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OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY



U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

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JOINT STATEMENT OF
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE DEPARTMENT OF JUSTICE

*ACCESSIBILITY (DESIGN AND CONSTRUCTION) REQUIREMENTS FOR
COVERED MULTIFAMILY DWELLINGS UNDER THE
FAIR HOUSING ACT*

Introduction

The Department of Justice (“DOJ”) and the Department of Housing and Urban Development (“HUD”) are jointly responsible for enforcing the federal Fair Housing Act (the “Act”),¹ which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability.² One of the types of disability discrimination prohibited by the Act is the failure to design and construct covered multifamily dwellings with certain features of accessible design. *See* 42 U.S.C. § 3604(f). This Joint Statement provides guidance regarding the persons, entities, and types of housing and related facilities that are subject to the accessible design and construction requirements of the Act (hereinafter, “design and construction requirements”). *See* 42 U.S.C. § 3604(f)(3).

¹The Fair Housing Act is codified at 42 U.S.C. §§ 3601-3619.

²The Act uses the term “handicap” instead of “disability.” Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of “disability” in the Americans with Disabilities Act is drawn almost verbatim “from the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”). This document uses the term “disability,” which is more generally accepted.

This Joint Statement does not focus on the specific technical criteria that must be followed to comply with the design and construction requirements because HUD has already provided rulemaking and specific technical guidance to the public on those criteria. See HUD regulations implementing the design and construction provisions at 24 C.F.R. § 100.200 *et seq.*; *Final Fair Housing Accessibility Guidelines* (“Guidelines”), 56 Fed. Reg. 9,472 (Mar. 6, 1991); *Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines* (“Questions and Answers”), 59 Fed. Reg. 33,362 (June 28, 1994); *Fair Housing Act Design Manual* (“Design Manual”) (August 1996, Revised April 1998)³. For additional technical assistance, see the Fair Housing Act Accessibility FIRST website, www.fairhousingfirst.org. This Joint Statement also does not focus on the accessibility requirements applicable to housing and related facilities under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (1990), the Architectural Barriers Act (1968), and state or local laws. Housing providers involved in designing and constructing covered multifamily dwellings are also subject to the other nondiscrimination provisions of the Fair Housing Act, including the obligations to provide reasonable accommodations and allow reasonable modifications. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act (May 17, 2004) and Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications under the Fair Housing Act (Mar. 5, 2008), at <http://www.hud.gov/offices/fheo/disabilities/index.cfm> or http://www.justice.gov/crt/about/hce/about_guidance.php. Further information about all of the Fair Housing Act’s nondiscrimination requirements is available on HUD’s Fair Housing website, which may be accessed at <http://www.hud.gov/offices/fheo/index.cfm>, and DOJ’s Fair Housing website, which may be accessed at http://www.justice.gov/crt/about/hce/housing_coverage.php.

QUESTIONS AND ANSWERS

Accessibility Requirements of the Fair Housing Act

1. What are the accessible features required by the Act?

The Act requires that covered multifamily dwellings be designed and constructed with the following accessible features:

- The public and common use areas must be readily accessible to and usable by persons with disabilities;
- All doors designed to allow passage into and within all premises of covered dwellings must be sufficiently wide to allow passage by persons with disabilities, including persons who use wheelchairs;
- All premises within covered dwellings must contain the following features:
 - An accessible route into and through the dwelling unit;

³All references to the Fair Housing Act Design Manual are to the August 1996 edition revised and republished April 1998.

- Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
- Reinforcements in bathroom walls to allow the later installation of grab bars;
- Usable kitchens and bathrooms such that an individual using a wheelchair can maneuver about and use the space.

See 42 U.S.C. § 3604(f)(3)(C).

To describe these requirements in more detail, HUD published the Fair Housing Act regulations (“Regulations”) at 24 C.F.R. Part 100 on January 23, 1989, the Guidelines on March 6, 1991, the Questions and Answers on June 28, 1994, and the Design Manual (issued in 1996 and revised and republished in 1998). In the Guidelines, the above statutory provisions appear as seven requirements, as follows:

Requirement 1. Accessible building entrance on an accessible route.

Requirement 2. Accessible and usable public and common use areas.

Requirement 3. Usable doors.

Requirement 4. Accessible route into and through the covered dwelling unit.

Requirement 5. Light switches, electrical outlets, thermostats and other environmental controls in accessible locations.

Requirement 6. Reinforced walls for grab bars.

Requirement 7. Usable kitchens and bathrooms.

Types of Dwellings Covered by the Act

2. What types of housing are covered by the Fair Housing Act’s design and construction requirements?

The Fair Housing Act requires all “covered multifamily dwellings” designed and constructed for first occupancy after March 13, 1991, to be readily accessible to and usable by persons with disabilities. In buildings with four or more dwelling units and at least one elevator, all dwelling units and all public and common use areas are subject to the Act’s design and construction requirements. In buildings with four or more dwelling units and no elevator, all ground floor units and public and common use areas are subject to the Act’s design and construction requirements.

The term “covered multifamily dwelling” is defined by the Act and its implementing regulations and covers many different types of residential buildings and facilities.⁴ Dwellings subject to the Act’s design and construction requirements include condominiums, cooperatives, apartment buildings, vacation and time share units, assisted living facilities, continuing care facilities, nursing homes, public housing developments, HOPE VI projects, projects funded with HOME or other federal funds, transitional housing, single room occupancy units (SROs), shelters designed as a residence for homeless persons, dormitories, hospices, extended stay or residential hotels, and more.

Housing or some portion of housing covered by the Act’s design and construction requirements may be subject to additional accessibility requirements under other laws. Those laws include Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the Architectural Barriers Act, and state or local laws.

3. What standards are used to determine whether a housing facility that includes short-term residencies is covered by the Act’s design and construction requirements?

Whether a housing facility that includes short-term residencies is a “dwelling” under the Act depends on whether the facility is intended to be used as a residence for more than a brief period of time. As a result, the operation of each housing facility needs to be examined carefully to determine whether it is intended to contain dwellings. Factors to be considered in determining whether a facility contains dwellings include, but are not limited to: (1) the length of time persons will stay in the project; (2) whether the rental rate for the unit will be calculated on a daily, weekly, monthly or yearly basis; (3) whether the terms and length of occupancy will be established through a lease or other written agreement; (4) how the property will be described to the public in marketing materials; (5) what amenities will be included inside the unit, including kitchen facilities; (6) whether the resident will possess the right to return to the property; and (7) whether the resident will have anywhere else to return. *See* Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15,740, 15,746-47 (Mar. 23, 2000). *See also* preamble to the final rule implementing the Fair Housing Amendments Act of 1988, stating that the definition of dwelling is “broad enough to cover each of the types of dwellings enumerated in the proposed rule: mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties.” 54 Fed. Reg. 3,232, 3,238 (Jan. 23, 1989).

4. Do the Fair Housing Act’s design and construction requirements, or any other laws mandating accessible design, apply to detached single family homes?

The Fair Housing Act’s design and construction requirements apply only to covered multifamily dwellings -- that is, buildings having four or more dwelling units built for first occupancy after March 13, 1991. This includes both rental and sale units and also attached single family homes when there are four or more dwellings in the building (*e.g.*,

⁴The federal regulation specifying the types of residential buildings and facilities that are subject to the design and construction requirements of the Act appears at 24 C.F.R. § 100.201.

condominiums). Detached single family houses as well as duplexes and triplexes are not covered by the Act's design and construction requirements. *See* 42 U.S.C. §§ 3604(f)(3)(C), (f)(7). Condominiums that are not detached are, however, covered. Preamble to the Guidelines, 56 Fed. Reg. at 9,481.

However, any housing (including single family detached homes) constructed by federal, state, or local government entities or constructed using any federal, state, or local funds may be subject to accessibility requirements under laws other than the Fair Housing Act. These laws -- particularly Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Architectural Barriers Act -- have requirements for accessibility that exceed those contained in the Fair Housing Act. In addition, state and local building codes may contain accessibility requirements for detached single family homes and/or other housing. Housing subject to the requirements of more than one federal, state, or local law must comply with the requirements of each such law. Where federal, state, or local laws differ, the more stringent requirements apply. *See* Preamble to the Guidelines, 56 Fed. Reg. at 9,477. In other words, state or local laws may increase accessibility beyond what is required by federal law but may not decrease the accessibility required by federal law.

