



# **Disparate Impact under the Fair Housing Act: A Proposed Approach**

COMMISSIONED BY THE NATIONAL FAIR HOUSING ALLIANCE  
December 1, 2009

# **Disparate Impact under the Fair Housing Act: A Proposed Approach**

Prepared by Robert G. Schwemm and Sara K. Pratt\*\*\*

Contents:

## I. Background

- A. Need for Action; Overview of this Commentary
- B. Principal Circuit Court Decisions Endorsing Impact Standard in FHA Cases

## II. Justification for Concluding that the FHA Includes an Impact Standard

- A. Overview; Basic Conclusion
- B. The FHA's Text Supports an Impact Standard
- C. The FHA's Legislative History Shows that Impact Claims Are Cognizable
- D. Congress Endorsed the Application of the FHA to Impact Claims in the Fair Housing Amendments Act of 1988
- E. Administrative Implementation of the FHA Supports an Impact Standard
- F. Summary

## III. Scope of HUD's Proposed Impact Approach

- A. Impact Evidence Relevant to Both Impact and Intent Claims
- B. "Perpetuation of Segregation" Claims
- C. Same Standards Apply to Private and Public Defendants in Impact Cases
- D. Impact Standard is Presumed to Govern All FHA's Substantive Provisions

## IV. Plaintiff's Initial Burden

- A. Prima Facie Case and Proper Statistical Focus
- B. Causation; Need to Focus on Particular Practices
- C. Need to Show "Substantial" Disparate Impact
- D. Summary

## V. Defendant's Burden of Justification; Less Discriminatory Alternatives

- A. Background; Different Articulations of the Proper Standard
- B. HUD's Position
- C. Less Discriminatory Alternatives

Appendix 1: Possible Regulatory Language: Impact Claims under the Fair Housing Act

Appendix 2: Examples of Impact-Producing Practices that Might Violate the FHA

\*\*\*

Robert G. Schwemm is the Ashland-Spears Professor at the University of Kentucky College of Law. Sara Pratt is former Director of Enforcement at HUD's Office of Fair Housing and Equal Opportunity and a consultant on fair housing issues.

NOTE: Because this paper deals primarily with court cases rather than administrative proceedings, the terms “plaintiff(s)” and “defendant(s)” are generally used, but these terms should be understood to refer to, respectively, “complainant(s)” and “respondent(s)” when administrative proceedings are involved.

## I. Background

### A. Need for Action; Overview of this Commentary

Ever since the early years of litigation under the 1968 Fair Housing Act (“FHA” or “Act”), courts have been called upon to determine whether the FHA’s prohibitions are limited to practices prompted by discriminatory intent or also cover those that produce a discriminatory effect (impact). *See, e.g., United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808-11 & n.12 (5<sup>th</sup> Cir. 1974) (holding, in case brought under both the FHA and the 14<sup>th</sup> Amendment, that the defendants bear a heavy burden of justification once the plaintiffs prove the existence of a racially discriminatory effect, but determining that, because defendants’ conduct here violated the 14<sup>th</sup> Amendment, “we do not reach the question of whether the . . . conduct also constituted a violation of the Fair Housing Act”). In 1974, the Eighth Circuit became the first federal appellate court to find a FHA violation based on the discriminatory effect of the defendant’s actions. *See United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85, 1188 (8<sup>th</sup> Cir. 1974) (holding, in exclusionary land-use case brought by the Justice Department, that the defendant-municipality violated the FHA’s § 3604(a) and § 3617 and commenting that in order “[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . Effect, and not motivation, is the touchstone . . .”).

Four decades of such litigation has produced a strong consensus that the Act does include an impact standard. *See 2922 Sherman Ave. Tenants’ Ass’n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (noting that “every one of the eleven circuits to have considered the issue has held that the FHA . . . prohibits not only intentional housing discrimination, but also housing actions having a disparate impact” and “assum[ing] without deciding that [plaintiffs] may bring a disparate impact claim under the FHA”).<sup>1</sup> Many of the early cases that established this consensus followed the lead of the Supreme Court’s first FHA decision, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972), in relying on precedents under Title VII of the 1964 Civil Rights Act to interpret the FHA and the Court’s unanimous decision a year earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), which held that Title VII proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . .

---

<sup>1</sup> Part I-B contains a list of many of these appellate decisions, organized by circuit.

Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

However, the Supreme Court has never directly ruled on the issue of whether the FHA includes an impact standard. *See City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 199-200 (2003) (avoiding this issue); *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (same). Furthermore, the Court has, in recent years, issued opinions dealing with impact claims under other civil rights statutes indicating that each statute's coverage of such claims must be determined on the basis of that statute's particular text and purposes. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 233-40 (2005) (ADEA); *see also Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-73 (2009) (Title VII).

The result has been that, despite the overwhelming consensus among lower courts that the FHA includes an impact standard, defendants/respondents continue to contest this issue, and courts and administrative law judges continue to have to issue decisions dealing with it. *See, e.g., Guerra v. GMAC LLC*, 2009 WL 449153, at \*3 (E.D. Pa. Feb. 20, 2009) (rejecting, in mortgage discrimination case, defendants' argument that the FHA lacks an impact standard and citing eight other district court decisions in similar cases in the past two years that reached the same conclusion). In addition, to the extent that lack of HUD regulatory guidance has allowed unnecessary uncertainties to continue, the effort to obtain voluntary compliance with the Act without the need for expensive and time-consuming litigation is undermined.

The Supreme Court has often relied on interpretive regulations of the agency charged with enforcing particular civil rights statutes in deciding whether those statutes include an impact standard. *See, e.g., Smith v. City of Jackson*, 544 U.S. at 239-40; *id.* at 243-47 (Scalia, J., concurring); *Griggs*, 401 U.S. at 433-34. Furthermore, the Court has held that HUD's regulations interpreting the FHA are entitled to substantial deference in determining the meaning of the FHA. *See Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (determining that HUD's internal interpretation of the FHA is "entitled to great weight"). *See generally Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

For many years, HUD has expressed its view that the FHA includes an impact standard. In 1994, HUD joined the Department of Justice and eight other federal regulatory agencies in publishing an *Interagency Policy Statement on Discrimination in Lending*, which recognized the disparate impact standard as one way of proving lending discrimination under the FHA and spelled out how such an impact-based case should be analyzed. *See* 59 Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).<sup>2</sup> In 1995, in its final rule on *The Secretary of HUD's Regulation of the*

---

<sup>2</sup> This *Interagency Policy Statement* stated that it was being issued for several reasons, including to "provide guidance about what the agencies consider in determining if lending discrimination exists" and to "provide a foundation for future interpretations and rulemakings by

*Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)*, HUD concluded that “the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law” and, on this basis, determined to prohibit these GSEs from discriminating “in a manner that has a discriminatory effect.” See 60 Fed. Reg. 61846, 61867 (Dec. 1, 1995); 24 C.F.R. § 81.41. In the 1990s, a number of HUD administrative decisions under the FHA endorsed the impact standard, including one in which the HUD Secretary ruled “that a disparate impact, if proven, would establish a violation of the Act. . . . [and] that this [discriminatory effects] test should have been applied in this case.” *HUD v. Mountain Side Mobile Estates*, Fair Hous.-Fair Lend. Rptr. ¶ 25,053, at p. 25,492, 1993 WL 307069, at \*5 (HUD Sec’y 1993).<sup>3</sup> In 1994, HUD’s Assistant Secretary for Fair Housing and Equal Opportunity told Congress: “The standards to determine discrimination [in home insurance under the FHA] – as in all other covered areas – will be based on the principles of overt discrimination, disparate treatment, and disparate impact.” *Hearings on Homeowners Ins. Discrimination Before the Sen. Comm. on Banking, Housing, & Urban Affairs* 52, 103<sup>rd</sup> Cong. (1994). Since the mid-1990s, HUD’s handbook for its FHA enforcement staff has endorsed the impact theory. See *HUD, No. 8024.01, Title VIII Complaint Intake, Investigation & Conciliation Handbook*, Part 3-5-A-1, at 3-25 (1995), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/fheh/80241> (instructing that a housing policy violates the FHA if it has a discriminatory motive or “a disproportionately negative effect upon [protected] persons”); *id.* Part 2-4, at 2-27 to 2-45 (discussing “discriminatory impact cases”); *id.* Part 7-12, at 7-20 to 7-23 (identifying “disparate impact” as one type of illegal discrimination under the FHA); *id.* Part 5-10-A-4, at 5-57 (noting that facially neutral land-use ordinances may violate the FHA if they have a “disparate impact”).

