

## Via Electronic Submission

January 17, 2012

Regulations Division  
Office of General Counsel, Room 10276  
Department of Housing and Urban Development  
451 Seventh Street, SW  
Washington, DC 20410-0500  
www.regulations.gov

**Re: Docket No. FR-5508-P-01;**  
***Implementation of the Fair Housing Act's Discriminatory Effects Standard***

Dear Rules Docket Clerk:

These comments are submitted by a coalition of legal services and housing advocates who are committed to protecting affordable housing and housing rights for low-income families and individuals nationwide. We write in strong support of HUD's proposed rule implementing the Fair Housing Act's discriminatory effects standard. Members of our coalition have used discriminatory effects theory in a variety of cases to preserve access to housing for people of color, people with disabilities, and families with children. HUD's proposed rule will help ensure that families and individuals are not unjustly denied housing opportunities as a result of practices that have a discriminatory effect.

In addition to expressing our support for the proposed rule, we write to suggest some ways in which the proposed rule could be strengthened. Our comments focus on these areas: (1) segregative effect and disparate impact; (2) discriminatory land use laws and practices; (3) defendant's burden of demonstrating a legally sufficient justification; and (4) burden of proof to establish a less discriminatory alternative.

1. Segregative Effect and Disparate Impact

In supporting HUD's proposed regulation, we are pleased to note that throughout the proposed regulations HUD has defined and applied a definition of discriminatory effect that specifically incorporates the two distinct forms of discriminatory effect that have long been recognized by the courts. We urge you to retain in the final regulation this clear distinction between an adverse "disparate impact" upon a protected class and the separate claims for cases involving "segregative effect."

As noted in HUD's commentary on page 70,924, col. 3, and in footnote 21 to the proposed regulations, these two distinct claims are founded in separate types of harm. "Disparate impact" is based upon a disproportionate harm to the protected class while the independent "perpetuation of segregation" or "segregative effect" claim is based upon harm to the entire community, primarily through the loss of interracial association.

The Supreme Court has given close scrutiny in recent years to the question of whether the text

and goals of a civil rights statute include the express language hallmarks of Title VII which led the Court to adopt the discriminatory effects test in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), reviewing the availability of an effects test under the Age Discrimination in Employment Act, the Court voiced an apparent intent to severely limit the applicability of the *Griggs*' determination based upon variations from the statutory language of Title VII and whether the law was intended to protect groups or simply individuals. In doing so the Court acknowledged that a civil rights law must be read in conjunction with the law's overriding goals and purposes.

A well-reasoned textual interpretation by HUD that the language in Title VIII was intended 1) to protect classes of persons, and 2) to prevent the creation and perpetuation of patterns of residential segregation may be critical to establishing a basis for the Court to confirm the viability of an effects test. The proposed regulation, by clearly framing the separate harms of "disparate impact" and "segregative effect" provides such an interpretation. At a minimum, framing the regulation to separately address the "segregative effect" claims as HUD has done provides an additional basis for preserving an effects test regarding those claims. This should be bolstered by reference to 42 U.S.C. § 3608(d)(5) which obligates the Secretary and the federal government as a whole to affirmatively further fair housing, a legislative direction to go beyond ending overt and intentional discrimination.

To the extent that there may be concerns about differences between the express texts of Titles VII and VIII, Title VIII's specific legislative history concerning the need to address patterns of residential segregation provides authority apart from the Title VII language analogies for applying an effects test. For example, Senator Mondale who authored much of the Act pointed out that the proposed law was designed to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong. Rec. 3422. Further, in an analysis regarding the separate question of the appropriate burden of proof related to a segregative effect claim, Prof. Robert G. Schwemm in his treatise, "Housing Discrimination Law and Litigation," specifically noted the distinction that segregative effect claims do not derive from Title VII law, but arise from this "unique legislative history" of the Fair Housing Act. (Schwemm, §10:7). As such, *segregative* effects claims have independent legislative authorization.

We do note, however, that in one portion of the proposed regulations the language supporting claims based on segregative effect was omitted. We urge you to add to proposed § 100.120 ("Discrimination in the making of loans and in the provision of financial assistance"), the same language used in § 100.65(b)(6), and in § 100.70 (d)(5), so that § 100.120(b)(2) would specifically prohibit: "Providing loans or other financial assistance in a manner that results in disparities in their cost, rate of denial or terms or conditions, or that has the effect of denying or discouraging their receipt on the basis of race, color, religion, sex, handicap, familial status, or national origin, or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin."

## 2. Other Prohibited Conduct—Discriminatory Land Use Laws & Practices (§ 100.70(d)(5))

We welcome HUD's proposed addition of discriminatory land use laws, policies and practices to the category of prohibited conduct. As highlighted in parts of the proposed rule, the courts have long recognized that local land use rules, procedures and development decisions can have a disparate impact on a protected group or the effect of creating, perpetuating or increasing

segregation. See, e.g., *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85 (8<sup>th</sup> Cir. 1974); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7<sup>th</sup> Cir. 1977); *Keith v. Volpe*, 858 F.2d 467, 482-84 (9<sup>th</sup> Cir. 2008); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2<sup>d</sup> Cir. 1988); *Charleston Housing Authority v. U.S. Dept. of Agriculture*, 419 F.3d 729, 740-42 (4<sup>th</sup> Cir. 2005). Clarifying the coverage of this significant area is very important. Exclusionary zoning and land use practices facilitated much of the entrenched segregation in this country and continue to provide formidable barriers to integration.

