

MIAMI VALLEY



FAIR HOUSING

Fair Housing Advertising Manual

Guide to Compliance with Real Estate Advertising Discrimination Laws
for Miami Valley, Ohio Area Publishers and Advertisers



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and

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The Fair Housing Advertising Manual is one of the various educational materials produced and/or made available by the Miami Valley Fair Housing Center, Inc. (MVFHC). MVFHC conducts free programs and seminars to further educate Miami Valley residents about housing discrimination. We also offer comprehensive fair housing education and training to housing industry professionals. To learn more about our programs, please contact John Zimmerman at (937) 223-6035.

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Vision/Mission

Mission Statement

The mission of the Miami Valley Fair Housing Center (MVFHC) is to eliminate housing discrimination and ensure equal housing opportunity for all people in our region.

Specifically, the Miami Valley Fair Housing Center seeks to eliminate housing discrimination against all persons because of race, color, religion, national origin, sex, disability, familial status, or any other characteristic protected under state or local laws. In furthering this goal, MVFHC engages in activities designed to encourage fair housing practices through educational efforts; assists person who believe they have been victims of housing discrimination; identifies barriers to fair housing in order to help counteract and eliminate discriminatory housing practices; works with elected and government representatives to protect and improve fair housing laws; and takes all appropriate and necessary action to ensure that fair housing laws are properly and fairly enforced throughout the Miami Valley.

Vision Statement

The Miami Valley Fair Housing Center recognizes the importance of "home" as a component of the American dream. We envision a country free of housing discrimination where every individual, group and community enjoys equal housing opportunity and access in a bias-free and open housing market. We envision a country where integrated neighborhoods are the norm, and private and public sectors guarantee civil rights in an open and barrier-free community committed to healing the history of discrimination in America.

The Miami Valley Fair Housing Center (MVFHC) provides assistance to people who request an investigation into a situation when they think or feel that their race, color, religion, sex, national origin, familial status or disability (or their association with members of any of these groups) was the basic motivation for differential treatment given by anyone associated with their search for housing.

Professional counseling and guidance are available to individuals who encounter discrimination in their search for housing, including informing consumers of their options under FHAA and providing support for consumers while going through the process of asserting their housing rights. **MVFHC staff are *not* attorneys. Staff *cannot and do not* offer legal advice.**

MVFHC offers an aggressive testing program to expose discriminatory practices in apartment rentals and real estate purchasing.

Educational programs are also available to inform consumers of their rights and professionals of their responsibilities under the Fair Housing Amendment Act.

Fair Lending

Until December 2015, MVFHC offered a program to assist residents who may have been facing foreclosure on their primary residences. However, that program was closed as a result of a lack of

○ funding. If you are currently facing foreclosure on your primary residence, contact the HomeOwnership Center of Greater Dayton.

If you believe you have encountered lending discrimination when attempting to secure a loan for your primary residence, MVFHC may be able to help you — to speak with someone about a lending discrimination issue, call 937-223-6035.

Introduction

As someone involved in the business of real estate advertising, you have a legal obligation to avoid engaging in advertising which is discriminatory or may send a discriminatory message. This Manual is designed to inform you about that obligation, and also to convince you that adopting a nondiscriminatory real estate advertising policy just makes good business sense.

The Miami Valley, Ohio area is a multi-racial community filled with professionals and working people from many different backgrounds, races, religions, and cultures. These citizens are readers, and potential readers, of local newspapers and magazines. They are also renters, homebuyers, and potential consumers in the active Miami Valley area real estate market. Adopting and enforcing a policy which ensures that your business will engage only in nondiscriminatory, inclusive real estate advertising will bring you in step with the legal standards — and the expectations and hopes of housing consumers across the metropolitan area.

Historically, the residential real estate market in the Miami Valley area has been marked by segregation and overt as well as subtle discrimination. While housing discrimination has been illegal under federal law since 1968, black homeseekers have continued to have their offers to rent or buy turned down, their business discouraged, or their applications subjected to unique and onerous conditions, solely because of their race. Other groups have suffered similar discouragements in their housing search, including Hispanics and single mothers, to cite only a few. Through the efforts of federal and local governments, fair housing groups, members of the community, and the real estate industry itself, housing discrimination has been reduced, particularly in its more virulent forms. Unfortunately, it has not been eliminated.

Realtors, leasing agents, property managers, advertising personnel, and publisher's to name a few engaged in real estate advertising, play an important role in the housing search for many home-seekers. By reaching out to accept and understand your legal obligations as a real estate advertiser, you can also play an important role in combating housing discrimination.

This manual was originally published by the Fair Housing Council of Greater Washington, and prepared by the law firm of Miller, Cassidy, Larroca & Lewin, under a grant from the United States Department of Housing and Urban Development's Fair Housing Initiatives Program. The manual has been localized and updated for use in the Miami Valley, Ohio area by the Miami Valley Fair Housing Center, Inc. The objective of the manual is to educate and provide general guidance to businesses that create and publish real estate advertising. This manual is not intended to provide legal advice. By its nature, a general manual cannot cover particular persons' situations or questions. However, this manual is intended to make you aware of and sensitive to the important legal obligations concerning how to avoid discriminatory real estate advertising practices in a marketing program for residential real estate that is for rent or purchase.

Manual Overview

- Part A **Historical Overview:** Reviews the background of discriminatory advertising practices in the Miami Valley area.
- Part B **Laws You Should Know:** Lists the basic laws and regulations applicable to real estate advertising and discusses the outcomes of legal cases which have been brought.
- Part C **Your Obligations Under The Law:** Recaps the publishers' and advertisers' basic obligations under the law, including screening real estate advertising, education of employees, establishing a fair housing policy, inclusion of the publisher's notice, and avoiding selective advertising strategies.
- Part D **What Advertising Discrimination Laws Prohibit:** Gives detailed examples of practices outlawed by the real estate advertising discrimination laws, addressing the verbal and visual content of advertising.
- Part E **The Population in the Miami Valley, Ohio Area:** Provides governmental statistics concerning the racial make-up of the Miami Valley (Dayton-Springfield MSA) metropolitan area.
- Part F **Drafting a Fair Housing Ad Policy:** Provides examples of publishers' policies concerning human model real estate advertising.

We urge you to read this Manual, to familiarize yourself with the issues, and to adopt and vigorously enforce a fair housing advertising policy.

A. Historical Overview

The use of discriminatory advertising is a remaining vestige of a long tradition of housing discrimination in the Miami Valley area real estate market. By the time of the Supreme Court's "separate but equal" decision in 1896, upholding segregated schools, *Plessy v. Ferguson*, 163 U.S. 537, the leading area newspapers had begun placing a separate "COLORED" section at the end of each category of real estate advertising in the classified columns. Dayton and Miami Valley area newspapers did not stop that invidious practice until the early 1960's, and even then they continued running ads with explicitly stated racial preferences.

Beyond the words in the advertisements, the race of the persons depicted was used as a "picture cue" to signal to readers the racial composition of desired customers. During the late 1960's, pictures of black families were used to signal to blacks that they were welcome in certain developments. In the absence of such a picture, or of phrasing conveying the same message, a black homeseeker "could generally assume that the housing advertised was closed to him."

In 1968, subsequent to the shocking death of the Reverend Doctor Martin Luther King Jr., Congress passed the Fair Housing Act. The Fair Housing Act expressly outlawed housing discrimination and barred the publication of any real-estate advertising which "indicated any preference, limitation, or discrimination" on the basis of race, color, religion, sex or national origin. Notwithstanding the passage of that Act, discriminatory real estate advertising proved hard to eradicate.

Miami Valley area newspapers continued to publish ads with express racial preferences — such as "private white home" — into the early 1970's. In the nation's capital, Washington, DC, it was not until the Metropolitan Washington Planning & Housing Association, Inc. ("MWPHA") conducted a vigorous advocacy campaign against racially explicit advertising was that practice ended. However, the continued use of single-race human model advertisements and veiled wordings to convey racial preference proved much more difficult practices to eliminate.

A 1969-70 comprehensive study — sponsored by MWPHA — of real estate ads in D.C. metropolitan area newspapers found ads depicting black persons "to be virtually non-existent" although blacks constituted approximately one-fourth of the population. While many ads contained pictures of people who were "obviously and exclusively white," blacks were depicted only for developments in areas either all-black or in transition.

In addition, the study found a range of wordings that indicated or suggested that certain categories of people might be unwelcome. These ranged from "outright racial references, through phrases indicating the 'private' or 'exclusive' policy of the neighborhood, to vague references of neighborhood prestige." Not surprisingly, the author of the study concluded that a "reader scanning these ads would receive the impression that in spite of the Fair Housing Act, black families were not now in residence in, or welcome patrons at, the housing advertised."

In 1969, MWPHA vigorously lobbied the Department of Housing and Urban Development ("HUD") to set standards under the Fair Housing Act for non-discriminatory advertising, and submitted a comprehensive draft of proposed requirements. In response, HUD formally promulgated housing advertising guidelines in May 1972, expressly providing that advertising campaigns "should indicate to

the general public that the housing . . . is not for the exclusive use of one [racial] group.” 37 Fed. Reg. 6701 (1972).

Unfortunately, the HUD guidelines did little to eradicate the practice of discriminatory human model advertising. In 1976, MWPFA published the results of a comprehensive study analyzing more than 7,000 real estate ads published in the D.C. area from 1972 through 1975. The study concluded that 90 percent of the more than 1,500 ads depicting humans contained only whites. The few ads that did show black persons were for developments in Prince George’s County, Maryland. This suburb was designated by the local real estate industry as the only one suitable for black residents. The study further concluded that 94% of the ads for housing did not include the equal housing opportunity logo.

In 1980, HUD took further action. After receiving comments from fair housing advocates and the real estate industry, the agency reissued its advertising guidelines as formal regulations. 45 Fed. Reg. 57,102 (1980); see also 44 Fed. Reg. 55,528 (1979). The language of the 1972 guidelines was strengthened to provide, among other things, that human models “may not be used to indicate exclusiveness on the basis of race [or] color.” 45 Fed. Reg. at 57,107. The regulations also described in considerable detail words, phrases, symbols, and forms that are often used to convey tacit or overt discriminatory intent.

Still, the practice of discriminatory model advertising continued.

As this historical discussion reveals, advertisers’ use of racially exclusive human model advertising has been a lingering problem in the Miami Valley area. Additional problems of more recent vintage have sprung up since 1988, when Congress amended the Fair Housing Act to cover the protected classes of familial status and handicap. Notwithstanding these amendments, a number of advertisers have continued to publish ads for housing that state “no children” or similarly exclusive phrasing.