These HUD endorsements of an impact standard under the FHA have been clear and consistent, but they have not yet taken the form of a regulation applicable to the entire statute. See, e.g., 60 Fed. Reg. at 61866 (noting, in 1995, that the GSEs “urged HUD to postpone application of the disparate impact standard in this rule until the issue is addressed in the HUD’s broader Fair Housing Act regulations”). Therefore, in order to bring additional clarity to this issue and to help inform judicial and administrative decisions, HUD should consider adoption of a clear language that authorizes an impact standard.

---

the Agencies.” 59 Fed. Reg. at 18267.

<sup>3</sup> In a subsequent decision in this case, the Tenth Circuit reversed a HUD ALJ’s decision on remand from the Secretary’s decision, but endorsed the view that the FHA includes an impact standard. See *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1051-52 (10th Cir. 1995). Other decisions by HUD administrative law judges endorsing this view include *HUD v. Pfaff*, Fair Hous.-Fair Lend. Rptr. ¶ 25,085, at pp. 25,781-83 (HUD ALJ 1994), *rev’d on other grounds*, 88 F.3d 739 (9th Cir. 1996); *HUD v. Ross*, Fair Hous.-Fair Lend. Rptr. ¶ 25,075, at pp. 25,699-700 (HUD ALJ 1994); *HUD v. Carter*, Fair Hous.-Fair Lend. Rptr. ¶ 25,029, at pp. 25,317-18 (HUD ALJ 1992).

The basic rationale for this determination is set forth in Part II. Part III discusses the scope and limits of the approach being proposed here. The particular circumstances that are deemed appropriate for impact-based claims are described in Parts IV and V. The Appendix provides examples of impact-producing practices that might violate the FHA.

## B. Principal Circuit Court Decisions Endorsing Impact Standard in FHA Cases

### 1<sup>st</sup> Circuit:

*Principal Case:* Langlois v. Abington Housing Authority, 207 F.3d 43, 49 (1st Cir. 2000).

*Others:* Macone v. Town of Wakefield, 277 F.3d 1, 5, 7-8 (1st Cir. 2002).

### 2<sup>nd</sup> Circuit:

*Principal Case:* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988).

*Others:* Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 574-78 (2d Cir. 2003); Fair Housing in Huntington Committee, Inc. v. Town of Huntington, N.Y., 316 F.3d 357, 366 (2d Cir. 2003); Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35, 52-53 (2d Cir. 2002); Hack v. President and Fellows of Yale College, 237 F.3d 81, 90-91, 93-102 (2d Cir. 2000); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998); Orange Lake Associates, Inc. v. Kirkpatrick, 21 F.3d 1214, 1227-28 (2d Cir. 1994); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036-37 (2d Cir. 1979).

### 3<sup>rd</sup> Circuit:

*Principal Case:* Resident Advisory Board v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977).

*Others:* Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of Tp. of Scotch Plains, 284 F.3d 442, 466-68 (3d Cir. 2002); Doe v. City of Butler, Pa., 892 F.2d 315, 323 (3d Cir. 1989).

### 4<sup>th</sup> Circuit:

*Principal Cases:* Betsey v. Turtle Creek Associates, 736 F.2d 983, 986 (4th Cir. 1984); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982).

*Others:* Edwards v. Johnston County Health Department, 885 F. 2d 1215, 1223 (4th Cir. 1989); Charleston Housing Authority v. U.S. Dept. of Agriculture, 419 F.3d 729, 740-42 (4th Cir.2005).

### 5<sup>th</sup> Circuit:

*Principal Case:* Hanson v. Veterans Administration, 800 F.2d 1381, 1386 (5th Cir. 1986).

