

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5136-N-01]

**Report of HUD Review of the Fair Housing Accessibility Requirements in the
2006 International Building Code**

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The purpose of this notice is to present a report of the Department of Housing and Urban Development's review of certain accessibility provisions of the International Building Code, 2006 edition (2006 IBC), published by the International Code Council (ICC).¹ ICC requested the Department's review of the accessibility provisions of the 2006 IBC to determine whether those provisions are consistent with the accessibility requirements of the Fair Housing Act (the Act), the Department's regulations implementing the 1988 Amendments to the Act (regulations), and the Fair Housing Accessibility Guidelines (the Guidelines) so that the 2006 IBC could be recognized by the Department as a safe harbor for compliance with the law.

The Department's report is intended to provide technical assistance to ICC and other interested parties. The Department is not promulgating any new technical requirements or standards by way of this report, nor is this report an endorsement of a model building code. The Department is not shifting its responsibility to enforce the accessibility requirements of the Act to state or local building code jurisdictions. Further, the Department's report is not intended to limit or invalidate any law of a State or local government that requires dwellings to be designed and constructed in a manner that affords persons with disabilities greater access than is required by the Act. The Department recognizes, however, that one important way to increase

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compliance with the Act's design and construction requirements is to encourage incorporation of those requirements into state and local building codes.

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SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. The Fair Housing Act Accessibility Provisions

Title VIII of the Civil Rights Act (the Fair Housing Act) (42 U.S.C. 3601 et seq.) prohibits discrimination in housing and housing-related transactions based on race, color, religion, national origin, sex, familial status, and disability.² In its 1988 Amendments to the Fair Housing Act (the Act), Congress provided that all covered multifamily dwellings built for first occupancy after March 13, 1991 shall be designed and constructed so that: “(1) The public and

² The Fair Housing Act refers to people with “handicaps.” Subsequently, in the Americans with Disabilities Act of 1990 and other legislation, Congress adopted the term “persons with disabilities,” or “disability,” which is the preferred usage. Accordingly, this Report hereinafter uses the terms “persons with disabilities,” “disability,” or “disabled.”

common use portions of such dwellings are readily accessible to and usable by persons with disabilities; (2) All the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by disabled persons in wheelchairs; and (3) All premises within such dwellings contain the following features of adaptive design: (a) An accessible route into and through the dwelling; (b) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) Reinforcements in bathroom walls to allow later installation of grab bars; and (d) Usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.” These basic accessibility requirements are known as the Act's design and construction requirements.

The Act does not set forth specific technical design criteria that have to be followed in order to comply with the design and construction requirements. It does provide, however, that compliance with the appropriate requirements of the “American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people,” commonly referred to as ANSI A117.1, satisfies the Act's design and construction requirements for the interiors of dwelling units.

On January 23, 1989 (54 FR 3232), HUD published its final regulations implementing the Fair Housing Amendments Act of 1988. In the final regulation, HUD adopted the 1986 edition of ANSI A117.1, which was the most recent edition in effect at that time, as the appropriate edition for acceptable compliance with the Act. HUD's regulation adopting the ANSI A117.1 standard is located at 24 CFR 100.201. HUD's regulations implementing the design and construction requirements are located at 24 CFR 100.205. The Department's regulations specify that compliance with the appropriate requirements of ANSI A117.1-1986 satisfies the technical requirements of the Act relating to dwelling units. In addition, the

Department's regulations reference the requirements of ANSI A117.1-1986 as a means of compliance with respect to the following features of covered multifamily dwellings: (a) public and common use areas, (b) accessible routes, and (c) building entrances on an accessible route. In the near future, the Department will be publishing a proposed rule to adopt the current edition of ANSI A117.1, which is the 2003 ICC/ANSI A117.1. The proposed rule will also stipulate that compliance with the appropriate requirements of the 1986, 1992, and 1998 editions remain sufficient to satisfy the Act's design and construction requirements.

