

Action	FCC form No.	Fee amount	Fee type code	Address
c. Review of Depreciation Update Study (Single State).	Corr & 159	23,750	BAK	Federal Communications Commission, Accounting & Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140.
(i) Each Additional State	Corr & 159	785	CVA	Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140.
d. Interpretation of Accounting Rules (per request).	Corr & 159	3,315	BCA	Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140.
e. Petition for Waiver (per petition) (Waiver of Part 69 Tariff Rules & Parts 36, 63 & 69 Accounting Rules).	Corr & 159	5,350	BEA	Federal Communications Commission, Accounting and Audits, P.O. Box 358140, Pittsburgh, PA 15251-5140.

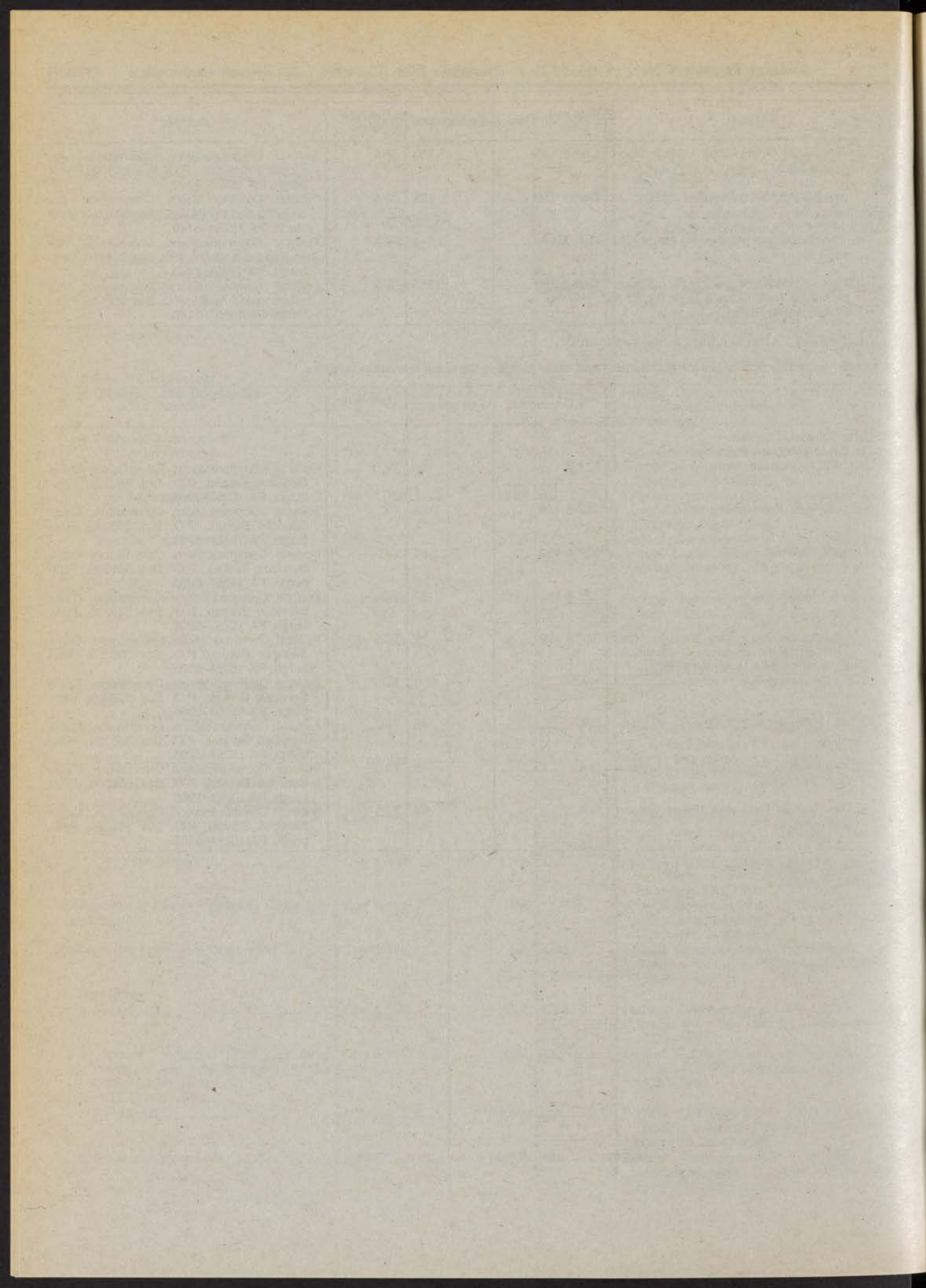
6. Section 1.1106 is added to read as follows:

§ 1.1106 Schedule of charges for applications and other filings in the cable television services.

Action	FCC form No.	Fee amount	Fee type code	Address
1. Cable Television Service:				
a. Cable Television Relay Service:				
(i) Construction Permit	327 & 159	180	TIC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
(ii) Assignment or Transfer	327 & 159	180	TIC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
(iii) Renewal	327 & 159	180	TIC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
(iv) Modification	327 & 159	180	TIC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
(v) Special Temporary Authority (other than to remain silent or extend an existing STA to remain silent).	327 & 159	115	TGC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
b. Cable Special Relief Petition	N/A	910	TQC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
c. 76.12 Registration Statement (per statement).	N/A	45	TAC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
d. Aeronautical Frequency Usage Notifications (per notice).	N/A	45	TAC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.
e. Aeronautical Frequency Usage Waivers (per waiver).	N/A	45	TAC	Federal Communications Commission, Cable Services Bureau, P.O. Box 358205, Pittsburgh, PA 15251-5205.

[FR Doc. 94-14211 Filed 6-13-94; 10:48 am]

BILLING CODE 6712-01-M



Federal Register

Thursday
June 16, 1994

Part IV

Department of Education

National Workplace Literacy Program;
Proposed Priority; Notice

DEPARTMENT OF EDUCATION

RIN 1830-ZA00

National Workplace Literacy Program**AGENCY:** Department of Education.**ACTION:** Notice of proposed priority.

SUMMARY: The Secretary proposes an absolute priority to focus fiscal year 1995 funds for new workplace literacy projects on communities that have been designated as Empowerment Zones or Enterprise Communities authorized under section 1391 of the Internal Revenue Code, as amended by title XIII of the Omnibus Budget Reconciliation Act of 1993. Under the proposed absolute priority, funds under this competition would be reserved only for projects that provide workplace literacy services to Empowerment Zones or Enterprise Communities through partnerships eligible for funding in the National Workplace Literacy Program.

DATES: Comments must be received on or before July 18, 1994.

ADDRESSES: All comments concerning the proposed priority must be addressed to Mr. Ronald S. Pugsley, U.S. Department of Education, 400 Maryland Avenue SW., room 4428-MES, Washington, DC 20202-7240.

FOR FURTHER INFORMATION CONTACT: Sarah Newcomb, Office of Vocational and Adult Education, U.S. Department of Education, 400 Maryland Avenue SW., room 4417-MES, Washington, DC 20202-7240, Telephone (202) 205-9872 or Jeanne Williams, Office of Vocational and Adult Education, U.S. Department of Education, 400 Maryland Avenue SW., room 4513-MES, Washington, DC 20202-7327. Telephone (202) 205-5977. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:**Background on Empowerment Zone and Enterprise Community Initiative**

The Empowerment Zone and Enterprise Community program is a critical element of the Administration's community revitalization strategy. The program is a first step in rebuilding communities in America's poverty-stricken inner cities and rural heartlands. It is designed to empower people and communities by inspiring Americans to work together to create jobs and opportunity.

Under this program, the Federal Government will designate up to nine areas as Empowerment Zones and up to

95 areas as Enterprise Communities in accordance with Internal Revenue Code section 1391, as amended by title XIII of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66). To be eligible for designation, an area must be nominated by one or more local governments and the State or States in which it is located or by a State-Chartered Economic Development Corporation. A nominated area must be one of pervasive poverty, unemployment, and general distress, and must have a poverty rate of not less than the level specified in section 1392 of the Internal Revenue Code.

In the Empowerment Zone and Enterprise Community program, communities are invited to submit strategic plans that comprehensively address how the community would link economic development with education and training as well as how community development, public safety, human services, and environmental initiatives will together support sustainable communities. Empowerment Zones and Enterprise Communities will be designated by the Department of Agriculture and the Department of Housing and Urban Development (HUD) based on the quality of their strategic plans. Designated areas will receive Federal grant funds and substantial tax benefits and will have access to other Federal programs. (For additional information on the Empowerment Zone and Enterprise Community program, contact HUD at 1-800-998-9999.)

The Department of Education is supporting the Empowerment Zone and Enterprise Community initiative in a variety of ways. It is encouraging Empowerment Zones and Enterprise Communities to use funds they already receive from Department of Education programs (including Chapter 1 of Title I of the Elementary and Secondary Education Act, the Drug-Free Schools and Communities Act, the Adult Education Act, and the Carl D. Perkins Vocational and Applied Technology Education Act) to support the comprehensive vision of their strategic plans. In addition, the Department of Education intends to give preferences to Empowerment Zones and Enterprise Communities in a number of discretionary grant programs that are well suited for inclusion in a comprehensive approach to economic and community development. In addition to the National Workplace Literacy Program described in this notice in which the Department intends to give an absolute preference, the Department intends to give competitive preferences to Empowerment Zones and Enterprise Communities in the Urban

Community Service program, the Rehabilitation Act Projects with Industry program, Rehabilitation Act Special Demonstration Projects program, the Parent Training program and Early Childhood Education program under the Individuals With Disabilities Education Act, and a variety of discretionary programs under the Elementary and Secondary Education Act. Notices concerning those programs will be published at a later date.

Background on National Workplace Literacy Program

The National Workplace Literacy Program is ideally suited to play a key role in the Empowerment Zone and Enterprise Community program because it links economic development and education and training efforts. The program, which makes discretionary grants of up to three years in length, supports demonstration projects that teach literacy skills needed in the workplace through exemplary education partnerships. The partnerships are established between a business, industry, or labor organization or a private industry council and an educational organization to support work-related basic skills training. The National Workplace Literacy Program funds may be used, among other things, to update or upgrade the skills of workers in line with changes in production processes or technology. For example, basic skill levels that formerly were adequate for assembly line production are inadequate for employees faced with sophisticated quality control systems, flexible production, team-based work, and participatory management practices.

National Workplace Literacy projects can improve the human resources of Empowerment Zones and Enterprise Communities, increase the productivity of businesses located in Empowerment Zones and Enterprise Communities, and help attract new businesses to these needy areas. Further, an amendment to the program, contained in the National Literacy Act of 1991, establishes a statutory priority for serving small businesses. This is the type of business most likely to be found in the zones.

In addition, the National Workplace Literacy Program is an important vehicle for achieving the National Education Goal that by the year 2000, every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship. The program helps further this goal by improving approaches and methods used in meeting the literacy needs of

adults in the workplace, including those with limited English proficiency. The National Workplace Literacy Program will also benefit by establishing an absolute priority related to Empowerment Zones and Enterprise Communities. Communities receiving these designations will already have demonstrated a capacity for the type of cooperative planning that is critical to a successful workplace literacy partnership. Projects funded under the priority will provide models for partnerships in other distressed areas and show how the National Workplace Literacy Program furthers the National Education Goal that every adult American will be literate and able to compete in the global economy.

Note: This notice of proposed priority does not solicit applications. A notice inviting applications under this competition will be published in the *Federal Register* concurrent with or following publication of the notice of final priority.

