

HOPA, FAMILIAL STATUS, AND THE FHA

IFHC CELEBRATING 25 YEARS!



WHO ARE WE?

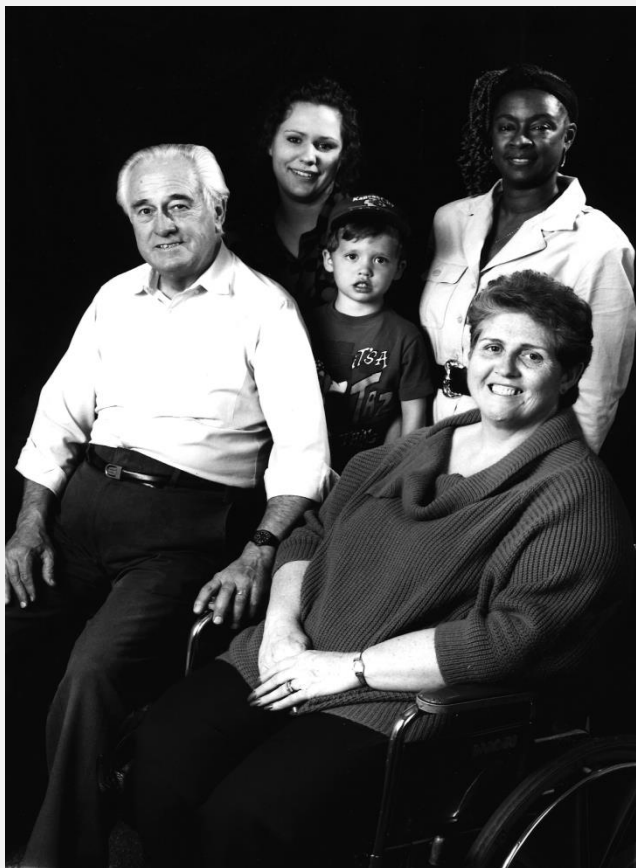
IFHC is a nonprofit organization whose mission is to ensure open and inclusive housing for all people. The IFHC's purpose is to advance equal access to housing for all persons without regard to race, color, sex, religion, national origin, familial status, gender identity, sexual orientation, source of income, or disability. The

IFHC attempts to eradicate discrimination through education of the fair housing laws, housing information and referrals, housing counseling and enforcement including filing complaints under the Fair Housing Act.



Housing Justice For All

WHAT IS THE FAIR HOUSING ACT?



The Fair Housing Act, Title VIII of the Civil Rights Acts, prohibits discrimination in housing. 42 U.S.C. 3601

1968 – Fair Housing Act is initially passed including Race, Color, Religion and National Origin

1974 – Sex is added as a protected class

1988 – Disability and Familial Status are added as protected classes

ELEMENTS OF A FAIR HOUSING CASE

When a complaint is filed, one must show:

- (1) that a member of a protected class was discriminated against
- (2) (a) the dwelling is covered (4 or more units/property/in business of housing) by (b) a person/entity in the business of housing 42 U.S.C. 3603(c)
- (3) within the time limitations (Statute of Limitations) 42 U.S.C. 3610, 3613
- (4) a discriminatory act occurred such as:
 - During application or screening
 - Denial of reasonable accommodation
 - Different policies, charges, treatment

WHAT DOES THE FAIR HOUSING ACT PROHIBIT?

- **Discriminatory housing practices based on seven protected classes.**
 - Making housing unavailable; 42 U.S.C. sec. 3604(a); examples at 24 CFR sec. 100.60
 - Discriminatory terms and conditions; 42 U.S.C. sec. 3604(b); examples at 24 CFR sec. 100.65
 - Discriminatory statements; 42 U.S.C. sec. 3604(c); examples at 24 CFR sec. 100.75
 - Steering; 42 U.S.C. sec. 3604(d); examples at 24 CFR sec. 100.80
 - Coercion, Interference, Threats; 42 U.S.C. sec. 3617
- **Exceptions exist**—religious, fraternal, Mrs. Murphy, etc.
 - 42 U.S.C. secs. 3603(b), 3607
 - And HOPA 42 U.S.C. secs. 3607 (b)(3)

THE PROTECTED CLASSES (42USC 3604):



- Race
- Color
- Sex
 - Includes sexual orientation/gender identity

<http://portal.hud.gov/hudportal/documents/huddoc?id=LGBTPR.PDF>

- Religion
- National Origin
- Disability
- **Familial Status** (presence of children under 18 yrs. old)

HOUSING COVERED UNDER THE FAIR HOUSING ACT

INCLUDES BUT IS NOT LIMITED TO:

- Condominiums
- Duplexes
- Multi-unit dwellings (apartments) with 4 or more units
- Manufactured homes
- Group homes for the recovery of drug addicts and alcoholics
- Seasonal bungalows
- Private homes
- Vacant land
- Homeless shelters
- Shelters for victims of domestic violence
- Hospice
- Nursing Home
- Assisted Living

FAIR HOUSING ACT APPLIES TO MANY DIFFERENT HOUSING TRANSACTIONS:

- Advertising media
- Residential landlords
- Rental agents
- Housing Agents/Managers
- Real Estate Brokers and Salespersons
- Homeowners
- Homebuilders
- Refugee Agencies
- Banks, Savings and Loan Associations, Mortgage Lenders or other financial institutions
- Developers and contractors
- Landowners
- Condominium developers or owners
- Home Owner and Condo Owner Associations

A VICTIM OF DISCRIMINATION CAN FILE A COMPLAINT WITH HUD

1. Complaints must be filed through the HUD administration process within one (1) year of the date of discrimination. 42 U.S.C. 3610
2. If HUD finds there is reasonable cause (there was discrimination), then a charge will be issued and may:
 - Go to trial before an administrative law judge
 - Go to court where the complaint will be represented by the Justice Department

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/online-complaint



OR FILE IN COURT

- Private attorneys may file a suit within two (2) years of the alleged violation 42 U.S.C. 3613
- Can be filed at the same time as a complaint filed with HUD
- Can file a suit even if HUD did not take action on the complaint
- May include more monetary damages

FAMILIAL STATUS

Refers to the presence of children under the age of 18

Broadly defined 42 U.S.C. 3604

Rules regarding children

Safety yes, but don't deny, segregate, be overly restrictive, prohibit children's play structures, fences, or tell people where to sleep

Two (2) per bedroom (plus one), don't count children 2 and under—
better yet, don't count children under 5

Read the **Keating Memo** with caution

https://www.hud.gov/sites/documents/DOC_7780.PDF

FAMILIAL STATUS: HOPA--THE EXCEPTION

HOPA-Housing for Older Persons Act

- Exception—55+ (and 62+ federally subsidized housing)
https://www.hud.gov/sites/documents/DOC_7769.PDF
- Must start out as HOPA housing
- Cannot evict families to become HOPA housing or use rules, housing practices, etc. to become senior housing

FAMILIAL STATUS AND HOPA

- The prohibition against discrimination based on familial status became effective March 12, 1989. The Act contained a provision exempting "senior" housing from the prohibition against familial status discrimination.
- On December 28, 1995, President Clinton signed the Housing for Older Persons Act (HOPA) which amended the housing for older persons exemption against familial status discrimination.
- The HOPA modified the statutory definition of housing for older persons as housing intended and operated for occupancy by at least one person 55 years of age or older per unit.

HOUSING FOR OLDER PERSONS ACT

- HOPA **eliminates** the requirement that housing for older persons have **significant services and facilities** specifically designed for its elderly residents.
- HOPA requires that facilities or communities claiming the exemption establish **age verification procedures**.
- HOPA establishes a **good faith reliance defense** or exemption against monetary damages for persons who illegally act in good faith to exclude children based on a legitimate belief that the housing facility or community was entitled to the exemption.

WHAT IS A HOUSING COMMUNITY OR FACILITY UNDER HOPA

- A housing community or facility is any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions.
- A portion of a single building may not be considered a housing facility or community.
- Examples include: a condominium association; a cooperative; a property governed by homeowners or resident association; a municipally zoned area; a leased property under common private ownership; a manufactured housing community, a mobile home park.
- An owner of single family houses that are dispersed throughout a geographical area, and who is not otherwise exempt under the Fair Housing Act, may **NOT** qualify as a "housing community or facility" and claim the exemption under HOPA.

HOW DOES A 55+ COMMUNITY/FACILITY QUALIFY FOR THE EXEMPTION?

- In order to qualify for the exemption, the housing community/facility must satisfy each of the following requirements:
 - a) at least 80 percent of the occupied units must be occupied by at least one person 55 years of age or older per unit;
 - b) the owner or management of the housing facility/community must publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older; and
 - c) the facility/community must comply with rules issued by the Secretary of HUD for verification of occupancy through reliable surveys and affidavits.