Congress directed the Secretary of HUD to "provide technical assistance to states and units of local government and other persons to implement [the design and construction requirements]." On March 6, 1991 (56 FR 9472), the Department published the "Final Fair Housing Accessibility Guidelines" which set forth specific technical guidance for designing covered multifamily dwellings to be consistent with the Act. Section I of the Guidelines states: "These guidelines are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act." On June 24, 1994 (59 FR 33362), the Department published its "Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines." The Department published a Fair Housing Act Design Manual (Design Manual) in 1996 that was reissued in 1998 with minor changes. The Design Manual is also a safe harbor for compliance with the Act. The Department also provides training and technical guidance through its Fair Housing Accessibility FIRST program (www.fairhousingfirst.org).

The Act states that Congress did not intend the Department to require states and units of local government to include the Act's accessibility requirements in their state and local procedures for the review and approval of newly constructed covered multifamily dwellings.

However, Congress authorized the Department to encourage inclusion of these requirements into their state and local procedures.

The Department's review of model codes falls within its mandate to provide technical assistance to state and local governments to incorporate the design and construction requirements of the Act into their laws and procedures for review and approval of newly constructed multifamily dwellings.³ In the course of its review of model codes over the past several years, the Department has made every effort to ensure that any code or version of a code it deems a safe harbor provides at least the same level of accessibility that is required under the Act.

B. Prior HUD Reviews of Model Building Codes

In 1999 and 2004, HUD reviewed certain model building codes to determine if the accessibility provisions in these model codes met the design and construction requirements set forth in the Act, the regulations, and the Guidelines. In conjunction with these reviews, HUD reviewed the 1992 and 1998 editions of ANSI A117.1. On March 23, 2000 (65 FR 15740), HUD published its Final Report of HUD Review of Model Building Codes. In this report, HUD stated that it reviewed the 1992 CABO/ANSI A117.1 and the 1998 ICC/ANSI A117.1 and determined that these editions provide at least the same level of accessibility as the 1986 edition of ANSI A117.1. HUD reiterated this view in its February 28, 2005 (70 FR 9738), Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, which uses the 1998 edition of ICC/ANSI A117.1. Both of these reports are available at: <http://www.hud.gov/offices/fheo/disabilities/modelcodes/>. These reports point out

³ The Act also makes it clear that it does not invalidate or limit any other state or federal laws that require dwellings to be designed or constructed in a manner that affords persons with disabilities greater access than that required under the Act. Further, federally funded facilities and dwelling units covered by section 504 of the Rehabilitation Act of 1973 (Section 504), the Architectural Barriers Act (ABA), or the Americans with Disabilities Act (ADA), must comply with the regulatory requirements of those laws in addition to the requirements of the Act, when applicable. For Section 504, regulatory requirements may be found at 24 CFR part 8; for the ABA, 24 CFR part 40; and for the ADA, 28 CFR parts 35 and/or 36, as applicable.

that because the ANSI A117.1 standard contains only technical criteria, designers and builders relying on the ANSI A117.1 standard also need to consult the Act, the Department's regulations, and the Guidelines for the scoping criteria. Scoping criteria define when a building, element or space must be accessible. Designers and builders also have the option of following one of the other HUD-recognized safe harbors which include scoping requirements.

C. Background on the International Building Code

The International Code Council was formed in an effort to bring national uniformity to building codes. Representatives of three former national model code bodies joined together to develop what are now called the International Codes, or I-Codes. The International Building Code is a major volume of the I-Codes, and contains provisions for accessibility designed to reflect the intent of the Act, the regulations, and the Guidelines.

Unlike the Act, the IBC is a model building code and not a law. It provides minimum standards for public safety, health, and welfare as they are affected by building construction. Compliance with the IBC or any other model code is not required unless adopted by a state or local jurisdiction's governing body. A jurisdiction may adopt a model building code in its entirety or with modifications.