Priority

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that are otherwise eligible for funding under the National Workplace Literacy Program and that meet the following priority. The Secretary may implement this priority for fiscal year 1995 and for any later fiscal year:

Projects that provide workplace literacy services only for (a) persons who reside in and work in Empowerment Zones and Enterprise Communities; (b) persons who work in Empowerment Zones and Enterprise Communities although they do not reside there; or (c) persons who reside in Empowerment Zones and Enterprise Communities and who may work outside the Empowerment Zone or Enterprise Community. If necessary to the proper functioning of a project serving a substantial number of persons in category (c), services may also be provided to a small number of their coworkers who neither work nor reside in an Empowerment Zone or Enterprise Community.

The proposed project under the National Workplace Literacy Program must contribute to the strategic plan of the Empowerment Zone or Enterprise

Community and be made an integral component of the Empowerment Zone or Enterprise Community activities.

In providing workplace literacy services, partnerships must develop curricula related to work or use or modify curricula developed by successful workplace literacy partnerships. For competitions under this absolute priority, the Secretary will waive the selection criterion "Evaluation Plan" in 34 CFR 472.22(f) and the evaluation requirements in 34 CFR 472.31 and, in their place, conduct a national evaluation of projects serving Empowerment Zones and Enterprise Communities. The purpose of the waiver is to allow Empowerment Zone and Enterprise Community projects to focus maximum resources on the provision of quality services and to further a Federal evaluation study that particularly can benefit other distressed areas.

Additional Factor the Secretary Considers

After evaluating each application according to the proposed selection criteria, the Secretary may select for funding one or more applications of high quality, other than the most highly rated applications, if the Secretary concludes that this selection would improve the distribution of grants among applicants serving urban and rural areas.

Executive Order 12866

This notice of proposed priority has been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice of proposed priority are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of proposed priority, the Secretary has determined that the benefits of the proposed priority justify the costs.

The Secretary has also determined that this regulatory action does not

unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from this proposed priority without impeding the effective and efficient administration of the program.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding this proposed priority.

All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in room 4428, Switzer Building, 330 C Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week, except Federal holidays.

Applicable Program Regulations: 34 CFR Part 472.

(Catalog of Federal Domestic Assistance Number 84.198B National Workplace Literacy Program)

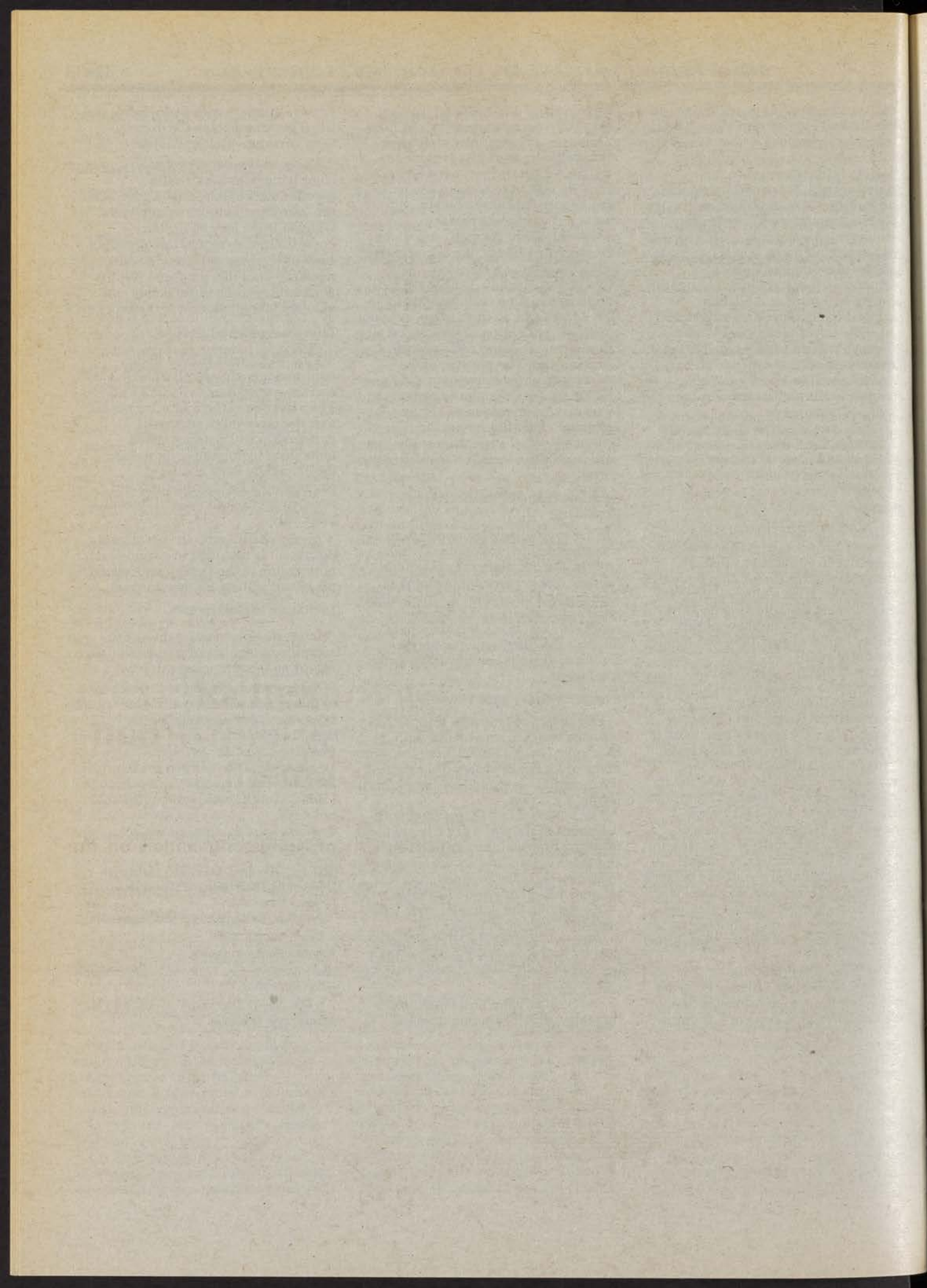
Program Authority: 20 U.S.C. 1211(a).

Dated: June 2, 1994.

Augusta Souza Kappner,
Assistant Secretary, Office of Vocational and Adult Education.

[FR Doc. 94-14591 Filed 6-15-94; 8:45 am]

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Federal Register

Thursday
June 16, 1994

Part V

**Department of
Housing and Urban
Development**

24 CFR Part 9

**Enforcement of Nondiscrimination on the
Basis of Disability in Programs or
Activities Conducted by the Department
of Housing and Urban Development;
Final Rule**

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 9

[Docket No. R-94-1510; FR-2163-F-05]

RIN 2501-AA04

Enforcement of Nondiscrimination on
the Basis of Disability in Programs or
Activities Conducted by the
Department of Housing and Urban
Development

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This rule makes final a proposed rule published on May 30, 1991 which proposed to amend title 24 of the Code of Federal Regulations to create a new part 9, that would provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, in programs or activities conducted by HUD. The rule at 24 CFR part 9 is distinguished from the rule at 24 CFR part 8, which applies to private, State or local programs or activities receiving Federal financial assistance from HUD. This final rule at 24 CFR part 9 establishes standards for what constitutes discrimination on the basis of mental or physical disabilities; provides definitions for "individuals with disabilities" and "qualified individuals with disabilities"; establishes a complaint procedure for resolving allegations of discrimination; and also incorporates additional changes to reflect regulatory implementation of the Americans with Disabilities Act.

EFFECTIVE DATE: July 18, 1994.

FOR FURTHER INFORMATION CONTACT: Elizabeth Ryan, Office of Fair Housing and Equal Opportunity, room 5214, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-5000, telephone (202) 708-2333 (voice/TDD). (This is not a toll free number.)

SUPPLEMENTARY INFORMATION:**I. Background**

Section 504 of the Rehabilitation Act of 1973, as amended (section 504), states in pertinent part that:

No otherwise qualified individual with disabilities in the United States, * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by

any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees. (29 U.S.C. 794 (1978 amendment italicized)).

On May 30, 1991 (56 FR 24604), HUD published a proposed rule that would amend title 24 of the Code of Federal Regulations to create a new part 9, that would provide for the enforcement of section 504 as it applies to programs or activities conducted by HUD (i.e., HUD conducted programs or activities). The part 9 rule is distinguished from the rule at 24 CFR part 8, which applies to private, State or local programs or activities receiving Federal financial assistance from HUD (HUD assisted programs or activities). However, the substantive nondiscrimination obligations of the agency as set forth in the part 9 rule are adapted from, and are very similar to, those contained in the part 8 rule. (See 24 CFR part 8; see also 28 CFR part 41, which is the section 504 coordination regulation for federally assisted programs issued by the Department of Justice (DOJ).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in House floor debate, including its sponsor, U.S. Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

There are, however, some differences between this part 9 rule and the DOJ section 504 coordination regulations for federally assisted programs, as well as many other agencies' implementing regulations. Many of these changes are based on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) [*Davis*], and the subsequent circuit court decisions interpreting *Davis* and section 504. These differences were discussed in detail in the preamble to the part 9 proposed rule at 56 FR 24604-24605. There are also differences between the part 9 proposed rule and the part 9 final

rule. These differences are discussed in the following section.

II. Differences Between Part 9 Proposed Rule and Part 9 Final Rule

The Department invited public comment on the part 9 proposed rule. During the public comment period, which expired July 29, 1991, the Department received seven comments. The commenters included: One state agency for the visually impaired; a not-for-profit law firm that specializes in disability and health law; an organization representing the interests of senior citizens; two legal service organizations; and two disability advocacy organizations.

Following careful consideration of the issues raised by the commenters, and further consideration of the part 9 rule in light of regulatory implementation of the Americans with Disabilities Act (Pub.L. 101-336, approved July 26, 1990) (ADA), the Department has decided to adopt the part 9 proposed rule substantially as published on May 30, 1991. However, the Department has made some changes to the proposed rule in response to certain issues raised by the commenters, and in response to the final rules published on July 26, 1991, implementing titles I, II, and III of the ADA, which address, respectively, equal employment opportunity for individuals with disabilities (title I); nondiscrimination on the basis of disability in State and local government services (title II); and nondiscrimination on the basis of disability by public accommodations and in commercial facilities (title III). (See 29 CFR part 1630, 56 FR 35726 (title I); 28 CFR part 35, 56 FR 35694 (title II); and 28 CFR part 36, 56 FR 3544 (title III).)

A change in terminology that has been made in the part 9 final rule (and which also will be made to the rule in 24 CFR part 8) is replacement of the term "handicap" with "disability." The Rehabilitation Amendments of 1992 (Pub.L. 102-569, approved October 29, 1992) amended the Rehabilitation Act of 1973 to replace "handicap" with "disability."

The additional changes made to the part 9 proposed rule by this final rule include the following.

Applicable Accessibility Standards

The final rule provides that HUD will follow the Uniform Federal Accessibility Standards (UFAS), except where the accessibility standards issued under the ADA provide for greater accessibility than the UFAS. The accessibility standards issued under the ADA are referred to as the ADA Accessibility Guidelines (ADAAG), and

are set forth in appendix A to 39 CFR part 1191.

The UFAS implements the accessibility standards required by the Architectural Barriers Act (42 U.S.C. 4151-4157) (Barriers Act), and these standards are set forth in 24 CFR part 40, appendix A for residential structures, and in 41 CFR 101-19.600 to 101.607 for non-residential structures.

