

January 17, 2012

Regulations Counsel
Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh St SW, Room 10276
Washington D.C. 20410

Re: Docket No. FR-5508-P-01
Implementation of the Fair Housing Act's Discriminatory Effect Standard
Submitted through Federal eRulemaking Portal at www.regulations.gov

To Whom It May Concern:

The National Fair Housing Alliance ("NFHA"), its members and the other civil rights organizations signed below commend the Department for its publication of a proposed regulation implementing the discriminatory effect standard under the Fair Housing Act ("FHA"), and submit the following comments and recommendations regarding that regulation.

Founded in 1988, NFHA is a consortium of more than 220 private, non-profit organizations, state and local civil rights agencies and individuals from throughout the United States. Headquartered in Washington D.C., NFHA, through comprehensive education, advocacy, and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

We support the Department's efforts to establish standards for determining when a housing practice with a discriminatory effect violates the FHA. The proposed rule effectuates the broad remedial effect intended by Congress and furthers the statutory goal of providing, "within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting the "broad remedial intent of Congress embodied in the Act"). For many years, we have encouraged the Department to adopt regulations implementing the discriminatory effect standard and request that the Department act promptly to enact the regulations.

In the more than forty years since the FHA was passed, a strong consensus has developed among the courts that the FHA includes a disparate impact standard. *See, e.g., Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011) ("All of the courts of appeal that have considered the matter . . . have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact. . ."). As federal courts have consistently held, "[i]n disparate impact cases, [e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme." *Id.* at 385 (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).



The Department has requested comments on the issue of which party bears the burden of proof to establish a less discriminatory alternative. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921, 70925 (proposed Nov. 16, 2011) (to be codified 24 C.F.R. § 100.500(c)(3)). Where the burden is apportioned is often a critical issue that has the potential to affect the outcome of fair housing cases and overall enforcement of the FHA and state and local fair housing laws. The dispute in disparate impact cases under the FHA often focuses on the determination of whether a less discriminatory alternative exists. *See, e.g., Mt. Holly*, 658 F.3d at 385 (indicating that this step in the analysis determines “whether a person is being deprived of his lawful rights because of his race”).

We must observe that the proposed rule places the burden of proof upon the plaintiff or complainant to demonstrate a less discriminatory alternative. Proposed § 100.500(c)(3) states that “[i]f the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less discriminatory effect.” Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. at 70927.

We respectfully suggest that the burden of proof should be assigned to the defendant or respondent to show that there is no less discriminatory alternative. The proposed rule observes that judicial interpretations of the FHA and the burden of proof Congress assigned to disparate impact employment discrimination cases support assigning the burden of proof to plaintiffs or complainants. *Id.* at 70925. In fact, federal courts are split on the issue of which party bears the burden of proof to demonstrate a less discriminatory alternative and reliance on Title VII standards is inappropriate because of the unique nature of less discriminatory alternatives in FHA cases. Furthermore, a defendant/respondent is in a far superior position to bear the burden of proof on this issue.

First, there is no unanimity among the courts that have addressed the question of which party should have the burden of proof regarding less discriminatory alternatives. Many federal courts have held that the defendant/respondent has the burden of proof to demonstrate that there is no less discriminatory alternative. *See e.g. Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (a defendant must show that there are no less discriminatory alternatives available); *Mt. Holly*, 658 F.3d at 385 (holding that defendants have the burden of showing that there is no less discriminatory alternative and that “[o]nly when the defendants make this showing does the burden shift back to the plaintiffs—where it ultimately remains—to provide evidence of such an alternative”); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000) (affirming the district court's decision holding that the defendant failed to show a less discriminatory alternative); *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 503 (N.D. Tex. 2010); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000).

Second, courts have rejected the lockstep importation of Title VII principles into the determination of which party bears the burden of establishing a less discriminatory alternative. As the Third Circuit explained in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), “[l]ooking to Title VII for the correct standard for rebuttal of a prima facie case, we note that the ‘business necessity’ test employed in Title VII job discrimination cases, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), is of somewhat uncertain application in Title VIII cases.” *Id.* The Third Circuit explained that less discriminatory alternatives are far easier to identify and quantify in a Title VII case, noting that “the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII.” *Id.*; see also, *Huntington*, 844 F.2d at 937-38 (stating that “in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related” and that a defendant’s justifications are “normally based on a variety of circumstances” in zoning cases under the FHA); *Langlois*, 207 F.3d at 51 (noting that “a single criterion-like the relationship of the test to job performance used under Title VII-is hardly possible” under the FHA). Thus, both the qualitative and quantitative nature of less discriminatory alternatives in FHA cases supports assigning the burden of proof to the defendant or respondent.