With respect to housing, the IBC contains requirements for three different types of accessible units, which include sleeping units when such units are used as a residence. The most accessible of these three types is an "Accessible Unit," which is wheelchair accessible and may be found in numerous types of buildings, and not just residential buildings. A second level of accessibility is set forth in the requirements for "Type A" dwelling units. Under the IBC, a percentage of "Type A" units must be provided containing a high level of accessibility, especially in kitchens and bathrooms, but will also have some features of adaptability. The third

level of accessibility is a “Type B” dwelling unit, which is a unit that is intended to comply with those features of accessible and adaptable design required under the Act. Like the Act, the requirements set forth for Type B dwelling units apply to a greater number of dwelling units in a building but do not require as great a level of accessibility as Type A dwelling units, and instead provide a basic degree of accessibility.

II. HUD REVIEW OF THE 2006 INTERNATIONAL BUILDING CODE

A. 2006 IBC

In July 2006, ICC contacted the Department to request that HUD review the accessibility requirements contained in the 2006 IBC to make a determination as to whether the 2006 IBC would be deemed a safe harbor for compliance with the Act’s design and construction requirements. ICC provided HUD with a side-by-side matrix of the 2003 and 2006 provisions in the IBC and related code documents which are intended to address the Act’s design and construction requirements. ICC also provided copies of the 2006 International Codes and the 2006 Code Commentary.

During its review of the 2003 IBC, HUD determined that there was one section of that code which could be interpreted in a manner which would be inconsistent with the requirements of the Fair Housing Act and a second section that needed further clarification. These sections related to accessible routes and site arrival points, as well as the circumstances under which it was permissible to use a vehicular route instead of an accessible pedestrian route between exterior public and common use areas. HUD advised ICC that approval of the 2003 IBC as a safe harbor was contingent upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, “ICC interprets Section 1104.1, and

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

In addition, in its Final Report on the 2003 IBC (70 FR 9738, published February 28, 2005), the Department stated: “During the next code change cycle, if ICC seeks to have the 2006 edition of the IBC declared a safe harbor, ICC must modify the IBC to clearly state, in a manner acceptable to the Department, that an accessible pedestrian route must be provided from site arrival points to accessible building entrances of buildings required to provide Type B dwelling units, unless site impracticality applies.”

The Department’s concerns with the two sections in the IBC 2003 were addressed through the following code changes that appear in the 2006 IBC (to aid the public’s review, changes are shown with deletions in strikeout and additions underlined):

1104.1 Site arrival points. Accessible routes within the site shall be provided from public transportation stops, accessible parking and accessible passenger loading zones and public streets or sidewalks to the accessible building entrance served.

Exception: Other than in buildings or facilities containing or serving Type B units ~~complying with Section 1107.3~~, an accessible route shall not be required between site arrival points and the building or facility entrance if the only means of access between them is a vehicular way not providing for pedestrian access.

1107.4 Accessible route. At least one accessible route shall connect accessible building or facility entrances with the primary entrance of each Accessible unit, Type A unit and

Type B unit within the building or facility and with those exterior and interior spaces and facilities that serve the units.

Exceptions:

1. If due to circumstances outside the control of the owner, either the slope of the finished ground level between accessible facilities and buildings exceeds one unit vertical in 12 units horizontal (1:12), or where physical barriers or legal restrictions, prevent the installation of an accessible route, a vehicular route with parking that complies with Section 1106 at each public or common use facility or building is permitted in place of the accessible route.
2. Exterior decks. . . (no change in text).

B. Missing Text - Section 1107.7.5 Design Flood Elevation

During its review of the 2006 IBC, the Department noted that text is missing from Section 1107.7.5, Design Flood Elevation, which appears in the 2003 edition. The missing text is shown below, in bold.

1107.7.5 Design Flood Elevation. The required number of Type A and Type B units shall not apply to a site where the required elevation of the lowest floor or the lowest horizontal structural building members of nonelevator buildings are at or above the design flood elevation resulting in:

1. A difference in elevation between the minimum required floor elevation at the primary entrances and vehicular and pedestrian arrival points within 50 feet (15 240 mm) exceeding 30 inches (762 mm); and

2. A slope exceeding 10 percent between the minimum required floor elevation at the primary entrances and vehicular and pedestrian arrival points within 50 feet (15 240 mm).