The DOJ, by memorandum dated June 30, 1993, advised all Federal agencies that at a recent meeting, the ATBCB adopted a resolution urging Federal agencies to follow the ADAAG whenever it provides equal or greater accessibility than UFAS. The DOJ has requested that Federal agencies which have not issued their final rules implementing section 504 in Federally-conducted programs and activities comply with the ATBCB's request. The DOJ notes that from a legal point of view, current section 504 regulations do not prohibit implementation of such a policy because the regulations do not require compliance with UFAS, but, rather they simply state that compliance with UFAS is deemed to be compliance with section 504 new construction and alteration requirements.

Accordingly, this final rule provides that HUD will follow the ADAAG whenever it provides greater accessibility than the UFAS. Additionally, the terms "UFAS" and "ADAAG" will be added to the definition section of the part 9 rule—§ 9.103.

Revised Definition of "Accessible"

A minor revision is made to each of the definitions of *accessible* in § 9.103. Each definition includes the phrase "complies with applicable accessibility standards" to clarify that the design, construction or alteration undertaken must comply with applicable accessibility standards.

Revised Definition of "Accessible Route"

This final rule revises the definition of *accessible route*. The definition of *accessible route* in the part 9 proposed rule was modeled on the definition of *accessible route* in 24 CFR part 8. However, on further consideration, the Department finds the part 8 definition to be too limited for purposes of part 9.

Part 8 applies solely to HUD-assisted programs. The majority of these programs are concerned with assisting individuals and families to obtain decent and affordable housing by providing financial assistance (through rental subsidies or for the development and operation of public housing), or by endorsing a mortgage on a house or the

mortgage note on a housing project (or both) for insurance. Thus, the part 8 definition of *accessible route* reflects part 8's focus on housing facilities.

Part 9, however, applies to all programs or activities conducted by HUD. These programs and activities, as noted in the preamble to the part 9 proposed rule (56 FR 24605), consist of the following: (1) Employment; (2) HUD's contact with the general public as part of ongoing agency operations; and (3) those HUD programs directly administered by HUD for program beneficiaries and participants. Activities within category 2 include communications with the public (telephone contacts, office walk-ins or interviews) and the public's use of the agency facilities. Activities within category (3) include programs that provide Federal services or benefits (e.g., housing facilities in HUD's Property Disposition Program, training at both HUD and outside facilities, contracting and policy-development). These activities involve many types of buildings and facilities, not just housing facilities.

Accordingly, the definition of *accessible route* in part 9 is revised by replacing it with the definition of *accessible route* used in the ADAAG. The definition of *accessible route* in the ADAAG includes examples of interior accessible routes and exterior accessible routes.

Revised Definition of "Adaptability"

The definition of *adaptability* is also revised by this final rule. The definition of *adaptability* in the proposed part 9 rule was based on the definition of *adaptability* in 24 CFR part 8. The part 8 definition is solely concerned with *adaptability* in dwelling units, and, therefore, inappropriate for part 9, for the same reasons stated under the discussion of the revised definition of *accessible route*. Accordingly, the Department is adopting the definition of *adaptability* based on the definition of *adaptability* provided in the UFAS and ADAAG, which provide the same definition for this term.

As revised in this final rule, *adaptability* will mean the ability of certain elements of a dwelling unit, such as kitchen counters, sinks and grab bars, to be added or altered so as to accommodate the needs of individuals with or without disabilities or to accommodate the needs of persons with different types or degrees of disability. This definition differs from the definition in the part 9 proposed rule in that it refers to "building spaces and elements" instead of "certain elements

of a dwelling unit." Both UFAS and ADAAG use the phrase "building spaces and elements."

Replacement of Definition of "Agency-Owned Housing Facility" With "PDP Housing Facility"

The final rule replaces the term "agency-owned housing facility" with *PDP housing facility*. PDP refers to HUD's Property Disposition Program, and a definition is also included for this term. (See discussion below.) Since the only HUD-owned housing facilities are those in the Property Disposition Program, the Department believed use of the term "PDP housing facility" is a more accurate term.

Revised Definition of "Alteration"

The part 9 final rule replaces the definition of *alteration* set forth in the May 30, 1991 proposed rule with that definition provided in the ADAAG. This definition is more detailed and therefore provides more guidance on what constitutes, and what does not constitute, an alteration.

Revised Definition of "Facility"

The part 9 final rule also replaces the definition of *facility* in the May 30, 1991 proposed rule with that definition provided in the ADAAG. As with the definition of *alteration*, the ADAAG definition of *facility* is more detailed and therefore more helpful than the definition provided in the part 9 proposed rule.

Revised Definition of "Individual With Disabilities"

The definition of *individual with disabilities* (formerly, "individual with handicaps") is also revised by this rule.

Paragraph (a), which defines the term "physical and mental impairment" is revised to include the human immunodeficiency virus disease.

A new paragraph (b) is added to this definition to incorporate the provisions of former § 9.131 in the proposed rule, which addressed applicability of section 504 to current and former illegal use of drugs. The DOJ and the Equal Employment Opportunity Commission (EEOC) which reviewed the part 9 rule in accordance with Executive Order 12067 (see Section IV of this preamble) suggested that the exclusion of individuals currently engaged in the illegal use of drugs from the protection provided by section 504, and the inclusion of individuals undergoing, or having successfully completed, drug rehabilitation, are more appropriately addressed in the definition of "individual with disabilities." Section 9.131 of the proposed rule has been

removed as a result of incorporation of its provisions in the definition of *individual with disabilities*.

Former paragraph (b) (paragraph (b) in the part 9 proposed rule), which addressed impairments that are not included in the definition of "physical or mental impairment" is redesignated as paragraph (c) in this final rule, and is revised to address what is excluded from the definition of *individual with disabilities* for purposes of employment.

In the part 9 proposed rule, paragraph (b) provided that the term "physical or mental impairment" did not include (1) an individual who has a currently contagious disease or infection and who, by reasons of such disease or infection, would constitute a direct threat to the health or safety of other individuals, and (2) an individual who is an alcoholic and whose current use of alcohol prevents the individual from performing the duties of the job in question. Although these exclusions are appropriate for inclusion under the definition of *individual with disabilities*, they are not appropriate for inclusion in the definition of "physical or mental impairment."

Accordingly, new paragraph (c) of the definition of *individual with disabilities* clarifies that the contagious disease and alcohol abuse exclusions are part of the definition of "individual with disabilities" and also clarifies that these exclusions are limited to the employment context, in accordance with section 504 which imposes this limitation.

New Definition for "Property Disposition Program"

As noted above, the final rule provides a definition for this term. *Property Disposition Program* is defined to mean the HUD program under which HUD administers the group of housing facilities that are either owned by the Secretary or where, even though the Secretary has not obtained title, the Secretary is mortgagee-in-possession. Such properties are deemed to be in the possession or control of the agency.

Direct Threat Standard—New § 9.131

The part 9 final rule adds a new § 9.131 to implement section 302(b)(3) of the ADA, which addresses the issue of "direct threat to the health or safety of others." Section 9.131 provides that the agency (HUD) is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the agency where the individual poses a direct threat to the health or safety of others. Section 9.131 is similar to § 36.208 of the final rule implementing title III of the ADA,

published on July 26, 1991 (56 FR 35544) and codified at 28 CFR part 36. New § 9.131 is not intended to imply that individuals with disabilities pose risks to others. It is intended to address concerns that may arise in this area, and to establish a strict standard that must be met before denying service to an *individual with disabilities* or excluding that individual from participation in the programs or activities conducted by the agency.

Paragraph (b) of this section defines "direct threat" to mean a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids and services. This paragraph codifies the standard first applied by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which the Court held that an individual with a contagious disease may be an *individual with disabilities* under section 504. In *Arline*, the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although individuals with disabilities are generally entitled to the protection of part 9, a person who poses a significant risk to others may be excluded if reasonable modifications to the agency's policies, practices, or procedures will not eliminate or reduce that risk (i.e., reduce it so that it is below the level of direct threat). The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. This determination must be based on an assessment of that individual that conforms to the requirements of paragraph (c) of § 9.131.

Paragraph (c) of § 9.131 establishes the test to be used in determining whether an individual poses a direct threat to the health or safety of others. The agency is required to make an individualized assessment, based on reasonable judgment that relies on current medical evidence, or on the best available objective evidence to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. This type of inquiry is essential if section 504 is to achieve its goal of protecting individuals with disabilities from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate

concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

Additional Changes

In addition to the above changes, and as discussed in further detail in Section III of this preamble, the final rule also revises § 9.170, which concerns the part 9 compliance procedure. A hearing procedure is not mandated by statute, and the Department has concluded that the compliance procedure set forth in § 9.170 provides an adequate remedy. Certain editorial changes were made to § 9.152 to clarify the extent of the agency's responsibility to modify existing housing.

II. Discussion of Public Comments

The revisions to the part 9 proposed rule discussed in section II above are further addressed in this section III, which addresses the issues raised by the public commenters.

Relationship of Section 504 to the Fair Housing Act and the Americans With Disabilities Act

Comment. Six of the commenters stated that the part 9 proposed rule did not incorporate the standards and requirements that appear in the Fair Housing Act¹ or in title II of the ADA. Two commenters expressed concern that the part 9 rule proposes to implement less stringent standards than the Fair Housing Act, and requested that the part 9 final rule conform to the Fair Housing Act requirements; thus, eliminating any conflict in program regulations. Another commenter stated that the ADA requires HUD's regulations to "refer to the ADA so that when HUD assumes responsibility for housing enforcement under the public services section (title II of the ADA), HUD will be better able to ensure consistency among all of its enforcement responsibilities."

Response. As noted in the preamble discussion under Section II, which discusses changes made to the part 9 proposed rule, HUD does, in several places in the final rule, incorporate the standards and requirements of the ADA. However, it is important to note that in

¹ Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988 is referred to as the "Fair Housing Act."

enacting the Fair Housing Act and the ADA, the Congress did not override the specific provisions of section 504. While all three statutes (the Fair Housing Act, the ADA, and section 504) provide certain civil rights protection to individuals with disabilities, the scope and mandate of each statute is different.

Section 504 is concerned with discrimination against individuals with disabilities in federally assisted and federally conducted programs and activities. Federal programs or activities subject to section 504 include those in the areas of employment, education, health, social services, housing and agency facilities. Under section 504, the mandate that a federally assisted or conducted program or activity be "accessible" to individuals with disabilities does not, in every case, require structural changes. Moreover, when compliance with the "program accessibility" of section 504 does require structural changes, structural changes are not required to the same extent as required under the Fair Housing Act. Under section 504, accessibility is defined in broader terms, as discussed in the preamble to HUD's part 8 interim rule implementing section 504 for HUD assisted programs and activities:

For example, even though a facility in which a federally assisted program is conducted is free of architectural barriers and thus meets requirements for facility accessibility, the program is not accessible if management policies and procedures effectively bar [individuals with disabilities] from participating in or otherwise benefiting from the program or activity. On the other hand, a program which is conducted in an inaccessible existing facility can be made accessible without altering the facility, where the program or activity can be delivered or otherwise be made available to a [disabled] beneficiary without loss of essential program benefits.

(See preamble to part 8 interim rule published on May 6, 1983, 48 FR 20638 at 20640)

The Fair Housing Act is concerned with discriminatory housing practices, and its provisions apply to all housing, not just federally-assisted or federally-owned housing. The Fair Housing Act is also concerned with structural accessibility. The Fair Housing Act establishes accessible design and construction requirements for certain new multifamily dwellings for first occupancy on or after March 13, 1991. These requirements, however, do not extend to existing facilities (i.e.,

alterations to existing facilities are not required).

The ADA is concerned with discrimination on the basis of disability in the areas of employment, public accommodations, State and local government services, and telecommunications. With respect to structural accessibility, title II of the ADA requires that newly constructed or newly altered State or local government facilities be designed and constructed or altered so as to be readily accessible to and usable by persons with disabilities. (See 56 FR 35574.)