Current trends see these problems continuing well after the first decade of the 21st century. In 2006 Bryan Greene, Assistant Secretary for Enforcement and Program at HUD, issued guidance on internet advertising. Greene’s guidance on the prohibition of discriminatory advertisements found in the FHAA says that the prohibition “applies to all advertising media, including newspapers, magazines, television, radio, and the Internet.”

In 2009 the National Fair Housing Alliance, (NFHA) published studies on internet advertising in its 2009 Fair Housing Trends report conducted in 2008. The study found advertisements such as the following on the internet:

- I would love to house a single mom with one child; not racists, but white only
- Room available to single white mother with child or younger to middle-aged white couple

This highlights the need for continuing vigilance by publishers to ensure that they do not accept for publication any advertising which conveys an illegal message of exclusion to any protected class, and a corresponding need for advertisers to ensure that all real estate advertising they create, place, or disseminate does not discriminate in any fashion.

B. The Laws You Should Know

Discriminatory real estate advertising is prohibited by federal law under the Fair Housing Act. The relevant provision is Section 3604(c) of Title 42 of the United States Code found at <http://www.fairhousinghelper.com/fhatext.html#3604>. This provision of the Fair Housing Act in the past was interpreted in regulations issued by the United States Department of Housing and Urban Development but was later rescinded. Many housing professionals still find these additional explanations of real estate advertising programs a valuable tool for implementing a fair housing marketing program. The rescinded parts are 109 and 110 of Volume 24 of the Code of Federal Regulations and can be found at <http://www.fairhousing.com/index.cfm?method=page.display&pageid=605>. Additional discussion is found in Section 100.75 of the same volume of the HUD regulations.

In the Miami Valley, Ohio area, discriminatory real estate advertising is also governed by the Ohio Fair Housing Law, and by local fair housing laws such as the City of Dayton Human Rights Ordinance. Many smaller jurisdictions have resolutions against housing discrimination or laws governing housing and housing discrimination which mirror state or federal law. Check with your local government staff for the presence of these ordinances.

Persons engaged in real estate advertising, such as newspapers and magazines, advertising agencies, real estate professionals, management companies, and developers, must comply with federal law, and must also ensure compliance with the law of any jurisdiction in which their advertising is distributed, sold, or otherwise made available to the public. For many businesses in the Miami Valley area, this may require examination of the laws of a number of jurisdictions which are similar but not identical.

1. THE FAIR HOUSING ACT

The Fair Housing Act of 1968 (the "Act") establishes a broad national policy "to provide, within constitutional limitations, for fair housing throughout the United States" 42 U.S.C. § 3601. While the Act prohibits virtually all forms of housing discrimination, including discrimination in sales, rentals, financing, and brokerage services, this Manual focuses exclusively on the provisions of the Act that cover advertising practices.

(a) Prohibition on Discriminatory Advertising

With respect to real estate advertising, Section 3604(c) of the Act provides that:

It shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Publishers and advertisers should be aware at the outset of three important points: First, this provision imposes legal requirements on anyone that participates in any fashion in the "making, printing, or publishing" of real estate advertising. This includes newspapers and magazines as well as the persons

or companies conducting the underlying sale or rental transactions. While some newspapers argued that the Act did not require them to screen the content of their real estate advertising, courts have established that the broad language of the Act imposes legal obligations on publishers as well as advertisers themselves. See, e.g., *United States v. Hunter*, 459 F.2d 205, 211 (5th Cir. 1972), cert. denied, 409 U.S. 934 (1972). By the same principle, advertising agencies, sales firms, real estate professionals and management companies may be liable, as well as their clients, if they play any role in creating, distributing or publishing discriminatory advertising on their clients' behalf.

Second, the prohibition against discriminatory real estate advertising broadly applies to every form of advertising for residential real estate, including "any notice, statement, or advertisement." This means that the law applies to classified ads, display ads, inserts, or any other type of real estate advertising that a newspaper or magazine may publish. It also applies to any type of advertising or written material that a real estate business may distribute or use, whether it is brochures, direct mailings, radio or television ads, MLS listings, posters, billboards, application forms, or other documents, signs or videos.

Third, the law is also broadly worded in prohibiting advertising which "indicates any preference, limitation, or discrimination" based on a protected class. This means that the Act outlaws not only real estate advertising which is explicitly discriminatory (e.g., an ad stating "whites only"), but also advertising which uses indirect means, such as word cues or photos, to convey a discriminatory message (e.g., advertising which uses only white models).

Just as a publication reviews advertising before printing it for such content as obscenity or defamatory material, publications must be very sensitive to the potentially discriminatory messages conveyed by real estate advertising that they are being asked to accept for publication. Advertisers must be similarly vigilant in reviewing the content of advertising materials they create, use or place. Examples of the types of advertising that are or may be considered discriminatory are discussed more fully in Part D.

(b) Protected Classes

The advertising provision of the Fair Housing Act, set forth above, specifies a number of "protected classes" which are covered by the law. Since 1968, the Act has reached discrimination based on race, color, religion, sex, or national origin. Under 1988 amendments, the Act also prohibits housing discrimination based on handicap or familial status. While the categories of race, color, religion, sex, and national origin are not defined, the law does provide definitions of "handicap" and "familial status."

A "handicap" is a physical or mental impairment which substantially limits one or more of a person's major life activities. It includes impairments which a person actually has, has a record of having, or is regarded as having. For example, a real estate ad which advertised for a "physically fit" or "active" tenant would indicate a preference against handicapped individuals in violation of the law. Of course, having a disability does not necessarily preclude one from being quite active and physically fit. Nevertheless, the indication of such a preference could be construed as excluding, under the specific language of "handicap," those who are unable to participate in certain physical activities. Specifically exempted from the definition of "handicap" are illegal drug use and drug addiction, and transvestites.

Protection based on “familial status” refers to a situation where one or more children under 18 years of age live with a parent or guardian, to pregnant women, and to persons in the process of obtaining legal custody of a child under 18. To cite an example, an ad which stated “no children” would violate the prohibition against discrimination based on familial status.

(c) Application to All “Dwellings”

The discriminatory advertising prohibition of the Fair Housing Act covers any “dwelling,” which is defined as any building, structure, or portion of a building or structure that is occupied as, or intended or designed for occupancy as, a residence by one or more families or individuals. Thus, “dwellings” include houses, townhouses, condominiums, apartments, co-ops, nursing homes, residential hotels, and any other type of residential housing.

You should be aware that a “dwelling” is also defined to include any vacant land offered for sale or lease for the construction or location of any residential housing. Real estate advertising frequently involves not only housing which has already been constructed, but also residential real estate developments which are under construction or which will be developed in the future. Advertising for such real estate projects is covered by the law.

Leaving aside the issue of senior complexes, discussed below, exceptions to the Fair Housing Act’s broad ban on discriminatory advertising are very limited, and do not apply to most types of “dwellings.” There are two types of property for which preferential advertising may be placed and accepted, subject to certain conditions: Religious groups who do not discriminate on the basis of color, race or national origin may give preference to members of their own religion in dwellings they operate on a noncommercial basis; and private clubs not open to the public may give preference to club members in dwellings they operate on a noncommercial basis.

Otherwise, the entire range of “dwellings” is covered by the Fair Housing Act’s discriminatory advertising prohibitions. Even though certain types of real estate are not covered by the federal Fair Housing Act’s ban on discriminatory sales and rentals (for example, owner-occupied buildings with fewer than four rental units are exempt from the federal law, but are not exempt from the State of Ohio law, which does not allow for such an exemption), discriminatory advertising for such dwellings is prohibited. Thus, publications must be careful to review all of their real estate advertising for compliance with the law, including such advertising as classified ads for basement or in-law apartments.

(d) Senior Complexes

There are special rules applicable to senior complexes, and advertising for such complexes. The Fair Housing Act exempts “housing for older persons” from its prohibitions against “familial status” discrimination. See 42 U.S.C. § 3607(b). The rules concerning which complexes will qualify as “housing for older persons” are complex.

The Fair Housing Act provides that housing for older persons includes: (1) housing provided under a state or federal program that HUD determines is “specifically designed and operated to assist elderly persons;” and (2) housing “intended and operated for occupancy by at least one person 55 years of age or older per unit,” which means that the housing must have at least 80 percent of its units occupied by at

least one person 55 or older and must adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 or older. The 1988 Amendments to the Fair Housing Act also provided for certain "transition" rules for existing complexes.

While the Act does not address the issue of advertising for senior complexes, the HUD regulations (discussed below) make clear that there is a parallel exemption from the discriminatory advertising provisions. In other words, advertising for qualified "housing for older persons" under the Fair Housing Act may make reference to the age of the desired residents.

(e) Potential Liability Under The Act

While it is not the place of this Manual to explain in detail the enforcement provisions of the Fair Housing Act, you should be aware of the potential liability which may be imposed on those who engage in discriminatory real estate advertising. Private parties who are aggrieved by discriminatory advertising may file suit in federal court or may file an administrative complaint with HUD.

Lawsuits to challenge discriminatory advertising may be brought both by fair housing organizations and by readers of discriminatory advertising who are deterred in their housing search or suffer emotional injury. See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993); *Housing Opportunities Made Equal, Inc. v. The Cincinnati Enquirer*, 943 F.2d 644 (6th Cir. 1991); *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990); *Saunders v. General Services Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987). In such a suit, if a court finds that a discriminatory practice has occurred or is about to occur, it may award the plaintiff compensatory damages, punitive damages, a declaratory judgment, and/or appropriate equitable relief.

Compensatory damages may include not only out-of-pocket expenses, but damages to the mission of an organization and damages for a reader's emotional suffering. Equitable relief may include an injunction preventing a newspaper, magazine, or advertiser from publishing future discriminatory ads, or placing specific conditions on advertising.

It is important for publishers and advertisers to understand that the financial liability for violating the Fair Housing Act may be very significant. As described in detail below, jury cases involving discriminatory real estate ads have resulted in jury awards of \$850,000 and \$2 million. In addition, a successful plaintiff in a discriminatory advertising suit is generally entitled to have the court order the defendant to pay the plaintiff's attorneys' fees, which can be significant. Where the defendant has acted in reckless disregard of the plaintiff's civil rights, punitive damage awards are also available under federal law. *Smith v. Wade*, 461 U.S. 30, 37 (1983).