Where no such arrival points are within 50 feet (15 240 mm) of the primary entrances, the closest arrival point shall be used.

The Department contacted ICC and learned that the text was erroneously left out when the 2006 IBC was published. ICC published an erratum on its Website at <http://www.iccsafe.org/cs/codes/errata/2006IBC.html>, on January 31, 2007. Therefore, the Department is not making a finding of inconsistency, but is alerting users of the code to the missing text and the need to obtain the January 31, 2007 erratum.

C. Commentary for 2006 IBC Section 1107.4

In Fall, 2005, at ICC's request, the Department provided ICC with commentary to aid code officials in properly interpreting situations that would qualify as circumstances that are beyond the control of the owner. The Department's commentary appears below. ICC included this commentary in the 2006 IBC Commentary, Volume I, Pages 11-18 through 11-20. ICC made some editorial changes to HUD's language; however, HUD has determined that the changes do not change the substance of the commentary.

HUD Commentary for Section 1107.4 of 2006 IBC

The intent of this section is to ensure that there will be at least one accessible route that connects all accessible building and facility entrances with the entrance of all Accessible, Type A and Type B units. To qualify as an accessible route, a route must serve pedestrians (*i.e.*, sidewalk or other walkway). People with disabilities who need the features of an Accessible, Type A or Type B dwelling or sleeping unit cannot use them if accessible routes are not provided from the entrances of buildings or facilities to the

primary entrance to their dwelling or sleeping unit. There also must be accessible routes connecting accessible building or facility entrances with all interior and exterior spaces and facilities that serve such dwelling or sleeping units. For example, if a development has a recreational facility such as a community center, persons with disabilities who need the features of an Accessible, Type A or Type B unit need an accessible route from their dwelling unit to that community center.

Exception 1 is intended to provide consistency with the federal Fair Housing Act, which recognizes that, in very rare circumstances, an accessible pedestrian route between an accessible entrance to a Type B dwelling unit or an accessible entrance to a building containing Type B units and an exterior public use or common use facility may be impractical because of factors outside the control of the owner. Section 1107.4 requires an accessible pedestrian route between covered dwelling units and public use or common use areas and facilities that are required to be accessible except in rare circumstances outside the control of the owner where extreme terrain or impractical site characteristics result in a finished grade exceeding 8.33 percent or physical barriers or legal restrictions prevent the installation of an accessible pedestrian route. In these cases, Exception 1 allows access to be provided by means of a vehicular route leading from the accessible parking serving the Type B dwelling unit to the accessible parking serving the public use or common use facility. Accessible parking complying with IBC Section 1106 must be provided in each parking area. If a building containing Type B units also contains units with accessible features that are required by other code provisions or federal, state or local laws, then Exception 1 may not apply at all.

It is important to understand that compliance with the accessible design and construction requirements of the Fair Housing Act is a legal obligation applicable to all architects, engineers, builders, developers, and others involved in the design and construction of housing that is required to meet the accessibility requirements of the Fair Housing Act. HUD's regulations implementing the Fair Housing Act make it clear that the burden of showing the applicability of exceptions is the responsibility of those individuals and entities involved in the design and construction of such housing. In order to ensure compliance with the Fair Housing Act, architects, engineers, developers, builders, and others who use the IBC must make accessibility a priority at the planning and design phase of Group I and Group R developments, including the siting of housing and public use or common use areas. To do this, at the initial stage of site planning and design for all sites, before considering whether Exception 1 applies, persons and entities involved in the design of covered residential occupancies must have determined whether and how the exceptions at Sections 1107.7.4 and 1107.7.5 apply.

After careful site planning and design has been completed, the following factors may then be considered to determine whether it is outside the control of the owner to provide an accessible pedestrian route between a building/Type B dwelling unit entrance and a given public use or common use facility. Each such route must be analyzed individually. Exception 1 will only apply when at least one of the following factors is present:

Factors:

1. Legal restrictions outside the control of the owner. These include setback requirements, tree-save ordinances, easements, environmental restrictions, and other

limitations that prevent installation of an accessible pedestrian route without violating the law.