The different mandates and scopes of section 504, the Fair Housing Act and the ADA limit the extent to which the regulations promulgated under these statutes can be uniform. Additionally, HUD's section 504 regulations are subject to the coordinating authority of the DOJ under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298.) The purpose of DOJ's coordinating authority is to ensure that, to the greatest extent possible, there is uniformity in the implementation of section 504 by all Federal agencies. Accordingly, HUD's section 504 regulations are obliged to adhere, as closely as possible, to DOJ's prototype section 504 regulations for these types of programs, and to such other guidance as DOJ may provide in the issuance of section 504 regulations (for example, see the discussion concerning applicable accessibility standards in Section II of the preamble).

With respect to any conflict among the requirements or the accessibility standards of section 504, the Fair Housing Act and the ADA, and their respective regulations, HUD notes that an individual or entity that is subject to the provisions (including regulatory provisions) of more than one of these statutes must comply with the provisions that provide for the greater substantive rights or the more stringent accessibility standards.

Definition of "Accessible" (§ 9.103)

Comment: Definition Requires Clarification. Two commenters stated that the definition of "accessible" in the part 9 proposed rule lacks the specific guidance provided by the definition for this term in § 100.201 of HUD's Fair Housing Act regulations (24 CFR 100.201). One of the commenters stated that the part 9 definition of "accessible" with respect to individual dwelling units requires that a unit be designed to meet the specific needs of a qualified individual's particular disability or impairment. The commenter requested that HUD clarify that for a unit to be counted toward a program's five percent

requirement for accessible units, all the accessibility requirements for dwelling units, as provided in 24 CFR part 40, must be met and not just those which might be adequate to meet the needs of the individual's specific disability.

Response. As discussed above, section 504 and the Fair Housing Act have different purposes. The Fair Housing Act's design and construction accessibility standards apply only to certain new multifamily housing. Section 504 is concerned with overall "program" accessibility, which includes accessibility standards for multifamily housing and other types of facilities, including Federal Government buildings. Additionally, the Fair Housing Act, unlike section 504, does not impose accessibility standards on alterations to existing housing and facilities. Accordingly, the definition of "accessible" in HUD's Fair Housing Act regulations is not sufficiently broad for section 504 purposes. However, as noted in Section II of this preamble, which discusses changes made to the proposed rule, the Department did make some modification to the definitions of "accessible" for purposes of clarity.

With respect to the question of whether an individual dwelling unit, that is altered to be accessible to a qualified individual with a specific disability, counts toward the program's five percent requirement, the Department notes that this issue is addressed by § 9.152 of the rule. Section 9.152 provides that if HUD undertakes alterations to a PDP multifamily housing project, that is subject to the accessibility requirements of § 9.152, a minimum of five percent of the total dwelling units, or at least one unit, whichever is greater, must be made accessible for persons with mobility impairments. (Emphasis added.) Section 9.152 also provides that if the unit is on an accessible route and is adaptable and otherwise in compliance with § 9.152(d) (which requires compliance with the definitions, requirements and standards of the UFAS, except where the ADAAG provides for greater accessibility) the unit is accessible for purposes of § 9.152. Section 9.152 further provides that an additional two percent of the units (but not less than one unit) in the project must be made accessible for persons with hearing or vision impairments. (Emphasis added.) Thus, whether an individual dwelling unit, which is altered for a specific qualified individual with disabilities, counts toward the program's five percent or two percent requirement depends upon the nature of the alterations undertaken to address the individual's disability.

Definition of "Accessible Route" (§ 9.103)

Comment: Definition Lacks Specific Guidance. Two commenters stated that the definition of "accessible route" as set forth in HUD's Fair Housing regulations provides more guidance than the definition in the part 9 proposed rule, and urged the Department to adopt the definition in the Fair Housing Act regulation.

Response. As discussed in the previous response, the differences between the mandate and scope of the Fair Housing Act and the mandate and scope of section 504 render the definition of "accessible route" in HUD's Fair Housing Act regulations inappropriate for section 504 purposes. However, as noted in section II of this preamble, the Department has revised the definition of "accessible route" to require compliance with the ADAAG. The Department believes that the ADAAG definition of "accessible route" provides more guidance than the definition of "accessible route" in the part 9 proposed rule, and should address the commenters' concerns.

Comment: Definition Should Reference Architectural Barriers Act. One commenter stated that the definitions of "accessible," "accessible route," and "adaptability" should reference the Barriers Act, which imposes access requirements on all HUD-owned, leased, and managed properties.

Response. As discussed in section II of this preamble, the definitions of "accessible route" and "adaptability" were revised in this final rule to adopt the standards of the ADAAG or UFAS, as applicable. Also, §§ 9.151 and 9.152 of the proposed rule, and of this final rule, which establish the requirements for new construction and alterations to existing facilities, provide that the definitions, requirements, and standards of the UFAS apply to facilities covered by this rule, except where the ADAAG may provide for greater accessibility.

Comment: Definition Should Provide Accessibility For Persons Who Are Hearing and Sight Impaired. One commenter stated that the definition of "accessible route" in the part 9 rule provides that "an accessible route that serves only accessible units occupied by persons with hearing or vision impairments would not be required to comply with those requirements intended to effect accessibility for persons with mobility impairments." The commenter requested that HUD revise this definition to include persons who are visually impaired, blind, or deaf and blind. The commenter stated

that moving about safely in one's environment can be a major obstacle to independent living for individuals with these disabilities.

Response. HUD agrees with the commenter and believes that the revision made to the definition of "accessible route" by this final rule, which is to adopt the ADAAG definition of "accessible route," addresses the commenter's concern.

Definition of "Adaptability" (§ 9.103)

Comment: HUD Should Adopt the Definition of Adaptability Used in Fair Housing Regulations. Two commenters urged the Department to adopt the definition of "adaptability" in the Fair Housing Act regulations (24 CFR 100.205), and stated that the part 9 rule should not use a different definition than that contained in the Fair Housing Act regulations.

Response. The more explicit description of "adaptability" in the Fair Housing Act regulations results from the fact that the statutory language of the Fair Housing Act is explicit as to what constitutes accessibility and adaptability under the Act. The language in § 100.205(c) of HUD's Fair Housing Act regulations is taken directly from section 804(f)(3)(C) of the Fair Housing Act. However, the features of adaptable design and construction described in § 100.205(c) do not include all the features that may be required under part 9. For example, the accessibility/adaptability requirements of the Fair Housing Act do not require adjustable cabinetry, fixtures and plumbing. (See discussion of this issue in the preamble to the Fair Housing Accessibility Guidelines codified at 24 CFR, Ch. I, Subch. A, App. III.) Additionally, the Fair Housing Act does not require accessible/adaptable features for individuals with hearing or vision impairments. The section 504 definition of "adaptability" includes adjustable cabinetry and fixtures, and design features for persons with impaired hearing and vision. Thus, the Fair Housing Act definition of adaptability, which is directed largely to individuals with mobility impairments, is inappropriate for section 504 purposes.

Definition of "Auxiliary Aids" (§ 9.103)

Comment: Definition Should Include Devices for Persons With Impaired Cognitive Skills. Two commenters stated that the definition of "auxiliary aids" in the part 9 rule limits these aids to persons with impaired sensory, manual or speaking skills. The commenters stated that auxiliary aids and services should not exclude individuals with mental disabilities,

and suggested that the definition be revised as follows: "Auxiliary aids means services or devices that enable persons with impaired sensory, manual, cognitive, interpersonal, or speaking skills to have equal opportunity"

Response. HUD's definition of auxiliary aids and services is consistent with the DOJ's definition for these terms. The DOJ interprets auxiliary aids and services as those aids and services designed to provide effective communication, e.g., making aurally and visually delivered information available to persons with hearing, speech and vision impairments. This interpretation was recently reiterated in DOJ's final rules implementing title II and title III of the ADA. (See 28 CFR part 35 (title II); and 28 CFR part 36 (title III); see, especially discussion in preamble to title III final rule at 56 FR 35565). To the extent that individuals with cognitive or learning disabilities have impaired sensory, manual, or communication skills, these individuals are covered by the definition of auxiliary aids and services.

Definition of "Individuals With Disabilities" (§ 9.103)

Comment: Definition Omits the Human Immunodeficiency Virus. Four commenters stated that the definition for "individuals with disabilities" in the part 9 rule omits from the list of physical and mental impairments the human immunodeficiency virus (HIV). The commenters stated that it is important to clarify that individuals who test positive for the HIV are covered because subsection (b) of the definition for "individuals with disabilities" excludes individuals who currently have contagious diseases and who pose a direct health and safety threat to others, or who, by reasons of the disease, cannot perform the duties of the job.

Response. As noted in section II of this preamble, HUD has revised the definition of "individuals with disabilities" in the final rule to clarify that persons with the human immunodeficiency virus disease (symptomatic or asymptomatic) are covered.

Comment: Direct Threat Standard Excludes Reasonable Accommodation Requirement. One commenter stated that the "direct threat to the health or safety of others" exclusion derives from the case of *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987), but fails to include the essential caveat that "the direct threat not be capable of elimination by reasonable accommodation". The commenter stated that the Congress, in its discussion of

this direct threat exclusion in the legislative history of the Fair Housing Act, was careful to note the reasonable accommodation requirement. The commenter requested that the reasonable accommodation requirement be explicitly acknowledged in the part 9 final rule.

Response: As discussed in section II of this preamble, the Department has added a new § 9.131 to address the issue of "direct threat to the health or safety of others." This new section provides that the agency must determine whether reasonable modifications of its policies, practices or procedures will mitigate the risk posed by the individual determined to present a direct threat to the health or safety of others. Although the commenter uses the term "reasonable accommodation," which is the appropriate term within the context of the Fair Housing Act, the appropriate comparable term for section 504, generally, is "reasonable modification," which reflects section 504's application to a broader range of programs and activities. However, reference to reasonable accommodation is appropriate when discussing section 504's application to the employment.

Comment: Delete Reference to "Inability to Perform the Essential Elements of Job or Activity." One commenter stated that the exclusion from the definition of "individuals with disabilities" of the following phrase—"persons with a contagious disease who are unable to perform the duties of the job"—was unwarranted. The commenter stated that inquiries as to whether an individual with disabilities is able to perform the duties of a job or activity are relevant only with respect to whether the individual is "qualified"—and then only if the individual is unable to perform the essential duties, not all duties, of the job or activity. The commenter stated that reasonable accommodation must be provided, if necessary, to assist the individual in performing the essential duties. The commenter further stated: "Because this subsection involves the definition of 'individual with disabilities,' rather than 'qualified individual with disabilities,' the reference to inability to perform the duties of job should be deleted."

Response: The Department agrees with the commenter's statement that without reference to the essential duties and reasonable accommodation aspects of the analysis, this particular provision of the definition is misleading. Accordingly, the Department has revised paragraph (c)(1)(ii) of the definition of "individuals with disabilities" to include the following

language: "An individual * * * is unable to perform the essential duties of the job, with or without reasonable accommodation."

Definition of "Multifamily Housing Project" (§ 9.103)

Comment: Multifamily Dwellings Covered by Section 504 Should Be the Same as Those Covered by the Fair Housing Act. Three commenters noted that the part 9 rule defined "multifamily housing project" to mean "a project containing five or more dwelling units," while the Fair Housing regulations define covered multifamily dwellings to mean buildings consisting of four or more dwelling units, if such buildings have one or more elevators, and ground floor units in other buildings consisting of four or more units. The commenters stated that the dwellings covered by the section 504 regulations should mirror those of the Fair Housing Act.