*Others:* Cox v. City of Dallas, Tex., 430 F.3d 734, 746 (5th Cir. 2005); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996).

### 6<sup>th</sup> Circuit:

*Principal Case:* Arthur v. City of Toledo, Ohio, 782 F.2d 565, 574-75 (6th Cir. 1986).

*Others:* Graoch Associates # 33 v. Louisville/Jefferson County 508 F.3d 366, 371-74 (6<sup>th</sup> Cir.

2007); *Larkin v. State of Mich. Dept. of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996).

7<sup>th</sup> Circuit:

*Principal Case*: *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

8<sup>th</sup> Circuit:

*Principal Case*: *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

*Others*: *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, 883-84 (8th Cir. 2003); *Darst-Webb Tenant Ass'n v. St. Louis Housing Authority*, 339 F.3d 702, 712 (8th Cir. 2003); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

9<sup>th</sup> Circuit:

*Principal Cases*: *Pfaff v. HUD*, 88 F.3d 739, 745-46 (9th Cir. 1996); *Keith v. Volpe*, 858 F.2d 467, 482-84 (9<sup>th</sup> Cir. 1988).

*Others*: *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114, 1118-19 (9<sup>th</sup> Cir. 2008); *Affordable Housing Development Corp. v. City of Fresno*, 433 F.3d 1182, 1194-96 (9<sup>th</sup> Cir. 2006); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 250-51 (9<sup>th</sup> Cir. 1997); *Gamble v. City of Escondido*, 104 F.3d 300, 304-06 (9<sup>th</sup> Cir. 1997); *Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9<sup>th</sup> Cir. 1982).

10<sup>th</sup> Circuit:

*Principal Case*: *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995).

*Others*: *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10<sup>th</sup> Cir. 2007); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995).

11<sup>th</sup> Circuit:

*Principal Case*: *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994).

*Others*: *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1217-18 (11th Cir. 2008); *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006).

D.C. Circuit:

*Principal Case*: *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (“assum[ing] without deciding that [plaintiffs] may bring a disparate impact claim under the FHA”).<sup>4</sup>

---

<sup>4</sup> District courts in the D.C. Circuit have recognized that the FHA includes an impact standard. *E.g., National Community Reinvestment Coalition v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 77-79 (D. D.C. 2008), *leave to appeal denied*, 597 F. Supp. 2d 120 (D. D.C. 2009); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of America.*, 208 F. Supp. 2d 46, 58-60 (D. D.C. 2002); *see also Brown v. Artery Organization, Inc.*, 654 F. Supp. 1106, 1114-

## II. Justification for Concluding that the FHA Includes an Impact Standard

### A. Overview; Basic Conclusion

The factors that the Supreme Court considers in determining whether a particular civil rights statute includes an impact standard support the conclusion that the FHA has such a standard. These factors, which are individually reviewed in Sections B-E of this Part, include: statutory text; legislative history and purpose; subsequent Congressional action; and administrative construction. *See e.g., Griggs*, 401 U.S. at 429-36; *Smith v. City of Jackson*, 544 U.S. at 233-40.

HUD's basic conclusion should be that the FHA should be interpreted as the Supreme Court interpreted Title VII in *Griggs*, because the two statutes share similar language and goals and were enacted in close proximity to one another.<sup>5</sup> "[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. at 233 (plurality opinion, citing *per curiam* opinion in *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973)).<sup>6</sup>

Furthermore, the Supreme Court has instructed that the FHA be given a "generous construction" in light of its "broad and inclusive" "language." *Trafficante*, 409 U.S. at 209, 212; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting "the broad remedial intent of Congress embodied

---

16 (D. D.C. 1987) (endorsing impact theory for public defendants).

<sup>5</sup> As noted in Part I-A, the Supreme Court's first FHA decision in 1972 relied on Title VII precedent to interpret the FHA. *See Trafficante*, 409 U.S. at 208-09; *cf. General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982) (holding that the 14th Amendment's discriminatory purpose standard controls claims under the 1866 Civil Rights Act, because these laws are "legislative cousins" and it would be "incongruous to construe" them in a "markedly different" manner).

