatory language in his advertisement. This owner could be investigated and charged under Subsections 804(a), 804(b), and 804(c).

3-5 SUBJECT MATTER/ISSUE JURISDICTION

A. What Constitutes a Violation of the Act?

In order for HUD to have jurisdiction over the subject matter of a given complaint, the complainant must allege a violation of the Act. In the broadest possible terms, an allegation will probably meet the test of involving a

violation of the Act if the complainant provides information which indicates:

1. that the act, statement or decision was in some way related to the provision or enjoyment of housing, and

   a. that the motive for the action or decision was the race, color, religion, sex, national origin, familial status or handicap of the complainant; or the race, color, religion, sex, national origin or handicap of one or more persons associated with the complainant

      or,

   b. that the action or policy has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status.

The activities prohibited by the Act are described at Sections 804, 805, 806, 818, and 901. Each complaint must allege a violation of one or more of these provisions in order to be jurisdictional. A discussion of the intent and application of each of these sections is presented below.

B. Activities Prohibited under Section 804

1. Part (a) of this Section of the Act makes it illegal to:

   > **. . . refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.**

   This provision, particularly the phrase "or otherwise to make unavailable," has been interpreted to provide coverage for a multitude of actions which prevent, or greatly impede, an individual's efforts to secure housing. For example, the provision speaks to situations in which a mortgage application is denied on a prohibited basis. (The prohibitions found at Section 805 would also apply). There are, however, other means people can use to render a desired dwelling unavailable.

Example One: A complainant filed a fair housing complaint against her landlord alleging his failure to accommodate her handicap, multiple chemical sensitivity (MCS). Nine months later, the complainant's lease expired and her landlord raised her rent. The complainant believed that she was the only tenant who had received a rent increase and that the increase was in retaliation for her pursuit of her complaint. The complainant maintained that she could not work because of her illness; her ability to stay in the subject unit was dependent upon her use of a Section 8 voucher. The complainant alleged that the landlord, who had been accepting Section 8 tenants for years, was well aware of the maximum amount of rent which could be paid for a one bedroom unit under the program. The complainant alleged that her landlord had purposefully raised her rent beyond that ceiling, in order to force her to leave. The alleged actions, if true, would violate Subsection 804(a) of the Act, as well as Section 818.

Example Two: Neighbors launch a campaign of petitions and rallies to keep a planned housing development, projected to attract a high percentage of minorities, out of their neighborhood. Neighbors attempt to convince local officials to modify existing zoning codes or to cancel city-held contracts necessary to construction of the development. Such instances of grass-roots protest raise the issue of free speech, which is protected by the U.S. Constitution. The Department generally will not investigate such cases in which the alleged violations all involve speech. The Department will, however, accept complaints in which the neighbors engage in discriminatory conduct, and/or where violence is threatened. (See the Section 3-5(E)(4) of this chapter for further information on complaints implicating First Amendment rights.)

Subsection 804(a) of the Act has been interpreted to extend coverage to mortgage companies and other lending institutions which finance real estate transactions. This provision has also been cited as providing coverage of insurance companies since acquisition of home hazard

insurance is usually a requirement for obtaining a mortgage.

In general, whenever a complainant asserts that he or she has been unable to secure a dwelling because of the respondent's actions, a violation of Subsection 804(a) is alleged.

2. Subsection (b) of Section 804 makes it illegal to:

> **. . . discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.**

a. Different Terms and Conditions. This prohibition is commonly referred to when a complainant alleges that a landlord has denied repairs, charged an inflated rent, or issued false notices of lease violations because of a prohibited basis. Complainants may allege that they were asked to provide excessive financial records or to pay a higher security deposit, because of their race, color, national origin, etc.

b. Children's Rules. The creation of separate rules and restrictions for children, unless clearly mandated by health and safety concerns, is also prohibited under this provision.

For example, housing providers may require young children to be accompanied by a responsible adult when using a swimming pool. Housing providers may not, however, forbid children to use a swimming pool associated with their dwelling, or permit children to swim only a few hours per week while providing adults unrestricted use. Some developments enforce rules against running, shouting, playing, or even walking or sitting on the grass so strictly that resident children cannot leave their units without risking reprimand. The Department has jurisdiction under section 804 to investigate such allegations.

c. Zoning Application. Communities have sometimes applied zoning codes in an uneven manner, or abruptly voted to re-zone tracts of land, to prevent the

construction of housing projected to attract persons of another race. The Department has jurisdiction to accept and investigate complaints of discriminatory application of zoning codes, although zoning cases are ultimately referred to the Department of Justice for litigation. Complainants involving the denial of housing by manipulation of zoning codes should be filed as alleged violation of 804(a) and 804(b).

d. Steering. The term "steering" refers to the practice of guiding prospective tenants or home-buyers to areas where persons of their class have previously been housed. Steering is often thought of in conjunction with race and home-buying. A real estate agent may show an African-American couple homes meeting their price and size requirements in predominately African-American neighborhoods and neglect to show them similar homes in White neighborhoods. Steering may also be alleged, however, within a single apartment complex or mobile home park, if persons of a particular class are guided to particular areas for discriminatory reasons.

