

Questions and Answer:s Concerning the Final Rule Implementing the Housing for Older Persons Act of 1995 (HOPA)

Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act), as amended by the Fair Housing Amendments Act of 1988 (the Fair Housing Act), prohibits discrimination in housing and real estate-related transactions based on race, color, religion, sex, national origin, handicap and familial status (in general, the presence of children under the age of 18 in the household). 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.

The Housing for Older Persons Act (HOPA), signed into law by President Clinton on December 28, 1995, 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. It eliminated the requirement that housing for older persons have significant services and facilities specifically designed for its elderly residents. It required that facilities or communities claiming the exemption establish age verification procedures. It established 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.

Question 1:

For the purpose of HOPA, what is a housing community or facility?
What are some typical examples of a housing, community or facility?

Answer:

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. Typical 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.

Question 2:

May an owner of single family houses that are dispersed throughout a geographical area, and who is not otherwise exempt under the Fair Housing Act, qualify as a "housing community or facility" and claim the exemption?

Answer:

No. The common use of the terms "housing community" and "facility" applies to dwelling

units which are in the same location and have some relationship to each other. The dwelling units in a housing community or facility must share a common set of rules, policies, and procedures, that is applied to all of the dwellings in the community or facility. Further, although there is no required stated minimum number of dwelling units that must be present for the exemption to apply, there must be a sufficient number of dwelling units to constitute a "community" or "facility" in the common meaning of those terms. One single family dwelling or a duplex would not qualify as a "housing community or facility."

Question 3:

What must a housing community or facility do to qualify for the 55 or older housing for older persons exemption?

Answer:

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 for verification of occupancy through reliable surveys and affidavits.

Question 4:

What are some examples of the types of policies and procedures that would demonstrate an intent to provide housing for persons 55 years of age or older?

Answer:

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;
- 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.

Question 5:

May a housing facility or community advertise as "adult" housing and still demonstrate the intent to be housing for older persons?

Answer:

Use of the word "adult" or "adult community" in an advertisement, sign or other informational material, or when describing the facility or community to prospective renters or purchasers or members of the public, does not demonstrate an intent to be housing for older persons as defined by the final rule. The use of these terms, on the other hand, does not destroy the intent requirement of HOPA. If a facility or community has clearly shown in other ways that it intends to operate as housing for older persons, and meets the 80% requirement, and has in place age verification procedures, the intent requirement can be met even if the term "adult" is occasionally used to describe it. The Department 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.

Question 6:

How many days after the effective date of the final rule implementing HOPA does a facility/community have to develop routine procedures for determining the occupancy of each unit, including age verification?

Answer:

The housing community/facility has 180 days after the effective date of the rule, May 3, 1999, to develop the appropriate procedures that should constitute a part of its normal leasing and purchasing procedures. However, if a housing facility or community is not now but intends to become eligible for the exemption, it should not delay development of appropriate procedures.

Question 7:

What information should a housing provider include in its survey of residents in order to calculate whether the community or facility meets the 80% requirement of HOPA?

Answer:

The owner or manager should obtain the total number of units in the housing community or facility. From that number, 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 (see question 22);
- 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 or 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.

Question 8:

What is considered reliable age verification documentation?

Answer:

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.

Question 9:

Is there any other documentation that would be considered reliable for age verification?

Answer:

Yes. 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.

Question 10:

What recourse is there for the owner or management of the housing community or facility if the occupants in the household refuse to cooperate in providing documentation regarding their age?

Answer:

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. Statements made under penalty of perjury from third party individuals who have knowledge of the age of the occupants of a household may be used when the household itself refuses to cooperate by providing age verification. 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. The census data referred to is household censuses that are conducted by many cities and towns.

Question 11:

How frequently should a housing/community provider update its lists of occupants to be in compliance with the age verification requirements of HOPA? Are there any consequences if a housing provider fails to update its list of residents?

Answer:

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 failure to survey or re-survey its list of occupants in accordance with its age verification procedures does not demonstrate intent to housing for older persons, and could jeopardize the housing community's status as 55 or older housing.

Question 12:

How long should a housing community/facility retain its records of survey information that show it meets the 80 percent requirement?

Answer:

The records referred to in Answer: 9 above need to be kept as long as the housing community/facility intends to proffer its exempt status.

Question 13:

Are the surveys and affidavits used to gather information about the facility's/community's residents admissible in an administrative or judicial proceeding under the Fair Housing Act?

Answer:

Yes.

Question 14:

What does the ratio or percentage of 80/20 portion of housing mean?

Answer:

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.

Question 15:

Is it lawful to advertise or market the 20 percent portion of the units not required to be occupied by at least one person 55 years of age or older to prospective tenants/purchasers under age 55 and to families with children?

Answer:

Yes. However, 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.

Question 16:

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

Answer:

Yes. For example, 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 that 80% of the units 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.

Question 17:

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, may the facility/community impose different terms and conditions of residency on those families with children who reside there?

Answer:

Yes. If a housing community/facility qualifies under HOPA as housing for older persons, 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.

Question 18:

If a 55 or older occupant dies and leaves his/her property to a surviving spouse or heir(s) under the age of 55, what rights, if any, do the survivors have to possession?

Answer:

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.

Question 19:

In the event that the sole 55 or older occupant dies, and a surviving spouse or heir remains in the unit, is the surviving occupant counted in the 80 percent or the 20 percent portion of the units needed to meet the criteria for housing for older persons?