<sup>6</sup> The FHA and Title VII share the common purpose of ending invidious discrimination in their respective fields of housing and employment. A number of appellate decisions holding that the FHA has an impact standard have noted the common purposes of these two statutes. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988) (citing numerous cases and other authorities noting "the parallel between Title VII and Title VIII [FHA]"); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 987 (4th Cir. 1984) (noting the "parallel" objectives of Title VII and the FHA); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("the anti-discrimination objectives of [the FHA] are parallel to the goals of Title VII"); *see also* note 10 and accompanying text.

in the Act"). This requirement supports the recognition of an impact standard under the FHA, as various appellate decisions have noted.<sup>7</sup>

## B. The FHA's Text Supports an Impact Standard

The text of the FHA's substantive provisions (§§ 3604-3606 and 3617) does not explicitly state whether impact claims are or are not cognizable. This was also true with respect to the Title VII provisions that *Griggs* held included an impact standard.<sup>8</sup> Therefore, as the Supreme Court did in *Griggs* for Title VII, HUD may properly interpret the text of the FHA's substantive provisions as including an impact standard.

Indeed, the Supreme Court has made clear from the beginning that it is appropriate to rely on Title VII precedents to interpret the FHA when the FHA's text is similar to that used in Title VII.<sup>9</sup> Following the Court's lead, a number of appellate courts have relied on *Griggs* and other Title VII precedents in concluding that the FHA includes an impact standard.<sup>10</sup>

In addition to relying on Title VII precedents, the view that impact claims are proper under the FHA is supported by the FHA's first provision (§ 3601), which states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Section 3601 counsels that, as between two reasonable and constitutional interpretations of the FHA, the one that provides a broader application of the Act is correct. The interpretive rule reflected in § 3601 is why the Supreme Court has held that only constitutional, and not also prudential, limits on standing apply under the FHA. *See, e.g., Havens*, 455 U.S. at 372.

Here, § 3601 encourages the FHA's application to impact claims, because this construction is permitted by the statute's language and, in light of the Supreme Court's approval of impact claims under Title VII more than thirty-eight years ago in *Griggs*, is plainly constitutional. Thus, a number of appellate courts have relied on § 3601 in determining that the

---

<sup>7</sup> *See, e.g., Huntington Branch*, 844 F.2d at 935; *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977).

<sup>8</sup> As Justice O'Connor noted in 2005, "the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived purpose . . . ." *Smith v. City of Jackson*, 544 U.S. 228, 261-62 (2005) (O'Connor, J., concurring, joined by Kennedy and Thomas, JJ.).

<sup>9</sup> *See supra* Part I-A and note 5 (describing *Trafficante*, 409 U.S. at 208-09, as interpreting the FHA based on Title VII precedent).

<sup>10</sup> *See, e.g., Town of Clarkton*, 682 F.2d at 1065; *Huntington Branch*, 844 F.2d at 934-36; *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 & n.7 (10th Cir. 1995).

FHA includes an impact standard.<sup>11</sup>

The Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005) is not to the contrary. *Smith* held that the Age Discrimination in Employment Act ("ADEA") includes an impact standard, although one somewhat more restrictive than Title VII's. 544 U.S. at 433-41. There are key textual differences between the FHA's substantive provisions and the ADEA provisions considered in *Smith*, which indicate that *Smith's* understanding of the ADEA is consistent with concluding that the FHA has a Title VII-like impact standard. For example, in the FHA's substantive prohibitions, the phrases "any person," "because of," and "based on" fit with an impact standard, because they do not focus on a particular individual as certain ADEA provisions do. The plurality opinion in *Smith* explained that the ADEA's explicit focus on a "targeted individual" is the reason why one part of the ADEA, 29 U.S.C. § 623(a)(1), is inconsistent with an impact standard. See 544 U.S. at 236 n.6. The key words in the ADEA emphasized by this opinion, see 544 U.S. at 236 n.6 (emphasizing § 623(a)(1)'s focus on "any individual" and "because of such individual's"), are not found in the FHA. Indeed, the FHA has no parallel to the ADEA's "such individual's" phrase. Rather, the FHA uses "any person" and defines "person" to include, *inter alia*, "one or more individuals." 42 U.S.C. § 3602(d). The FHA's use of the plural makes it more akin to the ADEA's provision that *Smith* held does allow impact claims, 29 U.S.C. § 623(a)(2), which uses the plural term "employees." Because the FHA's text reflects a general concern with protecting all people, not just a particular individual as the ADEA's text sometimes does,<sup>12</sup> interpreting the FHA to provide for impact claims is reasonable and consistent with the *Smith* opinions.<sup>13</sup>

