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Housing For Older Persons: Advertisement, Abridgement and Affirmative Defenses Under the New Human Relations Commission Regulations

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I. Executive Summary

The Pennsylvania Human Relations Commission (PHRC) has issued new regulations specifically prohibiting the use in housing advertisements of words, phrases and symbols that indicate a preference regarding age, familial status, religion or disability. The regulations contain limited exemptions for providers of housing for older persons and religiously affiliated providers and contain some flexibility for providers of accessible housing. The regulations also contain two affirmative defenses, which providers may use to insulate themselves from liability for civil monetary penalties.

II. Introduction

This article will review the prohibited words, phrases and symbols set forth in new advertising regulations recently issued by the PHRC as well as the requirements for the affirmative defenses set forth in the regulations. The impact of the regulations will vary depending on the status of the housing provider. The regulations will affect providers of housing for older persons, religiously affiliated providers, and providers of accessible housing in different ways. This article will focus on the effect on housing for older persons advertisements, but will touch on advertisements for religiously affiliated providers and providers of accessible housing.

III. Background

Federal restrictions on the content of housing advertisements were introduced in 1968. In that year, Congress passed the Fair Housing Act (FHA) as Title VIII of the Civil Rights Act of 1968. Pub. L. No.

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90-284, 82 Stat. 73 (Apr. 11, 1968), 42 U.S.C. §§3601-3619. The 1968 version of the FHA did not contain any provisions relating to age, familial status or disability, but did prohibit discrimination based on "race, color, religion, sex, and national origin." FHA §804(a), 42 U.S.C.A §3604(a) (West Supp. 1976).

Pennsylvania began restricting the content of housing advertisements in 1961. In that year, the General Assembly passed an amendment to the 1955 Fair Employment Practices Act and renamed it the Pennsylvania Human Relations Act (the "Act" or "PHRA"). §3 of the Act of February 28, 1961, P.L. 47 No. 19, 43 P.S. §953. Both the 1955 version and the 1961 version prohibited discrimination on the basis of age but this term only protected the class of people between the ages of 40 and 62. See §4(h) of the Act, 43 P.S. §954. In 1991, the Act was amended to prohibit discrimination on the basis of familial status. §1(a) and (b) of the Act of December 20, 1991, P.L. 414 No. 51, 43 P.S. §953.

In 1997, 1998 and 1999, the PHRC published various guidelines and statements of policy regarding advertising restrictions. Ultimately, the PHRC decided to adopt regulations on this subject. On July 10, 2000, the PHRC adopted and published new regulations governing housing advertisements. 30 Pa. Bull. 3434, 16 Pa. Code Ch. 45.

IV. The New Advertising Regulations

The new regulations contain a list of words and phrases that are prohibited in advertisements. The list is broad and generally prohibits the inclusion of words, phrases, symbols and the like that may have the effect of screening for age, familial status, religion or disability. The PHRA defines "advertisement" as:

[A]ny advertisement and any similar written, printed, taped or broadcast communication, notice, statement or the like which is disseminated (whether published, printed, circulated, issued, displayed, posted or mailed) for the purpose of promoting housing activity, including but not limited to, rentals, leases and sales.

43 P.S. §954(z).

This definition is broad enough to encompass many activities that providers might not recognize as "advertising," including the posting on campus of notices and direct-mail solicitation.

A. Prohibited Words, Phrases and Symbols

The regulations set forth a number of prohibited words, phrases and symbols. The list is not all-inclusive, but is illustrative of the types of words that the PHRC believes violate the PHRA. When reviewing the list of prohibited words, note that "prohibited"

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words may be used in advertisements if they are part of a proper noun such as the provider's name or an address. 16 Pa. Code §45.181(b).

Religious terms are prohibited, including the following specific examples: "Christian," "Jewish" and "Catholic." See 16 Pa. Code §45.174 and §45.181. Age-related words are prohibited, including the following specific examples: "Adult atmosphere," "Mature adults preferred," "Great for retired couple . . .," "Adult [] sections" and "Adult community." See 16 Pa. Code §45.172 and §45.181. Disability related terms are prohibited, including the following examples: "Able bodied []," "Disability," "Handicapped" and "Independent" (as in capable of living). 16 Pa. Code §45.173 and §45.181. The regulations also prohibit the use of "colloquialisms" which imply a prohibited preference. It should be stressed that the regulations are meant to prohibit discriminatory advertising and the list of prohibited words and phrases is merely illustrative of the types of words and phrases that may violate the Act.