Answer:

The surviving occupant must be counted in the 20 percent portion.

Question 20:

How should a housing provider count, for the purpose of meeting the 80/20 occupancy requirement, attendants or health care providers needed for the reasonable accommodation of the disability of an occupant (including family members under the age of 18)?

Answer:

The attendant or health care provider or family care provider is excluded from the calculation in its entirety. 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.

Question 21:

How is the calculation for the 80/20 percent requirement affected if a 55 or older individual purchases a dwelling in a senior housing facility/community, vacates the unit, and allows an underage adult relative to move in for an indefinite length of time?

Answer:

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.

Question 22:

Are there circumstances under which a 55 or older owner/tenant might be temporarily absent from a dwelling without affecting the exemption status of the community/dwelling?

Answer:

Yes. For example, 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 event, 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.

Question 23:

Can a housing community/facility that does not now meet the 80 percent occupancy requirement take any action to become eligible?

Answer:

Yes. For a period of one year after the rule became effective (May 3, 1999), a housing provider may reserve all new, vacant and/or unoccupied units/dwellings for occupancy until 80 percent of the units/dwellings are occupied by at least one person 55 years of age or older. This does not mean that the dwellings/units must be held off the market; indeed, marketing the units as 55 and over units during the transition period may be done as those units become vacant.

Question 24:

During this transition period, may a facility/community refuse to rent or sell to families with children in its effort to qualify as housing for older persons?

Answer:

Yes. If, during the one year period the facility/community demonstrates its intent to be housing for older persons through advertising and revisions to or development of rules and procedures, and adopts age verification procedures, it may refuse to rent or sell to applicants based on their familial status. Of course, the facility/community may have to meet the requirements of state and local laws with respect to making the changes required for the transition in its covenants or other instruments binding on the property.

Question 25:

Can the facility/community evict families with children during the transition period for the purpose of becoming housing for older persons?

Answer:

No. However, the housing facility/community can renew or not renew leases for families with children if doing so does not represent a change in its practices or does not violate state or local landlord tenant law. Additionally, while the facility/community may not take any measures deliberately designed to discourage families with children from continuing to reside in the community, nothing prevents the offering of positive incentives that might lead some families to seek housing elsewhere.

Question 26:

What if a 55 or older housing provider, at the end of the transition period, does not succeed in meeting the 80 percent occupancy requirement?

Answer:

At the expiration of the one year period, all units/dwellings must be marketed and made available to the public in general, including families with children. Additionally, all restrictive operations policies which may impact negatively on families with children must be rescinded.

Question 27:

When does HUD become involved in determining whether a 55 or older housing community or facility is in compliance with HOPA requirements?

Answer:

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.

Question 28:

When must a person claiming to be injured by a housing community/facility because of familial status file a complaint with the Department in order for the complaint to be timely?

Answer:

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

Question 29:

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

Answer:

No. The family cannot file a familial status complaint because it does not meet the definition of familial status.

Question 30:

Can an owner of a dwelling 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?

Answer:

Yes, 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.

Question 31:

If an individual files a complaint based on familial status and the housing community/facility claims the exemption as a defense, who has the burden of proving, that the community/facility is in compliance with HOPA requirements?

Answer:

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.

Question 32:

Can a corporate entity avail itself of the good faith reliance against monetary damages if the housing community/facility is found not to be in compliance with the HOPA requirements?

Answer:

No. 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.

Question 33:

Since individuals, including individual members of a homeowners association or a board of directors, can use the good faith reliance against monetary damages, under what conditions might that occur?

Answer:

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. 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.

Question 34:

Under what circumstances may an individual not use the good faith reliance defense?

Answer:

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.

Question 35:

Is an individual insulated from a liability claim for disseminating information to others regarding the facility's/community's exemption claim?

Answer:

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.

Question 36:

Is a publisher (newspaper or other print media) liable for damages under the Fair Housing Act for accepting for publication an advertisement for 55 and older housing if the community/facility is found not to be in compliance with HOPA?

Answer:

No. Newspaper publishers and other print media that rely on the assertions of the housing provider are not liable unless they have actual knowledge that the housing does not qualify for the exemption.

Question 37:

Does HUD certify that a housing, facility/community is housing for older persons?

Answer:

No. 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.

Question 38:

If a developer is building new housing that is intended to be for persons 55 and over, how should the new units be marketed and occupied as the facility/community is being

developed?

Answer:

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.

Question 39:

How are state and federal fair housing laws that prohibit age discrimination affected by HOPA?

Answer:

Neither the Fair Housing Act nor HOPA covers age discrimination. Neither of these federal laws 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.

Question 40:

Must state or local governments that have been determined to have substantially equivalent laws to the Fair Housing Act change the laws under which they operate in order to be identical to HOPA?

Answer:

No. 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.

Question 41:

Must a housing community/facility 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?

Answer:

HOPA does not require this. 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.

Question 42:

Must a resident of a 55 or older housing community/facility join the homeowner's association?

Answer:

The Fair Housing Act does not require this. HOPA does not require this. 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.

Question 43:

Would HUD apply HOPA retroactively to a familial status claim of discrimination that occurred prior to December 28, 1995, when HOPA was signed into law?

Answer:

No. 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.

Question 44:

How does the Fair Housing Amendments Act senior housing, exemption, and HOPA, affect eligibility requirements for federally funded housing programs.

Answer:

The Act 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. 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.