DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 180

[Docket No. FR–4302–P–01]

RIN 2529–AA83

Civil Penalties for Fair Housing Act Violations

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

ACTION: Proposed rule.

SUMMARY: This proposed rule interprets the Fair Housing Act to allow Administrative Law Judges (ALJs) to assess a separate civil penalty for each of multiple acts involving housing discrimination. Under the Fair Housing Act, housing discrimination violations carry maximum civil penalties for first-, second-, and third-time offenders. This proposed rule would interpret the Fair Housing Act to clarify that, in a given case, an ALJ may assess more than one maximum civil penalty against a respondent in a given case, where the respondent has committed separate and distinct acts of discrimination.

The proposed rule is also part of President Clinton's ''Make 'Em Pay'' initiative, which is designed to fight housing-related acts of hate violence and intimidation with increased enforcement and monetary penalties. Such housing-related hate acts continue to pose a significant problem; last year, according to FBI statistics, of 8,759 hate crimes, 2,416, or 27%, were housing-related. The rule would describe how ALJs are to consider housing-related hate acts under the six factors ALJs apply in determining the amount of a civil penalty to assess against a respondent found to have committed a discriminatory housing practice.

DATES: Comments on the proposed rule are due on or before: January 20, 1998.

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

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

SUPPLEMENTARY INFORMATION:

I. Civil Penalties for Separate and Distinct Fair Housing Act Violations

The Fair Housing Act (42 U.S.C. 3601–3619), allows an Administrative Law Judge (ALJ) in a Fair Housing Act case to assess a civil penalty if the ALJ ''finds that a respondent has engaged in or is about to engage in a discriminatory housing practice'' (42 U.S.C. 3612(g)(3) (emphasis added)). A ''discriminatory housing practice'' is defined as ''*an* act that is unlawful under section 804, 805, 806 or 818 of the [Fair Housing] Act'' (42 U.S.C. 3602(f) (emphasis added)). The Fair Housing Act specifically does not say that an ALJ may assess only a single civil penalty for *all* separate and distinct violations that respondent is found to have committed in a case. Likewise, the Fair Housing Act does not specify that the ALJ may assess a civil penalty for each separate discriminatory housing act. Thus, the statutory language is ambiguous with respect to the issue of whether an ALJ may assess multiple civil penalties for multiple discriminatory housing practices. The legislative history also does not address this point. In such a case of statutory ambiguity, the agency's interpretation will be upheld if it is ''based on a permissible construction of the statute.'' *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

It is certainly a permissible and reasonable interpretation of the Fair Housing Act that, where a respondent commits a single discriminatory housing practice, that is, a single act of discrimination, an ALJ has the discretion to assess a civil penalty against that respondent, up to the maximum, for that particular illegal act. It is similarly reasonable and permissible to interpret the Fair Housing Act to indicate that, where a respondent has committed multiple, separate illegal acts, an ALJ has discretion to assess a separate civil penalty against a respondent for *each separate* discriminatory housing practice that respondent committed in a case.

In accordance with the foregoing construction of the Fair Housing Act, HUD interprets the language of the statute to indicate that an ALJ may assess multiple penalties against a respondent in cases where the respondent is found to have committed multiple discriminatory acts. Accordingly, under the proposed rule, ALJs will have the discretion to assess multiple civil penalties in cases where a respondent has committed more than one discriminatory act, limited only by the number of violations that respondent is found to have committed.

This rule proposes to amend HUD's regulations at 24 CFR part 180 (Hearing Procedures for Civil Rights Matters) to clarify that, in a given case, an ALJ may, and in appropriate circumstances should, assess more than one civil penalty against a given respondent where the respondent has committed separate and distinct acts of discrimination

II. Housing Related Hate Acts

ALJs often assess maximum civil penalties against respondents in cases of particularly heinous or pervasive hate acts. Traditionally, ALJs have applied six factors in determining the amount of a civil penalty to assess: (1) Whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (2) the respondent's financial resources; (3) the nature and circumstances of the respondent's violation; (4) the degree of the respondent's culpability; (5) the goal of deterrence; and (6) other matters as justice may require (*HUD* v. *Housing Authority of Las Vegas*, 2A Fair Housing Fair Lending ¶ 25,116 (Nov. 6, 1995); H.R. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988)).