In addition to private party suits, the United States Government has the authority to file suit where it finds a "pattern or practice" of discriminatory real estate advertising or when the case raises an issue of "general public importance." A "pattern or practice" is shown where the discriminatory conduct is not an isolated or accidental departure from otherwise nondiscriminatory practices. *United States v. Hunter*, 459 F.2d 205, 217 (1972).

In a case brought by the United States, the court may award injunctive relief against the person responsible for violating the Act, other relief the court considers appropriate, including monetary

damages, and a civil penalty against the advertiser or publisher in the amount of \$50,000 for the first violation and \$100,000 for any subsequent violation. 42 U.S.C. § 3614(d).

2. THE HUD REGULATIONS

Since 1972, HUD has had in place Fair Housing Advertising regulations. 24 C.F.R. Part 109. However, in 1996 the regulations were removed from C.F.R. due to a mandate under the Paperwork Reduction Act. HUD has represented that it will continue to apply the regulations as guidance. One specific purpose of these HUD regulations is to assist all advertising media, advertising agencies, and other persons who use real estate advertising to comply with the Fair Housing Act. In 1989, HUD issued general regulations interpreting the Fair Housing Act which contain further discussion of the Act's advertising provisions. 24 C.F.R. § 100.75.

(a) Learn The HUD Regulations

It is very important for publishers to be familiar with the provisions of the HUD regulations. The courts frequently look to the HUD regulations for guidance in interpreting the Fair Housing Act, and will defer to HUD's interpretation of that statute. E.g. *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp. 1213, 1227 (S.D.N.Y. 1992), *aff'd in part and rev'd in part*, 6 F.3d 898 (2d Cir. 1993); *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361, 365 (D. Md. 1991); *Ragin v. Harry Macklowe Real Estate Co.*, 126 F.R.D. 475, 479 (S.D.N.Y. 1989); *Ragin v. New York Times Co.*, 726 F. Supp. 953, 958 (S.D.N.Y. 1989), *aff'd*, 923 F.2d 995 (2d Cir.), *cert. denied*, 112 S. Ct. 81 (1991).

(b) Human Model Advertising

One topic covered by the HUD regulations which has been the subject of extensive litigation is the use of human models in real estate advertising. Frequently, display advertising will include photos or drawings. Often, such ads will depict persons enjoying the amenities of the complex or the neighborhood to make the housing seem appealing to potential homeseekers. It is only common sense that a message may be sent by the race, sex, age, or family status of the persons in the advertisements.

With respect to such advertising, the HUD regulations describe the meaning of the Fair Housing Act's prohibition against advertising that "indicates any preference" based on a protected class.

The HUD regulations state expressly that human models in photos or drawings "may not be used to indicate exclusiveness." They go on to provide the following standard for human model ads:

If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

24 C.F.R. § 109.30(b). In essence, this standard requires that the human models depicted in advertising campaigns be generally reflective of the make-up of the metropolitan area in which the ads are published.

The regulation has several implications. First, by referring to advertising “campaigns,” the regulation requires that publishers and advertisers be sensitive to the need to review real estate advertising over a period of time. At times, an ad for a complex may include so many people in the picture that it is apparent from a single viewing that the ad sends a message that only whites live or are welcome at the complex advertised (or only blacks, or only adults, to cite other examples). Other ads, however, must at times be viewed in the context of an entire “campaign.” For example, the repeated publication of ads for a particular development over a period of weeks or months, almost all of which use one or two white models and no models of any other race, may be found to be in violation of the law.

A newspaper or magazine that accepts and prints such advertising may be held liable. Liability may also fall on the advertising agency, the real estate developer, the sales firm, and any other parties involved in developing or placing the advertising at issue. This can occur even if each individual ad in a series contains only one or two white models.

Second, the term “campaign” also makes clear that the publisher and advertiser should review advertising on a development-by-development basis. The general practice in the real estate advertising industry is to develop advertising “campaigns” for each complex to be promoted. Each of these “campaigns” must be appropriately inclusive. For example, an advertiser would not be in compliance with the law if it published virtually all-white advertising for a development in the southern suburbs of the Miami Valley, which are predominately white, and published integrated advertising for a development in West Dayton, an area with a substantial black population. To avoid liability, publishers and advertisers must be alert to and refuse to participate in publishing any advertising campaign which may be discriminatory.

Third, you should also keep in mind that the regulations refer to the “metropolitan area” in which the advertising is published. In using this term, the HUD regulations emphasize that the relevant community to look to in establishing human model standards is the racial make-up of the greater metropolitan area in which ads are published. It is not sufficient to publish advertising which merely reflects the racial make-up of particular neighborhoods. For example, if a development is located in a predominately white suburb, advertising for that development may not therefore show only white models. Such advertising would merely reinforce patterns of residential segregation, and is contrary to the purpose of the Fair Housing Act.

By the same token, the racial composition of advertising should not be tied to the income group of the potential buyers for the housing (e.g., luxury housing may not be targeted to a predominately white audience), or to the particular racial make-up of the publication’s audience (e.g., advertisers may not use models predominately of the race of the publication’s readers, whether white or black). Again, the relevant standard to follow is the racial make-up of the metropolitan area as a whole.

This reflects the national policy, set forth in the Fair Housing Act, to encourage housing integration and to outlaw all forms of housing discrimination. While it is common for advertisers of consumer

products to target particular racial groups in their advertising, publishers and advertisers must keep in mind that the same type of advertising may be illegal when housing is at issue.

The HUD regulations do not require that every advertising campaign which you design or publish must depict each racial or minority group in the Miami Valley metropolitan area, as well as both sexes, families, and a person with a disability. It does mean that businesses involved in real estate advertising have an obligation to take steps to ensure that the advertising they publish, as read by an ordinary reader, does not convey a message of preference for or against any protected group, whether through pictures or words. The best way to do this is to ensure that your advertising depicts persons from diverse groups, including different races, national origins, ages, types of families, and genders.

(c) The Publisher's Fair Housing Notice

The HUD regulations contain a special provision applicable to publishers. They provide that all publishers should publish at the beginning of their real estate advertising section a notice including language to the following effect:

All real estate advertised herein is subject to the Federal Fair Housing Act, which makes it illegal to advertise "any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or intention to make any such preference, limitation or discrimination."

We will not knowingly accept any advertising for real estate which is in violation of the law. All persons are hereby informed that all dwellings advertised are available on an equal opportunity basis.

The notice may also include a statement regarding the coverage of any local fair housing or human rights ordinance prohibiting discrimination in the sale, rental, or financing of dwellings. 24 C.F.R. § 109.30(d).

Some publishers, as a public service, have also included in their publisher's notice telephone numbers for local fair housing organizations or agencies which homeseekers may call for information if they feel that they have been the victim of housing discrimination. The authors of this Manual encourage publishers to include such information in the text of their fair housing notice. The suggested text for a publisher's notice for a Miami Valley area newspaper or magazine is provided in Part C.

(d) Selective Placement of Advertising

Advertisers should be aware that the HUD regulations warn against selective advertising campaigns, such as a campaign that primarily uses media catering to one racial or national origin segment of the population without complementary advertising directed at other groups. They warn, similarly, against advertising campaigns which use publications or media directed at one sex, or at persons without children. In an area where non-English publications are available, the HUD regulations note that use of English language media alone could have a discriminatory impact. 24 C.F.R. § 109.25(c).

The HUD regulations also caution against the strategic placement of advertising materials in only certain geographic areas. Examples would include such practices as the selective display of billboards, or the selective distribution of brochures by mail or by hand, to certain neighborhoods predominately inhabited by a particular race or ethnic group. Other selective advertising strategies disapproved by HUD include the selective use of HUD logos only in advertising reaching certain geographic areas, or only in advertising for certain properties, and the selective use of mixed-race human models only for particular developments and not others.

This means, first, that under the HUD regulations, advertisers should be sure to use a variety of media outlets which reach diverse groups in the community. Advertisers should not use only or predominately media targeted at particular protected groups. For example, an advertising strategy which used only publications geared to a black audience (or, to cite an alternative example, only publications directed to women) could be found to be in violation of the fair housing laws. Where non-English publications are available, advertisers would be well-advised to use those media outlets, as part of an overall advertising program, to reach out to parts of the population which they would not otherwise attract.

Second, advertisers should be careful to look to their overall advertising strategy to make sure that it is not selectively targeted in any manner to particular racial, ethnic or other protected groups. This includes review not only of print advertising but also of direct mail, signs and billboards, promotional materials and events, and each other element of the advertising strategy.

If your advertising program may appear to target neighborhoods or audiences predominantly made up of one racial or ethnic group (for example, a campaign using direct mail targeted to neighborhoods which are predominately white and geographic newspaper editions circulated in white suburbs), it is important to include complementary advertising efforts designed to reach other groups in order to avoid legal liability.

The HUD regulations are not intended to deter advertisers from using publications with specialized audiences, or to otherwise reaching out to protected groups in their advertising. To the contrary, such efforts can be an important source in bringing in homeseekers who might not otherwise apply to particular complexes or neighborhoods. The HUD regulations simply make clear that any selective advertising must be used as part of an overall, inclusive advertising strategy which places advertising in a variety of locations and media which seek to reach all groups in the community.

(e) Affirmative Marketing Efforts

The HUD regulations recognize that there may be some instances in which, contrary to the general rule, advertising which is geared to particular races or groups is permissible. In particular, housing advertising which is part of an affirmative effort to reach out to and include protected classes may be permissible.

In its regulations, HUD makes clear that its regulations are not intended to restrict advertising efforts designed to attract persons to dwellings who would not ordinarily be expected to apply, if such efforts are part of an affirmative marketing program or are undertaken to remedy the effects of prior discrimination in connection with the advertising or marketing of dwellings. 24 C.F.R. §109.16(b).

Affirmative advertising programs, designed to attract minority groups in order to help integrate neighborhoods, have also been approved by the courts. See *South-Suburban Housing Center v. Board of Realtors*, 935 F.2d 868, 884-85 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992).

Thus, federal law would not bar ads run by a developer to attract minority homeseekers to a traditionally white complex or area under development by HUD, even if the ads used references which might otherwise be impermissible. Indeed, under separate provisions of the HUD regulations, developers who seek to participate in HUD housing programs are required to develop and implement affirmative fair housing marketing plans for the housing, which must include advertising designed to appeal to groups which are not likely to apply for the housing. 24 C.F.R. Part 108. It is also permissible to publish remedial advertising designed to counteract the effects of past advertising discrimination.

In this regulation, HUD makes clear that neither publishers nor advertisers should read the Fair Housing Act so strictly as to prevent them from publishing real estate advertising which is designed to further fair housing goals.

