

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR-5006-F-02]

RIN 2529-AA92

Design and Construction Requirements; Compliance With ANSI A117.1 Standards

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity and construction requirements of the Fair Housing Act and its amendments, by: Updating and clarifying the references to the American National Standards Institute (ANSI) building standard for accessibility; and codifying the current HUD recognized safe harbors under the Act. The ANSI A117.1 standard is the technical standard for the design of housing and other facilities that are accessible to persons with disabilities referenced in the Fair Housing Act, and is commonly referred to as "ANSI A117.1." This final rule updates the references to the ANSI A117.1 to adopt the 2003 edition of the standard, and clarifies that compliance with the appropriate requirements of the 1986, 1992, and 1998 editions also remains sufficient to meet the design and construction requirements of the Fair Housing Act and its amendments. This final rule follows a July 18, 2007, proposed rule and takes into consideration the public comments received on that rule. This final rule makes no substantive changes to the proposed rule, but adds a new section on incorporation by reference and makes other technical revisions consistent with recent guidelines on incorporation by reference.

DATES: *Effective date:* November 24, 2008.

The standards incorporated by reference in this final rule are approved by the Director of the Federal Register as of November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Cheryl Kent, Special Advisor for Disability Policy, Office of Enforcement, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-2000; telephone number 202-708-2333 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) (the Fair Housing Act) prohibits discrimination in housing and housing-related transactions based on race, color, religion, national origin, and sex. The Fair Housing Amendments Act of 1988 expands the coverage of the Fair Housing Act to include families with children and persons with disabilities.¹ The Fair Housing Act, as amended, provides that unlawful discrimination against persons with disabilities includes the failure to design and construct covered multifamily dwellings for first occupancy after March 13, 1991, in such a manner that: (1) The public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (2) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (3) all premises within such dwellings contain the following features of adaptive design: (a) An accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. Additionally, the Fair Housing Act states that compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the above-listed requirements.

On January 23, 1989, at 54 FR 3232, HUD published its final regulation implementing the Fair Housing Amendments Act of 1988 (HUD's regulation). In the final regulation, HUD adopted the 1986 edition of ANSI A117.1, which was the edition in effect at that time, as the appropriate edition for acceptable compliance with the Fair Housing Act. HUD's regulation adopting ANSI A117.1 is located at 24 CFR 100.201, and HUD's regulation implementing the design and

¹ The Fair Housing Act refers to people with "handicaps." Subsequently, in the Americans with Disabilities Act of 1990 and other legislation, Congress adopted the terms "persons with disabilities" and "disability," which are the preferred usage. Accordingly, this document hereinafter uses the terms "persons with disabilities," "disability," or "disabled," unless directly quoting the Fair Housing Act.

construction requirements is located at 24 CFR 100.205.

II. This Final Rule

This final rule updates the references to the ANSI A117.1 standard to adopt the 2003 edition, and to stipulate that compliance with the appropriate requirements of the 1998, 1992, and 1986 editions continues to satisfy the requirements of the Fair Housing Act. Since the ANSI standards are incorporated by reference, this final rule also adds a section on incorporation by reference and otherwise revises the language incorporating the ANSI standards. This change is technical and not substantive.

The final rule also updates the regulation to acknowledge all 10 safe harbors currently recognized by HUD. This rule does not change either the scoping requirements or the substance of the existing accessible design and construction requirements contained in the regulations, nor does the rule state that compliance with the 1986 ANSI standard is no longer appropriate. The appropriate requirements of the 1986, 1992, 1998, and 2003 editions of ANSI A117.1 all constitute safe harbors for compliance with the accessibility requirements of the Fair Housing Act, when used together with the Act, HUD's regulations, and HUD's Fair Housing Accessibility Guidelines (or Guidelines in this preamble) for the scoping requirements.

In addition, the final rule makes an editorial change to the definitions of "Accessible," "Accessible route," "Building entrance on an accessible route," and to § 100.205(e) to combine the two sentences in the proposed rule that referred to the editions of ANSI A117.1 that are safe harbors into a single sentence. This is an editorial change only for purposes of greater clarity.