2. Physical barriers outside the control of the owner. These include physical characteristics of the site, which are outside the control of the owner, that prevent the installation of an accessible pedestrian route.

3. On sites that qualify for the exceptions at 1107.7.4 and 1107.7.5, the presence of extreme terrain or other unusual site characteristics (*e.g.*, flood plain, wetlands) outside the control of the owner that would require substantial additional grading to achieve a slope that will allow for an accessible pedestrian route.

In considering whether the additional grading is substantial enough to qualify for Exception 1, one must consider the extent to which the builder has elected to grade the site for other purposes unassociated with accessibility. If grading for those other purposes is extensive, then substantial additional grading would be required to provide the required accessible pedestrian route. If grading for other purposes is not extensive, and substantial additional grading is necessary to provide an accessible pedestrian route, then reliance on Exception 1 would be appropriate. Note: In determining whether the additional grading is substantial, one may not consider the grading that the builder must perform to provide accessible pedestrian routes from site arrival points to the accessible entrances of Type B dwelling or sleeping units.

If none of the factors above are present, Exception 1 does not apply. If one or more of these factors is present, then the next step in determining whether Exception 1 applies (*i.e.*, the vehicular route is the only feasible option), is to consider alternative locations and designs for buildings, facilities, and accessible pedestrian routes connecting

each accessible building/Type B dwelling unit entrance and each public use or common use area required to be accessible to ensure that there is no other way to provide the required accessible pedestrian routes. It is important to recognize that if a road sloping 8.33 percent or less can be provided, then an accessible pedestrian route would also be feasible and must be provided.

Following are some examples to illustrate the proper application of Exception 1:

Example 1: An undisturbed site has slopes of 8.33 percent or less between planned accessible entrances to Type B dwelling units and public use or common use areas and no legal restrictions or other unique characteristics preventing the construction of accessible routes. For aesthetic reasons, the developer would like to create some hills or decorative berms on the site. Because there are no extreme site conditions (severe terrain or unusual site characteristics such as floodplains), and no legal barriers that prevent installation of an accessible pedestrian route between the buildings/Type B dwelling units and any planned public use or common use facilities, the developer will still be obligated to provide accessible pedestrian routes. Exception 1 to Section 1107.4 is inapplicable in this circumstance.

Example 2: A developer plans to build several buildings with Type B units clustered in a level area of a site that has some slopes of 10 percent. A swimming pool and tennis court will be added on the two opposing sides of the site. The builder plans grading that will result in a finished grade exceeding a slope of 8.33 percent along the route between the Type B units and the swimming pool and tennis court. There are no physical barriers or legal restrictions outside the control of the owner or builder that prevent the builder from reducing the existing grade to provide an accessible pedestrian

route between the Type B units and the pool and tennis courts. Therefore, the builder's building plan would not be approved under the IBC because it is within the owner's control to assure that the final grading falls below 8.33 percent and meets the slope and other requirements for an accessible pedestrian route. Accessible pedestrian routes between the Type B units, pool and tennis court must be provided.

Example 3: A multi-family housing complex is built on two sections of a large piece of property, which is divided by a wide stream running through protected wetlands. Both sections of the property are at the same relative elevation and have dwelling units with accessible routes from site arrival points. However, a combination clubhouse and swimming pool is located on one section of the property. Access to each section is provided by an existing public road outside the boundary of the site, which includes a bridge over the stream. Environmental restrictions prevent construction of any type of paved surface between the two sections within the boundary of the site. If environmental restrictions do not prevent the construction of an accessible pedestrian route such as a boardwalk through the wetlands connecting the two sections, then the accessible pedestrian route must be provided even if a road cannot be provided. If construction of any type of pedestrian route is prohibited, then a vehicular route that utilizes the public road and bridge is permitted with parking complying with IBC 1106 located at the clubhouse/swimming pool, even though the vehicular route relies on a public road instead of a road through the development.