(f) Advertising Handicapped Access

The HUD regulations also make clear that the Act's prohibition against advertising which discriminates on the basis of "handicap" is not intended to prohibit any real estate company from including information which highlights the availability of handicapped accessible housing. 24 C.F.R. § 109.20(b)(6). Real estate advertising may state that a dwelling that is accessible to people with disabilities, or may describe other features which make it accessible, without violating any legal prohibition.

(g) Senior Complexes

As noted above, the Fair Housing Act creates a limited exemption from the housing discrimination laws for qualified "housing for older persons," as defined in the statute. In describing this provision of the Act, the HUD regulations make clear that advertising for exempt housing which makes reference to the fact that the housing is for older persons is permissible. 24 C.F.R. § 109.20(b) (7).

At the same time, publishers and advertisers should be aware that this exemption for advertising for housing for older persons applies only to the familial status prohibitions of the Act. In other words, while advertising for such a complex may express a preference for older persons, it may not express any preference on the basis of race, color, religion, sex, handicap, or national origin. For example, developers of qualified housing for older persons could not publish advertising which depicted only white persons. Nor could such advertising seek "active" older persons, or use other terms to suggest discrimination on the basis of handicap.

Although this Manual is not intended to cover every rule governing housing for older persons, you should be aware that the HUD regulations contain complex rules concerning the eligibility of new housing developments and developments that are occupied by employees of the housing facility less than 55 years of age. See 24 C.F.R. § 100.304.

(h) Advertising for Roommates

The HUD regulations adopt special rules which apply with respect to advertisements seeking roommates. Such advertisements may refer to the desired sex of the tenant, but only where the sharing of living areas is involved, or where the advertisement is for a dormitory for an educational institution. 24 C.F.R. § 109.20(b) (5).

Such a reference is not permissible where the advertisement merely involves the rental of separate units in a single or multi-family dwelling. For example, a landlord who seeks to rent a basement apartment (with no shared living quarters) could not advertise for a male tenant.

Moreover, the only exception with respect to advertising for a roommate is with respect to the person's sex. In no case may a housing advertisement seek a roommate of a particular race, religion, or other protected class.

(i) Notification to Employees and Clients

The HUD regulations also provide that all publishers and all businesses engaged in the sale, rental or financing of real estate should give notice to their employees and clients that they follow a nondiscriminatory advertising policy.

In particular, publishers and real estate businesses are called upon to provide a printed copy of their nondiscrimination policy to each employee and officer. 24 C.F.R. § 109.30(d) (1). They are also called upon to post a copy of their nondiscrimination policy in a conspicuous location wherever persons place advertising, and to have copies available for all firms and persons using their advertising services, id., and § 109.30(d)(2).

Implicit in this language, of course, is that HUD contemplates that each publisher and real estate business engaged in advertising will develop a nondiscrimination policy spelling out the real estate advertising it will not accept. The authors of this Manual strongly urge that every publisher and advertiser adopt and enforce a written nondiscriminatory advertising policy spelling out, in detail, the policy of the business not to publish discriminatory advertising, the specific obligations of their employees under the policy, and the consequences of a failure to follow that policy.

(j) Equal Housing Opportunity Symbols

The HUD regulations provide that all advertising for the sale, rental or financing of housing should contain an equal housing opportunity ("EHO") logotype, statement or slogan. This serves as a means of educating the homeseeking public that the property is available for all persons regardless of race, color, religion, sex, handicap, familial status, or national origin. 24 C.F.R. § 109.30(a).

Advertisers and publishers concerned with their potential legal liability should adopt and follow the HUD standards concerning EHO logos and statements. The specific language and sizes of the logos and statements are set forth in Part D.

There are several points to keep in mind with respect to EHO logos and statements. First, the HUD regulations make clear that EHO logos or statements should be included in advertising of all types, whether visual or auditory. In other words, the inclusion of EHO logos is not limited to newspaper advertisements. As an advertiser, you should be sure to include an EHO logo or statement in all of your written material, as well as a statement to the same effect in any radio, television, or video advertising.

Second, you should make sure that the EHO logo or statement is a visible part of the ad. In depicting EHO logos, the symbol should be placed in a visible location and comparable in size to other symbols used in the ad. In using an EHO statement, the print should be in a type size comparable to other type used in the ad.

Third, publishers in particular should note that the HUD regulation extends not only to advertising for the sale or rental of housing but also to advertising for the financing of housing. Such advertising should also include an EHO logo or statement.

3. STATE AND LOCAL LAW

In addition to federal law, in the Miami Valley area, publishers and advertisers should be aware that the State of Ohio and the City of Dayton each have their own provisions concerning discriminatory real estate advertising.

(a) State of Ohio Law

Section 4112.02(7) of the Ohio Fair Housing Act provides that it shall be an unlawful discriminatory practice to

print, publish, or circulate any statement or advertisement, or to make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, handicap, or national origin, or an intention to make any such preference, limitation, specification, or discrimination.

Under the Ohio Code, complaints to challenge discriminatory advertising may be filed with the Ohio Civil Rights Commission or as a civil action in a Court of Common Pleas. The Ohio Civil Rights Commission has the authority to grant actual damages, injunctive relief, and punitive damages up to fifty thousand dollars when there is a finding of unlawful discrimination in housing. The Commission can also assess civil penalties. A complaint can also be brought in a Court of Commons Pleas. If a Court finds that the defendant has engaged in unlawful advertising practices, it may order the defendant to "cease and desist" from the unlawful practice, to pay actual damages, reasonable attorney's fees, court costs incurred in the prosecution of the action, expert witness fees, and other litigation expenses, and may grant other relief that it considers appropriate, including a permanent or temporary injunction, a temporary restraining order, or other order and punitive damages. Ohio Revised Code § 4112.051(D).

(b) City of Dayton

Section 32.05 of The City of Dayton's Code provides that it shall be an unlawful discriminatory practice to:

print, publish, or circulate, advertise, or publicize any statement, notice, or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitations, specification, or discrimination based upon race, color, religion, sex, national origin, ancestry, age, marital status, familial status, or disability.

Under the City of Dayton Code, complaints to challenge discriminatory advertising may be filed with the Dayton Human Relations Council which has the comprehensive authority to grant actual damages, or arrange to have adjudicated in court at the expense of the Human Relations Council, the award of actual damages to an aggrieved person; grant injunctive relief, or arrange to seek such relief in Court; assess a civil penalty against a respondent, or arrange to have adjudicated in Court, at the expense of the Human Relations Council the award of punitive damages against a respondent.

The City of Dayton ordinance also provides that a Court of competent jurisdiction may award actual damages, punitive damages, injunctive relief, and civil penalties against the respondent: (1) in an amount not exceeding \$10,000 if the respondent has not been adjudged to have committed any previous discriminatory housing practice; (2) in an amount not exceeding \$25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the five-year period ending on the date of the filing of this charge; and (3) in an amount not exceeding \$50,000 if the respondent has been adjudged to have committed two or more discriminatory housing practices during the seven year period ending on the date of the filing of this charge; except that if the acts constituting the discriminatory housing practice that are the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice then the civil penalties set forth in subsections 2 and 3 hereto may be imposed without regard to the period of time within any subsequent discriminatory housing practice has occurred; and further grants the prevailing party in a fair housing case reasonable attorney fees and costs. City of Dayton Code § 32.21(H) (3).

4. COURT DECISIONS

In addition to the statutes and regulations discussed above, you should be aware that the discriminatory advertising laws have been applied in a number of court decisions and cases dating back over the last two decades — at times resulting in very substantial monetary awards against advertisers and developers.

(a) The Hunter Decision

The first of these cases, *United States v. Hunter*, was a case brought directly against a newspaper publisher by the United States Government, seeking injunctive relief prohibiting the publication of particular real estate ads. *United States v. Hunter*, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934

(1972). The decision of the United States Court of Appeals for the Fourth Circuit in *Hunter*, issued in 1972, remains one of the most important judicial statements about the meaning of Section 3604(c).

In that case, the challenge involved a classified ad seeking a tenant for an apartment in a “white home.” The Court of Appeals in *Hunter* ruled that the newspaper violated Section 3604(c) when it published the landlord’s ad. The *Hunter* court made several important points.

First, the court held that the law applies to newspapers and other media that carry discriminatory advertising, even though someone else placed the ad. Second, it found that the application of Section 3604(c) to newspaper advertising does not violate the First Amendment’s guarantee of freedom of the press. Third, it held that whether a particular advertisement violates Section 3604(c) is to be determined by how an ordinary reader would naturally interpret that ad. None of these conclusions reached by the *Hunter* Court more than two decades ago has been upset since that time.

The *Hunter* decision involved advertising that contained an express racial statement. Other decisions have addressed advertising that selectively used other content in the ad to convey a message of racial exclusion.

(b) Human Model Advertising Cases

Many cases have been brought challenging the use of all- or predominately-white models in real estate advertising campaigns. The courts have repeatedly held that Section 3604(c) reaches the use of models as a medium for the expression of a racial preference. See, e.g., *Ragin v. New York Times Co.*, 923 F.2d 995, 1000 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991). Many courts have declared that the use of virtually all white models in an advertising campaign is a violation of the Fair Housing Act. Where the model ad or ad campaign runs afoul of Section 3604(c), courts have made clear that liability extends to the newspaper publishing it as well as the developer placing it and the ad agency designing it.

For example, in *Saunders v. General Services Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987), a fair housing group and an individual homeseeker sued an apartment complex and its president for violations of the Fair Housing Act relating to the complex’s 38-page advertising brochure, which contained almost entirely white models. The District Court for the Eastern District of Virginia agreed that the brochure violated the law:

It requires no expert to recognize that human models in advertising attempt to create an identification between the model, the consumer, and the product. . . . Thus, the Court finds that the natural interpretation of the Lifestyle brochure is to indicate that GSC apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there.

Id. at 1058. The discriminatory message of the ad on its face was sufficient to establish a Section 3604(c) violation. *Id.*

Similarly, in *Ragin v. Steiner, Clateman and Assocs.*, 714 F. Supp. 709 (S.D.N.Y. 1989), a fair housing group and individual homeseekers sued an advertising agency and the owner and sponsor of a cooperative apartment complex who were responsible for a series of display ads appearing in *The New York Times* that depicted only white models and did not carry the equal opportunity housing logo. The

suit alleged that defendants had published, over an 18-month period, 27 separate display ads with all white models, and that when asked to correct this, the defendants shifted their advertising to ads containing no human models. The court held that the complaint adequately stated a claim under Section 3604(c). *Id.* at 712-13.