5. Do the Act's design and construction requirements apply to a building with four or more sleeping rooms that are each occupied by a separate household who share toilet or kitchen facilities?

Yes. A building with four or more sleeping rooms, each occupied by a separate household who share toilet or kitchen facilities, constitutes a covered multifamily dwelling for purposes of the Act's design and construction requirements. However, HUD has determined that a single family house that will be occupied by four or more persons functioning as one distinct household, such as a "group home" for persons with disabilities, is not considered to be a "covered multifamily dwelling" for purposes of the Act's design and construction requirements, even if it contains four or more sleeping areas with a shared kitchen and bathroom. *See* Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. at 15,746.

6. Are carriage house units -- where a dwelling unit is constructed above a garage -- covered by the Act's design and construction requirements?

If an individual stacked flat unit incorporates parking that serves only that unit, and the dwelling footprint is located directly above and within the footprint of the garage below, the unit is treated like a multistory unit without an elevator. It is, therefore, not covered unless the dwelling unit level is on an accessible route. However, for example, where several flat units are located over a common garage, the units are covered, and the units and common garage must comply with the Act's design and construction requirements whether or not the parking spaces are individually assigned or deeded to a specific unit. *See* memorandum from HUD General Counsel, Frank Keating, to Gordon Mansfield, Assistant Secretary for FHEO (Dec. 16, 1991), reprinted in the Design Manual at back of Appendix C. *See also* Design Manual at 1.29.

Example 1: A residential building consists of 4 dwelling units in which each dwelling unit has a 2-car garage and the garage footprint is used as the footprint for the floors of the dwelling unit above. These are carriage houses and are not covered.

Example 2: A residential building consists of 4 dwelling units situated over 4 individual 2-car garages, and the garage footprint serves as the footprint for the dwelling unit above. However, the front of the dwelling unit is accessed at grade from the street and access to the garages is from a lower level at the rear. The dwelling unit level of these units is on an accessible route. Therefore these units do not qualify as carriage houses and must comply with the Act's design and construction requirements.

Ground Floor Dwelling Units

7. Can a non-elevator building have more than one ground floor?

Yes. The Regulations define "ground floor" as "a floor of a building with a building entrance on an accessible route." *See* 24 C.F.R. § 100.201. A building may have one or more ground floors. Where the first floor containing dwelling units in a building is above grade, all units on that floor must be served by a building entrance on an accessible route. This floor will be considered to be a ground floor. *See* Guidelines, 56 Fed. Reg. at 9,500; Questions and Answers, Q. 6 and 12, 59 Fed. Reg. at 33,364, 33,365.

Example 1: A covered building is located on a slope with the upper story at grade on one side and the lower story at grade on the opposite side. It has entrances on both sides. This building has two ground floors.

Example 2: A 3-story residential building has an adjacent 3-story parking garage, with walkways leading from each floor of the garage to each floor of the residential building. In this case, all three floors of the residential building are covered and must comply with the Act's design and construction requirements because there is a vehicular or pedestrian arrival point on each level of the garage that provides access to the dwelling units on the opposite side. For purposes of the Act, each floor of the residential building is treated as a ground floor. This is true irrespective of whether the residential building or the garage has an elevator.

Single-story and Multistory Dwelling Units

8. Does the Fair Housing Act require townhouses to be accessible?

Yes, if the townhouses are single-story, or multistory with elevators internal to the unit, or multistory and located in a building with one or more elevators. *See* questions 22-27, below.

A discussion of the application of the Act's design and construction requirements to townhouses appears in the Preamble to the Regulations, 54 Fed. Reg. at 3,243-44, and in the Preamble to the Guidelines, 56 Fed. Reg. at 9,481. *See also* Questions and Answers, Q. 1, 59 Fed. Reg. at 33,363.

9. May a unit include either a loft or a raised or sunken living room and still comply with the Act's design and construction requirements?

Yes, but with certain restrictions. The Guidelines permit a single-story dwelling unit to have a special design feature such as a loft or an area on a different level within a room, but all portions of the single-story unit except the loft or the sunken or raised area must be on an accessible route. Note, however, that a covered dwelling unit may not have both a loft and a raised or sunken area. A single-story unit may have either a raised or sunken area, but this is limited to an area within a room and not the entire room. Further, the raised or sunken area must not interrupt the required accessible route throughout the rest of the unit. A unit with a loft is treated as a single-story unit. *See* Guidelines, Requirement 4(2), 56 Fed. Reg. at 9,507; *see also* Design Manual at 4.5. A loft (defined as an intermediate level between the floor and ceiling of any story, located within a room or rooms of a dwelling) may be provided without an accessible route to the loft. The Guidelines specify that kitchens and all bathrooms, including powder rooms, must be on an accessible route; therefore, a kitchen, bathroom, or powder room may not be located in a loft, or in a raised or sunken area, unless an accessible route is provided to the loft or the raised or sunken area. Because a unit with a loft is a single-story unit, all primary or functional living spaces must be on an accessible route. Secondary living spaces, such as a den, play area, or an additional bedroom, are the only spaces that may be in a loft unless an accessible route is provided to the loft. *See* Design Manual at 4.7.

10. What constitutes finished living space that would permit a unit to be considered a multistory unit that is not covered under the Act's design and construction requirements?

A multistory dwelling unit is one in which there is finished living space located on one floor and on the floor or floors immediately above or below it. Design Manual at 17, Guidelines, 56 Fed. Reg. at 9,500. An area is considered to have finished living space if it has interior partitions, wall finishes, electrical, heating and cooling systems or other building systems installed and if it complies with local building code requirements for habitable spaces. Habitable space is a space for living, sleeping, eating, or cooking. Habitable space does not include bathrooms, toilet rooms, closets, halls, storage or utility spaces and similar areas. *See* Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. at 15,762.

11. Do the Act's design and construction requirements apply to multistory townhouses in non-elevator buildings containing four or more dwelling units?

No. The Fair Housing Act applies to all ground floor dwelling units in non-elevator buildings consisting of four or more dwelling units. Multistory townhouses in non-elevator buildings are not considered ground floor dwelling units because the entire

dwelling unit is not on the floor that qualifies as a ground floor. Thus, if a building containing four or more dwelling units has only multistory townhouses and does not have an elevator, the Act's design and construction requirements do not apply. However, if the building has four or more dwelling units and includes one or more single story dwelling units, such as a townhouse, villa, or patio apartment, then the Act's requirements apply to the single story dwelling unit(s) and to the public and common use areas. *See* Preamble to the Regulations, 54 Fed. Reg. at 3,243-44, and Preamble to the Guidelines, 56 Fed. Reg. at 9,481. *See also* Questions and Answers, Q. 1, 59 Fed. Reg. at 33,363.

Additions

12. Do the Act's design and construction requirements apply to additions of four or more dwelling units or additions of new public and common use areas to existing buildings that were built for first occupancy on or before March 13, 1991?

Yes. When four or more units are built as an addition to a building that was built before the effective date of the Act's design and construction requirements, then the added units must comply with the design and construction requirements of the Act. If any new public and common use spaces are added along with the units, then these spaces are also required to be accessible. However, if only public and common use spaces are added to an existing building not already covered by the Act's design and construction requirements, then those spaces do not need to be made accessible. *See* Design Manual at 11; Questions and Answers, Q. 4, 59 Fed. Reg. at 33,364.

Example 1: An existing 4-wing residential building with four or more units built in 1985 is partially destroyed by fire such that one complete wing of the building must be torn down and rebuilt. Since the fire destruction necessitates complete rebuilding of this wing, all ground floor units in the new wing or all units in the new wing if the building has an elevator, are covered as an addition and must meet the Act's design and construction requirements.

Example 2: The new owner of a residential building built in 1975 decides to add a clubhouse with meeting rooms for residents. Since the original units were not built after the effective date of the Act, and no new units are being added, the new public and common use areas are not subject to the Act's design and construction requirements, but may be subject to other accessibility laws (*e.g.*, ADA, Section 504).