This proposed rule would also amend 24 CFR part 180 to define ''housing related hate act'' and articulate that it is appropriate that ALJs consider, under the last four of the traditional requirements, the commission of a housing-related hate act to provide a basis for assessing a maximum civil penalty. Nothing in this regulation, however, is intended to lead ALJs to infer that they should necessarily assess a less than maximum penalty in any particular case that does not involve a hate act.

III. Creation of New § 180.671

In addition to the amendments described above, this rule proposes to make a clarifying change to 24 CFR part 180. Specifically, the provisions governing the assessment of civil penalties currently found at § 180.670(b)(3)(iii)(A), (B), and (C)

would be moved to a new § 180.671. With the exception of the amendments described above, no substantive revisions would be made to these provisions. HUD, however, is proposing to make changes to certain of these provisions for purposes of clarity. The creation of a new § 180.671 is designed to make the part 180 regulations easier to understand.

IV. Justification for Reduced Comment Period

It is HUD's policy generally to afford the public not less than 60 days for submission of comments on its notices of proposed rulemaking (24 CFR 10.1). In this case, HUD has determined that it would be contrary to the public interest to provide a public comment period greater than 30 calendar days. The current interpretation of the civil penalty structure has not been sufficient to deter discriminatory housing practices, particularly housing-related acts of hate violence. The proposed amendments interpret the Fair Housing Act to insure that ALJs have the necessary flexibility to assess the appropriate number of civil penalties to deter these egregious acts of housing discrimination. The provision of a 60-day comment period would delay implementation of the proposed amendments, and tend to limit the ability of the government to maximize the use of civil penalties in cases involving housing-related hate violence.

HUD believes that the 30-day comment period strikes a balance between the need for public input in the regulatory process, and the need to address housing discrimination and, particularly, housing-related acts of hate violence. HUD recognizes the value and necessity of public comments in the development of final regulations and welcomes comments on this proposed rule. All public comments will be addressed in the final rule.

V. Findings and Certifications

Environmental Impact

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

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this proposed rule would have no federalism implications, and that the policies are not subject to review under the Order.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule would not pose an environmental health risk or safety risk to children.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this proposed rule, and in so doing certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

The Secretary has reviewed this proposed rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this proposed rule would not impose a Federal mandate that would result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Executive Order 12866, Regulatory Planning and Review.

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this proposed 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 proposed rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance Number.

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

List of Subjects in 24 CFR Part 180

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

Accordingly, 24 CFR part 180 is proposed to be amended as follows:

PART 180—HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

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

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

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

§ 180.670 Initial decision of ALJ.

* * * * *

(b) * * *

(3) * * *

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

* * * * *

3. Section 180.671 is added to read as follows:

§ 180.671 Assessing civil penalties for Fair Housing Act cases.

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

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

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

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

(b) *Definition of separate and distinct discriminatory housing practice.* A

separate and distinct discriminatory housing practice is a single, continuous, uninterrupted transaction or occurrence that violates section 804, 805, 806, or 818 of the Fair Housing Act, even if committed by the same person. Each single, continuous, uninterrupted transaction or occurrence that violates more than one provision of the Act, violates one provision more than once, or violates the fair housing rights of more than one person constitutes a separate and distinct discriminatory housing practice.

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

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

(ii) That respondent's financial resources;

(iii) The nature and circumstances of the violation;

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

(v) The goal of deterrence; and

(vi) Other matters as justice may require.

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

(ii) For purposes of this section, the term ''*housing-related hate act*'' means any act that constitutes a discriminatory housing practice under section 818 of the Fair Housing Act and which constitutes or is accompanied or characterized by the threat, or any action toward carrying out, or the carrying out of actual violence, intimidation, coercion, assault, bodily harm, and/or harm to property.

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

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

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

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

Dated: November 24, 1997.

Andrew Cuomo,

Secretary.

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