In *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp. 1213 (S.D.N.Y. 1992), *aff'd* in part and *rev'd* in part, 6 F.3d 898 (2d Cir. 1993), a fair housing group and individual homeseekers sued a corporate leasing agent/managing agent for two luxury rental complexes and the sole owner-president of the leasing agent in connection with their advertising campaign. The case involved ads which contained a number of photographs depicting one or more white models enjoying the amenities of the complexes, none of which depicted any blacks. The Court held:

Looking to the ads seen by the Plaintiffs, they formed a pattern in which, without exception, at least one human model was featured and in which that model or those models were exclusively white, and, conversely, never black. . . . Given this pattern, an ordinary reader. . . would naturally infer from these ads. . . that white individuals were preferred as tenants at River terrace and Riverbank West.

Id. at 1232.

Again, in *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361 (D. Md. 1991), a fair housing group and individual homeseeker sued real estate developers prominent in the Baltimore-Washington area, alleging that their exclusive use of white models in an area with a sizable black population violated the prohibition against discriminatory advertising. Plaintiffs alleged that over a two-year period, from 1988 through 1990, defendants caused to be published at least 70 human model ads depicting 132 white human models and no black persons. Applying the ordinary reader standard of *Hunter*, the Court held that the defendants' exclusive use of white models in an area with a sizable black population over a 25-month period could suggest to an ordinary reader a racial preference in violation of Section 3604(c).

Finally, in *Spann v. Colonial Village, Inc. (and Mobil Land Development Corporation)*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990), two fair housing groups and an individual homeseeker sued a developer and an ad agency, alleging that for a year and a half, Colonial Village caused to be published advertisements in *The Washington Post* for the sale of housing units in a complex in Arlington, Virginia. For a period from January 1985 to April 1986, the ads featured exclusively white models. After the district court dismissed plaintiffs' FHA claims as untimely, the D.C. Circuit reversed and remanded the case for a decision on the merits. The trial resulted in a jury verdict of \$850,000, which was upheld by the trial court with minor reductions. The case settled in 1995 for \$835,000.

These cases establish clearly that publication of a real estate advertising campaign which depicts all or nearly all white models states a claim under the Fair Housing Act.

Publishers should also note that these cases have uniformly held that a plaintiff need not show that the advertiser or publisher intended to express a discriminatory preference in violation of the Act. E.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905-07 (2d Cir. 1993); *Soules v. United States Department of Housing and Urban Development*, 967 F.2d 817, 822 (2d Cir. 1992); *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361, 364 (D. Md. 1991); *Saunders v. General Services Corp.*, 659 F.

Supp. 1042, 1058 (E.D. Va. 1986). Rather, Section 3604(c) is violated whenever an ad for housing suggests to an ordinary reader that a protected class is preferred or not preferred. *Ragin v. The New York Times Co.*, 923 F.2d 995, 1000 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991).

(c) The Publisher's Responsibility of Review

In several cases brought directly against publishers, the courts have delineated the contours of the publisher's duty to review advertising. The courts have generally agreed that a publisher has a duty not to accept for publication individual advertising campaigns that are discriminatory. However, several courts have refused to impose any broader duty on a publisher to ensure, for example, that each real estate page is integrated, or to review the statistics of the real estate section as a whole.

In *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (6th Cir. 1991), fair housing groups alleged that over a twenty-year period, the newspaper accepted for publication real estate advertisements that, in almost every instance, pictured only white human models. Less than one percent of the ads pictured black models. The court held, however, that the plaintiffs had not identified any particular ad that allegedly violated Section 3604(c), nor made any allegations with respect to any particular advertiser who placed ads with the defendant. Under such circumstances, the court concluded that plaintiffs failed to state a claim.

A similar case was presented, with opposite results, in *Ragin v. The New York Times Co.*, 923 F.2d 995 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991). Fair housing groups and individual homeseekers alleged that during a twenty-year period, ads appearing in the Sunday New York Times featured thousands of human models of whom virtually none were black. While many of the white models depicted potential homeowners or renters, the few blacks represented were usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children, or cartoon characters. *Id.* at 998. The Second Circuit held that the complaint could not be dismissed for failure to state a claim:

[The complaint] alleges a long-standing pattern of publishing real estate ads in which models of potential customers are always white while black models largely portray service employees, except for the exclusive use of black models for housing in predominantly black neighborhoods. Finally, it alleges that this pattern reflects a targeting of racial groups. Given the ordinary reader test, it can hardly be said that these allegations are insufficient to enable plaintiffs to prove that the Times has published, and continues to publish, some discriminatory ads.

Id. at 1001.

The lower court decision in the Times' case expressly rejected the argument that passive publishers should not be subject to the Act. As that court explained:

Illegality may be more or less overt. Publishers may be relatively "active" or "passive." But caselaw holds and common sense confirms that consistent use of exclusively or near-exclusively white models may operate as the functional equivalent of more explicit verbal racial messages. If the Times' argument is that "passive" publishers should not be subject to the Act, that argument must be addressed to Congress, not the courts.

726 F. Supp. at 963.

(d) Awards Made In Advertising Cases

Publishers and advertisers should also be aware that very substantial damage awards have been made in discriminatory advertising cases. In such cases, defendants may be liable for compensatory damages, punitive damages, and the other side's attorneys' fees and court costs.

Compensatory Damages: The courts have held that individual plaintiffs may recover compensatory damages for emotional distress caused by the deprivation of their right to nondiscriminatory real estate advertising. E.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993).

An organizational plaintiff, such as a fair housing group, may be awarded damages to compensate for the diversion of its resources caused by virtue of its efforts to counteract the discriminatory practice, as well as for the "frustration of its equal housing mission." *Saunders*, 659 F. Supp. at 1061. As one court explained:

In today's market, obviously advertising plays a pivotal role in providing housing information to the public. Thus, when one of the largest providers of housing in the Richmond area . . . publishes advertising . . . on a large scale which conveys a message that it prefers white tenants, such advertising has a subtle, but substantial, impact on [Housing Opportunities Made Equal's] mission of ensuring equal housing and conveying the availability of equal housing to the public.

Saunders, 659 F. Supp. at 1060-61.

Attorneys' Fees: Attorneys' fee awards are also available to plaintiffs under the Fair Housing Act. Prior to 1988, a district court could award attorneys' fees to a prevailing party in a Fair Housing Act case provided the plaintiff was "not financially able to assume said attorney's fees." 42 U.S.C. § 3612(c) (1982). The 1988 amendments to the Act eliminated this limitation, and the law now provides that a district court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c) (2) (1988). Under established Supreme Court case law, this language is interpreted to mean that a prevailing plaintiff should ordinarily recover his or her reasonable attorneys' fees and costs.

Punitive Damages: In addition, in some circumstances, a court may award plaintiff punitive damages. See *Ragin v. The New York Times*, 923 F.2d 995, 1004-05 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991); *Ragin v. Harry Macklowe Real Estate Co., Inc.*, 801 F. Supp. 1213, 1234-35 (S.D.N.Y. 1992), aff'd, 6 F.3d 898 (2d Cir. 1993); *Fenwick-Schafer v. Sterling Homes Corp.*, 774 F. Supp. 361, 366 (D. Md. 1991). Punitive damages are appropriate upon proof that the defendant's conduct was "motivated by evil motive or intent, or . . . involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

In one advertising case, for example, the court refused to dismiss plaintiffs' claim for punitive damages where they had presented evidence that "could indicate that defendants were aware of or had been forced to abide by the HUD regulations in one area but chose to avoid compliance in another in reckless or intentional violation of plaintiffs' rights." 774 F. Supp. at 366.

Examples of Advertising Awards: Several discriminatory advertising cases have been tried to a verdict. The Sterling Homes case, cited above, resulted in a verdict for defendants. At the same time, a related case filed in Maryland court against another Baltimore area developer, challenging its use of exclusively white models in real estate advertising, led to a jury verdict of over \$2 million, including \$800,668 in compensatory damages to the fair housing group, \$15,000 in compensatory damages to the individual plaintiff, and \$1.2 million in punitive damages. *Fenwick-Schafer v. Winchester Homes*, No. 90066002/CL110092 (Cir. Ct., Baltimore).

The Colonial Village case, also cited above, resulted in a total jury verdict of \$850,000, including \$325,000 in compensatory damages to each of the two fair housing organizations and \$200,000 to the individual plaintiff. The jury's verdict was upheld by the trial court against the defendants' motion to reduce the verdict, with a minor reduction, and the court also ordered the defendant to pay attorneys' fees.

Another case worth mentioning is the case of *Spann v. Words & Co.*, which was resolved through a Consent Order agreed to by the parties. In that case, two fair housing groups and an individual sued an advertising agency and a developer in connection with an ad campaign for a luxury development in Potomac, Maryland which featured only white models in its ads. The case was settled for \$325,000 and an agreement by the companies to follow agreed-upon standards in connection with their advertising activities. The Consent Order entered in that case is published at 734 F. Supp. 1, 4-12 (D.D.C. 1989).

Settlements in other discriminatory advertising cases have, similarly, resulted in advertisers' agreements to pay monetary settlements over \$150,000.

(e) The First Amendment

Publishers and advertisers should keep in mind that the First Amendment's free speech clause will not provide protection in a discriminatory advertising case brought under the Fair Housing Act. Beginning with the very first discriminatory advertising decision in *Hunter*, the courts have repeatedly rejected First Amendment arguments raised to contest liability under the Fair Housing Act. Thus far, no court has held that an ad otherwise unlawful under Section 3604(c) is protected by the First Amendment, although some courts have recognized First Amendment concerns in this area. E.g., *Ragin v. New York Times*, 923 F.2d at 1004.

The Fourth Circuit's decision in *Hunter* may still be the most important judicial statement about the relationship between Section 3604(c) and the First Amendment. In *Hunter*, the Fourth Circuit held that Section 3604(c) could be applied to a newspaper ad for an apartment in a "white home" without violating the First Amendment. The rationale for the decision was that "while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.'" 459 F.2d at 211.

In a series of discriminatory advertising cases decided after *Hunter*, the courts have made clear that some forms of commercial speech are entitled to First Amendment protection, but the courts have stopped short of protecting advertising that is related to illegal activity. One year after *Hunter* was decided, the Supreme Court in *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376

(1973), rejected a First Amendment challenge to an employment discrimination ordinance that prohibited newspapers from carrying “help-wanted” advertisements in gender-segregated columns. The Court held that the government may ban advertising and other speech related to illegal activity:

Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned “Narcotics for Sale” and “Prostitutes Wanted” rather than stated within the four corners of the advertisement.