13. Do additions of units or public and common use areas to buildings with four or more units that were built after March 13, 1991, have to meet the design and construction requirements of the Act?

Yes. Any of the following additions to a building with four or more units designed and constructed after March 13, 1991, must comply with the design and construction requirements of the Act: ground floor units in non-elevator buildings; any units in

elevator buildings; and public and common use areas. *See* Questions and Answers, Q. 4, 59 Fed. Reg. at 33,364.

14. If only dwelling units are added to housing that was designed and constructed for first occupancy on or before March 13, 1991, do the existing public or common use areas have to be retrofitted to comply with the Act's design and construction requirements?

No. Although new covered multifamily dwellings designed and constructed for first occupancy after March 13, 1991 would have to comply with the Act's design and construction requirements, public and common use areas designed and constructed for first occupancy before the effective date do not have to be modified to comply with those requirements. The covered dwelling units must be on an accessible pedestrian route. For example, where an addition consisting of new covered multifamily dwellings shares an inaccessible entrance with an existing building, the inaccessible entrance and route thereto must be made accessible to ensure access to the new units. Furthermore, if any new public and common use spaces are constructed at the same or later time as the new covered dwelling units, then these new public and common use spaces would need to be made accessible. *See* Questions and Answers, Q. 4(c), 59 Fed. Reg. at 33,364.

Alterations/Renovations

15. Do the Fair Housing Act's design and construction requirements apply to the alteration or renovation of residential properties designed and constructed for first occupancy on or before March 13, 1991?

No. "First occupancy" as defined in the Regulations implementing the Act means a building that has never before been used for any purpose. Therefore, alterations, rehabilitation, or repair of pre-existing residential buildings are not covered because first occupancy occurred before the effective date of the Act's design and construction requirements. *See* 24 C.F.R. § 100.201; Questions and Answers, Q. 9, 59 Fed. Reg. at 33,365. However, in those cases where the façade on a pre-existing building is maintained, but the building is otherwise destroyed, the new units are subject to the design and construction requirements. *See* Design Manual at 11.

Example 1: A 2-story residential building built in 1964 containing 20 units is being renovated into 10 large luxury condominium units in 2010. The exterior walls and roof will remain in place, but the interior will be completely rebuilt. This building is not covered because the first occupancy of the building occurred before the effective date of the design and construction requirements of the Act, and the renovations do not constitute construction of a new building.

Example 2: An existing residential building in a historic district is being torn down so that a new 2-story non-elevator residential building with eight dwelling units, four on each floor, may be constructed. The façade of the existing building will be preserved, however, and the new building will be built behind the façade.

In this case, the building is a new building designed and constructed for first occupancy after the effective date of the Act's design and construction requirements, and the ground floor units must comply with the Act's design and construction requirements. The preservation of the façade does not change this fact.

16. Do the Fair Housing Act's design and construction requirements apply to the alteration or renovation of nonresidential buildings into residential buildings?

No. First occupancy means a "building that has never before been used for any purpose." The conversion of a nonresidential building into a residential building through alteration or renovation does not cause the building to become a covered multifamily dwelling. This is true even if the original nonresidential building was built after March 13, 1991. This situation needs to be distinguished, however, from additions of covered multifamily dwellings (*see* questions 12, 13 and 14, above). *See* 24 C.F.R. § 100.201; Questions and Answers, Q. 4, 8 and 9, 59 Fed. Reg. at 33,364-65.

Example: A warehouse built in 1994 is being rehabilitated into a small condominium residential building with two stories and a total of 12 dwelling units. This conversion of this building is not covered because at the time of its first occupancy it was not designed and constructed as a covered multifamily dwelling.

Building Separations

17. Does the use of breezeways to separate dwelling units that would otherwise be covered by the Act's design and construction requirements make those units exempt from the Act's requirements?

No. In situations where four or more dwelling units are connected by one or more covered walkways (breezeways), stairs, or other elements that are structurally tied to the main body of a building, the dwelling units are considered to be in a single building. If the building does not contain an elevator, the ground floor units are subject to the Act's design and construction requirements. *See* Design Manual at 10. If the building contains an elevator, all units are subject to the Act's design and construction requirements.

18. Are dwelling units in one structure that are separated by firewalls treated as separate buildings under the Act?

No. Under the Act, dwelling units built within a single structure, but separated by a firewall, are treated as part of a single building. *See* Preamble to the Guidelines, 56 Fed. Reg. at 9,480; Design Manual at 10; Questions and Answers, Q. 1(c), 59 Fed. Reg. at 33,363.

Example: Four condominiums were designed and constructed after March 13, 1991, as part of one structure. In accordance with the local building code, the

adjoining condominiums are separated by firewalls. Although these condominiums may be considered separate buildings under the local building code, they are considered part of one building for purposes of the Fair Housing Act's design and construction requirements. They must therefore comply with the Act's design and construction requirements.

Dwelling Units Custom-Designed or Pre-Sold Prior to Completion

19. Do the Act's design and construction requirements apply to dwelling units that are sold before construction and/or custom designed during construction for a particular purchaser?

Yes. The mere fact that a covered dwelling unit is sold before the completion of design or construction or is custom designed for a purchaser does not exempt the unit from compliance with the Act's design and construction requirements. The Act's requirements are mandatory, regardless of the ownership status of the individual unit. *See* Preamble to the Guidelines, 56 Fed. Reg. at 9,481; Questions and Answers, Q. 3(b), 59 Fed. Reg. at 33,364.

20. May the builder, at the purchaser's request, modify a covered dwelling unit that is sold before the completion of design and construction so that the unit will no longer comply with the design and construction requirements?

No. All covered dwelling units are subject to the design and construction requirements of the Act and although a unit may be custom designed to meet a purchaser's wishes, a builder may not build a covered unit that has features that do not comply with the Act. *See* Preamble to the Guidelines, 56 Fed. Reg. at 9,481.

Subsequent Changes to Accessible Features

21. May owners of covered multifamily buildings designed and constructed in compliance with the Fair Housing Act make subsequent changes to the building so that it no longer meets the Act's requirements?

Original and subsequent owners of covered multifamily buildings that were designed and constructed in compliance with the Fair Housing Act's design and construction requirements must maintain the building's accessible features so that the building continues to meet the Act's requirements.

Buildings with One or More Elevators

22. Does the Fair Housing Act require a townhouse to be accessible if it is located in a building that has an elevator and also has at least four dwelling units?

Yes. If the building containing four or more dwelling units has at least one elevator, then all the dwelling units in the building are covered. This requirement applies to single story and multistory townhouses as follows:

- For single story townhouses in such buildings, the accessible features required by the Act must be provided throughout the entire unit. *See* Guidelines, Requirement 4(2), 56 Fed. Reg. at 9,507.
- For multistory townhouses located in such buildings, elevator access must be provided to the primary entrance level of the townhouse, and that level must meet the Act's design and construction requirements including providing a usable kitchen and an accessible bathroom or powder room, or just an accessible bathroom if there is both a bathroom and a powder room. However, the powder room in such situations must still have certain accessible features, including a usable door, and an accessible route into the powder room.⁵

23. If a covered building has a building elevator that serves some, but not all, of the units in the building, is it covered by the design and construction requirements?

The Act's design and construction requirements apply to all dwelling units in buildings with four or more units if such buildings have one or more elevators. Thus, elevator access must be provided to all units in the building. *See* 42 U.S.C. § 3604(f)(7). *See also* Guidelines, Requirement 1(3)(a)(ii), 56 Fed. Reg. at 9,504. The Design Manual at 1.21-1.22, provides a more detailed discussion of how the Act's design and construction requirements apply with respect to elevator buildings.

An exception to this general rule occurs when an elevator is provided only as a means of providing an accessible route to dwelling units on a ground floor that is above grade, below grade, or at grade, and does not provide access to floors that are not ground floors.⁶ In this case, the elevator is not required to serve dwelling units on floors other than ground floors, and the building is not considered to be an elevator building. Under that exception, only the ground floor units are required to meet the requirements of the Guidelines. The Guidelines, Requirement 1(3)(a)(i), 56 Fed. Reg. at 9,504, and the Design Manual at 1.31, illustrate this situation. However, if such an elevator is extended to reach floors other than the ground floor, then all of the units in the building must

⁵The powder room must comply with all the provisions except those applying solely to accessible bathrooms set out in Requirements 6 and 7 of the Guidelines, 56 Fed. Reg. at 9,509-15.