Response: The definition of "covered multifamily dwelling" found in the Fair Housing Act regulations is consistent with the definition of this term in the Fair Housing Act. The definition of "multifamily housing project" in the part 9 rule is consistent with the definition of this term in section 207(c) of the National Housing Act (12 U.S.C. 1713), and is the definition with which HUD program participants are familiar. The definition is also consistent with HUD's section 504 regulations for federally assisted activities. (See 24 CFR 8.3) Since section 504 extends only to federally assisted and federally conducted programs and activities, the Department believes that the definition of multifamily housing project, as set forth in the National Housing Act, which pertains to Federal housing programs, is the appropriate definition for HUD's section 504 regulations.

Comment: All HUD Housing Should Be Covered by Section 504, Including Single Family Homes. One commenter stated that the occupancy classification provision of the UFAS defines multifamily housing as apartment buildings, without reference to a number of units, and the residential section of the UFAS occupancy classification refers to one and two family dwellings. The commenter stated that the inclusion of the classification of one and two family dwellings in the UFAS indicates that these dwellings are also subject to the Barriers Act. The commenter requested that HUD make all of its housing, including single family homes, subject to the requirements of the Barriers Act.

Response: The fact that the UFAS contains provisions applicable to one or two family dwellings is not

determinative of whether one or two family dwellings are subject to the requirements of the Barriers Act. Whether one or two family dwellings are covered by the Barriers Act depends upon whether a statute subjects these types of dwellings to the requirements of Barriers Act. One or two family dwellings are subject to the requirements of section 504, and possibly the UFAS, to the extent that they are part of a HUD conducted program and meet the requirements of 24 CFR 9.150(e).

Definition of "Qualified Individuals With Disabilities" (§ 9.103)

Comment: Eliminate Definition. Five commenters stated that the definition for "qualified individuals with disabilities" should be removed from the part 9 rule. One commenter stated that HUD concedes in the preamble to the proposed part 9 rule that housing programs do not require a definition of qualified individual with disabilities (56 FR 24606). The commenter stated that HUD included this definition so that the part 9 rule will cover all programs or activities conducted by HUD now and in the future, and so that HUD's regulation will be consistent with the DOJ's prototype regulation and the regulations of other Federal agencies (56 FR 24606). The commenter stated that HUD could achieve its purpose through other ways, such as explicitly describing the HUD programs or the kinds of HUD programs to which the definition applies, or explaining that this term does not apply to housing consumers.

Response: The term "qualified individual with disabilities" is taken directly from the language of section 504. The protection afforded by section 504 is restricted to "qualified" individuals with disabilities. As noted in the preamble to the part 9 proposed rule, HUD does not conduct programs under which a person is required to perform services or achieve a level of accomplishment as a part of his or her participation in a particular program or activity (e.g., educational programs) (56 FR 24606). Notwithstanding this fact, HUD determined, as also noted in the preamble to the part 9 proposed rule, that it is important to include a definition for this term so that HUD's regulation will cover all programs or activities conducted by HUD now and in the future, and so that its section 504 regulation for federally conducted programs will be consistent with DOJ's prototype regulation. However, the fact that section 504 applies only to "qualified individuals with disabilities" makes it important to include a

definition for this term in HUD's section 504 regulations.

The purpose in defining the term "qualified individuals with disabilities" is to establish a uniform standard by which an individual with disabilities is determined to be "qualified" to participate in a federally assisted or federally conducted program. The standard, as established by DOJ on the basis of Federal case law concerning section 504, is whether, with appropriate modifications, an individual with disabilities is able to participate in, or achieve the purpose of a federally assisted or federally conducted program or activity. To be considered qualified, however, the modifications required for the individual with disabilities may not be those which would result in a fundamental alteration in the nature of the program. (See preamble to DOJ's coordination regulation for federally conducted programs codified at 28 CFR part 39, Editorial Note, 415-429 (1991) at 418; and preamble to proposed part 9 rule at 56 FR 24606.) HUD's definition of "qualified individuals with disabilities" incorporates this basic test established by DOJ and Federal case law and is consistent with the DOJ's definition of "qualified individual with disabilities" in its section 504 prototype regulation for federally conducted programs.

Comment: Eliminate Language Concerning Essential Eligibility Requirements

Five commenters objected to the language concerning "essential eligibility requirements" set forth in paragraph (b) of the definition. One commenter stated that the essential eligibility requirement language included "implicit" eligibility requirements.

Response. In defining "qualified individual with disabilities," HUD adheres to DOJ's guidance on the meaning and interpretation of this term, which guidance is set forth in DOJ's preamble to the final rule implementing its section 504 prototype regulation for federally conducted programs, codified at 28 CFR part 39, Editorial Note, 415-429 (1991). In this preamble, DOJ advises that the concept of "qualified individual with disabilities" includes the notion of "essential eligibility requirements". (*Id.* at 419). Under section 504, a qualified individual with disabilities must be able to meet the essential eligibility requirements of a federally assisted or federally conducted program, with the recognition that reasonable modification may need to be made to the program for the individual

with disabilities to meet the essential eligibility requirements of the program.

The inclusion of the term "implicit requirements" in the definition is to clarify that the essential eligibility requirements do not include only stated program eligibility requirements, but also those requirements that are inherent in the nature of the program. However, in including implicit requirements in the definition, HUD does not intend a program's eligibility requirements to include requirements that are not intrinsic to the program or that are applied solely to individuals with disabilities—and not to other tenants.

Comment: "All Obligations of Occupancy" Are Not Essential. One commenter stated that the "essential eligibility requirements" include the requirement to comply with "all obligations of occupancy." The commenter stated that all obligations of occupancy cannot possibly be essential. The commenter stated: "Rather than clarifying the obligations of program operators under section 504, this definition will mislead operators into believing that they can exclude any individual with disabilities who cannot fully satisfy every term of the lease, however incidental or unimportant."

Response. The phrase "all obligations of occupancy," as with the phrase "implicit eligibility requirements" discussed above, is intended to refer only to those requirements or obligations that are imposed on all tenants or residents, regardless of whether the tenants or residents are individuals with disabilities. The Department believes that it is important to retain the phrase "all obligations of occupancy" within the definition of "qualified individual with disabilities" because it is embodied in the concept of "essential eligibility requirements". To be eligible to participate in a HUD housing program, an applicant must be able to comply with all obligations of occupancy. Typical occupancy obligations include those related to rent, security deposits, use of premises, subletting, and utility charges. It is inappropriate for the Department to list in a regulation which obligations constitute "important" obligations of occupancy, because of the difficulty in ensuring the comprehensiveness of such a list, and because certain multifamily housing projects as a result of their location or use may require the inclusion of obligations (or terms) that are not generally found in leases for other multifamily housing projects. For the foregoing reasons, the Department declines to state which obligations of occupancy are those with which an

individual with disabilities must comply.

Comment: Definition Fails to Note the Obligation of HUD to Provide Reasonable Accommodations. Two commenters stated that the definition fails to note the obligation of HUD to provide reasonable accommodation to individuals who would be able to satisfy essential program requirements with such assistance.

Response. HUD's definition of "qualified individual with disabilities" is consistent with the definition for this term found in DOJ's section 504 prototype regulation for federally conducted programs and in the section 504 regulations of other Federal agencies. The fact that the definition of qualified individual with disabilities does not explicitly refer to the "reasonable modification" requirement does not mean that the requirement is inapplicable to Federal programs covered by section 504. As noted earlier in this preamble, reasonable modification is required under section 504. The reasonable modification requirement, although not explicitly referred to in the definition of "qualified individual with disabilities," is referred to in the definition of "individual with disabilities" and is implicitly referenced in the language of the definition of "qualified individual with disabilities" that provides that modifications in the program or activity, which result in a fundamental alteration in the nature of the program, are not required. Conversely, modifications to the program that would not result in a fundamental alteration in the nature of the program are required.

Comment: Definition Should Include Direct Threat Standard and Eliminate Standard of Significant Risk of Substantial Interference with the Safety of Others. Five commenters supported incorporating the "direct threat" standard that is included in the Fair Housing Act, rather than the standard of "significant risk of substantial interference with the safety or enjoyment of others or with his own health or safety," as set forth in the part 9 rule. One commenter stated that it was absolutely improper to permit evaluation of whether an individual is a potential risk to his or her own health or safety. The commenter stated that: "In the housing context, such a concern can never be related to an essential eligibility requirement. Where an individual may pose a risk to him or herself and to others, the Fair Housing Act standard of direct threat to the health and safety of others is adequate."

Response. As discussed in section II of this preamble, the Department has

added a new § 9.131, which addresses the direct threat standard.

Self-Evaluation (§ 9.110)

Section 9.110(a) provides that HUD shall, within one year of the effective date of the part 9 final rule, evaluate its current policies and practices, and the effects of those policies and practices, including regulations, handbooks, notices and other written guidance, that do not or may not meet the requirements of part 9, and, to the extent modification of any such policies is required, HUD shall take the necessary corrective actions.

Comment: Self-Evaluation Section Should Be Delayed by Final Rule Deadlines. Two commenters suggested that this section be revised to state that remedial actions, which HUD has begun or is planning, will not be delayed by the "deadlines in this section." One of the commenters stated that the part 9 final rule should clearly state that HUD will complete the self-evaluation of its policies and practices within one year of the effective date of the final rule.

Response. The Department periodically reviews the requirements of its various programs, and the policies and practices of these programs, to ensure that all HUD programs, both HUD assisted and HUD conducted, reflect existing statutory requirements. Given this periodic review process, the Department does not intend or foresee any delay in the evaluation of HUD conducted programs to ensure that these programs meet the requirements of part 9, as required by § 9.110.

Comment: HUD Should Review Its Federal Preference Criteria, As Part of Its Self-Evaluation Process. One commenter urged the Department to review its Federal preference criteria for housing programs funded by the Department. The commenter stated that the current criteria are not clear on the definition of what is not a "regular sleeping accommodation" and that Federal preferences should be revised to give top preference to individuals released from institutions, such as hospitals, nursing homes and rehabilitation facilities.

Response. A review of Federal preference criteria for housing programs is not appropriate in connection with the development and implementation of this part 9 rule. This rule is concerned with the implementation of section 504 solely as it applies to HUD conducted programs. Federal preferences in housing affect all HUD housing programs, not only housing owned by HUD. Any changes to the list of individuals that should be given preferences in federally-assisted or

federally-conducted housing is more appropriate for proposed rulemaking that provides for advance notice to, and solicitation of comment from, the public.

Comment: Expand Public Participation in the Self-Evaluation Process to Include Comments on Fair Housing Issues. Section 9.110(b) of the part 9 rule provides that HUD shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments, both oral and written. One commenter recommended that HUD expand this section of the self-evaluation process to include fair housing issues that relate to people with disabilities.

Response. As discussed throughout this preamble, the mandate and the scope of the Fair Housing Act and section 504 are different. Accordingly, it is inappropriate for issues specifically related to the Fair Housing Act to be included in the section 504 self-evaluation process. However, to the extent that section 504 incorporates or overlaps with the Fair Housing Act, these issues may be raised in connection with the self-evaluation process.

Comment: Files Should Be Maintained Permanently. Section 9.110(c) of the part 9 rule provides that HUD shall, for a period of at least three years following the completion of the self-evaluation, maintain on file and make available for public inspection: (1) A list of interested persons; (2) a description of the areas examined and any problems identified; and (3) a description of any modifications made or to be made. Two commenters recommended that HUD maintain this file permanently. The commenters stated that HUD may make progress in the implementation and enforcement of section 504 if HUD's efforts are permanently catalogued, and that this progress is more important than maintaining consistency with the DOJ's coordination regulation.