Finally, the burden of proof to establish a less discriminatory alternative in a FHA case should be assigned to the defendant/respondent for a more practical reason – that party almost always has superior knowledge of the less discriminatory alternatives available and whether the alternatives meet its business objectives. The test to determine a less discriminatory alternative asks whether an alternative imposes “an undue hardship under the circumstances of the specific case” on the defendant or respondent. *Mt. Holly*, 658 F.3d at 386. The test is similar to the rebuttal burden imposed on a defendant or respondent in a reasonable accommodation case. *Id.*

In assessing who should have the burden in FHA cases, courts have permitted shifting the burden to the party for whom the proof was the easiest. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1291, 1295 n. 16 (7th Cir. 1977) (holding that the burden to identify parcels of land that were appropriate for the development of multi-family housing was on the defendant municipality because “[i]t is far easier for defendant to show that a single parcel of land which is suitable does exist than for plaintiffs to show that no suitable land exists” and that allocating the burdens any other way “would compel plaintiffs to attempt the impossible task of proving a negative”). The defendant/respondent generally has far superior knowledge of the alternative practices available to meet its legitimate objectives and is in a far better position to assess whether an alternative imposes an undue hardship upon it in the particular circumstances of the case and is consistent with its goals.

For example, in cases challenging zoning policies or practices as having a disparate impact on people of color, the municipal defendant will unquestionably have superior knowledge about the existence and feasibility of alternative approaches that might achieve its permissible objectives with less discriminatory impact on protected classes. Plaintiffs will rarely be in a

position to conduct such an assessment because they will lack information and be outside the political decision-making process. In such a case, logic would dictate imposing the burden on local government to identify such alternatives and to articulate why they would not achieve its objectives.

In litigation involving insurance or lending—where private companies scrupulously protect proprietary information such as credit scores, actuarial data and risk assessment—there is an even stronger rationale for imposing the burden on the defendant, whose knowledge will be vastly superior to that of a plaintiff and who will uniquely possess information with respect to less discriminatory alternatives.

Beyond the litigation context, the policy embedded in the HUD final rule should incentivize and encourage insurers and lenders who build and use statistical models to look at alternative models and variables to make certain that they adopt the most predictive models that have the least discriminatory impact (and thus avoid litigation altogether). Placing the burden on these private parties will have salutary business and public policy effects as well: By requiring them to actually look at such alternatives, they may find and implement less discriminatory approaches that are equally (or even more) predictive of business risk that they would not otherwise have explored.

For the reasons outlined above, we urge the Department to revise the proposed rule to impose the burden on the defendant/respondent in the final step of the disparate impact analysis.

Thank you for the opportunity to comment on the proposed regulation implementing the FHA's discriminatory effect standard. We again commend the Department for promulgating the proposed regulations implementing the discriminatory effect standard under the FHA. Please contact Lisa Rice at 202.898.1661 or lrice@nationalfairhousing.org with any questions.

Sincerely,

Charles Hamilton Houston Institute for Race & Justice, Harvard Law School
NAACP
National Association of Consumer Advocates
National Coalition for Asian Pacific American Community Development
National Fair Housing Alliance
National Low Income Housing Coalition
Sargent Shriver National Center on Poverty Law

Michael T. Iglesias, Professor of Law, University of San Francisco School of Law
Gregory Squires, Professor of Sociology and Public Policy and Public Administration, George Washington University