⁶A second exception occurs when the elevator is located completely within one or more units and does not serve other areas of the building. That exception is discussed in more detail in questions 25-27, below.

comply with the design and construction requirements and an accessible route must be provided to all units.

Example: A 3-story building has below grade parking and provides an elevator only as a means of access from the below grade parking to the first level of dwelling units, which is located at grade. In this case, the elevator need not provide access to the second and third floors, and the building is not treated as a building with one or more elevators.

24. If the only elevator provided in a covered building is a freight elevator, are all of the units in the building covered by the design and construction requirements of the Act?

Yes. If a freight elevator is provided in a building with four or more dwelling units, even though no passenger elevator is provided, all units must comply with the Act's design and construction requirements.

Example: A 3-story building has a freight elevator from a side entrance where there is a large level pull-up area for moving vans. The freight elevator serves all 3 stories of the building. In this case, the building is treated as a building with one or more elevators, and all floors and all dwelling units on each floor of the building must comply with the Act's design and construction requirements.

25. If one multistory townhouse, in a building with four or more units, contains an internal (*i.e.*, unit-specific) elevator for that occupant's use, and there are no elevators serving other units in the building, must the unit with an elevator meet the Act's design and construction requirements?

Yes. Because the multistory townhouse has an elevator, the building with four or more units in which the townhouse is located is a building that "ha[s] one or more elevators" within the meaning of 42 U.S.C. § 3604(b)(7)(A). The Act's design and construction requirements therefore apply to any townhouse with an internal (*i.e.*, unit-specific) elevator if the townhouse is part of a building containing four or more units. Because the internal elevator serves only the individual unit, however, and there are no other elevators in the building that serve the other units, those multistory townhouses in the building that do not have internal elevators are not required to meet the Act's design and construction requirements. As the Preamble to the Proposed Guidelines, 55 Fed. Reg. 24,370, 24,377 (June 15, 1990), states:

"In both the proposed and final rulemaking, the Department stated that a dwelling unit with two or more floors in a non-elevator building is not a 'covered dwelling unit' even if it has a ground-floor entrance, because the entire dwelling unit is not on the ground floor. (Of course, if the unit had a[n] internal elevator, it would be subject to the Fair Housing Act requirements.)"

See also Preamble to the Regulations, which states, “townhouses consisting of more than one story are covered only if they have elevators and if there are four or more such townhouses.”⁷

26. How do the Act’s design and construction requirements apply if the builder of multistory townhouses in a building with four or more units offers an elevator as an option, and one or more of the buyers elects the elevator option?

If the developer of a building with four or more units that includes multistory townhouses offers internal (*i.e.*, unit-specific) elevators in the multistory townhouses as an option, and one or more of the buyers elects to have the elevator installed during construction, then those multistory townhouses with interior elevators are covered, and must comply with the Act’s design and construction requirements. In addition, if a multistory townhouse is designed and constructed for later installation of an internal elevator (for example, if it contains an elevator shaft or stacked closets so that the unit was designed for potential installation of an elevator after construction), the multistory townhouse is also covered and must comply with the design and construction requirements. In the case of stacked closets, the closets must have been designed in a manner that will accommodate later installation of an elevator, *e.g.*, inclusion of an elevator pit with a temporary flooring insert, and a raised ceiling to accommodate future elevator cab override. *See, e.g.*, Preamble to the Regulations, 54 Fed. Reg. at 3,244, 3,251; Preamble to the Proposed Guidelines, 55 Fed. Reg. at 24,377; Preamble to the Guidelines, 56 Fed. Reg. at 9,481; Questions and Answers, Q. 13, 59 Fed. Reg. at 33,365-66.

27. If a building with four or more units contains multistory townhouses with internal elevators or the option for a buyer to add an elevator, must the public and common use areas of the development also comply with the design and construction requirements of the Act?

Yes. Once a building is determined to have at least one covered dwelling unit, that is, either an elevator installed in at least one unit, or at least one unit designed for later installation of an elevator (*see* question 25, above), the design and construction requirements apply to the public and common use areas of the building and the development in which the building is located. *See* Questions and Answers, Q. 13, 59 Fed. Reg. at 33,365-66.

⁷*See* Preamble to the Regulations, 54 Fed. Reg. at 3,244, 3,251; Preamble to the Proposed Guidelines, 55 Fed. Reg. at 24,377; Preamble to the Guidelines, 56 Fed. Reg. at 9,481; Questions and Answers, Q. 13, 59 Fed. Reg. at 33,365-66. This position also is recognized in other documents determined by HUD to be safe harbors for compliance (*see* Question 37); *e.g.*, the Appendix to the Code Requirements for Housing Accessibility 2000, states that “a multistory unit in a non-elevator building is not subject to Chapter 4 unless it has an internal elevator. Section 406.7.2 would thus apply to those multistory units with an internal elevator.” Appendix § 406.7.2. Likewise, *see* the Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. at 15,740 which noted HUD’s agreement with the model code creators that “multistory units with internal elevators” are covered under the FHA. 65 Fed. Reg. at 15,759, 15,767, 15,776, and 15,786.

Note: If a builder is designing a development with units that come with a buyer's option to have the builder install an elevator, then the builder must design the elevator optional unit(s) and public and common use areas so that they are compliant with the Act's requirements. Otherwise, the builder must modify the elevator optional unit(s) and public and common use areas to comply with the Act's design and construction requirements once a buyer selects an elevator as an option.

Accessible Routes

28. What is an accessible route?

The Regulations define an accessible route as a continuous unobstructed path connecting accessible elements and spaces in a building or within a site that can be negotiated by a person with a severe disability using a wheelchair, and that is also safe for and usable by people with other disabilities. Interior accessible routes may include corridors, floors, ramps, elevators, and lifts. Exterior accessible routes may include parking access aisles, curb ramps, walks, ramps and lifts. A route that complies with the appropriate requirements of ANSI A117.1-1986, a comparable standard, or Section 5, Requirement 1 of the Guidelines is an accessible route. *See* 24 C.F.R. § 100.201. Exterior accessible routes must be pedestrian routes that are separate from the road or driveway. For example, it is not acceptable to provide only a road or driveway as an accessible route. However, there is a vehicular route exception to the requirement to provide an accessible pedestrian route that, if met, may apply. *See* Guidelines, Requirement 1(5), Requirement 2, Chart, Element 1, 56 Fed. Reg. at 9,504, 9,505; Design Manual at 1.9. *See also* question 33, below.

29. Does the Act permit covered multifamily dwellings to be designed and constructed in a manner that requires persons with disabilities to use an indirect or circuitous route to enter a building or unit or to use locks or call buttons that are not required of other persons?

No. Under the Fair Housing Act, persons with disabilities must be able to enter their dwellings through the same entrance that is used by other persons to enter their dwellings. *See* Preamble to the Proposed Regulations, 53 Fed. Reg. 44,992, 45,004 (Nov. 7, 1988) (“[h]andicapped persons should be able to enter a newly constructed building through an entrance used by persons who do not have handicaps.”). In addition, routes to the primary entrances of buildings and dwelling units are public and common use areas and must be readily accessible to and usable by people with disabilities.

Therefore, the accessible route cannot be hidden, remote, circuitous or require people with disabilities to travel long distances. Furthermore, the accessible route to the primary entrance must not place special conditions on persons with disabilities -- such as a special key, an attendant, or additional waiting periods that are not imposed on other persons, *i.e.*, including persons who use an inaccessible entrance. This does not preclude the use of special locks or security systems at entrances that are used by all persons to enter the building and/or the dwelling units, and which are used by all residents and members of

the public visiting the development; however, such locks and security systems must be accessible. *See* Design Manual at 1.35; *see also* 42 U.S.C. § 3604(f)(2).

30. Must an accessible route between public and common use areas and dwelling units be an interior route if the general circulation path is interior?