B. *Housing for Older Persons Exemption*

Providers of housing for older persons qualify for an exemption. 16 Pa. Code §45.13. Accordingly, providers of housing for older persons may advertise a preference against children or an age restriction. Although this article will briefly touch on the basic requirements of this exemption, providers are strongly encouraged to review the detailed requirements of the housing for older persons exemption to ensure their compliance with those requirements before publication of otherwise prohibited terms in housing advertisements.

The PHRC regulations expressly provide that the following phrases are appropriate for use by providers that are, in fact, providing housing for older persons:

- "Senior housing"
- "Senior community"
- "Retirement community"
- "Adult community"
- "62 and over"
- "55 and over"
- "Adult 55+"
- "Adult 62+"

See 16 Pa. Code §45.172 and §45.181.

As always, compliance with the other prohibitions under the PHRA, i.e., race, national origin, sex, disability, etc. must be

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observed regardless of status as a provider of housing for older persons. The PHRC will defer to the U.S. Department of Housing and Urban Development (HUD) regarding the characterization of federal program housing. See 16 Pa. Code §45.13(e), 12 U.S.C.A. §1701(q) (regarding assistance to nonprofits to enlarge the supply of supportive housing for the elderly).

C. Religious Affiliation Exemption

Status as a religious or denominational organization or equivalent is a necessary predicate to the lawful inclusion of religious or denominational terms in advertisements. See 16 Pa. Code §45.13(a)(1) and (b). Although this article will briefly touch on the basic requirements of this exemption, providers are strongly encouraged to review the specific requirements of the religious affiliation exemption to ensure their compliance with those requirements before using otherwise prohibited terms in their housing advertisements.

Unlike the housing for older persons exemption, the PHRC did not promulgate a list of words and phrases that religiously affiliated providers may safely employ. Compliance with the other prohibitions under the PHRA, i.e., race, national origin, sex, disability, etc. must be observed, regardless of status as a religiously affiliated provider.

D. Accessible Housing Providers

Providers of accessible housing may advertise that fact. 16 Pa. Code §45.173(b). Otherwise, the regulations provide that it is unlawful to advertise a preference with respect to disability. 16 Pa. Code §45.173. This is an important prohibition because some providers may wish to advertise in a fashion calculated to screen for health factors. For example, providers may wish to ensure that prospective residents are capable of doing self-care or activities of daily living. Even if efforts of this type pass muster under the age/familial status proscriptions, they may run afoul of the disability proscriptions.

E. Affirmative Defenses

The PHRA contains two affirmative defenses. See 43 P.S. §959.1. The new advertising regulations implement these affirmative defenses. Providers that avail themselves of one of these defenses can insulate themselves from a finding of a willful and knowing violation of the Act in the event that an advertisement is later determined to violate the Act.

The regulations contain two affirmative defenses to a charge of violating the PHRA: (i) good faith, and (ii) written advisory. The

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burden of proof will be on the provider to show each element of the affirmative defense with a preponderance of the evidence. The statutory version of the good faith defense reads as follows:

Nothing in this clause, regarding age or familial status, shall apply with respect to housing for older persons. A person shall not be held personally liable for monetary damages for a violation of this act if the person reasonably relied, in good faith, on the application of the exemption of this subclause. A person may only prove good faith reliance on the application of the exemption of this subclause by proving that at the time of the act complained of all of the following applied:

- (i) The person had no actual knowledge that the housing was not eligible for exemption under this subclause.
- (ii) The owner or manager of the housing had stated formally, in writing, that the housing complied with the requirements for exemption under this subclause.

43 P.S. §955(h)(9), See also .16 Pa. Code §45.192. The new advertising regulations provide that the good faith defense will be met if a provider can meet three essential requirements:

1. The provider must not have actual knowledge that it does not meet the requirements of the housing for older persons exemption, and
2. The provider must have attempted to comply with the regulations in good faith, and
3. The provider must have a signed written statement indicating that the provider complies with the requirements of the housing for older persons exemption.

Note that the good-faith defense is only available to housing for older persons. There is no specifically tailored affirmative defense for religiously affiliated providers.

In order to meet the written advisory affirmative defense, the provider must submit the proposed advertisement to the PHRC Housing Division for review.¹ The PHRC will review the proposed advertisement and issue a written advisory within 10 working days.