The proposed language for §100.70 addresses this area of discriminatory effect directly by identifying as prohibited conduct the implementation of land-use rules, policies, or procedures in a manner that has a discriminatory effect. Proposed Rule at page 70,926. The final rule, however, should make clear that enactment and maintenance of discriminatory land use practices are included in the proscription against discriminatory implementation. Enactment alone, of course, can have an illegally discriminatory effect if it effectively prohibits or discourages affordable housing development or limits affordable housing development to already segregated areas. See, e.g., *Huntington Branch, NAACP*, 844 F.2d at 937, described on page 70,924 of the proposed rule (local land use policies restricting multifamily housing development to segregated areas have a discriminatory effect).

The current language does not quite capture all the facets of this concept. We acknowledge that, given the case law, the drafted language may presume that enactment or maintenance of discriminatory land use policies are simply different aspects of implementation discriminatory policies. But, a clearer articulation would avoid confusion and future disagreement.

### 3. Defendant’s Burden of Demonstrating a Legally Sufficient Justification (§ 100.500(b))

We understand that defining a legally sufficient justification that would support a housing practice that has an adverse disparate impact is challenging, and courts have developed various descriptions of required justification. Section 100.500(b) of the proposed rule successfully addresses some, but not all of these challenges.

If a plaintiff meets the burden of demonstrating that a housing practice has a discriminatory effect, as defined in proposed § 100.500(a), the housing practice may still be lawful if defendant meets its burden of demonstrating that there is a “legally sufficient justification” for the housing practice. We applaud the *first part* of proposed § 100.500(b) and (b)(1) (in italics here) which states: “A legally sufficient justification exists where the challenged housing practice: (1) *has a necessary and manifest relationship* to one or more legitimate, nondiscriminatory interests of the respondent . . .” We understand this standard to be the same as the “business necessity” standard set forth in the 1994 *Interagency Policy Statement on Discrimination in Lending*, which indicates that the challenged practice must be important and necessary to the respondent’s interest and cannot be merely incidental, hypothetical or speculative. See 59 Fed. Reg. at 18,269.

We suggest two changes to § 100.500(b)(1) of the proposed rule. First, the legitimate and nondiscriminatory interest must be “substantial.” Second, HUD should explicitly include reference to the “business necessity” standard established in the 1994 *Interagency Policy Statement on Discrimination in Lending* so that there is no confusion that this standard is unchanged.

a. *Substantial Legitimate Nondiscriminatory Interest*

HUD's proposed language in the second part of (b)(1) requiring only a "*legitimate and nondiscriminatory interest*" to justify a practice that has adversely impacted protected groups sets the bar too low and should be strengthened to further the purposes of the Fair Housing Act. It is too easy for a respondent to claim that it has a "legitimate and nondiscriminatory" interest in an activity which would, in this proposed regulation, then place the burden on the complainant to articulate a less discriminatory alternative. All the respondent need show is that the activity is "legitimate" (and a respondent would hardly be defending an illegitimate practice) and not meant to discriminate. This is insufficient.

Although we suggest a stronger standard, we do not propose the most stringent, such as the "compelling business necessity" justification required in *Pfaff v. HUD*, 88 F.3d 739, 747 (9th Cir. 1996) ("appropriate standard of rebuttal in disparate impact cases normally requires a compelling business necessity") and *Graoch Associates # 33 v. Louisville/Jefferson County*, 508 F.3d 366, 387) (6th Cir. 2007). We suggest that HUD define what comprises a "legally sufficient justification" that falls between the proposed and weak "legitimate and nondiscriminatory interest" standard and the higher "compelling interest" standard. We recommend that a sufficient definition of business necessity is one where the challenged practice achieves goals that are "substantial." *Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir. 2000) ("a demonstrated disparate impact in housing [must] be justified by a legitimate and substantial goal of the measure in question").

b. *Business Necessity*

We support HUD's proposed language in (b)(1) that creates a single standard for both public and private actors. But in doing so, the language fails to include the "business necessity" standard articulated in the 1994 *Interagency Policy Statement on Discrimination in Lending*. This policy was signed by 10 government agencies, including HUD, and reads:

When a lender's policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by "*business necessity*." The *justification must be manifest* and may not be hypothetical or speculative. Factors that may be relevant to the justification include cost and profitability. 59 Fed. Reg. at 18,269 (emphasis added).

The Interagency Policy Statement standard is well-established, especially in fair lending matters, and we would urge including it in the regulation so that there is no confusion over, or dilution of, that standard because the proposed regulation does not include the "business necessity" language from the 1994 policy.

c. *Proposed Language*

We urge HUD to amend proposed § 100.500(b)(1) to read: "(1) Has a necessary and manifest relationship to one or more **substantial** legitimate, nondiscriminatory interests of the respondent, including a **business necessity** as defined in the 1994 *Interagency Policy Statement on Discrimination in Lending*."

4. Burden of Proof to Establish a Less Discriminatory Alternative (§ 100.500(c)(3))

We echo and support the comments submitted by the National Fair Housing Alliance (NFHA) regarding the issue of which party should bear the burden of proof to establish a less discriminatory alternative. As stated by NFHA, the burden of proof should be assigned to the defendant to show that there is no less discriminatory alternative available. In the majority of cases, the defendant will have greater access to information than the plaintiff regarding what alternatives are available, and the advantages and disadvantages of those alternatives. It is therefore more efficient to place the burden on the defendant to use the information that is readily available to it to articulate why the alternatives would not achieve its objectives.

Conclusion

The undersigned organizations support HUD's efforts to establish a uniform discriminatory effects standard and urge HUD to issue a final rule as quickly as possible. Thank you for your attention to our suggestions for ways in which the rule could be strengthened.

Respectfully submitted,

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