Yes. The Act permits accessible routes between public and common use areas and dwellings to be interior or exterior. However, if the general circulation path is provided via an interior route, then that path is a public and/or common use area that must be “readily accessible to and usable by” persons with disabilities. *See* Guidelines, Requirement 2, 56 Fed. Reg. at 9,504-05. Persons with disabilities cannot be required to go outside a building to access a public and common use area when persons without disabilities are not required to do the same. The Fair Housing Act prohibits discrimination 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 a dwelling, because of disability. *See* 42 U.S.C. § 3604(f)(2).

31. Does the Act require accessible routes between buildings that contain only covered multifamily dwelling units?

Walkways between separate buildings containing only covered dwelling units generally are not required to be accessible. However, if the walkways also serve as the accessible route to a public or common use area, the walkways must be accessible. For example, if a walkway connects separate buildings containing only covered dwelling units and is the only walkway from the buildings to the clubhouse, it must be accessible. *See* Guidelines, Requirement 2, Chart, Element 1(b), 56 Fed. Reg. at 9,505; Design Manual at 2.16.

32. Must there be accessible pedestrian routes from site arrival points to building entrances serving covered dwelling units?

Yes. Requirements 1 and 2 of the Guidelines require an accessible pedestrian route, within the boundary of the site, from vehicular and pedestrian arrival points to the entrances of covered buildings and dwelling units, except in very limited circumstances where a site is impractical due to steep terrain or unusual site characteristics. The Guidelines outline the tests that must be performed pre-construction during the site design process to determine site impracticality under Requirement 1. If the conditions of these tests are not met, then there must be an accessible entrance on an accessible route from all vehicular and pedestrian arrival points to the entrances of covered buildings and dwelling units. *See* Guidelines, Requirements 1 and 2, 56 Fed. Reg. at 9,503-05 and the discussions of site impracticality in the Design Manual at Part II, Chapter 1. *See also* HUD Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, 70 Fed. Reg. 9,738, 9,742 (Feb. 28, 2005).

33. May a builder use a vehicular route in lieu of an accessible pedestrian route to connect dwelling unit entrances with public and common use areas?

The Act requires an accessible pedestrian route connecting entrances to covered dwelling units with public and common use areas, including the public street or sidewalk, except in rare circumstances that are outside the control of the owner where extreme terrain or impractical site characteristics result in a finished grade exceeding 8.33%, or where physical barriers or legal restrictions that are outside the control of the owner prevent installation of an accessible pedestrian route. In these rare cases, the Guidelines allow access by means of a vehicular route leading from the accessible parking serving the covered dwelling unit to the accessible parking serving the public or common use facility. *See* Guidelines, Requirements 1 and 2, 56 Fed. Reg. 9,503-05. *See also* HUD Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, 70 Fed. Reg. at 9,744.

Example 1: An undisturbed site has slopes of 8.33% or less between planned accessible entrances to covered dwelling units and public use or common use areas and has no legal restrictions or other unique characteristics preventing the construction of accessible routes. For aesthetic reasons, the developer would like to create some hills or decorative berms on the site. Because there are no extreme site conditions (severe terrain or unusual site characteristics such as floodplains), and no legal barriers that prevent installation of an accessible pedestrian route between the covered dwelling units and any planned public use or common use facilities, the developer is obligated to provide accessible pedestrian routes.

Example 2: A developer plans to build several buildings with covered dwelling units clustered in a level area of a site. The site has some undisturbed slopes of 10% and greater. A swimming pool and tennis court will be added on the two opposing sides of the site. The builder plans grading that will result in a finished grade exceeding a slope of 8.33% along the route between the covered dwelling units and the swimming pool and tennis court. There are no physical barriers or legal restrictions (*e.g.*, pipe easement, wildlife habitat, or protected wetlands) outside the control of the owner or builder that prevent the builder from reducing the existing grade to provide an accessible pedestrian route between the covered dwelling units and the pool and tennis court. Therefore, the developer's building plan would not meet the design and construction requirements of the Act because it is within the owner's control to assure that the final grading falls below 8.33% and meets the slope and other requirements for an accessible pedestrian route. Accessible pedestrian routes from the covered dwelling units to the pool and tennis court must be provided.

34. What is the site impracticality exception to the accessible route requirement of the Fair Housing Act design and construction requirements?

The Regulations provide that all covered multifamily dwellings must be served by an accessible route "unless it is impractical to do so because of the terrain or unusual

characteristics of the site.” The Regulations place the burden of establishing site impracticality on the persons or entities that designed or constructed the housing. 24 C.F.R. § 100.205(a). *See also Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co.*, No. 01-CV-2069, Fair Housing-Fair Lending Reporter ¶ 16,779, 16,779.4 (W.D. Tenn. Apr. 26, 2004) (order granting partial summary judgment to the United States). The Guidelines set forth two distinct tests which may be used to establish site impracticality: the site analysis test and the individual building test. To claim impracticality, the test must be fully followed and performed at the design stage before construction starts. *See* Guidelines, Requirement 1, 56 Fed. Reg. at 9,503-04; Questions and Answers, Q. 11, 59 Fed. Reg. at 33,365.

Accessible Entrances

35. How many entrances to a covered multifamily dwelling must be accessible?

The Guidelines require at least one accessible entrance to each covered dwelling unit and to buildings containing covered dwelling units, unless it is impractical to do so as determined by applying one of the site impracticality tests provided in the Guidelines. Additional entrances to a building or to a dwelling also must be accessible if they are public and common use areas, *i.e.*, if they are designed for and used by the public or residents. *See* 24 C.F.R. § 100.201; Design Manual at 3.10 (“[t]he exterior of the primary entry door of covered dwelling units is part of public and common use spaces, therefore, it must be on an accessible route and be accessible . . .”). It is not acceptable to design and construct a covered multifamily building or dwelling unit in such a manner that persons with disabilities must use a different entrance than the entrance used by persons without disabilities. *See* Preamble to the Proposed Regulations, 53 Fed. Reg. at 45,004 (“[h]andicapped persons should be able to enter a newly constructed building through an entrance used by persons who do not have handicaps.”). *See also* Design Manual at 1.28 (illustration). Buildings containing covered dwelling units with more than one ground floor must have an accessible entrance on each ground floor connecting to each covered dwelling unit. *See* 24 C.F.R. § 100.205(a); Guidelines, Requirement 1, 56 Fed. Reg. at 9,503-04.

Example 1: If a secondary entrance at the back of a building containing covered units leads to the clubhouse or parking, both that entrance and the primary entrance at the front of the building must be accessible. *See* Guidelines, Requirement 2, 56 Fed. Reg. at 9,504-05.

Example 2: If a non-elevator building has more than one ground floor (*i.e.*, a building built into a hill with entrances to the first and second stories at grade on opposite sides), then it must have at least one accessible entrance to each floor that connects to the covered dwelling units. *See* 24 C.F.R. § 200.201 (definition of “ground floor”); Guidelines, Requirement 1(1)(a), 56 Fed. Reg. at 9,503.

Example 3: If a covered multifamily building has two entrances -- one entrance facing the public street that is inaccessible because it has steps, and a second

entrance which is accessible, but it is in the back of the building, the building does not comply with the Act. The entrance facing the street must also be made accessible because it is part of the route to the street and is a public and common use area. This is true even if the residential parking is located in the back of the building across from the back entrance and both entrances can be accessed from inside the building via interior hallways. See question 36, below.

36. Which entrance to a covered dwelling unit or building containing covered dwelling units must be accessible?

The primary entry to dwelling units that have individual exterior entrances or the primary entry to a building containing covered dwelling units must be accessible. This entrance is part of the public and common use areas because it is used by residents, guests and members of the public for the purpose of entering the dwelling or building. It must therefore be readily accessible to and usable by persons with disabilities. Service doors, back doors, and patio doors may serve as additional accessible entrances, but may not serve as the only accessible entrance to buildings or units. See Guidelines, 56 Fed. Reg. at 9,500. See also *United States v. Edward Rose & Sons*, 384 F.3d 258 (6th Cir. 2004), *aff'g*, 246 F. Supp. 2d 744 (E.D. Mich. 2003).