3. Part (c) of Section 804 makes it illegal to:

. . . make, print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin or an intention to make any such preference, limitation, or discrimination.

The regulations at 24 CFR 100.75 describe the advertising, statements, and notices prohibited by the Act. This section of the Act prohibits the practice of dividing real estate listings according to the race of the persons welcome in the neighborhood and requires that printed advertisements be free of prejudicial statements. This provision also prohibits advertising apartments or trailer parks as "adults only." This section has been interpreted to prohibit advertisements which specify a desire for "empty-nesters" or "quiet, mature tenants", although it is permissible for an apartment or trailer park which qualifies as housing for older persons to so state in its advertising.

This provision of the Act can also be applied to oral statements made during the course of a real estate-related transaction (to the complainant or to his or her agent) which indicate a preference based upon one of the prohibited factors.

This section of the Act prohibits the use of photographs or drawings of people (the regulations refer to the "use of human models"), to indicate a preference for persons of a given race, color, religion, ethnic group, sex, or familial status (24 CFR 100.75(c)(1)). Thus, apartment complexes that publish, over a period of time, advertisements which include only White models can be, and have been, charged with discriminatory advertising. In Ragin v. Harry Macklowe Real Estate Co., (1992) 88 CV 5665, Southern District, New York), the complainants objected to a series of advertisements placed by two luxury rental complexes in Manhattan, both managed by the same company. During the period from May 1986 (prior to the buildings' opening) through December 11, 1988, the managers of this building published more than thirty full-page or half-page advertisements in the New York Times which featured human models. Eleven different designs were used, but all included only White models--no Black or other evidently minority models were included. Most of the advertisements included single white human image, such as a skier, a woman lying on the beach, or a woman applying lipstick. One lay-out, however, entitled "3-D," featured a photograph of 75 persons wearing 3-D glasses. All of the 75 persons were apparently White. This case was tried before a jury, who agreed with the complainants' argument that an ordinary reader would interpret the respondent's advertising as expressing a discriminatory preference towards non-minority clients. The complainants (two upper middle-class minority couples and a fair housing organization) were able to establish their standing to file a complaint against the advertiser by arguing that the respondents' discriminatory message had caused them emotional distress (in the case of the individual complainants) and caused a diversion of resources (in the case of the non-profit organization.) The judge who awarded damages in the complaint awarded each individual complaint $2,5000 in compensatory damages, but denied the complainants' petition for punitive damages, finding that no evidence of racially discriminatory intent had been presented.

The choice of where advertising appears is also addressed, by the regulations which prohibit "[s]electing media or locations for advertising . . . which deny particular segments of the housing market information . . . because of race, color, religion, sex, handicap, familial status or national origin," (24 CFR 100.75(c)(3)). For example, the owner of an apartment building located in a neighborhood with two synagogues, and a large population of orthodox Jews, who advertised vacancies exclusively by posting notices at neighborhood churches, might be alleged to have used advertising which discriminated against persons of the Jewish religion. A complainant might allege that the landlord's choice of advertising location demonstrated a clear preference for Christian, rather than Jewish or Muslim tenants. This allegation could be raised even if the text of the advertisements is facially neutral.

Occasionally a respondent will make a discriminatory statement to an investigator. In such cases, the investigator should not advise the complainant to amend their complaint to include an allegation of discriminatory advertising. Statements made to an investigator are not normally considered to have "injured" the complainant. Discriminatory statements made to or discovered by the investigator should be assessed for their value as evidence of the respondent's intent, and may support the complainant's other allegations. (Discriminatory statements made by a party or witness during an investigation should be recorded exactly as expressed in the case file, and the interview record should clearly indicate that the investigator is quoting the interviewee directly.)

4. Part (d) of Section 804 makes it illegal to:

. . . represent to any person because of race, color, religion, sex, handicap, familial status, or national origin, that any dwelling is not available for inspection, sale, or rental when such a dwelling is in fact so available.

This provision prohibits the actions of housing providers who falsely claim that a desired unit has just been rented, is under repair, or has been taken off of the market because of the race, color, religion, sex,

national origin, handicap, or familial status of the person seeking the unit.

This provision may be applied in cases where bona fide home-seekers are turned away from a desired dwelling with a false claim that the dwelling is unavailable. This provision is violated when testers, who visit a complex to determine the presence or absence of discrimination, are given false information for discriminatory reasons. In addition, this provision is frequently applicable when a bona fide home-seeker is denied access to an apartment, condominium, house, or mobile home, by being told that the unit is under repair or no longer available.