Id. at 388 (emphasis in original). Five years after *Pittsburgh Press* was decided, the Supreme Court, in *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977), contrasted the situation where a town sought to ban “the flow of truthful and legitimate commercial information” through a general prohibition on the display of “For Sale” signs. Such a limitation on lawful advertising, it held, does violate the First Amendment. Id. at 98.

The lower courts have applied the Supreme Court’s distinction between advertising related to a legitimate purpose, and advertising related to unlawful activity, to uphold plaintiffs’ challenges to discriminatory real estate advertising. In *Ragin v. The New York Times*, 923 F.2d 995 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991), the Second Circuit acknowledged that the information content of advertising creates a First Amendment question. However, it held that commercial messages that do not accurately inform the public about lawful activity — such as advertising which conveys a discriminatory message through the use of all-white human models — is not protected. Id. at 1002-03.

In that case, the Second Circuit rejected the newspaper’s claim that Section 3604(c) imposed unconstitutional burdens on the press: “[W]e perceive no disruption of the press’s traditional role that will result from prohibiting the publication of real estate ads that, to the ordinary reader, indicate a racial preference.” Id. at 1003. The Court also dismissed the contention that the press is ill-equipped to conduct the monitoring of advertisements for discriminatory content, noting that such a review of advertising is already conducted under the Times’ standards of advertising acceptability. Id. at 1004.

Given these precedents, the First Amendment will likely not offer protection to a publisher or advertiser who runs afoul of the Fair Housing Act’s prohibitions on discriminatory real estate advertising.

C. Your Obligations Under the Law

To review, the basic obligations which every publisher and every advertiser should follow are three-fold: (1) screen your real estate advertising for discriminatory content; (2) develop and enforce a nondiscrimination policy in the area of real estate advertising; and (3) train and inform your employees and clients.

If you are a publisher, you must also insure that an appropriate publisher's notice is included in any real estate advertising sections you publish. If you are an advertiser, you also have an obligation to insure that your advertising does not involve the selective use of particular media catering to limited groups, or other, similar selective advertising strategies.

Beyond these concrete steps, every publisher and advertiser involved with real estate advertising should have a working knowledge of the requirements of the applicable laws, and be sensitive to other legal issues that may arise concerning real estate advertising.

1. SCREENING OF ADVERTISING

As an advertiser or publisher, you should engage in a pre-publication review of real estate ads including at least the following checks: (a) you should screen for the use of discriminatory words, phrases, symbols, directions, or other verbal cues; (b) you should screen for the composition of human models depicted in ad campaigns and for any other visual cues; and (c) you should screen for the use of the appropriate Equal Housing Opportunity logotype or statement. Examples of the type of advertisements which may be discriminatory and should not be published or disseminated are discussed in detail below in Part D.

In setting up screening procedures, publications should not forget that advertising for residential real estate may appear in sections other than a formal real estate section. For example, ads for senior complexes may be published on the health or living pages. Seasonal real estate inserts or special pull-out sections may be included from time to time. A newspaper magazine may sometimes include real estate ads. No matter which section of the newspaper a real estate advertisement will appear in, to protect your publication against potential liability, the ad must be reviewed in advance of publication for compliance with the discriminatory advertising laws.

Advertisers such as developers, ad agencies, real estate companies, and others engaged in the real estate business must remember that the Fair Housing Act broadly applies to any "notice, statement or advertisement." Be sure to screen for discriminatory content not only your newspaper ads, but also any other materials you distribute or display. This includes flyers, brochures, deeds, applications, signs, banners, posters, billboards, and informational materials of any type, including MLS listings and other electronic messages. Your review should also include any advertising you do in non-print media, such as television or radio ads, sales videos, audiovisual displays, signs in sales offices, and so on. Each of these could be considered a "notice, statement or advertisement" with respect to a dwelling, and none may be discriminatory.

2. ADOPTION OF A FAIR HOUSING ADVERTISING POLICY

Most major newspapers have in place fair housing advertising policies applicable to all real estate advertising in those papers. As a publisher or advertiser, you need to adopt and enforce such a policy as well.

A fair housing advertising policy should provide clear guidelines for your employees and clients to follow. It should inform them that your company is aware of its obligations under federal, state, and local law, and intends to comply with those obligations. The policy should also provide for meaningful enforcement mechanisms. It should make clear to clients that your company will not accept business from those who are engaging in advertising discrimination, and should make clear to employees that compliance with the policy is a term and condition of employment.

You need to be aware that ensuring compliance with the fair housing laws is an active, ongoing process. Simply adopting a fair housing policy on paper and passing it out will not insulate you from liability if you have not taken steps to apply and enforce that policy in practice. A business which simply gives a copy of a fair housing policy to employees, and does not make enforcement of that policy a part of the employees' job responsibilities, runs the risk of lawsuits.

Enforcing a fair housing policy requires dedication and vigilance. Competition for advertising business is keen, and advertising-related businesses are under pressure to generate revenues. Advertising personnel are frequently oriented toward seeking to please the client. Employees need to understand the very serious consequences of publishing discriminatory advertising, and to appreciate that compliance with your fair housing advertising policy is in the interest of both your business and your clients.

3. TRAINING AND NOTIFICATION

Your business must also ensure that your employees receive appropriate training, and that any clients are informed of your fair housing advertising policy. The HUD regulations specifically provide that you should [24 C.F.R. §109.30(d)]:

- (a) provide a printed copy of your nondiscrimination policy to each employee and officer;
- (b) post a copy of your nondiscrimination policy in a conspicuous location wherever persons place advertising; and
- (c) have copies of your nondiscrimination policy available for all firms and persons using your advertising services.

4. A MODEL PUBLISHER'S NOTICE

Under the HUD regulations, discussed above, publishers should include at the beginning of their real estate advertising section a Publisher's Notice. The following language would be an acceptable form of such a notice in the greater Miami Valley area, making reference to federal, state, and local law:

All real estate advertised herein is subject to the Federal Fair Housing Act, which makes it illegal to advertise "any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or intention to make any such preference, limitation or discrimination." State and local laws forbid discrimination based on factors in addition to those protected under federal law.

We will not knowingly accept any advertising for real estate which is in violation of the law. All persons are hereby informed that all dwellings advertised are available on an equal opportunity basis.

As a public service, some newspapers have included in their Publisher's Notice telephone numbers for local fair housing organizations. The Dayton Daily News's Publisher's Notice now includes the phrase below.

If you believe your fair housing rights have been violated or you would like more information on fair housing and your rights, contact the Miami Valley Fair Housing Center at (937) 223-6035.

The authors of this Manual encourage Miami Valley area publications to include a statement to this effect in their Publisher's Notice.

You should be aware that some publications may need to include more than one publisher's notice in their paper. Some newspapers publish real estate advertising in several different sections, such as a classified advertising section and a real estate section. The HUD regulations indicate that publishers should be sure to include a Publisher's Notice in each section of their newspaper which carries real estate advertising.

5. SELECTIVE PLACEMENT OF ADVERTISING

Advertisers need to be sensitive to the placement and targeting of their overall advertising program. As noted above, the HUD regulations caution against the selective use of media catering to particular protected classes, the selective use of advertising directed at limited geographic locations, the selective use of EHO logos, and the selective use of human model advertising.

This is essentially a common sense test. Of course, advertisers work on a fixed budget, and must necessarily target their advertising to where it will bring in the most customers. In developing this targeting, however, it is important to be sensitive to whether your advertising is or could be perceived as directed at or against a particular racial, ethnic, or other group. If this is the case — if, for example, a promotional mailing you are planning would go out only to neighborhoods which are predominately white — it is important to devote part of your advertising budget to complementary attempts to reach other racial groups.

D. What Advertising Discrimination Laws Prohibit

1. DISCRIMINATION AGAINST ANY PROTECTED CLASS SUMMARY

<u>Law</u>	<u>Classes Protected By the Law</u>
Federal Law:	race, color, religion, sex, handicap, familial status, and national origin
Ohio Law:	race, color, religion, sex, handicap, familial status, national origin, and ancestry, military status
Dayton Law:	race, color, religion, sex, disability, familial status, national origin, ancestry, military status, marital status, sexual orientation, gender identity and age

2. USE OF WORDS, PHRASES, AND SYMBOLS

The law prohibits the use of words, phrases, and symbols to convey either overt or tacit discriminatory preferences or limitations. As a publisher or advertiser, it is important that you understand that the law prohibits not only advertisements that express a preference against certain homeseekers (e.g., no children, no blacks) but also those that express a preference for particular types of persons (e.g., Jewish tenants sought, ideal for female tenant). Both types of advertisements may indicate a “preference, limitation or discrimination based on” a protected class, and thus violate the law. In general, advertisements which use

- explicit words which refer to protected classes under the law in connection with describing the dwelling, landlord, tenants, or neighborhood will be found to violate the law such as white home, colored home, Christian Realtor, etc.;
- words descriptive of a protected class should raise a red flag, and call for further review for the legality of the advertisement such as Black, Protestant, white;
- certain “catch words,” words and phrases that are frequently used in a discriminatory context such as Restricted, Exclusive, Private, Integrated and Traditional Neighborhood;
- symbols or logotypes which imply or suggest race, color, religion, sex, handicap, familial status, or national origin such as the Christian cross, the Jewish Star, or the male or female symbol;
- words or phrases that are used regionally or locally which imply or suggest race, color, religion, sex, handicap, familial status, or national origin such as hillbilly, colored, etc.;
- advertising of directions to a unit/home which imply a discriminatory preference, limitation, or discrimination. Examples would be directions which refer to landmarks which have racial or ethnic significance, such as directions relying on: a church, mosque, neighborhood known for national origin of the inhabitants, etc.;
- advertising which refers to facilities which cater to a particular racial, national origin, or religious group, such as country clubs, private school designations and facilities used exclusively by one sex.