Local Agency	City	State
Arizona Fair Housing Center	Phoenix	AZ
Austin Tenants' Council	Austin	TX
Baltimore Neighborhoods, Inc.	Baltimore	MD
California Rural Legal Assistance, Inc.	Marysville	CA
Center for Fair Housing Mobile, Inc.	Mobile	AL
Central Alabama Fair Housing Center	Montgomery	AL
Chicago Area Fair Housing Alliance	Chicago	IL
Community Legal Aid Society, Inc.	Wilmington	DE
Connecticut Fair Housing Center, Inc.	Hartford	CT
Eden Council for Hope and Opportunity	Hayward	CA
Fair Housing Advocates Association	Akron	OH
Fair Housing Center of Central Indiana	Indianapolis	IN
Fair Housing Center of Greater Boston	Boston	MA
Fair Housing Center of the Greater Palm Beaches, Inc.	Lantana	FL
Fair Housing Center of Metropolitan Detroit	Detroit	MI
Fair Housing Center of Nebraska and Iowa	Omaha	NE
Fair Housing Center of Northern Alabama	Birmingham	AL
Fair Housing Center of Southeastern Michigan	Ann Arbor	MI
Fair Housing Center of Southwest Michigan	Kalamazoo	MI
Fair Housing Center of Washington	Tacoma	WA
Fair Housing Center of West Michigan	Grand Rapids	MI
Fair Housing Contact Service, Inc.	Akron	OH
Fair Housing Continuum, Inc.	Melbourne	FL
Fair Housing Council of Central California	Fresno	CA
Fair Housing Council of Central New York, Inc.	Syracuse	NY
Fair Housing Council of Greater San Antonio	San Antonio	TX
Fair Housing Council of Northern New Jersey	Hackensack	NJ
Fair Housing Council of Orange County	Santa Ana	CA
Fair Housing Council of Oregon	Portland	OR
Fair Housing Council of Riverside, Inc.	Riverside	CA
Fair Housing Council of San Fernando Valley	Panorama City	CA
Fair Housing Council of Suburban Philadelphia	Swarthmore	PA
Fair Housing Foundation	Long Beach	CA
Fair Housing Justice Center	New York	NY

Fair Housing Napa Valley	Napa	CA
Fair Housing of Marin	San Rafael	CA
Fair Housing Law Clinic of Cleveland-Marshall School of Law, Cleveland State University	Cleveland	OH
Fair Housing Opportunities of Northwest Ohio, Inc.	Toledo	OH
Fair Housing Partnership of Greater Pittsburgh, Inc.	Pittsburgh	PA
Fair Housing Resource Center, Inc.	Painesville	OH
Fair Housing Rights Center in SE Pennsylvania	Glenside	PA
Greater Houston Fair Housing Center	Houston	TX
Greater New Orleans Fair Housing Action Center	New Orleans	LA
Gulf Coast Fair Housing Center	Waveland	MS
Heights Community Congress	Cleveland Heights	OH
HOPE Fair Housing Center	Wheaton	IL
The Housing Advocates, Inc.	Cleveland	OH
Housing Opportunities Made Equal of Virginia, Inc.	Richmond	VA
Housing Opportunities Made Equal, Inc., NY	Buffalo	NY
Housing Opportunities Made Equal, Inc., OH	Cincinnati	OH
Housing Opportunities Project for Excellence, Inc.	Miami	FL
Housing Research and Advocacy Center	Cleveland	OH
Housing Rights Center	Los Angeles	CA
Housing Rights, Inc.	Berkeley	CA
Inland Fair Housing and Mediation Board	Rancho Cucamonga	CA
Interfaith Housing Center of the Northern Suburbs	Winnetka	IL
Intermountain Fair Housing Council	Boise	ID
Lawyers' Committee for Better Housing	Chicago	IL
Legal Aid Society of Southwest Ohio	Cincinnati	OH
Lexington Fair Housing Council, Inc.	Lexington	KY
Long Island Housing Services, Inc.	Bohemia	NY
Massachusetts Fair Housing Center	Holyoke	MA
Metro Fair Housing Services, Inc.	Atlanta	GA
Metropolitan Fair Housing Council of Oklahoma, Inc.	Oklahoma City	OK
Metropolitan Milwaukee Fair Housing Council	Milwaukee	WI
Metropolitan St. Louis Equal Housing Opportunity Council	St. Louis	MO
Miami Valley Fair Housing Center, Inc.	Dayton	OH
Montana Fair Housing	Butte	MT
North Texas Fair Housing Center	Dallas	TX
Northwest Fair Housing Alliance	Spokane	WA

Oak Park Regional Housing Center	Oak Park	IL
Project Sentinel, Inc.	Redwood City	CA
Savannah-Chatham County Fair Housing Council	Savannah	GA
Silver State Fair Housing Council	Reno	NV
South Suburban Housing Center	Homewood	IL
Tennessee Fair Housing Council	Nashville	TN
Westchester Residential Opportunities, Inc.	White Plains	NY