Any provider may avail itself of the written advisory defense. However, religiously affiliated providers seeking to establish

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¹ Telephone No. (717) 787-4055, Address: PHRC, Housing Division, 101 S. Second St., Suite 300, P.O. Box 3145, Harrisburg, PA 17105-3145.

this defense can expect to be queried regarding their exempt status. The PHRC may ask them to prove that they qualify for the religious affiliation exemption before it renders a written advisory.

Because the requirements of the housing for older persons exemption and the religious affiliation exemption are important to establishing an affirmative defense, requirements of these exemptions will be reviewed briefly.

V. Housing For Older Persons

Since its introduction in 1988, the housing for older persons exemption in the Fair Housing Act has taken a number of twists and turns. A brief review of these will underscore the fact that establishing a provider's entitlement to the exemption remains somewhat technical and providers should not assume that they meet its detailed requirements.

A. Federal Law

In 1988, Congress amended the FHA by passing the Fair Housing Amendments Act of 1988 (FHAA). Pub. L. No. 100-430, 102 Stat. 1619 (Sept., 13, 1988), 42 U.S.C. §§3601-3631 (1988). The FHAA was intended to remedy discrimination against families with children and discrimination against the disabled. H.R. Rep. No. 711, 100th Cong., 2d Sess., 19-21 (1988), U.S.C.C.A.N. 2173, 2180-81. The FHAA prohibits discrimination based on familial status. See Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995, 52 U. of Miami Law Review 1, October 1997. The FHAA defines the term "familial status" as:

[O]ne or more individuals (who have not attained the age of 18 years) being domiciled with:

- (1) a parent or another person having legal custody of such individual or individuals, or
- (2) the designee of such parent or other person having such custody with the written permission of such parent or other person.

42 U.S.C.A. §3602(k) (West Supp. 1995).

The FHAA also contains an exemption for senior housing, termed "housing for older persons" in the FHAA. 42 U.S.C.A. §3607(b)(1). The FHAA's housing for older persons exemption covered three categories of senior housing:

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1. housing provided under a state or federal program to assist elderly persons
2. housing intended for and solely occupied by persons 62 years of age or older
3. housing intended and operated for occupancy by at least one person 55 years of age or older per unit

See 42 U.S.C.A. §3607(b)(2) (West Supp. 1995).

Because the “55 or older” exemption is the broadest of the three exemptions, it is often claimed by providers. Under the FHAA, housing qualified for the 55 or older exemption if it had:

1. the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons, and
2. that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit, and
3. the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

See 42 U.S.C.A. §3607(b)(2)(C) (West Supp. 1995).

On January 23, 1989, HUD issued regulations implementing the 1988 amendments, including the housing for older persons exemption. 54 Fed. Reg. 3232, 3290 (Jan. 23, 1989). HUD defined “significant facilities and services” in a way that subsequently proved difficult to apply and that generated immense controversy. See S. Rep. No. 172, 104th Cong., 1st Sess. 2, 1996 U.S.C.C.A.N. 778 (Nov. 9, 1995) (Report on Pub. L. No. 104-76), Id. at 10.

In 1992, Congress directed HUD to issue revised regulations with a better definition of “significant facilities and services.” §919 of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3883 (Oct. 28, 1992). HUD’s second rule, issued in July 1994, was widely criticized. See 59 Fed. Reg. 34902 (July 7, 1994).

After reviewing many comments and holding public hearings, HUD issued a third rule, which it published as a final rule on August 18, 1995. 60 Fed. Reg. 43322 (Aug. 18, 1995). The third rule expressly placed the burden of proving qualification on the

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housing provider claiming the exemption. Id. at 43327, 24 C.F.R. §100.304(b). It also required the housing provider to:

affirmatively demonstrate [] through credible and objective evidence that facilities and services specifically designed to meet the needs of older persons are 'significant.'

Id. at 43328, 24 C.F.R. §100.306(a).

The third rule defined "significant facilities and services specifically designed for older persons" as:

[T]hose which actually or predictably benefit the health, safety, social, educational, or leisure needs of older persons.

Id. at 43328-29, 24 C.F.R. §100.306(d).

A provider could meet the "significant facilities and services" criteria by making available, directly or indirectly, at least two facilities and services in at least five categories, including at least two facilities in either category 10 (leisure needs) or 11 (health/safety needs). Id. at 43328, 24 C.F.R. §100.306I. The 1995-era rule also listed criteria for HUD's evaluation of whether a provider's facilities and services, in the aggregate, were "significant." Id. at 43329, 24 C.F.R. §100.306(f). The new rule took effect on September 18, 1995.