Fair Housing Advertising Word and Phrase List

This word and phrase list is intended as a guideline to assist in complying with state and federal fair housing laws. **It is not intended as a complete list of every word or phrase that could violate any local, state, or federal statutes.**

This list is intended to educate and provide general guidance to the many businesses in the Miami Valley that create and publish real estate advertising. **This list is not intended to provide legal advice.** By its nature, a general list cannot cover particular persons' situations or questions. The list is intended to make you aware of and sensitive to the important legal obligations concerning discriminatory real estate advertising. For additional information, contact the Miami Valley Fair Housing Center at (937) 223-6035, or visit the MVFHC website: http://www.mvfairhousing.com/ad_word_list.php

BOLD — not acceptable *ITALIC* — caution **STANDARD** — acceptable

<u># of bedrooms</u>	<u>Equal Housing Opportunity</u>	Mexican, no	<i>school name or school district</i>
# of children	ethnic references	Mexican-American, no	<u>se habla espanol</u>
<i># of persons</i>	<i>Exclusive</i>	Migrant workers, no	<u>seasonal rates</u>
<u># of sleeping areas</u>	<i>Executive</i>	<i>Military, no§</i>	<u>seasonal worker(s), no</u>
<i>55 and older community*</i>	<u>families welcome</u>	<i>Mormon Temple</i>	<i>Secluded</i>
able-bodied	families, no	Mosque	<u>section 8 accepted/welcome</u>
<i>Active</i>	<u>family room</u>	<u>Mother in law apartment</u>	<i>section 8, no</i>
adult community	<u>family, great for</u>	<i>Muslim</i>	<i>Secure</i>
adult living	<i>female roommate**</i>	<i>Nanny's room</i>	<u>security provided</u>
adult park	<i>female(s) only**</i>	Nationality	<i>senior adult community*</i>
adults only	<u>fixer-upper</u>	<i>Near</i>	<i>senior citizen(s)*</i>
African, no	<u>gated community</u>	Negro, no	senior discount
Agile	<i>Gays, no¶</i>	<u>Neighborhood name</u>	<i>senior housing*</i>
AIDS, no	<i>Gender</i>	Newlyweds	

Alcoholics, no	golden-agers only	<u>Nice</u>	<i>senior(s)*</i>
American Indians, no	<u>golf course, near</u>	<u>non- smokers</u>	<i>sex or gender**</i>
Appalachian, no	group home(s) no	<u>Nursery</u>	Shrine
Asian	<u>guest house</u>	<u>nursing home</u>	<u>single family home</u>
<u>Assistance animal(s)</u>	<u>handicap accessible</u>	<i>Older person(s)</i>	single person
<u>Assistance animal(s) only</u>	handicap parking, no	one child	<i>single woman, man**</i>
<u>Bachelor</u>	Handicapped, not for	<i>one person</i>	singles only
Bachelor pad	healthy only	Oriental, no	<i>sixty-two and older community*</i>
<i>Bisexuals, no¶</i>	<i>Hindu</i>	Parish	<u>Smoker(s), no</u>
Blacks, no	Hispanic, no	<i>perfect for . . . (should not describe people)</i>	<u>Smoking, no</u>
blind, no	HIV, no	<u>pets limited to assistance animals</u>	<i>Snowbirds*</i>
<i>board approval required</i>	<i>Homosexuals, no¶</i>	<i>pets, no</i>	<u>sober</u>
Catholic	<i>housing for older persons/seniors*</i>	Philippine or Philipinos, no	<i>Sophisticated</i>
Caucasian	Hungarian, no	physically fit	<u>Spanish speaking</u>
Chicano, no	<i>Ideal for . . . (should not describe people)</i>	play area, no	Spanish speaking, no
children, no	Indian, no	preferred community	<u>Square feet</u>
Chinese	Integrated	<i>Prestigious</i>	<i>Straight only¶</i>
<i>Christian</i>	Irish, no	<u>Privacy</u>	<u>student(s)</u>
Churches, near	Italian, no	<i>Private</i>	Supplemental Security Income (SSI), no
<u>college students, no</u>	<i>Jewish</i>	<u>Private driveway</u>	Synagogue, near
	<u>kids welcome</u>	<u>Private entrance</u>	temple, near
		<u>Private property</u>	

Colored			tenant (description of)
Congregation	<i>Landmark reference</i>	<u>Private setting</u>	<u>Townhouse</u>
<u>Convalescent home</u>	Latino, no	<u>Public transportation(near)</u>	traditional neighborhood
<u>Convenient to</u>	<i>Lesbians, no¶</i>	Puerto Rican, no	traditional style
Couple	<i>male roommate**</i>	<u>Quality construction</u>	<i>tranquil setting</i>
couples only	males(s) only**	<i>quality neighborhood</i>	<i>Transgendered, no¶</i>
<u>Credit check required</u>	<i>man (men) only**</i>	<u>Quiet</u>	<i>two people</i>
crippled, no	<i>Mature</i>	<u>Quiet neighborhood</u>	Unemployed, no
<i>Curfew</i>	mature complex	<u>references required</u>	<u>Verifiable Income</u>
Deaf, no	mature couple	religious references	<i>walking distance of, within</i>
<u>Den</u>	mature individuals	<u>Responsible</u>	Wheelchairs, no
disabled, no	mature person(s)	Restricted	White
<i>domestics, quarters</i>	<i>Membership approval required</i>	retarded, no	White(s) only
<u>Drug users, no</u>	<u>membership available</u>	<i>Retirees</i>	<u>winter rental rates</u>
<u>Drugs, no</u>	Mentally handicapped, no	<i>Retirement home</i>	<i>winter/summer visitors*</i>
employed, must be	Mentally ill, no	<i>safe neighborhood</i>	<i>woman (women) only**</i>
empty nesters			
English only			

* Permitted to be used only when complex or development qualifies as housing for older persons

** Permitted to be used only when describing shared living areas or dwelling units used exclusively as dormitory facilities by educational institutions

¶ Discrimination based on sexual orientation is illegal within the City of Dayton and certain other local jurisdictions.

§ Discrimination based on military status is illegal in the State of Ohio.

All cautionary words are unacceptable if utilized in a context that states an unlawful preference or limitation. Furthermore, all cautionary words are “red flags” to fair housing enforcement agencies. Use of these words will only serve to invite further investigation and/or testing.

This word and phrase list is intended as a guideline to assist in complying with state and federal fair housing laws. It is not intended as a complete list of every word or phrase that could violate any local, state, or federal statutes.

This list is intended to educate and provide general guidance to the many businesses in the Miami Valley that create and publish real estate advertising. This list is not intended to provide legal advice. If you are in need of legal advice, please see an attorney. By its nature, a general list cannot cover particular persons’ situations or questions. The list is intended to make you aware of and sensitive to the important legal obligations concerning discriminatory real estate advertising. While the lists of questionable words, phrases and symbols, listed above, may seem extensive at first glance, in fact, a publisher who is sensitive to the requirements of the law will quickly develop a sense of the type of advertisements which may raise a question under the law.

3. REFERENCES TO PROTECTED CLASS WHICH MAY BE PERMISSIBLE

Exceptions in which preferential advertising is permitted are limited. They include the following situations:

(a) Advertisements for Roommates.

Advertisements for roommates may specify gender, but only in two cases:

- If the accommodation involves shared living space, or
- If the housing is a dormitory in an educational institution.

Keep in mind:

- Advertisements for apartments or housing not involving shared living space may not specify gender.
- Where living space is shared, only the gender of a roommate may be specified, and the ad may not specify race, religion, or any other protected class.

(b) Handicapped Access.

Advertisers may include information in their real estate advertising about the availability of handicapped accessible housing. For example, advertisers may promote such features as:

- Availability of handicapped accessible units
- Exception from a no-pets policy for guide dogs

(c) Housing for Older Persons.

Advertising for housing intended and operated for occupancy by older persons which meets the federal law qualifications for "housing for older persons" may make reference to age. Such advertising may permissibly use such phrases as:

- Housing for older persons
- Senior Complex

However, such advertising is permissible only if the housing advertised meets the legal requirements. As noted above, the legal rules in this area are complicated, and real estate companies working in this area may wish to seek legal advice.

(d) Affirmative Advertising Efforts.

Advertisers may make reference to protected classes, including race, in advertising which is either:

- Part of an affirmative marketing program to attract persons to dwellings who would not ordinarily be expected to apply to the housing, or
- Undertaken to remedy the effects of prior real estate advertising or marketing discrimination

(e) Religious Groups.

A limited exception allows religious groups or organizations to advertise:

- Housing they operate on a noncommercial basis,
- Can state a preference for or limitation to members of their religion
- If the religious group does not discriminate on the basis of race, color or national origin

However, such an advertisement may not state any preference other than a preference for members of the religion (e.g., one based on race, gender, or other protected class).

(f) Private Clubs.

A limited exception allows private clubs to advertise:

- Housing it operates or owns incident to its primary purpose
- Can state a preference for or limitation to members of the club
- If the club is not in fact open to the public

4. USE OF PHOTOS AND DRAWINGS

As discussed at length in the preceding sections, the Fair Housing Act's prohibition against advertising that "indicates any preference, limitation or discrimination" has been interpreted to apply to the use of human models in advertising. Pictorial ad campaigns may not include only or mostly models of a particular race, gender, or other protected class.

You should review the advertising campaign for each development separately. You should be sensitive to advertising campaigns such as those which depict:

- All or predominately models of a single race, gender or ethnic group
- No families or children
- Particular racial groups in service roles (maid, doorman, servant, etc.)
- Particular racial groups in the background or obscured locations
- Any symbol or photo with strong racial, religious, or ethnic associations
- Minorities who are not residents of the complex
- Advertising campaigns depicting predominately one racial group are particularly vulnerable to legal challenge if one or more of the following factors are present:
 - The complex is located in a neighborhood which is predominately white or known historically as being racially exclusive and the models are white
 - The complex is located in a neighborhood known to be a black or minority area and the advertising depicts minority-race models
 - The campaign includes a number of different ads, none or few of which include models of other races
 - The ads fail to contain EHO statements or logos, or logos which are not readily visible

- The campaign runs over a long period of time, or involves ads published on many occasions
- The ad campaign involves group shots or photos or drawings depicting many people, all or almost all of whom are from one racial group
- The campaign involves full-page or color ads which are visually prominent

Remember that real estate advertising may be illegal not only if it includes predominately white models, but also if it includes predominately minority models, particularly if the advertising involves complexes in neighborhoods or suburbs known to be welcoming to minorities. The basic test is: Would the ordinary reader construe the advertising as sending a message of preference for or against a particular class of homeseekers?

5. THE EQUAL HOUSING LOGO AND STATEMENT

As discussed above, the HUD regulations provide that all advertising for the sale, rental or financing of residential real estate should contain an equal housing opportunity logotype, statement or slogan. The specific HUD standards for the content and size of EHO statements and logos are as follows:

Content of the Equal Housing Opportunity Statement:

We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the Nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, handicap, familial status, or national origin.