This final rule applies only to the accessibility requirements of the Fair Housing Act. When more than one law applies to a project, and there are different accessibility standards for each law, the governing principle to follow is that the more stringent requirements of each law apply. For example, when a residential property that is covered by the Fair Housing Act receives federal financial assistance, it must also comply with the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504) and 24 CFR part 8. A complex that is covered by the Fair Housing Act may also be covered, in part, by the Americans with Disabilities Act (ADA), *e.g.*, the rental office and any other place of public accommodation that is leased or used by persons other than the residents and their guests.

Therefore, this final rule does not constitute a change in the requirements for compliance for federally funded facilities and dwelling units covered by Section 504 or the Architectural Barriers Act (ABA); such facilities and units must comply with their respective regulatory requirements at 24 CFR parts 8 and 24 CFR part 40, including the Uniform Federal Accessibility Standard (UFAS), the ADA, and the Department of Justice's regulations for the ADA. However, to the extent that the requirements of the Fair Housing Act apply to the same dwelling units that are subject to the requirements of Section 504, the ABA, or the ADA, the safe harbors for compliance outlined in this final rule shall be applied to those dwelling units that are subject to the Fair Housing Act, but may not be used in lieu of more stringent accessibility requirements mandated by Section 504 and the ABA, or the ADA, where applicable.

III. Discussion of Public Comments

The Department published its proposed rule on July 18, 2007 (72 FR 39540), for public comment. The public comment period ended on September 17, 2007. A total of eight comments were received from the following: An individual building owner; a consultant who monitors compliance with the Fair Housing Act; a nonprofit organization that addresses design issues for persons with disabilities and older persons; a nonprofit organization representing paralyzed veterans; an organization representing building safety and fire prevention professionals; a coalition representing both the multifamily rental housing industry and an international federation representing owners and managers of commercial properties; a national, nonprofit organization of diverse communities within the disability community; and an organization representing wheelchair users.

A. The ANSI A117.1 Standard

Comment: Several commenters expressed support for HUD's proposal to update its regulations and to clarify the accessibility building requirements. The commenters wrote that each new edition of ANSI A117.1 yields additional information and that updating the technical specifications to ANSI 1998 and 2003 would be valuable.

Two commenters expressed concerns regarding the continued use of previous editions of ANSI A117.1. One of the commenters, while agreeing with HUD that covered multifamily buildings should be constructed using the technical specifications of ANSI 1998 or

ANSI 2003, objected regarding ANSI 1992, writing that ANSI 1992 is no longer in print and is generally difficult to locate. Another commenter objected to use of the 1986, 1992, and 1998 editions, writing that only the 2003 edition of ANSI meets the design and construction requirements of the Fair Housing Act. Conversely, certain building industry commenters objected to HUD's adopting any edition of ANSI except for the 1986 edition, arguing that Congress adopted the 1986 edition as the version meeting the Act.

Response: The Department agrees with the commenters' support of the ANSI standard. Congress, in the Fair Housing Act, specifically referenced the ANSI standard and encouraged its use for compliance with the Act's accessibility requirements. Contrary to the commenters' assertion that Congress adopted the 1986 edition, the Fair Housing Act did not reference a specific edition of the standard. In its final regulations implementing the Fair Housing Act, the Department elected to specify the 1986 edition—the edition in effect at that time—in response to public comments that the Department should refer to a specific edition and incorporate future editions through rulemaking proceedings.

The Department's review and recognition of new editions of the ANSI A117.1 standard is well established. This issue was addressed during the Department's initial review of several model building codes, all of which referenced a more recent edition of the ANSI standard. In its final report, published in the **Federal Register**, on its review of these model building codes, the Department noted that many commenters commended the Department for recognizing the 1998 ANSI A117.1 as a safe harbor (65 FR 15740, March 23, 2000). Several commenters pointed out that ANSI A117.1–1998 is the basis for the accessibility provisions in the model codes and that HUD's acceptance of ANSI A117.1–1998 as a safe harbor resolved many of the concerns of the multifamily housing industry.