Response. The Department believes that successful implementation and enforcement of section 504 will not be hindered by the rule's requirement to maintain the "self-evaluation" files for a period of three years. The Department notes that under § 9.110, HUD is not required to discard the self-evaluation files after the three year period has expired. Rather, HUD is required to maintain these files for a period of at least three years following the completion of the self-evaluation. HUD may maintain these files permanently or

indefinitely. Accordingly, the Department believes that the minimum three-year requirement is sufficient.

Notice (§ 9.111)

Comment: This Section Should Clarify How HUD Will Communicate with People with Disabilities. Section 9.111 provides that HUD shall make available to employees, applicants, participants, beneficiaries, and other interested persons, information regarding the provisions of part 9. One commenter stated that although the preamble to the part 9 proposed rule indicated that certain HUD materials will be made available on tape and in Braille, nothing in the regulation makes that clear. The commenter requested that the part 9 proposed rule describe the specific ways in which HUD will communicate effectively with applicants, participants, personnel or other Federal entities, and members of the public who have disabilities.

Response. To make available to individuals with disabilities the information required by § 9.111, HUD will use, to the extent necessary, the auxiliary aids and services described in § 9.103. The definition of "auxiliary aids" in § 9.103 provides in relevant part as follows: "Although auxiliary aids are required explicitly only by § 9.160(a)(1), they may also be necessary to meet other requirements of the proposed regulation."

General Prohibitions Against Discrimination (§ 9.130)

Section 9.130 lists the general prohibitions against discrimination under section 504. Subsection (b)(vi) of § 9.130 states that it is discriminatory to:

"Deny a dwelling to an otherwise qualified buyer or renter because of a disability of that buyer or renter or a person residing or intending to reside in that dwelling after it is sold, rented or made available." (§ 9.130(b)(vi))

Comment: § 9.130 Should Include Relatives, Friends and Associates of Individuals with Disabilities. Three commenters stated that this paragraph was similar to language in the Fair Housing Act, except that the Fair Housing Act adds a third category of discrimination—"or because of a disability of any person associated with that person." The commenters urged adoption of this category of individuals so that the section 504 regulations, like the Fair Housing regulations (24 CFR 100.202), will prohibit discrimination against buyers and renters who have relatives, friends or associates who have disabilities.

Response. The Fair Housing Act prohibits, *inter alia*, discrimination

against any person on the basis of disability, whether or not it is the aggrieved person or an associate or relative of that person who is disabled. Because of differences in the language and structure of the Fair Housing Act and section 504, the Fair Housing Act language is not necessarily transferable to section 504.

Comment: This Section Should Incorporate Language Concerning Reasonable Accommodation. One commenter requested that HUD incorporate the language of § 100.204 of the Fair Housing Act regulations concerning reasonable accommodation in the part 9 rule's provision establishing the general prohibitions against discrimination under section 504.

Response. HUD's Fair Housing Act regulation concerning reasonable accommodation is not appropriate for the section 504 regulations. The reasonable accommodation requirements of the Fair Housing Act are narrower than the "reasonable modification" requirements of section 504, because the Fair Housing Act requirements only refer to reasonable modifications and the rules, policies, practices or services associated with a dwelling unit. (See 24 CFR 100.204.) Under section 504, reasonable modifications will vary in the context of each Federal program or activity. Accordingly, it is important that the interpretation of reasonable modification with respect to a program or activity covered by section 504 not be limited to the interpretation provided by HUD's Fair Housing Act regulations. Additionally, as noted previously, the term, "qualified individuals with disabilities," used throughout the part 8 and part 9 rules implicitly incorporates the concept of reasonable accommodation or reasonable modification.

Program Accessibility: Existing Facilities (§ 9.150)

Comment: The Department Should Consider the Impact of the Americans with Disabilities Act on Existing Facilities. Section 9.150(b) provides that HUD is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. Three commenters stated that HUD should consider the impact of the ADA on HUD programs and activities. Two commenters stated that it would be helpful both to consumers and to HUD and Justice enforcement personnel if these regulations referred to the ADA and to the ADA title II regulations and standards.

Response. In developing this final rule, the Department in consultation with the DOJ and EEOC, has considered the impact of the ADA on HUD conducted programs and activities, and where appropriate, incorporated those requirements of the ADA that are applicable to these programs and activities.

Comment: Section 9.150(e) Should Clarify HUD's Responsibility to Make Reasonable Modifications in Housing Sold to Buyers with Disabilities. Section 9.150(e) provides that HUD is not required to make alterations to existing facilities that are part of HUD's Property Disposition Programs, unless such alterations are necessary to meet the needs of a current or prospective tenant during the time when the Department expects to retain legal possession of the facilities and there is no alternative method to meet the needs of that tenant. Section 9.150(e) further provides that nothing in this section shall be construed to require alterations to make facilities accessible to persons with disabilities who are expected to occupy the facilities only after HUD relinquishes legal possession.

One commenter stated that this section relieves HUD of all responsibility to make any modifications for buyers with disabilities who purchase housing through HUD's Property Disposition Program. The commenter stated that § 9.150(e) should be revised to clarify HUD's responsibility to make reasonable modifications in housing sold to buyers with disabilities.

Another commenter stated that the part 9 final rule should be revised to provide that HUD will exert its best efforts to assist a purchaser in obtaining the funding and expertise that HUD is able to provide in making the building usable for tenants and owners with disabilities.

Response. Section 9.150 requires the housing provider to demonstrate that physical alterations to make a unit accessible would result in a fundamental alteration in the nature of the program or activity or in an undue financial and administrative burden. This section requires that where physical alterations would result in a fundamental alteration or undue financial and administrative burden, alternative action must be taken that would not result in such an alteration or such burdens, but nevertheless would ensure that individuals with disabilities receive the benefits and services of the program or activity.

In the preamble to the part 9 proposed rule, HUD explained why the traditional approach to program accessibility with

respect to existing facilities is not appropriate for the Property Disposition Programs because HUD holds the properties only temporarily and for an unpredictable amount of time (56 FR 24611). Since HUD does not know how long it will be in possession of the property, the agency cannot identify a time period within which it can assess the needs of those who might wish to live there in the future. However, HUD recognizes that during the time that the agency retains possession of a housing property under this program, HUD provides a housing service to the residents and also has a section 504 obligation to those who apply for housing in the facility.

Program Accessibility: Alterations of Property Disposition Program Multifamily Housing Facilities (§ 9.152)

Section 9.152 imposes accessibility requirements on HUD when HUD undertakes alterations to multifamily housing facilities that are part of HUD's Property Disposition Program. This section would require that once HUD undertakes alterations that cost 75 percent or more of the replacement value of the building, HUD must make at least five percent of the units accessible to tenants with mobility disabilities and two percent of the units accessible to tenants with sight and hearing disabilities.

Comment: Section 9.152 Should Include the Fair Housing Act Standards for New Construction. One commenter stated that HUD adopted the 75 percent figure for its section 504 federally assisted regulations, because it purposely wanted the level of alterations to "be tantamount to new construction" (53 FR 20224). The commenter stated that the Department is now required to meet the Fair Housing Act new construction standards when altering housing facilities. The commenter further stated that this section requires the five percent/two percent standard only in buildings with 15 or more units that are undergoing significant alteration, and that this requirement conflicts with HUD's UFAS standards for federally owned residential property which has no minimum 15 unit requirement.

Response. As previously discussed, it is inappropriate for HUD to incorporate the standards and requirements of the Fair Housing Act in a regulation implementing section 504 because the purposes and goals of these two statutes are not identical. To the extent that newly constructed HUD multifamily housing is subject to the requirements of the Fair Housing Act and section 504,

HUD will adhere to the standards that provide for greater accessibility.

The UFAS standards were promulgated under the Barriers Act. (See 24 CFR part 40, App. A, 4.1; 49 FR 31528; 53 FR 20228.) Because section 504 requires compliance with accessibility standards in certain circumstances, the DOJ recommended that Federal agencies provide that new construction and alterations comply with the ADAAG or the UFAS (that is, compliance with the ADAAG whenever the ADAAG provides for greater accessibility than the UFAS).

Compliance with the UFAS or the ADAAG therefore is deemed to be compliance with section 504. The DOJ recommended the UFAS and the ADAAG as the applicable accessibility standards for section 504 to reduce potential conflict between standards enforced under the Barriers Act and section 504. However, the degree of accessibility required by the Barriers Act and that required by section 504 are not identical, and the regulations and standards promulgated under section 504 and the Barriers Act reflect these differences.

Comment: Replacement Cost Cap of Section 9.152 Should Be Lowered from 75 percent to 50 percent. One commenter recommended lowering the replacement cost cap in § 9.152 because many states and cities nationwide have a lower triggering percentage. The commenter stated that HUD projects should not be allowed to remain inaccessible until a renovation totals 75 percent of replacement cost when private buildings are subject to a more stringent standard.

Response: The 75 percent replacement cost cap set forth in § 9.152 is also contained in § 8.23 of HUD's section 504 regulation for HUD assisted programs. The replacement cost cap issue was carefully considered by the Department during development of the final part 8 rule. The Department received 290 comments on this issue following publication of the proposed part 8 rule (53 FR 20224). In the preamble to the final part 8 rule, the Department explained in detail the reasons behind its decision to retain the 75 percent replacement cost cap. (See 53 FR 20224.) The comment made by the commenter on this issue in the context of the part 9 rule has not persuaded the Department to revise its initial decision that the 75 percent replacement cost cap is an appropriate standard for section 504 purposes. The Department points out, however, that HUD projects in jurisdictions which impose more stringent accessibility standards, than those prescribed in HUD's section 504

regulations, must comply with the more stringent requirements.

Comment: Section 9.152(b) is Unclear As to When Responsibility to Modify Existing Housing Ends. One commenter stated that paragraph (b) of § 9.152 is confusing. The commenter stated that housing providers who read the regulation do not understand when their responsibility to modify existing housing ends. The commenter stated that paragraph (b) should be revised to clarify that each time a building is altered, accessibility requirements apply.

Response: The Department believes that part of the confusion concerning § 9.152 results from the fact that the subheadings were inadvertently omitted at the time of publication of the part 9 proposed rule. Paragraph (a) of § 9.152 should be titled "Substantial Alterations," and paragraph (b) of this section should be titled "Other Alterations." The final rule includes these subheadings which indicates the extent of the provider's responsibility to modify existing housing. The Department believes that no further revisions to this section are necessary. The issue raised by the commenter, like the issue in the preceding comment, was the subject of considerable public comment at the time of publication of the proposed part 8 rule. (See 24 CFR 20224.) The Department believes that the lack of substantial public comment on § 9.152(b), which is identical to § 8.23(b), indicates that the provisions of this section are not confusing for the majority of HUD program participants. Accordingly, except for the inclusion of the subheadings, the Department declines to amend the language in this section.

Distribution of Accessible Dwelling Units (§ 9.153)

This section requires accessible units to be distributed throughout projects "to the maximum extent feasible and subject to reasonable health and safety requirements".

Comment: Eliminate Language Concerning "To the Maximum Extent Feasible". Two commenters recommended that the Department delete the language beginning "to the maximum extent feasible." The commenters stated that the Fair Housing Act prohibits segregating all tenants with disabilities into one area or into one part of a building.

