

**The Stuff of Nightmares:  
What You Need to Know  
About Accessibility  
Claims & Lawsuits**

October 6, 2015




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**April 30, 2013  
HUD / DOJ Joint  
Statement**

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**HUD/DOJ Position on  
Statute of Limitations**



- SOL begins to run when “aggrieved person” is denied housing as a result of the failure to design and construct property per FHAA
- “a failure to design and construct a multifamily property in accordance with the FHA may cause an injury to a person at any time until the violation is corrected. A person may be injured before, during or after a sale, rental or occupancy of a dwelling.”

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**HUD/DOJ Position on  
Statute of Limitations**



- Take away
- Any property built after 3/13/91 (implementation date of the FHAA) that is NOT in complete compliance with the design and construction requirements is at fault until the violation has been corrected
- Can face a complaint today for a development constructed in the 1990s

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It  
**NEVER**  
goes  
away

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**HUD/DOJ Position on  
“Pattern or Practice”**



- “Continuing Violation” “**pattern or practice**”
- New statement further says
  - If a builder, architect or developer does not comply with the design and construction requirements at multiple properties over time, violations at all properties constitutes a “continuing violation” or “pattern or practice” of illegal discrimination
  - In past occasionally applied to builders, **now can apply to architect or developer as well**

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**Manhattan U.S. Attorney Files Civil Rights Lawsuit**

- Against Major Real Estate Developers And Architects
- To Remedy *Pattern And Practice* Of Inaccessible Design And Construction Of New York City Apartment Buildings
- Monday, March 17, 2014
- [http://www.justice.gov/usao/nys/press\\_releases/March14/RelatedFHALawsuit.php](http://www.justice.gov/usao/nys/press_releases/March14/RelatedFHALawsuit.php)




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**HUD/DOJ Joint Statement on FHA Accessibility**



- What should you do?
  - Owners of older covered Multi-Family development (built after 3/13/91) should consider having their properties evaluated to determine if there are non-compliant features, and consult an expert to determine what corrective actions to take
  - Management companies, Federal agencies, etc. should strive to make sure properties are fully complying with the FHAA design and construction requirements

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**Recent Settlements Concerning Design & Construction**

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**Dept. of Justice  
Settlements in Disability  
Discrimination Cases**



- DOJ announced June 25, 2012 a settlement involving One company with 210 properties in 26 states. The company was ordered to pay **\$10.5 million** in settlement.
- DOJ announced May 16, 2013 another settlement involving multifamily units in MS, LA, and TN.
  - One owner of 9 properties alleged to have violated the FHA and ADA.
  - Approved Settlement: **\$865,000** to make the complexes accessible and **\$60,000** to compensate the aggrieved persons for a total of **\$925,000**

**All based on Design  
and Construction Issues**

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**False Claims  
Act**

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**False Claims Act**



- Lincoln Law
- RD/HUD Certifications
- Westchester case
- Trickle Down

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### Westchester Case and Current Initiatives



- Westchester case was private litigation under the False Claims Act
  - HUD eventually challenged Westchester County’s certification and terminated funding briefly
  - Remedy included large numbers of affordable housing units in segregated white neighborhoods
- HUD published proposed regulations

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### Not So Veiled Threat



“Significantly, not only did [the Fair Housing Group] find systemic violations of the FHA, but they further found that Defendants’ affirmations and assurances to the federal government and the State regarding compliance with the FHA and the Americans with Disabilities Act (ADA) in order to receive public financial assistance were false and invalid.”

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### Not So Veiled Threat



“For many years, Defendants have received substantial governmental financial assistance for the development of their properties, including Low Income Housing Tax Credits. As a condition of participation in these federal and state supported financing programs Defendants signed many Land Use Restriction Agreements certifying that their properties will conform to the requirements of the FHA and ADA. Based on the investigation and testing by [the Fair Housing Group], it appears that many of Defendants’ certifications to the government were false or erroneous.”