Further, as newer editions of ANSI have been developed, many organizations have encouraged the Department to adopt these newer editions. One major organization that represents home builders wrote to the Department in 1998, pointing out that a 1998 edition of the ANSI standard was about to be published and that it is logical to rely on the latest version of a standard, unless the statute specifically refers to a specific edition. This organization stated that there are sound policy reasons for adopting the latest

version of the ANSI standard, since it reflects new developments in accessible design. The organization pointed out that since the Fair Housing Act does not refer to a particular edition of the ANSI standard, it would be reasonable for the Department to permit use of the 1998 ANSI standard. Also, the organization stated that the 1998 standard would be used by state and local officials around the country and urged the Department to state that the most recent edition of the ANSI standard meets the requirements of the Fair Housing Act.

Other comments the Department received on its proposed rule support the need to continue to recognize earlier editions of the standard because state and local building codes are not updated on any particular established schedule nor are they updated as frequently as the model building code is updated. Similarly, there are state and local jurisdictions that have adopted HUD's Fair Housing Accessibility Guidelines into their building code or state fair housing law. Accordingly, the Department believes that it is appropriate at this time to continue to recognize all four editions of the ANSI A117.1 standard—1986, 1992, 1998, and 2003, as previously proposed.

With respect to one of the commenter's concerns that ANSI 1992 is no longer in print and is generally difficult to locate, the Department determined that the standard, 1992 CABO/ANSI A117.1 Accessible and Usable Buildings and Facilities, is available in print and on compact disc (CD–Rom) from the International Code Council, Washington DC (1–800–786–4452 and <http://www.iccsafe.org/e/category.html>), which addresses the commenter's concern.

B. Concern With the Department's Discussion of Its Enforcement of the Fair Housing Act

Comment: One of the commenters expressed concern that the Department's discussion of how it enforces the Fair Housing Act was an announcement of new enforcement policy and did not belong in the preamble of a proposed rule relating to the adoption of the 1992, 1998, and 2003 ANSI standards.

Response: The commenter does not correctly characterize HUD's statements about enforcement of the Fair Housing Act in the preamble to the proposed rule. Rather than announcing new policy, the preamble merely restated HUD's existing enforcement policy as part of the agency's effort to explain the safe harbor provisions.

C. Concern With Expanding the Intent of the Fair Housing Act

Comment: One commenter wrote that if the proposed rule is promulgated, it would directly contradict the creativity and diversity of solutions to accessibility needs that the Fair Housing Act encourages and that it would also establish a national building code. The commenter wrote that the lack of specificity under the Fair Housing Act reflects the intent of Congress that builders retain flexibility in designing housing covered by the law. The commenter wrote that, in enacting the Fair Housing Act, Congress did not direct or empower HUD to promulgate binding regulations for accessible design features.

Response: The Department disagrees that its proposal either expands the intent of the Fair Housing Act or limits designers and builders with respect to the design and construction of covered multifamily dwellings. In this final rule, the Department is adopting the 2003 edition of the ANSI A117.1 standard, while at the same time continuing to recognize the earlier 1986, 1992, and 1998 editions. Moreover, the recognition of additional safe harbors does not in any way result in the adoption of a mandatory national building code. Rather, designers and builders may continue to use alternative methods of complying, with the following caveat, which the Department has stated since the publication of the regulations and the Fair Housing Accessibility Guidelines in 1991. If a designer or builder does not rely on one of the HUD-recognized safe harbors, that designer or builder has the burden of demonstrating how its efforts comply with the accessibility requirements of the Fair Housing Act.

D. Codification of HUD-Recognized Safe Harbors

Comment: One commenter wrote that while HUD's effort to list in a binding regulation the standards and codes accepted as safe harbors for compliance with the Fair Housing Act's accessibility requirements is appreciated, the many limiting comments and exceptions attending HUD's designation of these standards as safe harbors detracts significantly from their usefulness and reliability. The commenter wrote that to follow the safe harbors as described by the proposed rule assumes extensive prior knowledge and study not only of the standards themselves, but also of the administrative guidance, enforcement actions, and judicial decisions surrounding them. The commenter wrote that it is unrealistic to expect

multifamily housing professionals to have that sort of complex understanding of the difficult technical nuances.