EXAMPLES OF POLICIES AND PROCEDURES THAT WOULD DEMONSTRATE AN INTENT TO PROVIDE HOUSING FOR PERSONS 55 YEARS+

Examples include:

- a) the written rules, regulations, lease provisions, deed or other restrictions,
- b) the actual practices of the owner/management of the housing facility/community used in the enforcement of the rules;
- c) the kind of advertising used to attract prospective residents to the housing facility/community as well as the manner in which the facility/community is described to prospective residents; and
- d) the housing community's/facility's age verification procedures, and its ability to produce, in response to a familial status complaint, verification of required occupancy.

INTENT TO BE HOPA HOUSING

- Use of the word "adult" or "adult community" in an advertisement, sign or other informational material does not demonstrate an intent to be housing for older persons as defined by the final rule, but it does not destroy the intent requirement of HOPA either as long as the housing provider can show intent in other ways.
- The term "adult" may be occasionally used to describe the housing as long as the community and or facility intends to operate as housing for older persons, meets the 80% requirement, and has in place age verification procedures.
- The Department of Housing and Urban Development (HUD) will look at the totality of the circumstances in the investigation of a complaint alleging that the facility or community does not qualify as housing for older persons.

80/20 RULE

- HOPA requires that at least 80 percent of the occupied units must be occupied by at least one person 55 or older.
- The remaining 20 percent of the units may be occupied by persons under 55, and the community/facility may still qualify for the exemption.

MEETING THE 80% REQUIREMENT OF HOPA

The owner/manager should obtain the total number of units in the housing community or facility.

From the total, the following units should be EXCLUDED from the calculation of the 80% requirement:

- a) the number of units that have been continuously occupied by the same household since September 13, 1988, and the household did not contain and does not currently contain at least one person over the age of 55;
- b) the number of unoccupied units;
- c) the number of units occupied by employees of the housing facility or community who are under 55 years of age, and who provide substantial management and maintenance services to the housing facility or community
- d) the number of units occupied solely by persons who are necessary or essential to provide medical and/or health and nursing care services as a reasonable accommodation to residents.

The owner/management then should calculate the percentage of the remaining number of units that are occupied by at least one person age 55 or over as of the date of the survey or the alleged date of violation of the Act.

RELIABLE AGE VERIFICATION DOCUMENTATION

The following documents are considered to be reliable for age verification:

Birth certificate, drivers license, passport, immigration card, military identification, or any other state, local, national or international documentation, provided it contains current information about the age or birth of the possessor.

A self certification in a lease, application affidavit, or other document signed by an adult member of the household asserting that at least one occupant in the unit is 55 years of age or older will satisfy this requirement. as well.

WHAT IF THE OCCUPANTS IN THE HOUSEHOLD REFUSE TO COOPERATE IN PROVIDING DOCUMENTATION REGARDING THEIR AGE?

The housing/community facility may, if it has sufficient evidence, consider the household to be occupied by at least one person who is 55 years or older. Evidence includes:

- Statements made under penalty of perjury from third party individuals who have knowledge of the age of the occupants of a household.
- Other information, such as statements indicating age in prior applications may be acceptable.
- In addition, the facility/community may base its decision on government documents such as census data.

RESURVEY REQUIREMENTS

- HOPA requires that a housing facility/community re-survey its lists of residents every two years to ensure that the 80% requirement is met.
- A housing community's or facility's completion or failure to survey or re-survey its list of occupants in accordance with its age verification procedures demonstrates the intent (or lack there of) to be housing for older persons.
- Failure to re-survey could jeopardize the housing community's status as 55 or older housing.
- The records must be kept as long as the housing community/facility intends to proffer its exempt status and these records are admissible in administrative and judicial proceedings.

IS IT LAWFUL TO ADVERTISE OR MARKET THE 20 PERCENT OF THE UNITS TO FAMILIES WITH CHILDREN?

Yes, but the marketing must be done in a way that identifies the facility/community as housing intended for older persons.

Advertising and marketing must not be inconsistent with the intent.

Further, the facility/community needs to plan with care any attempt to sell or rent the entire 20 percent portion of the remaining units to incoming households under age 55, because it could risk losing the exemption if some occupants over 55 die, with surviving spouses or heirs who are under 55 years of age.

Such planning should address notice to incoming households under the age of 55 regarding how the housing provider will proceed in the event that the 80% requirement is endangered.

MAY A HOUSING FACILITY/COMMUNITY IMPOSE A MORE RESTRICTIVE AGE LIMIT?

A housing facility/community may impose an age limitation more restrictive than that required by HOPA and qualify for the 55 or older exemption

The housing facility/community may require that at least 80 percent of the units be occupied by at least one person 60 years of age or older.