Safe Harbors for Compliance with the Act

37. Are there any “safe harbors” for compliance with the Fair Housing Act?

Yes. In the context of the Act, a safe harbor is an objective and recognized standard, guideline, or code that, if followed without deviation, ensures compliance with the Act’s design and construction requirements. The Act references the American National Standard Institute (“ANSI”) A117.1 standard as a means of complying with the technical provisions in the Act. In determining whether a standard, guideline or code qualifies as a safe harbor, HUD compares it with the Act, HUD’s regulations implementing the Act, the ANSI A117.1-1986 standard (the edition that was in place at the time the Act was passed) and the Guidelines to determine if, taken as a whole, it provides at least the same level of accessibility. HUD currently recognizes ten safe harbors for compliance with the Fair Housing Act’s design and construction requirements, listed below. If a state or locality has adopted one of these safe harbor documents without amendment or deviation, then covered residential buildings that are built to those specifications will be designed and constructed in accordance with the Act as long as the building code official does not waive or incorrectly interpret or apply one or more of those requirements. See Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. at 15,756; see also Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, 70 Fed. Reg. at 9,740; Report of HUD Review of the Fair Housing Accessibility Requirements in the 2006 International Building Code, 72 Fed. Reg. 39,432, 39,438 (July 18, 2007), and Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. 63,610, 63,614 (Oct. 24, 2008).

Those involved in the design and construction of covered multifamily dwellings who claim the protection of a safe harbor must identify which one of the following HUD-recognized safe harbors they relied upon.

The ten HUD-recognized safe harbors for compliance with the Act's design and construction requirements are:

1. HUD's March 6, 1991 Fair Housing Accessibility Guidelines and the June 28, 1994 Supplemental Notice to Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines;
2. ANSI A117.1-1986 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations and the Guidelines;
3. CABO/ANSI A117.1-1992 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;
4. ICC/ANSI A117.1-1998 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines;
5. HUD's Fair Housing Act Design Manual published in 1996 and revised in 1998;
6. Code Requirements for Housing Accessibility 2000 (CRHA), approved and published by the International Code Council (ICC), October 2000;
7. International Building Code (IBC) 2000, as amended by the IBC 2001 Supplement to the International Codes;
8. 2003 International Building Code (IBC), with one condition. Effective February 28, 2005, HUD determined that the IBC 2003 is a safe harbor, conditioned upon the International Code Council publishing and distributing the following statement to jurisdictions and past and future purchasers of the 2003 IBC;

ICC interprets Section 1104.1, and specifically, the exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7;

9. ICC/ANSI A117.1-2003 - Accessible and Usable Buildings and Facilities, used in conjunction with the Act, HUD's Regulations, and the Guidelines; and

10. 2006 International Building Code, published by ICC, January 2006, with the 2007 erratum (to correct the text missing from Section 1107.7.5), and interpreted in accordance with relevant 2006 IBC Commentary.

HUD's purpose in recognizing a number of safe harbors for compliance with the Fair Housing Act's design and construction requirements is to provide a range of options that, if followed in their entirety without modification or waiver during design and construction, will result in residential buildings that comply with the design and construction requirements of the Fair Housing Act. In the future, HUD may decide to recognize additional safe harbors.

38. May an architect or builder select aspects from among the HUD recognized safe harbors when designing and constructing a single project and retain "safe harbor" status?

No. The ten documents listed above are safe harbors only when used in their entirety, that is, once a specific safe harbor document has been selected, the building in question must comply with all of the provisions in that document that address the Fair Housing Act design and construction requirements to ensure the full benefit of the safe harbor. The benefit of safe harbor status may be lost if, for example, a designer or builder chooses to select provisions from more than one of the above safe harbor documents, from a variety of sources, or if waivers of provisions are requested and received. If it is shown that the designers and builders departed from the provisions of a safe harbor document, they bear the burden of demonstrating that the dwelling units nonetheless comply with the Act's design and construction requirements.

39. If a property is built to some recognized, comparable, and objective standard other than one of the safe harbors, can it still comply with the Act's design and construction requirements?

Yes. The purpose of the Fair Housing Act Guidelines is "to describe the minimum standards of compliance with the specific accessibility requirements of the Act." Preamble to the Guidelines, 56 Fed. Reg. at 9,476. The Introduction to the Guidelines states, "builders and developers may choose to depart from these guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act." Guidelines, 56 Fed. Reg. at 9,499. However, the standard chosen must meet or exceed all of the design and construction requirements specified in the Act and HUD's Regulations, and the builders and developers bear the burden of showing that their standard provides an equivalent or a higher degree of accessibility than every provision of one of the recognized safe harbors. *See* Design Manual at 13; Preamble to the Guidelines, 56 Fed. Reg. at 9,478-79. While there are some differences among the ten designated safe harbors, there is broad consensus about what is required for accessibility based on the ANSI standards and the safe harbors. These standards result from a process that includes input from a variety of stakeholders, including builders, designers, managers, and disability-rights advocates. Builders and designers should therefore exercise caution before following a standard that contains specifications for an element

that do not meet the parallel requirements of the other safe harbors. If the alternative standard is not a generally accepted accessibility standard, it may well not provide the minimum accessibility required by the Act.

40. What constitutes evidence of noncompliance with the Fair Housing Act design and construction requirements?

A case of discrimination may be established by showing that the housing does not meet HUD's Guidelines. This evidence may be rebutted by proof of compliance with a recognized, comparable, objective measure or standard of accessibility. The Ninth Circuit has affirmed this approach in *Nelson v. HUD*, Nos. 07-72803 and 07-73230, 2009 WL 784260, at *2 (9th Cir. Mar. 26, 2009).

41. If I follow my state or local building code, am I safe from liability if a building does not comply with the Fair Housing Act's design and construction requirements?

No. The Fair Housing Act's design and construction requirements are separate from and independent of state and local code requirements. If a state or local code requires, or is interpreted or applied in a manner that requires, less accessibility than the Act's design and construction requirements, the Act's requirements must still be followed. However, state and local governments can assist those involved in building housing subject to the Act's design and construction requirements by incorporating one of the HUD-recognized safe harbors listed above into their building codes without deviation, amendment, or waiver. *See* 42 U.S.C. § 3604(f)(6)(B). For example, some jurisdictions have already adopted the revised editions of the IBC that are recognized by HUD as safe harbors. *See* question 39, above.

42. Does the Fair Housing Act require fully accessible units?

No. The Fair Housing Act does not require fully accessible units. For example, the Act's design and construction requirements do not require the installation of a roll-in shower in a dwelling unit in new construction. The Act's design and construction requirements are modest and result in units that look similar to traditional units and are easily adapted by people with disabilities who require features of accessibility not required by the Fair Housing Act.

43. Can a builder meet the Fair Housing Act's design and construction requirements by building a specific number or percentage of fully accessible dwelling units?

No. Congress specifically rejected the approach of requiring only a specific number or percentage of units to be fully accessible. Instead, Congress decided that all covered multifamily dwelling units must comply with the Act's design and construction requirements. *See* question 1, above, and 42 U.S.C. § 3604(f)(3)(C). Other laws may require developers to construct a specific number or percentage of units with a higher

degree of accessibility than the Act's modest requirements. *See* questions 46, 47 and 48, below. *See* H.R. Rep. 100-711, at 49 (1988).

Reviews for Compliance

44. Does HUD or DOJ review state and local building codes to determine whether they comply with the Act's accessibility requirements?

No. Although HUD has reviewed several model building codes to determine whether they comply with the Act's design and construction requirements (*see* question 37, above), neither HUD nor DOJ reviews individual state and local building codes for consistency with the Act.

45. Does HUD or DOJ review site or building plans for compliance with the Act's design and construction requirements?

No. Neither HUD nor DOJ is required by the Act or has the capacity to review or approve builders' plans or issue certifications of compliance with the Act's design and construction requirements. *See* 42 U.S.C. § 3604(f)(5)(D). The burden of compliance rests with those who design or construct covered multifamily dwellings. *See* Design Manual at 2. To assist those involved in design or construction to comply with the Act's requirements, HUD provides rulemaking, training and technical assistance on the Act, the Regulations, and the Guidelines. HUD has also recognized ten safe harbors for compliance with the Act's design and construction requirements. *See* question 37, above. HUD also provides technical guidance through its Fair Housing Accessibility FIRST program, an initiative designed to promote compliance with the Fair Housing Act design and construction requirements. The program offers comprehensive and detailed instruction programs, useful online web resources, and a toll-free information line for technical guidance and support. The Fair Housing Accessibility FIRST website is found at <http://www.fairhousingfirst.org>. DOJ's fair housing website may be accessed at http://www.justice.gov/crt/about/hce/housing_coverage.php.