Response: The Department does not agree that including the 10 currently recognized safe harbors in its regulations will create difficulty in complying with the Act. The Department has placed very few conditions on the use of the building codes as safe harbors. Indeed, the few conditions that the Department has set on the International Building Code (IBC) were determined necessary to ensure that the declared safe harbor for IBC provided at least the same degree of accessibility as the Fair Housing Act, HUD's regulations, and the Guidelines. The 2003 IBC was deemed a safe harbor with only one condition, and this condition is spelled out in the same paragraph in which the Department specified the 2003 IBC. The 2006 IBC had text missing, upon its initial publication, and it was necessary to alert users about the text that was missing. In addition, it was determined that it would be helpful to alert users of the IBC code about its 2006 Commentary because users may not have been aware that a Commentary with guidance exists or they may need additional guidance on how to interpret the code.

E. References to the Fair Housing Act in the IBC

Comment: One commenter wrote that HUD should seek greater inclusion in technical code documents such as the ANSI standard of references to HUD's Fair Housing Accessibility Guidelines. The commenter wrote that this would avoid circumstances where people relying on ANSI overlook the need to reference those Guidelines.

Response: The Department is mindful of the importance of the Guidelines in the Department's work as a member of the ANSI A117 Committee and its involvement in the code development process. The 2003 and the 1998 editions of ANSI A117.1 include an explanation in their "Purpose" statements that the Type B dwelling units are intended to be consistent with the intent of the criteria of the Guidelines. The Department also wishes to point out that individuals using an edition of the IBC that has been recognized by HUD as a safe harbor will not need to refer to the Guidelines because these editions of the IBC contain scoping requirements consistent with the Fair Housing Act, HUD's regulations implementing the Act, and the Guidelines. The International Code Council (ICC) has included references to the Fair Housing Act, HUD's regulations, and the Fair

Housing Accessibility Guidelines in its 2006 IBC Code Commentary. The Department also provided commentary to ICC, which ICC included in this same document, to provide guidance in interpreting language that the Department recommended and which the code body accepted for inclusion in Chapter 11 of the IBC.

F. HUD Participation in the ANSI and IBC Development Process

Comment: One commenter recommended that HUD continue to participate in the model code development process. Two commenters recommended that HUD participate as a full and equal partner on the A117.1 Committee and offer proposals regardless of possible objection from committee members.

Response: The Department agrees with these comments and intends to continue its active role as a member of the ANSI A117 Committee. The Department also hopes to be actively engaged in the IBC code development process, and has participated in recent code hearings. The Department proposed changes to the code that it believes will ensure greater compliance with the Fair Housing Act.

G. Clarification of Requirements for Type B Dwelling Units as Designated in ANSI

Comment: One commenter asked about requirements for townhouse units in the State of California, stating that in buildings with four or more townhouse style units, the State requires 10 percent (at least one) of these units to be accessible on the primary entrance level. The commenter stated that neither the townhouse units nor the buildings have an elevator, and that the units are multistory with garage, living room, powder room, and den on the first floor (ground level) and the kitchen, dining room, bathrooms, and bedrooms on the second level. The commenter asked for clarification on whether it was intended that the ground floors of such townhouse units comply with the Fair Housing Act's accessibility requirements or be "Type B units" as provided for in the ANSI A117.1-2003 accessibility standard when there are no elevators, either in the unit or in the building.

Response: The Fair Housing Act and HUD's Fair Housing Accessibility Guidelines require multistory townhouse units to be accessible only if they have an internal elevator, or if they are located in a building that has one or more elevators. However, the Fair Housing Act does not preclude states or units of local government from

establishing requirements that are more stringent than the requirements of the Act. It appears that the State of California may have established a more stringent requirement. However, if the commenter would like further technical guidance on this matter, the Department has established a technical guidance program called Fair Housing Accessibility FIRST, to provide technical guidance to the building industry on the accessibility requirements of the Fair Housing Act. This program includes a technical guidance telephone hotline (1-888-341-7781) and a comprehensive technical guidance Web site (<http://www.fairhousingfirst.org/>).