### C. The FHA's Legislative History Shows that Impact Claims Are Cognizable

---

<sup>11</sup> See *Huntington*, 844 F.2d at 928, 934; *Arlington Heights*, 558 F.2d at 1289-90; *City of Black Jack*, 508 F.2d at 1184; see also *Town of Clarkton*, 682 F.2d at 1068 (relying on § 3601 to reject defendant's objection to the scope of the trial court's remedial order in impact-based case).

<sup>12</sup> Furthermore, the FHA's statement of policy in § 3601 has no parallel in the ADEA. See 29 U.S.C. § 621(b) (providing the ADEA's more narrow statement of policy).

<sup>13</sup> Justice O'Connor's concurring opinion in *Smith* (joined by Justices Kennedy and Thomas) disagreed with the Court's decision to find an impact standard in the ADEA, primarily because "there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent." 544 U.S. at 261. This opinion did recognize, however, that "if *Griggs* had been decided *before* the ADEA was enacted . . . , we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims." *Id.* at 260. Before the FHA was amended in 1988, eight federal appellate courts had held that the FHA includes a *Griggs*-type impact standard. See *infra* Part II-D. Because the 1988 amendments maintained the operative language of the FHA's substantive provisions and even extended it to handicap and familial status, Justice O'Connor's analysis supports crediting Congress with the intention that the consistent judicial construction of the FHA would continue to govern.

Congress adopted the Fair Housing Act in the wake of the report of the National Advisory Commission on Civil Disorders, which warned that the "Nation is moving toward two societies, one black, one white – separate and unequal." *See Report of the National Advisory Commission on Civil Disorders 1* (1968). Proponents of the FHA emphasized that the facially neutral practices of private and public actors were a principal cause of residential segregation, which the Act aimed to eliminate.<sup>14</sup> One of the Act's leading supporters, Senator Brooke, noted that African Americans could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often *institutionalized* by business and industry, and Government *practices*." 114 Cong. Rec. 2526 (1968) (emphases added). Senator Mondale, the Act's principal sponsor, explained that after the Supreme Court had prohibited explicitly racial zoning laws in 1917, "[l]ocal ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." *Id.* at 2669 (emphasis added).

Proponents of the FHA plainly intended to eliminate these causes of residential segregation. Senator Mondale stated that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act *to undo the effects*" of past discriminatory governmental actions. *Id.* (emphasis added)<sup>15</sup> Because Congress was undoubtedly empowered to proscribe intentional governmental discrimination, Senator Mondale would have had no reason to comment on the Act's constitutionality unless it also aimed at the discriminatory effects of facially neutral laws and practices.

The FHA's legislative history also demonstrates that Congress was aware of the difficulty of proving discriminatory intent and, because of this difficulty, allowed other forms of proof. Senator Baker introduced a floor amendment that would have exempted from liability any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . , or an intention to make any such preference, limitation or discrimination." 114 Cong. Rec. 5214. The Baker amendment would have made such homeowners liable only if they intentionally discriminated. A number of the bill's supporters objected that the amendment would undermine Congress's purpose by making proof of discrimination difficult in all but the most blatant cases.<sup>16</sup> The Baker amendment was defeated.

---

<sup>14</sup> In marking the FHA's 40th anniversary in 2008, the House of Representatives confirmed that the Act aimed "to advance equal opportunity in housing and achieve racial integration . . . ." H.R. Res. 1095, 110th Cong., 154 Cong. Rec. H2280-01 (2008), *available at* 2008 WL 1733432 (Apr. 15, 2008).