Buildings Covered by the Act and Other Accessibility Laws or Codes

46. When would both Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act apply to the same property, and which standard would apply in this situation?

If housing was built for first occupancy after March 13, 1991, and federal financial assistance is involved, both Section 504 and the Fair Housing Act apply. The accessibility standards under both laws must be used. *See* Preamble to the Guidelines, 56 Fed. Reg. at 9,477-79.

HUD's Section 504 requirements are found in 24 C.F.R. Part 8 and these regulations reference the Uniform Federal Accessibility Standards (UFAS). Further information about the applicability of Section 504 can be found at

<http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm>. The Uniform Federal Accessibility Standards may be found at <http://www.access-board.gov/ufas/ufas-html/ufas.htm>.

47. What if the Americans with Disabilities Act (ADA) and the Fair Housing Act requirements both apply to the same property?

In those cases where a development is subject to the accessibility requirements of more than one federal law, the accessibility requirements of each law must be met.

There are certain residential properties, or portions of other residential properties, that are covered by both the Fair Housing Act and the ADA. These properties must be designed and built in accordance with the accessibility requirements of both the Fair Housing Act and the ADA. To the extent that the requirements of different federal laws apply to the same feature, the requirements of the law imposing greater accessibility requirements must be met, in terms of both scoping and technical requirements.

In the preamble to its regulation implementing Title III of the ADA, the Department of Justice discussed the relationship between the requirements of the Fair Housing Act and the ADA. The preamble noted that many facilities are mixed-use facilities. For example, a hotel may allow both residential and short term stays. In that case, both the ADA and the Fair Housing Act will apply to the facility. The preamble to the Title III regulation also stated that residential hotels, commonly known as “single room occupancies,” may be subject to Fair Housing Act requirements when operated or used as a residence but they are also considered “places of lodging” subject to the requirements of the ADA when guests are free to use them on a short-term basis. A similar analysis applies with respect to homeless shelters, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time. It is important for those involved in the design and construction of such facilities to comply with all applicable accessibility requirements. *See* 56 Fed. Reg. 35,544, 35,546-47 (July 26, 1991).

Covered multifamily dwellings that are funded or provided through programs operated by or on behalf of state and local entities (e.g., public housing, homeless shelters) are also subject to the requirements of Title II of the ADA.

Under the Fair Housing Act, the common areas of covered multifamily dwellings that qualify as places of public accommodation under the ADA must be designed and constructed in accordance with the ADA Standards for Accessible Design, and the Act’s design and construction requirements. For example, a rental office in a multifamily residential development, a recreational area open to the public, or a convenience store located in that development would be covered by the Act and under Title III of the ADA. *See* 28 C.F.R. § 36.104. Common use areas for use only by residents and their guests are covered by the Act’s design and construction requirements, but would not be covered by the ADA.

48. What if a state or local building code requires greater accessibility than the Fair Housing Act?

The Fair Housing Act does not reduce the requirements of state or local codes that require greater accessibility than the Act. Thus, the state or local building code's greater accessibility must be provided. However, if a state or local code requires, or is interpreted or applied in a manner that requires, less accessibility than the Act, the Act's requirements must nonetheless be followed. *See* Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. at 15,753-57. *See also* Preamble to the Final Rule, Design and Construction Requirements, Compliance with ANSI A117.1 Standards, 73 Fed. Reg. at 63,610.

Accessible Public and Common Use Areas

49. Are rental offices and other public and common use areas required to be accessible under the Fair Housing Act?

Rental offices and other public and common use areas must be accessible if they serve multifamily dwelling units that are subject to the design and construction requirements of the Act. If there are no covered dwelling units on the site, then the public and common use areas of the site are not required to be accessible under the Fair Housing Act. *See* Questions and Answers, Q. 13, 59 Fed. Reg. at 33,365-66.

It is important to note that Title III of the Americans with Disabilities Act contains accessibility requirements that apply to rental and sales offices and other places of public accommodation that may be associated with housing, even if the housing is not covered by the Fair Housing Act's design and construction requirements. Further, Title II of the ADA applies accessibility requirements to housing and related facilities owned or operated by state or local government entities. In addition, Section 504 of the Rehabilitation Act and the Architectural Barriers Act may also apply to public and common use areas of properties that are designed, constructed, or operated by entities receiving federal financial assistance. The question of whether the accessibility requirements of any of these three federal laws apply to the public or common use areas of a property needs to be considered in addition to whether the Fair Housing Act's design and construction requirements apply.

50. When covered parking is provided as an amenity to covered multifamily housing, what are the accessibility requirements under the Fair Housing Act?

When covered parking is provided, at least 2% of the covered parking serving the covered dwelling units must comply with the accessibility requirements for covered parking and be on an accessible pedestrian route to the covered dwelling units. *See* Guidelines, Requirement 2, Chart, Element 4, 56 Fed. Reg. at 9,505; Design Manual at 2.23 to 2.24.

51. When a swimming pool is provided on a site with covered multifamily dwellings, what are the design and construction requirements for the pool?

When provided, a swimming pool must be located on an accessible pedestrian route that extends to the pool edge, but the Guidelines do not require that the pool be equipped with special features to offer greater access into the pool than is provided for persons without disabilities. In addition, a door or gate accessing the pool must meet the Act's design and construction requirements and the deck around the pool must be on an accessible route. If toilet rooms, showers, lockers or other amenities are provided at the pool, these also must be accessible and meet the requirements for accessible public and common use areas. *See* Guidelines, Requirement 2, 56 Fed. Reg. at 9,504-05. It is important to note that the swimming pools and related facilities may be subject to the ADA if persons other than residents and their guests are allowed to use them.

52. Are garbage dumpsters required to comply with the Act's design and construction requirements?

Garbage dumpsters are public and common use spaces and must be located on accessible pedestrian routes. If an enclosure with a door is built around the dumpster, both the door to the enclosure and the route through this door to the dumpster must meet the provisions of ANSI A117.1-1986 or another safe harbor (when used in accordance with HUD's policy statement, *see* questions 37-38, above). If parking is provided at the dumpster, accessible parking must also be provided. *See* Guidelines, Requirement 2, 56 Fed. Reg. at 9,504-05; Design Manual at 2.16 (figure). However, there are no technical specifications for the actual garbage dumpster.

53. When emergency warning systems are installed in the public and common use areas of covered multifamily buildings (for example, in corridors, or breezeways), do the Act's design and construction requirements require such warning systems to include visual alarms?

Yes. The Act requires public and common uses areas to be readily accessible to and usable by persons with disabilities. This includes accessibility of building emergency warning systems, when provided. Alarms placed in these areas must have audible and visual features and the Guidelines reference the provisions of ANSI A117.1-1986 Section 4.26 for such alarms. *See* Guidelines, Requirement 2, Chart, 56 Fed. Reg. at 9,505.

Example: A single user restroom in a rental office must have a visual alarm if the rental office is served by an audible alarm.

54. If there is an emergency warning system installed in the public and common use areas of a covered multifamily building, must there be visual alarms in the interior of dwelling units?

No. The Fair Housing Act's design and construction requirements do not require installation of visual alarms on the interior of dwelling units; however, if there is a

building alarm system provided in a public and common use area, then it must be accessible as specified in ANSI A117.1-1986. In addition, the system must have the capability of supporting an audible and visual alarm system in individual units. Note: The International Building Code (IBC) requires that certain multifamily residential buildings that must have a fire alarm also have the capability of supporting visible alarm notification appliances which meet the requirements of ICC/ANSI A117.1. *See, e.g.,* 2006 IBC §§ 907.2.9 and 907.9.1.4.

Enforcement

55. What remedies are typically sought in Fair Housing Act design and construction cases?

Lawsuits brought pursuant to the Fair Housing Act may seek injunctive relief including retrofitting of the property so that the covered dwelling units and public and common use areas meet the Act's requirements, training, education, reporting, future compliance with the Act's requirement, surveying and inspecting retrofits, monetary damages for aggrieved persons, and, in cases brought by the federal government, civil penalties.