H. Comments in Response to Proposed Rule's Request for Public Comment on Sunsetting Earlier Safe Harbors

Comment: In its proposed rule, the Department requested public comments on both the efficacy of continuing to recognize older editions of ANSI A117.1, and on how long the Department should continue to recognize earlier editions of the IBC. The Department made this request to obtain feedback for consideration for possible future rulemaking. Two commenters expressed concerns regarding the continued use of previous editions of ANSI A117.1. One of the commenters, while agreeing with HUD that covered multifamily buildings should be constructed using the technical specifications of ANSI 1998 or ANSI 2003, demurred regarding the 1992 edition, writing that ANSI A117.1-1992 is no longer in print and is generally difficult to locate. Another commenter objected to use of the 1986, 1992, and 1998 editions, writing that only the 2003 edition of the ANSI meets the design and construction requirements of the Fair Housing Act.

One commenter also wrote that it is illogical to suggest that older standards and safe harbors, which have been recognized to provide accessible housing over the past 20 years, are no longer adequate because a newer standard for compliance is being recognized as an additional safe harbor by HUD. The commenter wrote that neither the Fair Housing Act nor its legislative history indicates that Congress intended future versions of ANSI to replace ANSI 1986 as a safe harbor. The commenter urged HUD to withdraw its proposed regulatory changes. This commenter also proffered that rather than requiring full compliance with any particular safe harbor document, HUD should encourage the flexibility of using standards from more than one such

document without losing benefits of the safe harbor status.

One commenter wrote that given the likelihood that state and local jurisdictions will continue to rely on legal adoptions of or references to the 10 safe harbor documents, it is incumbent on HUD to maintain its regulatory recognition of these documents. In addition, the commenter wrote that any action regarding the recognition of a safe harbor should be understood to preserve the legal status of buildings constructed using that safe harbor. Another commenter wrote that the numerous conditions imposed on the use of the 2003 IBC make it possible that the full complement of required information will not be conveyed to every intended recipient and user. The commenter wrote that since there are other versions of the IBC available as safe harbors, HUD should drop the 2003 IBC from this designation.

One commenter recommended that HUD move to sunset older safe harbors over the next few years, with the exception of the HUD Fair Housing Act Design Manual. The Design Manual has, in the commenter's view, proven to be the most useful and popular safe harbor and offers a significant number of illustrations that enhance the users' understanding of the Fair Housing design and construction requirements. The commenter wrote that once the final rule is published, the next step should be the updating of the Design Manual, referencing ANSI 1998 and 2003.

Several commenters suggested that HUD phase out all safe harbors other than the 2003 edition of ANSI A117.1. The commenters wrote that reliance on the latest edition would avoid any confusion regarding the applicable accessibility requirements. One of the commenters wrote that, in reference to a building with dwelling units to which the Fair Housing Act and Section 504 apply, these dual standards for housing accessibility coupled with the multiplicity of safe harbors could result in confusion.

Response: The Department has considered all of the comments offered on its request for comment on the appropriateness of sunsetting some of the current HUD-recognized safe harbors at some future time. At present, the Department has not determined whether in the future it might be appropriate to sunset some of the safe harbors. If it decides to do so in the future, the Department will give the public appropriate notice and opportunity to comment at that time. With respect to one of the commenter's concerns that ANSI 1992 is no longer in

print, as noted earlier in this preamble, the 1992 edition of ANSI 117.1 is available from the International Code Council.