Example 4: A narrow and deep site has a level section in the front taking up most of the site and another level section at the back that is located up a steep incline. The developer will place all of the buildings/Type B dwelling units on the front section,

assuring accessible routes from site arrival points to building entrances. After considering all options for siting buildings and facilities in different locations, including the priority of accessibility, the only feasible location for a planned swimming pool is at the top of the higher section to the rear of the property. Because of the narrowness of the site and the relative elevation of the upper level at the rear of the property, it is not possible to construct an accessible pedestrian route to the pool. However, a road that slopes more than 8.33 percent can be provided. Under these circumstances, Exception 1 is applicable and access to the swimming pool on the upper level of the site may be provided by means of a vehicular route with parking complying with Section 1106 provided at the pool.

Example 5: A developer plans to build a multi-family housing complex with non-elevator buildings on a site with hilly terrain. All of these buildings will have some Type B dwelling units. The developer plans to locate tennis courts on the site. There are gentle slopes exceeding 8.33 percent with existing trees between the entrances to the Type B units and the tennis courts. There is also a tree-save ordinance in place. If the builder can grade the site to allow for an accessible pedestrian route to the tennis courts without disturbing the trees in violation of the tree-save ordinance, then an accessible pedestrian route between the Type B units and the planned location of the tennis courts must be provided. If however, the grading necessary to reduce the slope of the site near the trees to provide an accessible route would cause tree loss or damage in violation of the ordinance, then the developer cannot grade without violating the tree-save ordinance. The developer must then consider whether the tennis courts can be relocated so they are served by an accessible pedestrian route and if yes, the tennis courts must be relocated. If

the tennis courts cannot be relocated so they can be served by an accessible pedestrian route, then the developer may provide a vehicular route from the Type B dwelling units to the tennis court with parking complying with Section 1106 at the tennis courts. Note, however, that if the developer can provide an accessible pedestrian route from some of the buildings without violating the ordinance, the developer must do so, even if it is necessary to provide a vehicular route from other buildings. Additionally, if the grading and construction of the proposed vehicular route can be limited to 8.33 percent by design and would not violate the tree save ordinance, it is likely that an additional accessible walkway adjacent to the vehicular route would also fall under the scope of work that would not violate the tree save ordinance and, therefore, must be provided, eliminating the use of Exception 1.

D. ICC/ANSI A117.1-2003 Edition

The 2006 IBC requires buildings and facilities to be accessible in accordance with the code and ICC/ANSI A117.1-2003, Accessible Buildings and Facilities. With respect to the design and construction of Type B dwelling units, the 2006 IBC references the requirements of Chapter 10 of 2003 ICC/ANSI A117.1. The Department has reviewed the technical standards of the 2003 ICC/ANSI A117.1, particularly the technical criteria for the Type B dwelling unit in Chapter 10, to determine if these technical criteria provide at least the same level of accessibility as the 1986 edition of ANSI A117.1, which is the edition that was in effect at the time the Act was passed. Having completed this review, the Department believes that the technical criteria of the 2003 ICC/ANSI A117.1 are consistent with the Act and constitute a safe harbor when used together with the Act, HUD's regulations and the Guidelines for the scoping requirements. Similarly, the technical criteria of the 2003 ICC/ANSI A117.1 constitute a safe harbor when used

together with one of the other HUD-recognized safe harbors that provide scoping requirements. ANSI A117.1 is a technical standard on how to make buildings, elements or spaces accessible. Since it lacks specific details on scoping requirements, it is necessary to consult a safe harbor document that provides scoping information.

In the near future, the Department will publish a proposed rule proposing to adopt the 2003 ICC/ANSI A117.1 accessibility standard, and stipulating that the 1998, 1992, and 1986 editions of ANSI A117.1 continue to be available as safe harbors. In its proposed rule, the Department will seek comments on the efficacy of continuing to recognize older editions of the ANSI standard.