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### Impact on Transactions



- **EVERYONE** has to ensure compliance
  - New Construction
    - What law applies?
    - What standard applies?
    - The question you must ask yourself is.....
      - Do my people know what they are doing?
  - Post-Construction Transaction
    - Does the property comply with the FHA, Section 504, and ADA accessibility requirements?
      - Both buyer and seller need an inspection to determine compliance
    - Impossible to fully mitigate risk without full retrofit
    - Difficult to value property because of inability fully mitigate risk

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### Fair Housing Advertising

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### HUD Affirmative Fair Housing Marketing Plan

- Each applicant is to pursue affirmative fair housing marketing policies by seeking out possible buyers and tenants, and advertising available housing properties. Examples of such action include:
  - Advertising the availability of housing to the population that is less likely to apply, both minority and non-minority groups, through various forms of media (i.e. radio stations, posters, newspapers) within the marketing area;

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### HUD Affirmative Fair Housing Marketing Plan

- Use of the Equal Housing Opportunity Logo and the equal housing opportunity statement
- Educate persons within an organization about fair housing and their obligations to follow nondiscrimination laws; and
- Conduct outreach to advocacy groups (i.e. disability rights groups) on the availability of housing.

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### Affirmative Fair Housing Marketing Plans

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### Updating the AFHMP



The HUD requirement is to review the document every 5 years and update as needed.



Currently RD requires the plan to be reviewed every 3 years.

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## Procedure

Prepare at least **once per year** a property by property demographic breakdown of:

- A breakdown of each site-based waiting list and percentage of applicants by categories
- Number and percentage of income eligible families
- Subdivide eligible families by income levels, i.e. extremely low, very low, Tax Credit, and lower income families



Poverty rates rise, median incomes fall

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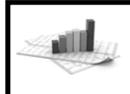
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## Procedure



Don't wait until you are asked, instead, prepare at least **once per year** a property by property demographic breakdown of:

- Comparing the data on property demographics and waiting list to determine if any are under-served
- Use data on unit turnover, number, size, type, likely to become vacant in the next 12 months
- Evaluate whether waiting lists are closed, should be closed, or when it would be re-opened
- Evaluate potentially under-served categories and design marketing to reach them

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## Practical Pointers



Do not let your AFHPM be "out of sight, out of mind"

- Know what your plan says
- Understand the Fair Housing implications of not following it
- Say what you mean, mean what you say...follow the plan
- Change the plan when you change what your doing

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## Target Marketing



- Target Marketing may violate the FHA
  - Marketing analysis may result in simply determining who has lived in the past
  - Most marketing agencies rely on race, national origin, sex, religion, and even sexual orientation to develop marketing models

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## Discriminatory Statements?



- Which statement is unlawful?
  - “No children”
  - “Active Adult”
  - “Adults Only”
  - “Women preferred”
  - “Married Couples Only”
  - “Housing for Students”
  - “Not wheelchair accessible”

ALL of these!

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## Testers

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**Government Testers** 

- In 1991, the U.S. Department of Justice established the Fair Housing Testing Program
- "Testing refers to the use of individuals who, without any bona fide intent to rent or purchase a home, apartment, or other dwelling, pose as prospective buyers or renters of real estate for the purpose of gathering information based on race, national origin, disability, or familial status."

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**Government Testers** 

DOJ employs various means to accomplish testing in local communities, including contracts with private fair housing organizations, contracts with individuals, and by using non-attorney Department employees throughout the country.

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**Government Testers** 

- Using these various means, the DOJ conducts numerous investigations simultaneously at any given time.
- Since 1992, DOJ has filed *98 pattern and practice testing cases* with evidence directly generated from the Fair Housing Testing Program

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## Private Testers

### National Fair Housing Alliance

"Thousands of housing discrimination complaints are investigated and tested each year resulting in the resolution of many cases through conciliation, settlement, and litigation. Data gathered from the investigation of these complaints is compiled to examine and report on the extent and nature of housing, lending, and insurance discrimination in this country."

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## Drive By Testers

- Is your property accessible?
  - Stairs
  - Slopes
  - Door Knobs
  - Accessible Parking
  - Accessible Common Areas

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## Who Answers the Telephone?



- Manager?
- Maintenance staff?
- Other?
- Is it the same person?
  
- *How do you know they provide the same information?*

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## Answering the Phone



1. Who answers the phone?
2. What do they say?
3. What do they write down?
4. Do they send an email?
5. Do they make a follow-up call?

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## Telephone



- Do you provide the same information?
  - Rent
  - Deposit
  - Income Qualification
  - Age/Disability Status Qualification
  - Unit availability
  - Wait list information

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## What's in your office?



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### What's in your office?

- Needed Information
  - Fair Housing Poster
  - Reasonable Accommodation Notice
  - Section 504 Coordinator contact info
  - Copy of your 504 Transition Plan
- What language are your posters in?
  - LEP

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**Mark English**

(888) 504-7483, ext. 113

[mark@EandATeam.com](mailto:mark@EandATeam.com)



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