IV. HUD Policy Regarding HUD-Recognized Safe Harbors for Compliance With the Fair Housing Act's Design and Construction Requirements

As the Department noted in the preamble to the proposed rule, with the recognition of ICC/ANSI A117.1-2003 and the 2006 IBC as safe harbors, the Department currently recognizes 10 safe harbors for compliance with the design and construction requirements of the Fair Housing Act. (See 72 FR 39541-39542.) These documents are:

1. Fair Housing Accessibility Guidelines, March 6, 1991 (<http://www.hud.gov/offices/fheo/disabilities/fhefhag.cfm>), in conjunction with the June 28, 1994, Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines (<http://www.hud.gov/offices/fheo/disabilities/fhefhasp.cfm>);
2. Fair Housing Act Design Manual (<http://www.huduser.org/publications/desstech/fairhousing.html>), published by HUD in 1996 and updated in 1998;
3. ANSI A117.1-1986, Accessible and Usable Buildings and Facilities (available from Global Engineering Documents, 15 Inverness Way East, Englewood, Colorado 90112), in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
4. CABO/ANSI A117.1-1992, Accessible and Usable Buildings and Facilities (<http://www.iccsafe.org>), in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
5. ICC/ANSI A117.1-1998, Accessible and Usable Buildings and Facilities (<http://www.iccsafe.org>), in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
6. ICC/ANSI A117.1-2003, Accessible and Usable Buildings and Facilities (<http://www.iccsafe.org>), in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
7. 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (<http://www.iccsafe.org>) (ICC has issued an errata sheet to the CRHA);
8. 2000 International Building Code, as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement);

9. 2003 International Building Code, published by ICC (<http://www.iccsafe.org>), December 2002, with one condition: Effective February 28, 2005, HUD determined that the IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "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 1107.7²"; and

10. 2006 International Building Code, published by ICC (<http://www.iccsafe.org>) in January 2006, with a January 31, 2007, erratum to correct the text missing from Section 1107.7.5 and interpreted in accordance with the relevant 2006 IBC Commentary.

The Department is also reiterating, in this preamble to the final rule, its policy with respect to the above safe harbors, as it did in the preamble to the proposed rule. If a State or locality has adopted one of the above documents without modification to the provisions that address the Fair Housing Act requirements, a building covered by the Act's design and construction requirements will be deemed compliant, provided: (1) The building is designed and constructed in accordance with plans and specifications approved during the building permitting process and (2) the building code official does not waive, incorrectly interpret, or misapply one or more of those requirements. However, neither the fact that a jurisdiction has adopted a code that conforms with the accessibility requirements of the Fair Housing Act, nor that construction of a building subject to the Fair Housing Act was approved under such a code, changes HUD's statutory responsibility to conduct an investigation, following receipt of a complaint from an aggrieved person, to determine whether the requirements of the Fair Housing Act have been met. Nor does either fact prohibit the Department of Justice from investigating whether violations of the Fair Housing Act's design and

construction provisions may have occurred. The Fair Housing Act provides that: "Determinations by a State or unit of general local government under paragraphs 5(A) and (B) shall not be conclusive in enforcement proceedings under this title." 42 U.S.C. 3604(f)(6)(a).

HUD's investigation of an accessibility discrimination complaint under the Fair Housing Act typically involves, *inter alia*, a review of building permits, certificates of occupancy, and construction documents showing the design of the buildings and the site, and an on-site survey of the buildings and property. During the investigation, HUD investigators take measurements of relevant interior and exterior elements on the property. All parties to the complaint have an opportunity to present evidence concerning, *inter alia*, whether HUD has jurisdiction over the complaint, and whether the Act has been violated as alleged. In enforcing the design and construction requirements of the Fair Housing Act, a prima facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines. This prima facie case may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility. See Order on Secretarial Review, *U.S. Department of Housing and Urban Development and Montana Fair Housing, Inc. v. Brent Nelson*, HUD ALJ 05-068FH (September 21, 2006) (2006 WL 4540542). In making a determination as to whether the design and construction requirements of the Fair Housing Act have been violated, HUD uses the Fair Housing Act, the regulations, and the Guidelines, all of which reference the technical standards found in ANSI A117.1-1986.