E. HUD Determination of 2006 IBC as a Safe Harbor

Through this report, HUD is formally announcing that it has assessed the provisions of the 2006 edition of the International Building Code, with the January 31, 2007 erratum, that relate to facilities covered by the Act. HUD has determined that these provisions, when interpreted in accordance with relevant 2006 IBC Commentary, are consistent with the Act, HUD's regulations, and the Fair Housing Accessibility Guidelines. Therefore, the 2006 IBC, with the 2007 erratum, constitute a safe harbor for compliance with the design and construction requirements of the Act, HUD's regulations and the Guidelines, when used in accordance with HUD policy, as discussed below.

The 2006 IBC is a publication of the International Code Council. The Department is not promulgating any new regulatory, legal or technical requirements or standards by way of this report, nor is this report an endorsement of a model building code. Further, the Department is not shifting its responsibility for enforcement of the Act's accessibility requirements. The Department's report explains under what conditions the 2006 IBC will serve as a safe harbor for

compliance with the design and construction requirements of the Act, and provides guidance on the Department's enforcement policies concerning the requirements of the Act and HUD-recognized safe harbor documents.

III. HUD Recognized Safe Harbors and HUD Policy

With its review of the 2006 International Building Code and the 2003 ICC/ANSI A117.1 as safe harbors, the Department currently recognizes ten safe harbors for compliance with the design and construction requirements of the Act. These documents are:

1. Fair Housing Accessibility Guidelines, March 6, 1991 (<http://www.hud.gov/offices/fheo/disabilities/fhefhag.cfm>), in conjunction with the June 28, 1994 Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines (<http://www.hud.gov/fheo/disabilities/fhefhasp.cfm>);

2. Fair Housing Act Design Manual (<http://www.huduser.org/publications/destech/fairhousing.html>), published by HUD in 1996, updated in 1998;

3. ANSI A117.1-1986, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act (available from Global Engineering Documents, 15 Inverness Way East, Englewood, Colorado 90112), HUD's regulations, and the Guidelines for the scoping requirements;

4. CABO/ANSI A117.1-1992, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act (<http://www.iccsafe.org>), HUD's regulations, and the Guidelines for the scoping requirements;

5. ICC/ANSI A117.1-1998, Accessible and Usable Buildings and Facilities, in conjunction with the Fair Housing Act (<http://www.iccsafe.org>), HUD's regulations, and the Guidelines for the scoping requirements;
6. ICC/ANSI A117.1-2003, Accessible and Usable Buildings and Facilities (<http://www.iccsafe.org>), in conjunction with the Fair Housing Act, HUD's regulations, and the Guidelines for the scoping requirements;
7. 2000 ICC Code Requirements for Housing Accessibility (CRHA), published by the International Code Council (ICC), October 2000 (<http://www.iccsafe.org>) (ICC has issued an errata sheet to the CRHA);
8. 2000 International Building Code (IBC), as amended by the 2001 Supplement to the International Building Code (2001 IBC Supplement);
9. 2003 International Building Code (IBC) (<http://www.iccsafe.org>)⁴, published by ICC December 2002, with one condition: Effective February 28, 2005, HUD determined that the IBC 2003 is a safe harbor, conditioned upon ICC publishing and distributing a statement to jurisdictions and past and future purchasers of the 2003 IBC stating, "ICC interprets Section 1104.1, and specifically, the Exception to Section 1104.1, to be read together with Section 1107.4, and that the Code requires an accessible pedestrian route from site arrival points to accessible building entrances, unless site impracticality applies. Exception 1 to Section 1107.4 is not applicable to site arrival points for any Type B dwelling units because site impracticality is addressed under Section 1107.7"; and

⁴ ICC's website includes information about the condition on the 2003 IBC at the following links: <http://www.icesafe.org/news/nr/2005/index.html>; <http://www.iccsafe.org/government/news/>; http://www.iccsafe.org/news/ePeriodicals/eNews/archive/ICCeNews_0305.html.