Response: The language in § 9.153 is identical to the language in § 8.26 of HUD's section 504 regulation for federally assisted programs. Section 8.26 was the subject of considerable public comment following publication

of the part 8 proposed rule. (See 53 FR 20226.) The commenters on the part 8 rule expressed concerns similar to those expressed by the commenters on this rule. In the preamble to the part 8 proposed rule, the Department stated that this provision does not allow "the unnecessary segregation of qualified individuals with disabilities" (53 FR 20226). The Department reaffirms that prohibition here, and notes that this prohibition is contained in § 9.130(b)(1)(iv), which prohibits the agency from providing different or separate housing, aid, benefits, or services to individuals with disabilities, or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with housing, aid, benefits, or services that are as effective as those provided to others.

Occupancy of Accessible Dwelling Units (§ 9.154)

Section 9.154(b) provides that when offering an accessible unit to an applicant who is not disabled and does not require the accessibility features of the unit, the Department may require the applicant to agree (and may incorporate this agreement in the lease) to move to a non-accessible unit when available.

Comment: Department Should Require All Leases to Incorporate "Agreement to Move" Clause as Standard Practice. One commenter recommended that the Department incorporate this provision in the lease as standard practice.

Response: The Department believes that it is unnecessary to require that this provision be incorporated in the lease as standard practice. The Department believes that the language in § 9.154, which provides that this provision may be incorporated in the lease is adequate. The Department notes that this language was contained in § 8.26 of HUD's part 8 interim rule published on May 6, 1983 (48 FR 20655) and was retained in § 8.27(b) of the part 8 final rule, published on June 2, 1988 (53 FR 20240). Because this provision has been in HUD's section 504 regulations for approximately 10 years, the Department believes that HUD managers are aware that they are legally empowered to—and will—require an applicant without disabilities to agree to move to a non-accessible unit when one becomes available.

Housing Adjustments (§ 9.155)

This section requires the Department to modify its housing policies and practices to ensure that they do not limit

the participation of tenants with disabilities.

Comment: New Housing Policies Implemented In Response to Fair Housing Act Should be Included in § 9.155. One commenter stated that since the passage of both section 504 and the Fair Housing Act, HUD has changed some of its housing policies, as for example, making FHA mortgages available to non-profit organizations for the purchase of single-family homes that are to be used by groups of unrelated tenants with disabilities. The commenter recommended that these new policies be listed in the regulation.

Response. The Department does not believe that the part 9 rule is the proper place to enunciate any policy revisions resulting from the Fair Housing Act. All new policies have been or will be announced in a more appropriate forum.

Comment: Section 9.155(a) Should Include Reference to Reasonable Accommodation. Four commenters stated that the last sentence of § 9.155(a) discusses fundamental alterations and undue financial and administrative burdens but not reasonable accommodation, which indicates that HUD has no duty to reasonably accommodate an individual's disability.

Response. Again, the appropriate term, generally, for purposes of section 504 is "reasonable modification." The reasonable modification issue has been raised in connection with other sections of the part 9 rule. The Department refers the commenters to its previous response on this issue as set forth in this preamble.

Communications (§ 9.160)

Section 9.160 would require HUD to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants and members of the public.

Comment: Section 9.160 Should Address the Communication Needs of Individuals with Impaired Cognitive Skills. One commenter stated that this section focuses on individuals with hearing and sight disabilities, and excludes individuals with impaired cognitive skills.

Response. The provisions of this section are not intended to exclude individuals who have disabilities other than hearing and vision impairments. Because hearing and vision impairments present easily identifiable communication difficulties, a number of auxiliary aids and services have been designed to overcome these communication difficulties, and serve as clear examples of how effective communication may be achieved under the requirements of section 504.

However, the provisions of § 9.160 clearly provide that HUD shall, where necessary, furnish the auxiliary aid appropriate to an individual's disability, and in determining what type of auxiliary aid is necessary, shall give primary consideration to the request of the individual with disabilities.

Compliance Procedures (§ 9.170)

Section 9.170 would establish the procedures for processing complaints arising under section 504. In the preamble to the proposed rule, the Department specifically solicited comment on whether the compliance procedures for part 9 should include a hearing before an Administrative Law Judge. (See 56 FR 24613.)

Comment: Procedures Should Include Full Evidentiary Hearing Before an Administrative Law Judge. One commenter recommended that HUD provide complainants with the opportunity for a full evidentiary hearing before an Administrative Law Judge in appeals from the Assistant Secretary's determination.

Response. The issue of whether the part 9 rule should provide for an administrative law judge was carefully considered by the Department during development of the proposed part 9 rule, and again, after receiving this comment. The Department has concluded that the complaint processing procedure set forth in § 9.170 will provide for an adequate remedy, and therefore, it is not necessary to provide for a hearing before an administrative law judge. Accordingly, the "right to request a hearing" has been deleted from § 9.170 of the final rule.

IV. Other Matters

Coordination. This final rule has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. This final rule also has been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

Environmental Impact. At the time of development of the proposed part 9 rule, a Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection during regular business

hours in the Office of the Rules Docket Clerk at the above address.

Impact on Small Entities. The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication, and by approving it, certifies that this rule does not have a significant economic impact on small entities. The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973 as it applies to programs or activities conducted by HUD.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule would not, if implemented, have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Specifically, the requirements of this rule are directed to HUD programs and activities, and do not impinge upon the relationship between the Federal government and State and local governments. Accordingly, the rule is not subject to review under the Order.

Executive Order 12606, the Family. The General Counsel, as the Designated Official under Executive Order 12606, *the Family*, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule establishes requirements prohibiting discrimination against individuals with disabilities in programs and activities conducted by HUD.

Semiannual Agenda of Regulations. This rule was listed as sequence number 1528 in the Department's Semiannual Agenda of Regulations published on April 25, 1994 (59 FR 20424, 20434) pursuant to Executive Order 12866 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 9

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Federal buildings and facilities, Government employees, Persons with disabilities.

Accordingly, title 24 of the Code of Federal Regulations is amended by adding a new part 9, consisting of §§ 9.101 through 9.170, to read as follows:

**PART 9—ENFORCEMENT OF
NONDISCRIMINATION ON THE BASIS
OF DISABILITY IN PROGRAMS OR
ACTIVITIES CONDUCTED BY THE
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

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Authority: 29 U.S.C. 794; 42 U.S.C. 3535(d).

§ 9.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 9.102 Applicability.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with disabilities in the United States.

§ 9.103 Definitions.

For purposes of this part:

Accessible: (1) When used with respect to the design, construction, or alteration of a facility or a portion of a facility other than an individual dwelling unit, means that the facility or portion of the facility when designed, constructed or altered, complies with applicable accessibility standards and can be approached, entered, and used by individuals with physical

disabilities. The phrase "accessible to and usable by" is synonymous with accessible.

(2) When used with respect to the design, construction, or alteration of an individual dwelling unit, means that the unit is located on an accessible route and, when designed, constructed, altered or adapted, complies with applicable accessibility standards, and can be approached, entered, and used by individuals with physical disabilities. A unit that is on an accessible route and is adaptable and otherwise in compliance with the standards set forth in § 9.151 is "accessible" within the meaning of this definition. When a unit in an existing facility which is being made accessible as a result of alterations is intended for use by a specific qualified individual with disabilities (e.g., a current occupant of such unit or of another unit under the control of the same agency, or an applicant on a waiting list), the unit will be deemed accessible if it meets the requirements of applicable standards that address the particular disability or impairment of such person.

Accessible route means a continuous unobstructed path connecting accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps and lifts.

ADA means the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 through 12213).

ADA Accessibility Guidelines (ADAAG) means the Accessibility Guidelines issued under the ADA, and which are codified in the Appendix to 39 CFR part 1191.

Adaptability means the ability of certain building, spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered, to accommodate the needs of persons with or without disabilities, or to accommodate the needs of persons with different types or degrees of disability. For example, in a unit adaptable for a person with impaired hearing, the wiring for visible emergency alarms may be installed but the alarms need not be installed until such time as the unit is made ready for occupancy by a person with impaired hearing.

Agency means the Department of Housing and Urban Development.

Alteration means a change to a building or facility or its permanent fixtures or equipment that affects or could affect the usability of the building or facility or part thereof. Alterations

include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangements of the structural parts and changes or rearrangements in the plan configuration of walls and full-height partitions. Normal maintenance, re-roofing, painting, or wallpapering or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Assistant Secretary means the Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or communication skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, note takers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Facility means all or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, rolling stock or other conveyances, or

other real or personal property located on a site.

Historic properties means those properties that are listed or are eligible for listing in the National Register of Historic Places, or such properties designated as historic under a statute of the appropriate State or local government body.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with disabilities means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus disease (symptomatic or asymptomatic), mental retardation, emotional illness, drug addiction and alcoholism.

(2) The term "individual with disabilities" does not include:

(i) An individual who is currently engaging in the illegal use of drugs, when the agency acts on the basis of such use. This exclusion, however, does not exclude an individual with disabilities who—

(A) Has successfully completed a supervised drug rehabilitation program, and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully, and is no longer engaging in such use;

(B) Is participating in a supervised rehabilitation program, and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) Except that it shall not violate this part for the agency to adopt or administer reasonable policies and procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (2)(i) (A) and (B) of this definition is no longer engaging in the illegal use of drugs.

(iii) Nothing in paragraph (2) of this definition shall be construed to encourage, prohibit, restrict or authorize the conduct of testing for illegal use of drugs.

(iv) The agency shall not deny health services provided under titles I, II and III of the Rehabilitation Act of 1973 (29 U.S.C. 701 through 777f) to an individual with disabilities on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(3) For purposes of employment, the term "individual with disabilities" does not include:

(i) An individual who has a currently contagious disease or infection and who, by reason of such disease or infection—

(A) Has been determined, in accordance with the provisions of § 9.131, to pose a direct threat to the health or safety of other individuals, which threat cannot be eliminated or reduced by reasonable accommodation, or

(B) Is unable to perform the essential duties of the job, with or without reasonable accommodation; or

(ii) An individual who is an alcoholic and whose current use of alcohol prevents him or her from performing the duties of the job in question or whose employment would constitute a direct threat to the property or the safety of others by reason of his or her current alcohol abuse.

(4) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(5) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(6) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated

by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Multifamily housing project means a project containing five or more dwelling units.

Official or Responsible Official means the Assistant Secretary of HUD for Fair Housing and Equal Opportunity.

PDP housing facility means a housing facility administered under HUD's Property Disposition Program.

Project means the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single mortgage or contract or otherwise treated as a whole by the agency for processing purposes, whether or not located on a common site.

Property Disposition Program (PDP) means the HUD program which administers the housing facilities that are either owned by the Secretary or where, even though the Secretary has not obtained title, the Secretary is mortgagee-in-possession. Such properties are deemed to be in the possession or control of the agency.

Qualified individual with disabilities means:

(1) With respect to any agency non-employment program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with disabilities who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other agency non-employment program or activity, an individual with disabilities who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Essential eligibility requirements" include stated eligibility requirements such as income, as well as other explicit or implicit requirements inherent in the nature of the program or activity, such as requirements that an occupant of a PDP multifamily housing facility be capable of meeting selection criteria and be capable of complying with all obligations of occupancy with or without supportive services provided by persons other than the agency.

(4) "Qualified person with disabilities" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 9.140.

Replacement cost of the completed facility means the current cost of construction and equipment for a newly constructed housing facility of the size and type being altered. Construction and equipment costs do not include the cost of land, demolition, site improvements, non-dwelling facilities and administrative costs for project development activities.

Secretary means the Secretary of Housing and Urban Development.

Section 504 means section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794). As used in this part, section 504 applies only to programs or activities conducted by the agency and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

UFAS means the Uniform Federal Accessibility Standards, which implement the accessibility standards required by the Architectural Barriers Act (42 U.S.C. 4151 through 4157), and which are established at 24 CFR part 40, Appendix A for residential structures, and 41 CFR 101-19.600 through 101-19.607, and Appendix A to these sections, for non-residential structures.