56. Who can be sued for violations of the accessibility requirements of the Fair Housing Act?

Any person or entity involved in the noncompliant design and construction of buildings or facilities subject to the Act's design and construction requirements may be held liable for violations of the Act. This includes a person or entity involved in only the design, only the construction, or both the design and construction of covered multifamily housing.

Note that a person or entity that has bought a building or property after it was designed and constructed may be sued when that person or entity is necessary to provide authority to remedy violations or allow access for other necessary reasons such as the identification of any aggrieved persons. This may include subsequent owners, homeowners associations, property management companies or later individual owners or occupants of inaccessible units when such persons must be involved to provide authority to remedy violations.

57. If someone is successfully sued for violating the Act's design and construction requirements, will a court order the building to be torn down and rebuilt?

Courts make rulings in cases based on the facts of each specific situation. Thus, it is difficult to predict what a court might order in a case without knowing the facts. However, extensive modifications including complete retrofits of buildings, units, and public and/or common use areas have been routinely sought and obtained by federal law enforcement agencies and ordered by courts.

58. What recourse is available to a person with a disability or a person associated with a person with a disability who believes that she cannot rent, purchase, or view housing at a particular multifamily property because it is in violation of the design and construction requirements of the Act?

When a person with a disability or a person associated with a person with a disability believes that she has been harmed by a failure to design and construct a unit or property in accordance with the Act's requirements (or any other discriminatory housing practice), she may file a complaint with HUD within one year after the alleged discriminatory practice has occurred or terminated or may file a lawsuit in federal district court within two years after the alleged discriminatory practice has occurred or terminated. *See* 42 U.S.C. §§ 3610 and 3613. However, persons aggrieved by discriminatory housing practices are encouraged to file a complaint as soon as possible after the discriminatory housing practice occurs or terminates. If a complaint is filed with HUD, HUD will investigate the complaint at no cost to the complainant.

59. At what point do the time frames for a person filing a complaint begin to run?

A person should file a complaint as soon as possible after becoming aware that he or she has been or may be harmed because a property may not be constructed in compliance with the accessibility requirements of the Fair Housing Act. Under the Fair Housing Act, “[a]n aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint” with HUD (*see* 42 U.S.C. § 3610(a)) and “may commence a civil action [in Court]. . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice.” *See* 42 U.S.C. § 3613(a)(1)(A). While some courts have had differing views, HUD and DOJ believe that the Act is violated, and the one- or two-year statute of limitations begins to run, when an “aggrieved person” is injured as a result of the failure to design and construct housing to be accessible as required by the Act. *See* 42 U.S.C. § 3602(i). A failure to design and construct a multifamily property in accordance with the Act 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.

In addition, HUD has interpreted the Act to hold that “with respect to the design and construction requirements, complaints can be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice -- failure to design and construct the building in compliance -- does not terminate” until the building is brought into compliance with the Act and the continuing violation terminates. *See* Design Manual at 22. Although not all courts have agreed with these interpretations, HUD uses them in determining whether to accept a complaint.

Readers should be aware that as of the date of this joint statement, at least one circuit court has ruled that the Act's statute of limitations for individual complaints begins to run

upon the completion of the covered dwelling, regardless of when the dwelling is actually sold, rented or occupied by a person with a disability.⁸

The time frames for the United States to bring an action under the Fair Housing Act are not addressed in this question and answer.

60. If a designer or builder has built more than one multifamily property in violation of the Act's design and construction requirements, may he be held liable for violations at all of those properties?

Where a builder, owner, architect or developer of covered multifamily does not comply with the design and construction requirements over a period of time at multiple properties, violations at all of the noncompliant properties may be part of a continuing violation or pattern or practice of illegal discrimination. HUD and DOJ may investigate and take legal action respecting all such properties. An entity involved in the design and construction of an earlier noncompliant property and involved in the design and construction of a later noncompliant property may therefore be subjected to a complaint for participating in a continuing violation or engaging in a pattern or practice of violating the Act.

61. How is a complaint alleging a failure to design and construct multifamily housing filed?

There are several ways that a person may file a complaint with HUD:

- By placing a toll-free call to 1-800-669-9777 or TTY 1-800-927-9275;
- By completing the "on-line" complaint form available on the HUD internet site: <http://www.hud.gov/offices/fheo/index.cfm>; or
- By mailing a completed complaint form or letter to:

Office of Fair Housing and Equal Opportunity
Department of Housing & Urban Development
451 7th Street, S.W., Room 5204
Washington, DC 20410-2000

Upon request, HUD will provide printed materials in alternate formats (large print, audio tapes, or Braille) and provide complainants with assistance in reading and completing forms.

⁸See *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc). Complaints by persons in states and territories located in the Ninth Circuit -- Washington, Idaho, Montana, Oregon, California, Nevada, Arizona, Alaska, Northern Mariana Islands, Hawaii, and Guam -- may be subject to this ruling if other dwellings designed and/or constructed by the same respondent or defendant were not completed within the limitations period.

The Civil Rights Division of the Department of Justice brings lawsuits in federal courts across the country to end discriminatory practices and to seek monetary and other relief for individuals whose rights under the Fair Housing Act have been violated. The Civil Rights Division initiates lawsuits when it has reason to believe that a person or entity is involved in a “pattern or practice” of discrimination or when there has been a denial of rights to a group of persons that raises an issue of general public importance. The Division also participates as *amicus curiae* in federal court cases that raise legal questions involving the application and/or interpretation of the Act. To alert DOJ to matters involving a pattern or practice of discrimination, matters involving the denial of rights to groups of persons, or lawsuits raising issues that may be appropriate for *amicus* participation, contact:

U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section - G St.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

To report an incident of housing discrimination to the U.S. Department of Justice, call the Fair Housing Tip Line: 1-800-896-7743, or e-mail: fairhousing@usdoj.gov.

For more information on the types of housing discrimination cases handled by DOJ, please refer to the DOJ’s Housing and Civil Enforcement Section’s website at http://www.justice.gov/crt/about/hce/housing_coverage.php.

A HUD or DOJ determination not to proceed with a Fair Housing Act matter does not foreclose private plaintiffs from pursuing a private lawsuit. However, litigation can be an expensive, time-consuming, and uncertain process for all parties. HUD and DOJ encourage parties to Fair Housing Act disputes to explore all reasonable alternatives to litigation, including alternative dispute resolution procedures, such as mediation. HUD attempts to conciliate all Fair Housing Act complaints. In addition, it is DOJ’s policy to offer prospective defendants the opportunity to engage in pre-suit settlement negotiations, except in unusual circumstances.

Reasonable Accommodations and Reasonable Modifications Under the Act

62. Is any information available concerning reasonable accommodations and reasonable modifications under the Fair Housing Act?

Yes. HUD and DOJ have published joint statements concerning reasonable accommodations and reasonable modifications for persons with disabilities under the Fair Housing Act. See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act (May 17, 2004) and Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Modifications under the Fair

Housing Act (Mar. 5, 2008), at <http://www.hud.gov/offices/fheo/disabilities/index.cfm> or http://www.justice.gov/crt/about/hce/about_guidance.php.

Location of Documents

63. Where can one find the documents referred to in this Joint Statement?

A copy of the Preamble to the Regulations is found at 54 Fed. Reg. 3,243 (Jan. 23, 1989). The Regulations are found at 24 C.F.R. Part 100. The Preamble to the Guidelines can be found at 56 Fed. Reg. 9,472 (Mar. 6, 1991), and both the Preamble to the Guidelines and the Guidelines are reprinted in the Fair Housing Act Design Manual in Appendix B. The Questions and Answers can be found at 59 Fed. Reg. 33,362 (June 28, 1994) and is reprinted at Appendix C of the Fair Housing Act Design Manual. The Fair Housing Act Design Manual can be obtained from <http://www.huduser.org/publications/destech/fairhousing.html>. *See also* HUD's Office of Fair Housing and Equal Opportunity website at <http://www.hud.gov/offices/fheo/disabilities/index.cfm>.