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

HUD's March 23, 2000 Final Report addresses HUD's policy with respect to the above safe harbors. If a state or locality has adopted one of the above documents without modification to the provisions that address the Act's design and construction requirements, a building that is subject to these requirements will be deemed compliant provided the building is designed and constructed in accordance with construction documents approved during the building permitting process and the building code official does not waive, incorrectly interpret, or misapply one or more of those requirements. However, neither the fact that a jurisdiction has adopted a code that conforms with the accessibility requirements of the Act, nor that construction of a building subject to the Act was approved under such a code, changes HUD's statutory responsibility to conduct an investigation, following receipt of a complaint from an aggrieved person, to determine whether the requirements of the Act have been met. Nor does either fact prohibit the Department of Justice from investigating whether violations of the Act's design and construction provisions may have occurred. The Act provides that: "determinations by a State or unit of general local government under paragraphs 5(A) and (B) shall not be conclusive in enforcement proceedings under this title."

HUD's investigation of an accessibility discrimination complaint under the Act typically involves a review of building permits, certificates of occupancy, and construction documents showing the design of the buildings and the site, and an on-site survey of the buildings and property. During the investigation, HUD investigators take measurements of relevant interior and exterior elements on the property. All parties to the complaint have an opportunity to

present evidence concerning whether HUD has jurisdiction over the complaint, and whether the Act has been violated, as alleged. In enforcing the design and construction requirements of the Fair Housing Act, a prima facie case may be established by proving a violation of HUD's Fair Housing Accessibility Guidelines. This prima facie case may be rebutted by demonstrating compliance with a recognized, comparable, objective measure of accessibility. *See Order on Secretarial Review, U.S. Department of Housing and Urban Development and Montana Fair Housing, Inc. v. Brent Nelson*; HUD ALJ 05-068FH (September 21, 2006) (2006 WL 4540542 (H.U.D. A.L.J.)).

In making a determination as to whether the design and construction requirements of the Fair Housing Act have been violated, HUD uses the Fair Housing Act, the regulations, and the Guidelines, which reference the technical standards found in ANSI A117.1-1986.

It is the Department's position that the above-named documents represent safe harbors only when used in their entirety; that is, once a specific safe harbor document has been selected, the building in question should comply with all of the provisions in that document that address the Fair Housing Act design and construction requirements to ensure the full benefit of the safe harbor. The benefit of safe harbor status may be lost if, for example, a designer or builder chooses to select provisions from more than one of the above safe harbor documents or from a variety of sources, and will be lost if waivers of provisions are requested and received. A designer or builder taking this approach runs the risk of building an inaccessible property. While this does not necessarily mean that failure to meet all of the respective provisions of a specific safe harbor will result in unlawful discrimination under the Fair Housing Act, designers and builders that choose to depart from the provisions of a specific safe harbor bear the burden of demonstrating that their actions result in compliance with the Act's design and construction

requirements. HUD's purpose in recognizing a number of safe harbors for compliance with the Fair Housing Act's design and construction requirements is to provide a range of options that, if followed in their entirety during the design and construction phase, will result in residential buildings that comply with the design and construction requirements of the Fair Housing Act, so long as they are applied without modification or waiver.

IV. Conclusion

Through this report, the Department is formally announcing that it has assessed the provisions of the 2006 International Building Code, as corrected by the January 31, 2007 erratum, that relate to facilities covered by the Act. HUD has determined that these provisions, when interpreted in accordance with relevant 2006 IBC commentary, are consistent with the Act, HUD's regulations, and the Fair Housing Accessibility Guidelines. Therefore, the 2006 IBC, as corrected by the January 31, 2007 erratum to the IBC, if adopted without modification and without waiver of any of the provisions intended to address the Fair Housing Act's design and construction requirements, constitute a safe harbor for compliance with the design and construction requirements of the Act, HUD's regulations and the Guidelines, and interpreted in accordance with relevant 2006 IBC commentary. The Department looks forward to continuing to work with members of the housing industry, persons with disabilities and advocacy organizations, model code officials, state and local governments, fair housing organizations and all other interested parties on our common goal of eliminating discrimination against persons with disabilities and eliminating structural barriers to housing choice for persons with disabilities.

Environmental Impact

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

Dated: May 31, 2007

Kim Kendrick, Assistant Secretary for
Fair Housing and Equal Opportunity

[FR-5136-N-01]