§ 9.110 Self-evaluation.

(a) The agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects of those policies and practices, including regulations, handbooks, notices and other written guidance, that do not or may not meet the requirements of this part. To the extent modification of any such policies is required, the agency shall take the necessary corrective actions.

(b) The agency shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A list of interested persons;
- (2) A description of the areas examined and any problems identified; and
- (3) A description of any modifications made or to be made.

§ 9.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency. The agency shall make such information available to such persons in such manner as the Secretary finds necessary to apprise them of the protections against discrimination assured them by section 504 and this part. All publications and recruitment materials distributed to participants, beneficiaries, applicants or employees shall include a statement that the agency does not discriminate on the basis of disability. The notice shall include the name of the person or office responsible for the implementation of section 504.

§ 9.112-9.129 [Reserved]

§ 9.130 General prohibitions against discrimination.

(a) No qualified individual with disabilities shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b) (1) The agency, in providing any housing, aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with disabilities the opportunity to participate in or benefit from the housing, aid, benefit, or service;

(ii) Afford a qualified individual with disabilities an opportunity to participate in or benefit from the housing, aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with disabilities with any housing, aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate housing, aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with housing, aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with disabilities the opportunity to participate as a member of planning or advisory boards;

(vi) Deny a dwelling to an otherwise qualified buyer or renter because of a disability of that buyer or renter or a person residing in or intending to reside in that dwelling after it is sold, rented or made available; or

(vii) Otherwise limit a qualified individual with disabilities in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the housing, aid, benefit, or service.

(2) For purposes of this part, housing, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for individuals with disabilities and for persons without disabilities, but must afford individuals with disabilities equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.

(3) The agency may not deny a qualified individual with disabilities the opportunity to participate in programs or activities that are not separate or different, despite the existence of programs or activities that are permissibly separate or different for persons with disabilities.

(4) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would:

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(6) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(7) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified

entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) (1) Notwithstanding any other provision of this part, persons without disabilities may be excluded from the benefits of a program if the program is limited by Federal statute or Executive order to individuals with disabilities. A specific class of individuals with disabilities may be excluded from a program if the program is limited by Federal statute or Executive order to a different class of individuals.

(2) Certain agency programs operate under statutory definitions of "persons with disabilities" that are more restrictive than the definition of "individual with disabilities" contained in § 9.103. Those definitions are not superseded or otherwise affected by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e) The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement that, based on disability, imposes inconsistent or contradictory prohibitions or limits upon the eligibility of qualified individuals with disabilities to receive services or to practice any occupation or profession.

(f) The enumeration of specific forms of prohibited discrimination in paragraphs (b) and (d) of this section does not limit the general prohibition in paragraph (a) of this section.

§ 9.131 Direct threat.

(a) This part does not require the agency to permit an individual to participate in, or benefit from the goods, services, facilities, privileges, advantages and accommodations of that agency when that individual poses a direct threat to the health or safety of others.

(b) "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(c) In determining whether an individual poses a direct threat to the health or safety of others, the agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the

nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

§§ 9.132—9.139 [Reserved]

§ 9.140 Employment.

No qualified individual with disabilities shall, on the basis of disability, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613 (subpart G), shall apply to employment in federally conducted programs or activities.

§§ 9.141—9.148 [Reserved]

§ 9.149 Program accessibility: discrimination prohibited.

Except as otherwise provided in § 9.150, no qualified individual with disabilities shall, because the agency's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 9.150 Program accessibility: existing facilities.

(a) *General.* Except as otherwise provided in paragraph (e) of this section, the agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This section does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic properties, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance

with § 9.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, also shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within sixty days of July 18, 1994 except that where structural changes in facilities are undertaken, such changes shall be made within three years of July 18, 1994, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, within six months of July 18, 1994, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with disabilities

or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

(e) The requirements of paragraphs (a), (b), and (c) of this section shall apply to the Property Disposition Programs. However, this section does not require HUD to make alterations to existing facilities that are part of the Property Disposition Programs unless such alterations are necessary to meet the needs of a current or prospective tenant during the time when HUD expects to retain legal possession of the facilities, and there is no alternative method to meet the needs of that current or prospective tenant. Nothing in this section shall be construed to require alterations to make facilities accessible to persons with disabilities who are expected to occupy the facilities only after HUD relinquishes legal possession.

§ 9.151 Program accessibility: new construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered and provide emergency egress so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and accessibility standards that apply to buildings covered by this section are those contained in the UFAS, except where the ADAAG provides for greater accessibility for the type of construction or alteration being undertaken, and in this case, the definitions, requirements and standards of the ADAAG shall apply.

§ 9.152 Program accessibility: alterations of Property Disposition Program multifamily housing facilities.

(a) *Substantial alteration.* If the agency undertakes alterations to a PDP

multifamily housing project that has 15 or more units and the cost of the alterations is 75 percent or more of the replacement cost of the completed facility, then the project shall be designed and altered to be readily accessible to and usable by individuals with disabilities. Subject to paragraph (c) of this section, a minimum of five percent of the total dwelling units, or at least one unit, whichever is greater, shall be made accessible for persons with mobility impairments. A unit that is on an accessible route and is adaptable and otherwise in compliance with the standards set forth in paragraph (d) of this section is accessible for purposes of this section. An additional two percent of the units (but not less than one unit) in such a project shall be accessible for persons with hearing or vision impairments. If state or local requirements for alterations require greater action than this paragraph, those requirements shall prevail.

(b) *Other alteration.* (1) Subject to paragraph (c) of this section, alterations to dwelling units in a PDP multifamily housing project shall, to the maximum extent feasible, be made to be readily accessible to and usable by individuals with disabilities. If alterations of single elements or spaces of a dwelling unit, when considered together, amount to an alteration of a dwelling unit, the entire dwelling unit shall be made accessible. Once five percent of the dwelling units in a project are readily accessible to and usable by individuals with mobility impairments, then no additional elements of dwelling units, or entire dwelling units, are required to be accessible under this paragraph. Once two percent of the dwelling units in a project are readily accessible to or usable by individuals with hearing or vision impairments, then no additional elements of dwelling units, or entire dwelling units, are required to be accessible under this paragraph.

(2) Alterations to common areas or parts of facilities that affect accessibility of existing housing facilities, shall, to the maximum extent feasible, be made to be accessible to and usable by individuals with disabilities.

(c) The agency may establish a higher percentage or number of accessible units than that prescribed in paragraphs (a) or (b) of this section if the agency determines that there is a need for a higher percentage or number, based on census data or other available current data. In making such a determination, HUD shall take into account the expected needs of eligible persons with and without disabilities.

(d) The definitions, requirements, and accessibility standards that apply to PDP multifamily housing projects covered by this section are those contained in the UFAS, except where the ADAAG provides for greater accessibility for the type of alteration being undertaken, and, in this case, the definitions, requirements and standards of the ADAAG shall apply.

(e) With respect to multifamily housing projects operated by HUD, but in which HUD does not have an ownership interest, alterations under this section need not be made if doing so would impose undue financial and administrative burdens on the operation of the multifamily housing project.

§ 9.153 Distribution of accessible dwelling units.

Accessible dwelling units required by § 9.152 shall, to the maximum extent feasible, be distributed throughout projects and sites and shall be available in a sufficient range of sizes and amenities so that a qualified individual with disabilities' choice of living arrangements is, as a whole, comparable to that of other persons eligible for housing assistance under the same agency conducted program. This provision shall not be construed to require (but does allow) the provision of an elevator in any multifamily housing project solely for the purpose of permitting location of accessible units above or below the accessible grade level.

§ 9.154 Occupancy of accessible dwelling units.

(a) The agency shall adopt suitable means to assure that information regarding the availability of accessible units in PDP housing facilities reaches eligible individuals with disabilities, and shall take reasonable nondiscriminatory steps to maximize the utilization of such units by eligible individuals whose disability requires the accessibility features of the particular unit. To this end, when an accessible unit becomes vacant, the agency (or its management agent) before offering such units to an applicant without disabilities shall offer such unit:

(1) First, to a current occupant of another unit of the same project, or comparable projects under common control, having disabilities requiring the accessibility features of the vacant unit and occupying a unit not having such features, or, if no such occupant exists, then

(2) Second, to an eligible qualified applicant on the waiting list having a

disability requiring the accessibility features of the vacant unit.

(b) When offering an accessible unit to an applicant not having disabilities requiring the accessibility features of the unit, the agency may require the applicant to agree (and may incorporate this agreement in the lease) to move to a non-accessible unit when available.

§ 9.155 Housing adjustments.

(a) The agency shall modify its housing policies and practices as they relate to PDP housing facilities to ensure that these policies and practices do not discriminate, on the basis of disability, against a qualified individual with disabilities. The agency may not impose upon individuals with disabilities other policies, such as the prohibition of assistive devices, auxiliary aids, alarms, or guides in housing facilities, that have the effect of limiting the participation of tenants with disabilities in any agency-conducted housing program or activity in violation of this part. Housing policies that the agency can demonstrate are essential to the housing program or activity will not be regarded as discriminatory within the meaning of this section if modifications would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens.

(b) The decision that compliance would result in such alteration or burdens must be made by the Secretary or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

§ 9.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with disabilities an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with disabilities.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries or members of the public by telephone, telecommunication devices for deaf persons (TDD's), or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with § 9.160 would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

§ 9.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies

to all allegations of discrimination on the basis of disability in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Responsible Official shall coordinate implementation of this section.

(d) Persons may submit complete complaints to the Assistant Secretary for Fair Housing and Equal Opportunity, 451 Seventh St., SW., Washington, DC 20410, or to any HUD Area Office. The agency shall accept and investigate all complete complaints for which the agency has jurisdiction. All complete complaints shall be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause. For purposes of determining when a complaint is filed, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency. The agency shall acknowledge all complaints, in writing, within ten (10) working days of receipt of the complaint.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), is not readily accessible to and usable by individuals with disabilities. The agency shall delete the identity of the complainant from the copy of the complaint.

(g)(1) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Office of Fair Housing and Equal Opportunity shall complete the investigation of the complaint, attempt informal resolution, and if no informal resolution is achieved, issue a letter of findings. If a complaint is filed against the Office of Fair Housing and Equal Opportunity, the Secretary or a designee of the Secretary shall investigate and resolve the complaint through informal agreement or letter of findings.

(2) If a complaint is resolved informally, the terms of the agreement

shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and the agency. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and the respondent have agreed.

(3) If a complaint is not resolved informally, the Office of Fair Housing and Equal Opportunity or a person designated under this paragraph shall notify the complainant of the results of the investigation in a letter containing—

(i) Findings of fact and conclusions of law;

(ii) A description of a remedy for each violation found;

(iii) A notice of the right to appeal to the Secretary;

(h)(1) Appeals of the findings of fact and conclusions of law or remedies

must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 9.170(g). The Assistant Secretary or the person designated by the Secretary to decide an appeal of a complaint filed against the Office of Fair Housing and Equal Opportunity may extend this time for good cause.

(2) Timely appeals shall be accepted and processed by the Assistant Secretary. Decisions on an appeal shall not be issued by the person who made the initial determination.

(i) The Assistant Secretary or the person designated by the Secretary to decide an appeal of a complaint filed against the Office of Fair Housing and Equal Opportunity shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the agency determines that it

needs additional information from the complainant, it shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(j) The time limits cited in paragraphs (g) and (i) of this section may be extended with the permission of the Assistant Attorney General.

(k) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

Dated: June 9, 1994.

Henry G. Cisneros,

Secretary.

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