Three months later, Congress passed the Housing for Older Persons Act of 1995 (HOPA). Section 2 of HOPA amended the FHA by eliminating the "significant facilities and services" requirement from the housing for older persons exemption. Pub. L. No. 104-76, 109 Stat. 787 (Dec. 28, 1995), 42 U.S.C. §3607(b)(2)(C) (1996). HUD subsequently revised its implementing regulations to reflect the amendment. See 24 C.F.R. §100.304 (1996), 61 Fed. Reg. 18249 (Apr. 25, 1996), 64 Fed. Reg. No. 63, 16324, 24 CFR part 100.

Essentially, Section 2 of HOPA sets forth six requirements, all of which must be met to qualify as housing for older persons:

1. Intention Requirement: The housing facility is intended for occupancy by persons 55 years of age or older
2. Operation Requirement: The housing facility is operated for occupancy by persons 55 years of age or older
3. Occupancy Requirement: The housing facility has at least 80 percent of its units occupied by one person 55 years of age or older
4. Policies Requirement: The housing facility publishes

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- policies demonstrating its intent to meet requirements Nos. 1, 2 and 3
5. Procedures Requirement: The housing facility publishes procedures designed to assure adherence with 1, 2 and 3
 6. Compliance Requirement: The housing facility complies with HUD rules for verifying requirements Nos. 1, 2 and 3

HOPA §3, U.S.C.A. §3607(b)(2)(c).

Section 3 of HOPA amended the FHA by adding a good-faith defense in new Section 807(b)(5) of the FHA. A housing provider that can successfully establish this good faith defense will be immune from civil monetary penalties if the provider is later found to have violated the FHA. As amended by HOPA, Section 807(b)(5) now sets forth three requirements that must be met to establish the good-faith defense:

1. Provider's reliance was objectively reasonable
2. Provider did not have actual knowledge that it did not qualify for the exemption
3. Provider formally stated in writing that it complies with the requirements for the exemption

FHA §807(b)(5). These three requirements mirror the requirements for the good faith affirmative defense set forth in the new PHRC regulations.

B. State Law

Like the FHA, the PHRA prohibits discrimination based on familial status. PHRA §5(h), 43 P.S. §955(h). Also like the federal FHA, the PHRA exempts "housing for older persons." PHRC §5(h), 43 P.S. §955(h).

In a fashion similar to the federal law, the PHRA and the PHRC regulations define the term "housing for older persons" as one of three types of housing:

1. Housing provided under any federal or state program that HUD determines is specifically designed and operated to assist elderly persons, or
2. Housing intended for and solely occupied by persons sixty-two years of age or older, or
3. Housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit and where at least eighty percent of the units are occupied by at least one person fifty-five years of age or older per unit and where there is publication of, and adherence to,

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policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older where verification by reliable surveys and affidavits are provided to the PHRC

43 P.S. §954(w), 16 Pa. Code §45.13.

The PHRA contains a safe-harbor for housing solely occupied by those 62 and over. It provides:

The exemption for housing for older persons in which the housing is solely occupied by persons 62 years of age or older shall be met if all of the occupants are 62 years of age or older.

16 Pa. Code §45.13(d), See also 43 P.S. §954(w).

Providers of housing designed and occupied for persons 55 and over must meet the following essential requirements:

- Intention Requirement: The housing facility is intended for occupancy by persons 55 years of age or older
- Operation Requirement: The housing facility is operated for occupancy by persons 55 years of age or older
- Occupancy Requirement: The housing facility has at least 80 percent of its units occupied by one person 55 years of age or older
- Publication Requirement: Housing must be subject to published policies and procedures which demonstrate an intent to provide housing to persons 55 or older
- Adherence Requirement: Providers must adhere to published policies and procedures
- Compliance Requirement: Providers must comply with PHRC regulations regarding verification of occupancy
- Verification Requirement: Providers must provide verification by reliable surveys and affidavits of its compliance with exemption requirements

43 P.S. §654(w)(1).

These requirements are practically identical to the HOPA test but they are stated in a slightly different way. Note that these requirements are considerably more stringent than the good-faith defense requirements.

