

January 17, 2012

Via Electronic Submission & Mail

Regulations Division
Office of General Counsel, Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500
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Re: Docket No. FR-5508-P-01; "RIN 2529-AA96" *Implementation of the Fair Housing Act's Discriminatory Effects Standard*

Dear Rules Docket Clerk:

On behalf of the undersigned organizations, we write in strong support of HUD's proposed regulation implementing the Fair Housing Act's discriminatory effects standard. HUD's proposed regulation is an important and necessary step in ensuring that the nation's housing is available to all, regardless of protected class status.

The proposed regulation formalizes the long and consistent interpretation of the Fair Housing Act by HUD which has repeatedly determined that the anti-discrimination provisions of the Act are directed to the consequences of housing policies and practices, not simply their purpose. This interpretation is consistent with the uniform interpretation of the Act by the federal courts of appeals, which have consistently held, for over forty years, that liability under Title VIII may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group or creates, perpetuates, or increases segregation. As the Supreme Court recently noted, in another context, "[t]his unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long a period of time." *United States v. Tinklenberg*, 131 S. Ct. 2007, 2014 (2011). With this proposed regulation, HUD is providing this same type of "practical administrative" guidance for HUD investigators and administrative law judges, as well as for the state and local fair housing agencies that share responsibility with HUD for the investigation of fair housing complaints.

The importance of the disparate impact standard to effective and vigorous fair housing enforcement cannot be overstated. This is evident in the variety of cases listed in the proposed regulation where disparate impact analysis has been applied (76 Fed. Reg. 70924-25). Without the ability to prove violations through a disparate impact analysis, there would be major obstacles to attacking subtle but pernicious housing-related discrimination. Moreover, without a disparate impact standard, the Fair Housing Act would not address many of the implicit, structural and institutional biases operating in today's housing market.

Furthermore, the proposed standard codifies the burden-shifting standard that has long been used by HUD in its agency adjudications. In particular, we support placing the burden at the second stage on the defendant to show the challenged practice has a manifest relationship to one or more legitimate, nondiscriminatory interests. The burden is appropriately placed on defendant because they are best positioned to articulate the legitimate, nondiscriminatory interests served by the challenged practice. We further note the inapplicability to the Fair Housing Act of the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) that in Title VII disparate impact claims the defendant has the burden of production but not persuasion in the second stage. See *Meacham v. Knolls Atomic Power Lab*, 544 U.S. 84, 98 (2008).

The breadth of cases relying on disparate impact claims brought by private enforcers of the Act illustrates the importance of such claims to achieving the "policy of the United States to provide within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Examples are numerous and far-reaching and include the following:

- Cases attacking zoning and land-use policies and decisions which restrict private construction of multifamily housing to a largely minority area or block or limit development of affordable housing in communities of opportunity, resulting in both discriminatory denial of housing to minorities and the perpetuation and/or exacerbation of residential segregation;
- A wide variety of fair lending cases attacking policies of financial institutions with a discriminatory impact on protected groups, including (1) underwriting policies; (2) pricing and fee policies (which were a central factor in the ongoing foreclosure crisis); (3) discriminatory application of credit score criteria in determining home mortgage interest rates; (4) minimum loan amount policies which disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live; and (5) residential mortgage lending policies requiring a credit score above the Federal Housing Authority minimum;
- A wide variety of homeowners' insurance cases attacking insurance company policies that (1) deny insurance based on the age of the home; (2) do not provide replacement value insurance policies based on the age or location of the home; (3) do not insure for replacement value if that value is greater than the market value of the house, based on a moral hazard rationale; and (4) discriminate in the pricing of homeowners' insurance policies;
- Residency requirements and other admissions procedures imposed by public housing agencies or housing management firms in predominantly white communities which discriminate against minority persons not living in such communities;
- Cases challenging governmental redevelopment or demolition plans or policies which disproportionately displace minorities by eliminating lower income housing;
- A variety of cases involving group homes for disabled persons. For example, there have been many cases brought by groups of unrelated persons seeking to live together in

financially viable and therapeutic group settings, such as persons recovering from alcohol or drug addiction, who seek to occupy a home located in a single-family neighborhood but are denied because the zoning ordinances only permit families related by blood or marriage to occupy homes in this neighborhood. Other cases attack municipal ordinances requiring that all group homes be located more than one mile from any other group home;

- Cases attacking unreasonably restrictive occupancy standards adopted by landlords which result in excluding or limiting families with children from the housing;
- Cases attacking policies which have a disparate impact because of the sex of tenants, e.g. a policy which refuses to consider alimony payments in determining eligibility; a policy or practice of evicting tenants who receive welfare; a policy or practice of evicting victims of domestic violence; and
- Cases attacking policies requiring that tenants speak English or be United States citizens.

In each of these contexts, the discriminatory effects standard has proven to be a valuable tool in assessing when policies have an adverse impact on members of a protected class, and whether these policies are necessary to achieve a legitimate goal that cannot be achieved through less discriminatory means. This type of assessment is an essential part of our fair housing enforcement system, and the proposed rule will ensure that the standard continues to be applied consistently across the country.

We applaud HUD's proposal to provide a long needed regulation on the propriety of disparate impact claims under the Fair Housing Act and to clarify the burden of proof under this standard. This regulation will foster the goals of the Fair Housing Act and benefit the clients and constituents of our organizations. It provides a national standard for courts, housing providers, municipalities and the financial and insurance industries. These issues are now being considered by the Supreme Court and we urge HUD to issue the final rule as soon as possible to provide the Court definitive agency interpretation concerning these issues.

Very truly yours,

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