Appearance of the Equal Housing Opportunity Logo:



Content of the Equal Housing Opportunity Slogan:

“Equal Housing Opportunity”

Choice of Logo, Statement or Slogan:

In choosing which EHO symbol to include in an advertisement (a logo, statement, or slogan), the HUD standard provides that:

- Advertising 4 column inches or less should include the Equal Housing Opportunity Slogan

- Advertising 4 column inches or less can also be grouped under a caption which states that the housing advertised is available to all without regard to race, color, religion, sex, handicap, familial status or national origin
- All other advertising may include either an Equal Housing Opportunity Statement or an Equal Housing Opportunity Logo.

Size and Placement of EHO Symbol:

If the Statement is used, it should be clearly visible and in print size comparable to that used in the rest of the advertisement.

If logos are used, HUD provides the following size standards:

Size of Ad	Size of Logo
1/2 page or larger	2" x 2"
1/8 page to 1/2 page	1" x 1"
4 column inches to 1/8 page	1/2" x 1/2"
Less than 4 column inches	Slogan not logo

If these sizes are not relevant (for example, for a small pamphlet), the EHO logo should be of a size at least equal to other logotypes in the ad. If there are no other logos, the EHO logo should be in bold display face which is clearly visible. If an EHO statement is used instead, it should take up 3 to 5 percent of the ad.

Keep in mind, advertisements may be in violation of the law even if they include an EHO statement or logo (e.g., a single-race advertising campaign may indicate a racial preference even if an EHO statement is shown). Be sure that your advertising review process goes beyond simply review for the EHO language or symbol.

E. The Population in the Miami Valley, Ohio Metropolitan Area

It is important to know the population in the Miami Valley area because the HUD regulations concerning human model advertising specifically refer to the "majority and minority groups in the metropolitan area" in which the advertising is published. 24 C.F.R. § 109.30(b).

The 2009 United States Census figures show the following racial make-up for the Dayton Metropolitan Statistical Area, which includes Montgomery, Preble, Greene, and Miami Counties:

<u>Segment of Population</u>	<u>Number of Persons</u>
Total population	835,063
<u>Segment of Population</u>	<u>Percentage</u>
White persons	89.38
Black persons	7.42*
American Indian, Eskimo or Aleut	.16
Asian	1.32
Hawaiian or Pacific Islander	.01
More than 2 races	1.17
Hispanic origin	1.34
White persons not Hispanic	88.08

*This is an average ranging from .06% Black persons in Preble County to 20.3% Black persons in Montgomery County. In addition, note that the statistics for those of Hispanic origin are set out separately because Hispanics are not considered by the United States Census to be a separate race. Thus, the figures for those of Hispanic origin include those whites, blacks, American Indians, Eskimos and Aleuts, Asian or Pacific Islanders, and others who identified themselves as being of Hispanic origin.

F. Drafting a Fair Housing Ad Policy

1. THE IMPORTANT ELEMENTS

As noted above, it is important that your policy inform employees and clients that real estate advertising is covered by the discrimination laws, explain the basic provisions of those laws, describe the specific guidelines your company uses in applying those laws, and explain the consequences of noncompliance.

There are two areas in which specific, numerical guidelines are particularly important: (1) human models and (2) EHO logos and statements. Because of the history of racial exclusion in human model advertising in the real estate market, several prominent newspapers in other parts of the United States have entered into agreements with fair housing groups to apply specific formulas in this area. The Miami Valley Fair Housing Center has not yet entered into such an agreement with any newspapers in the Miami Valley area, but hopes to do so and therefore provides the formula used by The Washington Post in the Washington, DC area, as an example below:

(1) In advertisements for a particular residential development or complex that depict a single model, one or two couples, or a family, at least one out of every four such advertisements must include one or more minorities (predominately blacks). In advertisements for multiple developments or no particular development, the same criteria are applied for each four ads submitted by a particular developer.

(2) In each advertisement depicting three or more individuals (other than those covered in (1) above), minorities (predominately blacks) must constitute at least 25 percent of the models depicted (e.g., one minority in a group of three or four models, two minorities in groups of five to eight models, three minorities in groups of nine to twelve models, and so on).

(3) Minority models must be depicted in a manner and setting generally comparable to the depiction of white human models in any particular advertisement or group of advertisements placed by the same developer.

With respect to Equal Housing Opportunity Statements and Logos, such symbols must meet the content and size standards spelled out in the HUD regulations, 24 C.F.R. § 109.30(a). All logos or statements must be clearly visible, and must be printed in display face roughly equivalent to other print found in the advertisement. A copy of the nondiscriminatory advertising policy of The Washington Post is attached hereto.

This policy provides a good guide for businesses to follow with respect to human model advertising campaigns. Because they do not cover all issues that will arise, the human model standards should be part of a broader policy making clear that the company does not publish or disseminate any advertising which uses words, photos, symbols, or visual or non-visual messages to target or exclude any protected class.

2. ENFORCEMENT OF YOUR POLICY

There are two important issues with respect to enforcement of a fair housing advertising policy: the policy must have teeth; and the policy must be applied in practice.

With respect to sanctions, prominent newspapers have used an enforcement system under which any advertiser who fails to comply is given written notice and a copy of the paper's policy. If the advertiser again fails to comply within the following three months, the advertiser is given written notice and informed that the next ad containing human models must include one or more minorities (predominately blacks); in the case of group ads, the advertiser is also contacted personally. If the advertiser submits any further non-complying ads, they are either rejected by the paper, or the advertiser is subjected to a pre-clearance requirement until compliance with the policy (including depicting adequate minority models to make up for past non-compliance) has been demonstrated for a period of three months.

Other businesses should consider the enforcement mechanisms most appropriate to their type of business. Whether you adopt these sanctions or others, it is essential that your policy provide that clients' business will not be accepted if they do not comply with the law.

With respect to enforcement, you should clearly designate a person responsible for ensuring your business's overall compliance with the fair housing laws, delineate other employees' responsibilities for screening advertising, and set up a procedure by which the questions and issues which inevitably arise will be referred for resolution. It is also important to impress upon each employee, especially those involved in advertising activities, that it is part of each employee's job responsibilities to ensure that the company remains in compliance with the fair housing laws.

3. DEALING WITH COMPLAINTS

If your company receives a complaint that any advertisement published is in violation of the law, prompt action is essential. You will need to take quick steps to correct the situation. In some cases, the offending ad will need to be immediately withdrawn. In others, additional actions may be necessary. For example, in some cases, you may need to ensure that the next advertisement contains black models or other appropriate content. In every case, it is advisable to thank the complainant for their letter or call, and inform them in writing what steps you have taken in response.

Prompt remedial action in response to complaints will help to protect your company against lawsuits. The earlier such a complaint can be resolved, the less expensive it will be for your business, particularly if you can avoid having the complainant file administrative or legal action against your company, or can promptly terminate such an action after filing. Responding openly and positively to complaints about your advertising is the best business strategy.

APPENDIX A: THE WASHINGTON POST POLICY ON HUMAN MODELS AND LOGOS IN REAL ESTATE DISPLAY ADVERTISEMENTS

Human Models

Real estate display advertisements that depict human models that are racially identifiable, excepting only those humans obviously not depicted as residents should reflect an approximate cross-section of the Greater Washington, D.C. metropolitan area population. (The Greater Washington area is currently comprised of the following racial groups: approximately 2/3 White, 1/4 Black, 1/10 Hispanic, Asian and other minorities.) Models used in Post ads must meet the following criteria for minority (i.e. predominately black) representation.

1. In advertisements for a particular residential development or complex that depict a single model, one or two couples, or a single family, at least one out of every four advertisements are to include one or more minorities. For advertisements for multiple developments or no particular development, this criterion will be applied according to the firm, owner or developer placing the ads.
2. In each advertisement depicting three or more individuals, not falling within the first category, minorities must constitute at least 25% of the human models—i.e., one minority in a group of three or four models, two minorities in groups of five to eight models, three minorities in groups of nine to twelve models, etc.
3. Minority models must be depicted in a manner and setting generally comparable to the depiction of white models in any particular advertisement or series of advertisements placed by the same advertiser.

Logos

Advertisements of four column inches or larger must display the Equal Housing Opportunity logo, which includes the “Equal Housing Opportunity” slogan, found at 24 C.F.R., Sec. 109.30(a), or the substance of the following statement:

“We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, handicap, familial status, or national origin.”

The logo in such advertisements must meet the following minimum size requirements”

- i. 2” x 2” in half page or larger
- ii. 1” x 1” in one-eighth page to half page
- iii. 1/2” x 1/2” in four column inches to one-eighth page.

All logos or statements must be clearly visible, and must be printed in display face roughly equivalent to other print found in the advertisement.

APPENDIX B: HUD MEMO ON INTERNET ADVERTISING FOUND AT

<http://www.hud.gov/offices/fheo/library/Guidance-InternetAds.pdf>

Text of Memo issued in 2006 by Bryan Greene, Assistant Secretary for Enforcement and Programs, ED

“804(c) of the Fair Housing Act makes it illegal "to make, print, or publish, or cause to be made, printed, or published, any notice or statement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, national origin, sex, disability, or familial status." This prohibition applies to all advertising media, including newspapers, magazines, television, radio, and the Internet. Just as the Department has found newspapers in violation of the Fair Housing Act for publishing discriminatory classifieds, the Department also has concluded that it is illegal for Web sites to publish discriminatory advertisements.

Some Web sites assert that they are exempt from liability under Section 804(c) of the Fair Housing Act because of a provision in the Communications Decency Act ("CDA"), 47 US. C. § 230, which limits the liability of interactive computer services for content originating with a third party user of the service. Although the CDA does not state intent to limit liability under the Fair Housing Act or other civil rights statutes, some believe that Section 230 of the CDA gives Internet publisher's immunity from lawsuits brought under federal and state civil rights statutes. However, HUD has concluded that the CDA does not make Web sites immune from liability under the Fair Housing Act or from liability under state and local laws that HUD has certified as substantially equivalent to the Fair Housing Act.

In order to ensure that Web sites do not provide an open market for unlawful discriminatory conduct, HUD will continue to investigate allegations that Web sites have published discriminatory advertisements on the Internet and, where there is cause to believe discrimination has occurred, will issue a Determination of Reasonable Cause. As required by the Fair Housing Act, HUD will attempt conciliation in each case. I recommend that proposed conciliation agreements include provisions designed to prevent discriminatory advertisements from being posted to the Web site; this may include the Web site agreeing to practices such as screening, filtering, pop-up warnings, or user self-certification.

This guidance does not change the established procedures for processing these cases. Regional Directors should continue to process these cases in accordance with current guidelines.”