5. Part (e) of Section 804 makes it illegal to:

For profit,... induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

This provision prohibits the activity of unscrupulous real estate speculators who induce homeowners to sell their property at depressed prices by appealing to their fear of integration. The activity described is referred to as "blockbusting." Blockbusting is inherently discriminatory, as it requires that the practitioner represent that a specific group is undesirable and damaging to a neighborhood.

The 1988 amendments to the Act extended the Act's coverage by addition of the prohibitions found at Subsection 804(f) which protect persons with disabilities. Subsection 804(f) is divided into paragraphs 804(f)(1) through 804(f)(9). The language of 804(f)(1) parallels the language found at 804(a) and the language of 804(f)(2) parallels the language found at 804(b). Subsection 804(f) is unique, however, in that the Act explicitly asserts that its protections apply to persons who suffer discrimination because of their own disability or disabilities of their household members, clients, or associates.

The provisions of subsection 804(f) are examined below.

6. Paragraph 804(f)(1) states that it is unlawful to:

> **...discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of the handicap of**
>
> **(A) that buyer or renter,**
>
> **(B) a person residing in or intending to reside in that dwelling after is it so sold, rented or made unavailable.; or**
>
> **(C) any person associated with that buyer or renter.**

Like Subsection 804(a), this portion of Subsection 804(f), should be applied broadly to permit investigation of any allegation that discrimination based upon handicap has rendered a dwelling unavailable to a household including or associated with a person with disabilities.

This is the section of the Act that would cover the complaint of a family alleging that a landlord rejected their application because one of their children is a paraplegic. This section prohibits the action of landlords who refuse a rental application because the applicant was recently hospitalized because of mental illness.

a. Paragraph 804(f)(2) states that it shall be unlawful to:

> **. . . To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of --**
>
> **(A) that person; or**
>
> **(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or**
>
> **(C) any person associated with that person.**

This section, probably in conjunction with 804(f)(1), would address, for example, the complaint of a woman rejected as a tenant by an apartment management firm because the firm's policy prohibited consideration of Social Security Disability Income (SSDI) when evaluating the rent-to-income ratio of prospective tenants, and because the woman could not satisfy income requirements without including the SSDI payments. The analysis would consider whether the failure to consider SSDI income had a disparate impact on persons who are disabled, whether the policy was justified, and whether there were less discriminatory ways to accomplish a business justification.

This section of the Act, again in conjunction with paragraph 804(f)(1), could also be cited in a complaint alleging that the zoning codes of a given municipality have the effect of providing discriminatory terms and conditions of tenancy disabilities.

Persons with disabilities may, because of their disabilities, need or benefit from group home living arrangements. Local zoning ordinances sometimes require that a "variance" or "special use permit" be obtained prior to the establishment of a group home within a neighborhood zoned for single-family dwellings. (A "variance" is a formal record of permission to ignore one or more provisions of the zoning code; a "special use permit" provides permission to use a building in a manner which would normally be prohibited under the zoning code assigned to the area.) Persons seeking zoning variances typically must make application to the municipal government, allow notice of their application to be published, and attend public hearings. A zoning code which requires persons with disabilities to go through these steps prior to being permitted to reside in a home which would be available to a non-disabled group without any exceptional process, may violate 804(f)(2).

b. Paragraph 804(f)(3) states that it shall be unlawful to:

> **refuse to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary**

to afford such person full enjoyment of the premises, except that, where it is reasonable to do so, the housing provider may condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Under the Act, denying a person with disabilities the opportunity to reasonably modify their unit, or refusing to make a reasonable accommodation in policy, constitutes discriminatory conduct. Essentially, the Act provides that persons with disabilities have an equal right to the full enjoyment of their dwellings even if some changes in the physical environment or procedures are needed to ensure that enjoyment.

Animals, for example, may be prohibited by the owner of an apartment complex. If, however, a woman with a visual impairment who uses a guide dog seeks to rent in an apartment building, the owner may not legally refuse her tenancy because of her service animal. Similarly, persons who are deaf or hard of hearing must be permitted to install flashing-light fire alarm systems if they so desire.

Although the Act requires that, under normal circumstances, persons with disabilities will bear the expense of necessary modifications to their dwellings, the fact that it may be unclear who was to bear the costs of a modification does not prevent a complaint from being filed or investigated. In some cases, even though the complainant sought to have the owner bear the costs of a modification, the operation of Section 504 of the 1973 Rehabilitation Act may place the burden of cost on the respondent. Moreover, in some instances a denial of a "modification" also may amount to a denial of a reasonable accommodation for which a respondent does bear the burden of cost under the Act. In addition, complainants who allege that they have been denied an accommodation or modification but who do not have evidence of their request for the accommodation or modification, should be counseled that their case will be stronger if they document their request and the housing provider's response prior to filing. If the complainant does not wish to take this extra step before filing, however, the