The housing facility/community may require that 100% of the units are occupied by at least one person 55 years of age or older

Or 80% of the units must be occupied exclusively by persons aged 55 or older

However, the facility/community should review other state and local laws, including fair housing laws that may prohibit discrimination based on age, before establishing policies and procedures restricting occupancy based on age, or affecting survivors' rights to property, that are not covered under HOPA.

DIFFERENT TERMS AND CONDITIONS ON FAMILIES WITH CHILDREN IN HOPA HOUSING

If a housing facility or community meets the requirements of HOPA but permits up to 20 percent of the units to be occupied by families with children, it may impose different terms and conditions of residency on those families with children who reside there.

If HOPA compliant, the community/facility is exempt from the Act's prohibition against discrimination on the basis of familial status.

The housing community/facility may restrict families with children from benefits of the community, or otherwise treat family households differently than senior households, as long as those actions do not violate any other state or local law.

However, the community/facility is not exempt from the provisions of the Act that prohibit discrimination against any resident or potential resident on the basis of race, color, religion, national origin, sex, or disability.

RIGHTS YOUNGER SURVIVORS TO POSSESSION

- The right to possession by a surviving spouse or heir is not governed by the HOPA or the Fair Housing Act.
- Whether an underage heir or surviving spouse can occupy the unit upon the death of the 55 or older occupant is a matter of state/local law or custom, and generally is governed by private contractual agreements between senior housing developers and the individuals who purchased or rented the dwelling.
- The provision in the Act permitting 20 percent of the units to be occupied by persons under 55 is intended, in part, to prevent a housing facility/community from losing the exemption due to situations where there are surviving spouses and underage heirs when the 55 or older occupant dies.

REASONABLE ACCOMMODATIONS FOR ATTENDANTS/HEALTH CARE PROVIDERS NEEDED FOR OCCUPANT WITH A DISABILITY

- The attendant or health care provider or family care provider is excluded from the calculation.
- This is true whether the live-in person resides in the same unit with the disabled occupant or in a separate unit.
- Neither circumstance adversely affects the exemption of the housing facility/community.

A person with a disability (42 U.S.C. 3602 (h)(1)-(3)):

- has a physical or mental impairment that substantially limits one or more major life activities
- has a record of such impairment
- is regarded as having such an impairment
- broadly defined

Reasonable accommodations: <https://www.justice.gov/crt/us-department-housing-and-urban-development>

UNDERAGE ADULT RELATIVE MOVES IN

- In calculating whether a community/facility meets the 80 percent requirement, it is the occupants of the dwelling units who are counted, not the owners.
- In this example, the current resident, the underage adult relative, would be counted in the 20 percent portion.
- Similarly, if a 55 or older owner/occupant decided to vacate a unit for an indefinite period of time and rent to an underage individual, the current occupant would be counted in the 20 percent portion.
- The 55 or older occupant may be on vacation, hospitalized, or absent for a season without affecting the exempt status of the community.
- The resident may, if he/she wishes, allow a younger relative or a house sitter under 55 years of age to live in the unit during this absence.
 - In either of the last two examples, the unit would be included in the calculation of the 80 percent occupancy requirement as long as the dwelling is not rented out, the owner/tenant returns on a periodic basis, and maintains legal and financial responsibility for the upkeep of the dwelling.

HUD COMPLAINT

HUD's involvement begins in one of two ways:

- 1) when a person allegedly injured on the basis of familial status files a complaint against a housing facility/community and the respondent claims the exemption as a defense; or
- 2) when HUD commences a Secretary-initiated investigation or files a complaint based on information it has that indicates the need for an investigation.

The complaint must be filed no later than one year after the alleged discriminatory act occurred or was terminated.

A household which does not fall within the Fair Housing Act's definition of familial status cannot file a complaint challenging a housing provider's attempt to provide housing for older persons.

HUD COMPLAINT

An owner of a dwelling can file a complaint based on familial status if the owner is being impeded in the ability to sell or rent the dwelling because the housing facility/community is claiming to be 55 and over housing but does not meet the requirements for the exemption.

If the owner has affirmatively undertaken to rent or sell his property and can establish that the housing community/facility illegally (is not qualified housing for older persons) interfered with the owner's ability to do so, he/she can file a familial status complaint.

Other complainant parties could include the family with children seeking to rent or buy but was denied the opportunity, as well as any real estate agent involved in the transaction.

The community/facility housing provider has the burden of proving that it was in compliance with HOPA requirements on the date of occurrence of the alleged act or incident of discrimination.

LIABILITY FOR NON-COMPLIANCE

The **governing board, management company, or corporate entity** of the housing facility/community is **liable** if the facility/community fails to meet the requirements, and cannot claim a good faith reliance defense against monetary damages.