Providers with 100 percent of their rented units rented to persons 62 years of age and older will automatically meet the housing for older persons exemption under state and federal law. Providers

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of housing under a HUD program will be deemed by the PHRC to be housing for older persons if HUD has determined that the program is designed or operated to assist elderly persons. Providers that are unsure on this point should consult their HUD Representative.

Providers of senior housing that do not meet either of these two exemptions must meet the six-part HOPA test in order to establish itself under the "55 and over" exemption or comply with the PHRC advertising regulations. Providers meeting the six-part HOPA test will qualify for the good-faith affirmative defense under the PHRC regulations.

VI. Religious Affiliation Exemption

While the PHRC regulations do not contain a good-faith safe-harbor for religiously affiliated providers, such providers may avail themselves of the written advisory safe-harbor. However, to take advantage of the written advisory safe-harbor, the affiliated provider will need to show that it meets the requirements of the religious institution exemption. Both federal and state law contain such an exemption.

A. Federal Law

Since its enactment in 1968, the FHA has prohibited housing discrimination based on religion. However, the FHA contains the following narrow exemption:

Nothing in this subchapter shall prohibit a religious organization, association, or society, or any non-profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

FHA §807(a), 42 U.S.C.A. §3607(a) (West 1988). This text of the exemption is quite narrow because it is subject to so many conditions. It has been construed by the courts as an affirmative defense and the burden of proving religious affiliation status has been placed squarely on the entity asserting it. U.S. v. Columbus Country Club, 915 F.2d 877 (3rd Cir. 1990). This holding has narrowed the exemption still further.

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To meet this burden to prove religious affiliation, a provider must show that it is either:

1. a church or analogous religious organization, or
2. a non-profit organization operated, supervised or controlled by a church or analogous religious organization, and
3. that the project is operated for a non-commercial purpose

See 42 U.S.C.A. §3607(a) (West 1988).

Very few, if any, housing providers will fit under the first category. A hierarchical relationship in which the housing provider is subordinate to a church or analogous religious organization would probably meet the requirements of the second category. At a minimum, there should be some direct affiliation between the housing provider and the church or analogous religious organization. Senator Walter F. Mondale, the author of the amendment to the 1968 Civil Rights Act that created the FHA, stated:

There is an exemption to permit religious institutions or schools, etc., affiliated with them, to give preference in housing to persons of their own religion despite the Act.

114 Cong. Rec. 2273 (Feb. 6, 1968). Finally, the provider must be able to show that the project is operated for a non-commercial purpose. Providers that cannot prove that they meet the exemption lack the status needed to assert the right to advertise religious preferences under the FHA and under the PHRA as well. Accordingly, for the purpose of applying the new PHRC advertising regulations, they should be considered non-religiously affiliated providers.

B. State Law

The PHRA contains a religious institution exemption similar to FHAA exemption. It provides:

Nothing in this clause shall bar any religious or denominational institution or organization or any charitable or educational organization which is *operated, supervised or controlled by or in connection with a religious organization* or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal

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organization or from making such selection as is calculated by such organization to promote the religious principals or the aims, purposes or fraternal principals for which it is established or maintained. . . .(Emphasis added.)

43 P.S. §955(10).

The PHRC regulations provide that it is unlawful to advertise a religious preference. The regulations also set forth a narrow exemption that mirrors the exemption in the PHRA and the FHAA:

Notwithstanding the prohibitions [on religious discrimination], it is not unlawful for any religious or denominational institution or organization or any charitable or education organization which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization to advertise:

- (1) A preference to persons of the same religion or denomination . . .
- (2) That the making of the selection is calculated [] to promote the religious principals [] for which it is established.

See 16 Pa. Code §45.13(a)(1) and §45.174(b).

The key point of analysis under the exemption is the nature and quality of the operation, supervision or control of the nonprofit provider that is exercised by the parent religious or denominational institution. Providers that are unable to establish themselves under this narrow exemption are prohibited from expressing a religious or denominational preference.

VII. Conclusion

Providers must avoid the use of prohibited words, phrases and symbols. Where a provider has determined that it meets the requirements of the housing for older persons exemption, it may avail itself of the good faith affirmative defense or submit the proposed advertisement for review. Religiously affiliated providers continue to enjoy whatever flexibility is afforded by the religious affiliation exemption in the FHA and the PHRA, but

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are limited to the written advisory affirmative defense in the new regulations. Providers of adaptive or accessible housing may state that fact in their advertisements. Otherwise, providers must avoid expressing a preference that violates that disability prohibition.

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