It is the Department's position that these documents represent safe harbors only when used in their entirety; that is, once a specific safe harbor document has been selected, the building in question should 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 or from a variety of sources, and will be lost if waivers of provisions are requested and obtained from state or local governmental agencies. A designer or builder taking this approach runs the risk of building an inaccessible property. While this does not necessarily mean that failure to meet all of the respective provisions of a specific

safe harbor document will result in unlawful discrimination under the Fair Housing Act, designers and builders that choose to depart from the provisions of a specific safe harbor bear the burden of demonstrating that their actions result in compliance with the Act's design and construction requirements. 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 during the design and construction phase without modification or waiver, will result in residential buildings that comply with the design and construction requirements of the Act.

V. Additional Information

A link to the Department's report of its review of the 2006 IBC, as well as the February 28, 2005, and March 23, 2000, reports, is located at <http://www.hud.gov/offices/fheo/disabilities/modelcodes/>. The Fair Housing Act, as amended in 1988, and the Fair Housing Accessibility Guidelines can also be obtained through links provided at this Web site. The Fair Housing Act regulations are located at http://www.access.gpo.gov/nara/cfr/waisidx_00/24cfr100_00.html. CABO/ANSI A117.1-1992, ICC/ANSI A117.1-1998, and ICC/ANSI A117.1-2003 are available for purchase at <http://www.iccsafe.org/e/category.html>. ANSI A117.1-1986 is available from Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112, telephone number 1-800-854-7179, and can be purchased at global.ihs.com.

VI. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis on any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule adopts the 2003 edition of ANSI A117.1 for purposes of defining technical standards for accessibility for covered multifamily dwellings. The final rule also provides that compliance with the 1986 edition of ANSI A117.1 that HUD previously adopted, as well as with the 1992 and 1998 editions of ANSI A117.1, would meet the requirements of the Fair Housing Act and of HUD-recognized safe harbors. Small entities need not incur a significant economic impact, as small entities can still be in compliance

² ICC's Web site includes information about the condition placed on HUD's approval of the 2003 IBC as a safe harbor at the following links: <http://www.iccsafe.org/news/nr/2005/index.html>; <http://www.iccsafe.org/government/news/>; and http://www.iccsafe.org/news/ePeriodicals/eNews/archive/ICCeNews_0305.html.

with the requirements of the Fair Housing Act if they continue to use the 1986 ANSI A117.1 technical standard. Adopting the 2003 edition, as well as the 1992 and 1998 editions of the standard, may even alleviate a significant economic impact for small entities, as those entities may find compliance with more recent editions of the ANSI A117.1 standard to be less burdensome than compliance with the 1986 edition. The final rule does not impose an undue burden on small entities, as the rule would merely codify the use of more recent ANSI A117.1 standards as satisfying the design and construction requirements of the Fair Housing Act. Therefore, the undersigned certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Environmental Impact

This final rule is a policy document that sets out fair housing and nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1531–1538) requires federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose, within the meaning of the UMRA, any federal mandates on any state, local, or tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

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

VII. Incorporation by Reference

These reference standards are approved by the Director of the Federal Register for incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these standards may be obtained from the following organizations:

ICC/ANSI A117.1–2003, ICC/ANSI A117.1–1998, and CABO/ANSI A117.1–1992 may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001–2070, telephone number 1–888–422–7233, and may be ordered online at <http://www.iccsafe.org/cs/standards/a117/order.html>.

ANSI A117.1–1986 may be obtained from Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112, telephone number 1–800–854–7179, and may be ordered online at global.ihs.com.

The 1986, 1992, 1998, and 2003 editions of ANSI A117.1 may be inspected at the Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5240, Washington, DC 20410–0001, telephone number 202–708–2333.

List of Subjects in 24 CFR Part 100

Fair housing, Incorporation by reference, Individuals with disabilities.

■ For the reasons stated in the preamble, HUD amends 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

■ 1. The authority for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

■ 2. In § 100.201, remove the definition of "ANSI A117.1–1986" and revise the definitions of "Accessible," "Accessible route," and "Building entrance on an accessible route" to read as follows:

§ 100.201 Definitions.

Accessible, when used with respect to the public and common use areas of a building containing covered multifamily dwellings, means that the public or common use areas of the building can be approached, entered, and used by individuals with physical disabilities. The phrase "readily accessible to and usable by" is synonymous with accessible. A public or common use area that complies with the appropriate requirements of ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at

§ 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard is deemed "accessible" within the meaning of this paragraph.