The legislative history of HOPA shows that in creating the **good faith reliance defense**, Congress intended to **protect individual persons**, such as **individual members** of boards of governing homeowners associations and real estate agents relying on information provided by the housing providers of senior housing.

An individual is not liable for monetary damages if the person acted with a **good faith** belief that the housing facility/community qualified for a housing for older persons exemption.

LIABILITY FOR NON-COMPLIANCE

- Such a person must have knowledge, from an authorized representative, that the facility/community asserted in writing that it qualified for the older persons exemption before the date on which the alleged discrimination occurred.
 - An authorized representative may be an individual, committee, management company, listing agent, owner or other entity.
- An individual **is not entitled** to the good faith defense if he or she has **actual knowledge** that the facility/community does not or will not qualify as housing for older persons, despite the fact that he/she received written assurances to the contrary from an authorized representative of the housing provider.
- An individual who claims the good faith reliance defense based on his/her actual knowledge and a written assertion from an authorized representative of the facility/community may disseminate such information to others.
 - Those others may include real estate agents, multiple listing services, advertisers and other print media who may, in turn, rely on the assertions of the individual from whom they received the information, **unless** they have actual knowledge that information is not accurate.

OTHER PROVISIONS

- Neither the Fair Housing Act nor HOPA authorizes the Department to certify whether a particular housing facility or community meets the qualifications for housing for older persons.
- Newly constructed housing for first occupancy after March 12, 1989 (including a facility or community that has not been occupied in its entirety for at least 90 days prior to re-occupancy due to renovation or rehabilitation) must be marketed as housing intended for older persons.
- It does not have to have at least one occupant in each occupied unit who is age 55 and over until at least 25 percent of the units are occupied.

WHEN STATE AND FEDERAL LAW CONFLICT

- Neither the Fair Housing Act nor HOPA covers age discrimination and do not supersede or otherwise affect state or local laws that prohibit age discrimination.
 - Housing community/facilities always should check all relevant state, local and federal laws, and any requirements imposed as a term of governmental financial assistance before implementing policies and procedures that limit the eligibility of its residents.
- States and local governments with fair housing laws that have been determined to be substantially equivalent to the federal law may have no exemption from familial status discrimination for housing for older persons, or may have more stringent requirements to meet an exemption than does HOPA.
- HOPA does not require housing community/facility file a declaration of intent with the state/local unit of government in order to claim its exemption as housing for older persons. However, the state or local government might require the housing community/facility to register its intent to be housing for older persons. The facility/community should consult the appropriate governmental body for requirements in this regard.

OLDER PERSONS HOUSING AND LOCAL LAWS

- Neither the FHA nor HOPA require the housing community/facility to file or register a declaration of intent with the state or local unit of government in order to claim its exemption as housing for older persons.
- Neither the FHA nor HOPA require a resident to join an HOA. This is an example of an issue or aspect of senior housing communities that is generally governed by independent law, deed restriction, or other legally enforceable documents.

PRE-HOPA & OTHER FEDERAL HOUSING

- HUD would not apply HOPA retroactively to a familial status claim of discrimination that occurred prior to December 28, 1995, when HOPA was signed into law.
- If the alleged violation occurred prior to December 28, 1995, the Department's investigation of a pending complaint will determine whether the community/facility met the requirements for the housing for older persons exemption, based on the regulations that were in effect at the time of the alleged violation.

PRE-HOPA & OTHER FEDERAL HOUSING

- The FHA and HOPA do not affect statutory or regulatory provisions of federally assisted housing programs. For example, neither HOPA nor the Act change the definition of "elderly family" in federally assisted housing programs such as Section 202 housing.
 - HOPA does not permit a HUD funded public housing provider to designate a project as an "elderly project" without HUD review and approval as mandated by existing regulations.
 - HUD funded housing that is designated as elderly housing may not, because of HOPA, admit households that are not statutorily eligible for the housing.
 - No public housing development that is not designated as an elderly development by statute or program regulation may exclude families with children even if at least 80% of the units are occupied by at least one person age 55 or older.
 - Federally assisted housing providers should continue look to existing program statutory and regulatory requirements to determine tenancy of those developments.

EDUCATION

- Education and training truly are the best way for housing providers, consumers and advocates to understand reasonable accommodations.
- Fair housing education and training may prevent costly fair housing violations.
- The cost of discrimination in fair housing cases is high and may lead to loss of much needed community planning and development funds and or huge damage awards.

QUESTIONS?



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