Accessible route means 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 ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992, ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard is an "accessible route."

* * * * *

Building entrance on an accessible route means an accessible entrance to a building that is connected by an accessible route to public transportation stops, to accessible parking and passenger loading zones, or to public streets or sidewalks, if available. A building entrance that complies with ICC/ANSI A117.1–2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1–1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1–1992 (incorporated by reference at § 100.201a), ANSI A117.1–1986 (incorporated by reference at § 100.201a), or a comparable standard complies with the requirements of this paragraph.

* * * * *

■ 3. Add § 100.201a to read as follows:

§ 100.201a Incorporation by reference.

(a) The following standards are incorporated by reference into 24 CFR part 100 pursuant to 5 U.S.C. 552(a) and 1 CFR part 51, as though set forth in full. The incorporation by reference of these standards has been approved by the Director of the Federal Register. The effect of compliance with these standards is as stated in 24 CFR 100.205.

(b) The addresses of organizations from which the referenced standards can be obtained appear below:

(1) American National Standard: Accessible and Usable Buildings and Facilities, 2003 edition, (ICC/ANSI A117.1–2003), may be obtained from the

International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001-2070, telephone number 1-888-422-7233, <http://www.iccsafe.org/e/category.html>.

(2) American National Standard: Accessible and Usable Buildings and Facilities, 1998 edition, (ICC/ANSI A117.1-1998), may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001-2070, telephone number 1-888-422-7233, <http://www.iccsafe.org/e/category.html>.

(3) American National Standard: Accessible and Usable Buildings and Facilities, 1992 edition, (CABO/ANSI A117.1-1992), may be obtained from the International Code Council, 500 New Jersey Avenue, NW., 6th Floor, Washington, DC 20001-2070, telephone number 1-888-422-7233, <http://www.iccsafe.org/e/category.html>.

(4) American National Standard for Buildings and Facilities: Providing Accessibility and Usability for Physically Handicapped People, 1986 edition, (ANSI A117.1-1986) may be obtained from Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112, telephone number 1-800-854-7179, global.ihs.com.

(c) The 1986, 1992, 1998, and 2003 editions of ANSI A117.1 may be inspected at the Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5240, Washington, DC 20410-0001, telephone number 202-708-2333.

■ 4. Revise § 100.205(e) to read as follows:

§ 100.205 Design and construction requirements.

* * * * *

(e)(1) Compliance with the appropriate requirements of ICC/ANSI A117.1-2003 (incorporated by reference at § 100.201a), ICC/ANSI A117.1-1998 (incorporated by reference at § 100.201a), CABO/ANSI A117.1-1992 (incorporated by reference at § 100.201a), or ANSI A117.1-1986 (incorporated by reference at § 100.201a) suffices to satisfy the requirements of paragraph (c)(3) of this section.

(2) The following also qualify as HUD-recognized safe harbors for compliance with the Fair Housing Act design and construction requirements:

(i) Fair Housing Accessibility Guidelines, March 6, 1991, in conjunction with the Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, June 28, 1994;

(ii) Fair Housing Act Design Manual, published by HUD in 1996, updated in 1998;

(iii) 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (with corrections contained in ICC-issued errata sheet), if adopted without modification and without waiver of any of the provisions;

(iv) 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement), if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements;

(v) 2003 International Building Code (IBC), if adopted without modification

and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and conditioned upon the ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "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 impracticability applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticability is addressed under Section 1107.7."

(vi) 2006 International Building Code; published by ICC, January 2006, with the January 31, 2007, erratum to correct the text missing from Section 1107.7.5, if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, and interpreted in accordance with the relevant 2006 IBC Commentary;

(3) Compliance with any other safe harbor recognized by HUD in the future and announced in the **Federal Register** will also suffice to satisfy the requirements of paragraph (c)(3) of this section.

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Dated: September 11, 2008.

Kim Kendrick,

Assistant Secretary for Fair Housing and Equal Opportunity.

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