<sup>15</sup> Senator Mondale's statement here focused on public actors, but there is no indication in the FHA's text or legislative history that Congress intended to treat private and public acts differently. *See infra* Part III-C.

<sup>16</sup> For example, Senator Dominick argued that the amendment would "increase[] the opportunity for discrimination," *id.* at 5220, and Senator Percy stated that the amendment "would

*Id.* at 5221-22.

In short, the FHA's sponsors recognized that residential segregation stemmed in part from ostensibly neutral private and public practices, and they sought to undo the effects of those practices. This, along with the recognition that intentional discrimination would often be difficult to prove, confirms Congress's goal of outlawing housing practices that disproportionately harm minorities without a legitimate justification. A contrary interpretation of the FHA would condemn Congress as having adopted a measure incapable of achieving its intended goals.

#### D. Congress Endorsed the Application of the FHA to Impact Claims in the Fair Housing Amendments Act of 1988

When it passed the Fair Housing Amendments Act of 1988 ("FHAA"), Congress used the same language the FHA already applied to race, color, religion, sex, and national origin to add new prohibitions against familial status discrimination. *See* Pub. L. No. 100-430, at § 6(a), (b) (1988); amended §§ 3604(a)-(e), 3605, 3606, 3617. Prior to the FHAA, all eight of the federal Courts of Appeals to address the issue had concluded that the FHA includes an impact standard. Congress is presumed to "adopt[s] prior judicial] interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted). In addition to this presumption, the FHAA's legislative history in both the House and the Senate shows that the 1988 Congress agreed with these Circuit Court decisions.

The House Judiciary Committee's *Report* on the FHAA explicitly relied on two of these decisions (*Betsey* from the Fourth Circuit and *Halet* from the Ninth Circuit) in noting: "Because minority households tend to be larger and exclusion of children often *has a racially discriminatory effect*, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under title VIII." H.R. Rep. No. 100-711, at 21 (1988) (emphasis added). The *Report* also discussed the Second Circuit's *Huntington* decision permitting disparate impact claims. *See id.* at 90.

The Senate was also made aware of the Circuit Court decisions. *See Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary 529-557* (1987) (testimony and statement of Robert Schwemm) (discussing "strong consensus" in Circuit Courts). The FHAA's principal sponsor in the Senate, Senator Kennedy, stated that "Congress accepted th[e] consistent judicial interpretation . . . of the [] Federal courts of appeals that the FHA prohibits[s] acts that have discriminatory effects, and that there is no need to prove discriminatory intent." 134 Cong. Rec. 23711-12 (1988).

---

require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce." *Id.* at 5216; *see also id.* at 5218, 5220-21 (remarks of Senators Mondale and Hart regarding the difficulty of proving discriminatory intent).

Congressional approval of these decisions is further demonstrated by the House's rejection of an amendment mandating that "a zoning decision is not a violation of the Fair Housing Act unless the decision was made with the intent to discriminate on the basis of race or other prohibited criteria under the Act." H.R. Rep. No. 100-711, at 89 (emphasis added). The explicit purpose of this amendment was to eliminate the impact standard approved by the federal appellate courts in favor of an intent requirement. *See id.* 89-93. The House Judiciary Committee rejected this amendment. *Id.* at 89.

The House likewise made clear that it intended impact analysis to apply to the new protected class of handicap:

The Committee understands that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. *Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination.* A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying "No Handicapped People Allowed." *Id.* at 25 (1988) (emphasis added). By using the FHA's original language to accomplish its goal of reaching acts with a discriminatory effect based on handicap,<sup>17</sup> Congress showed that it agreed with the Circuit Courts' holdings that the FHA's original language includes an impact standard.

#### E. Administrative Implementation of the FHA Supports an Impact Standard

Part I-A, above, describes numerous examples of HUD's determination over the years that the FHA includes an impact standard. Because HUD's consistent and long-standing view of the FHA reflected in these pronouncements is firmly rooted in the statute's text, purpose, and legislative history, it is entitled to substantial deference, e.g., at least *Skidmore* deference based on HUD's "specialized experience" and "the value of uniformity." *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 140 (1944)) (internal quotation marks omitted).

Other agencies have also interpreted the FHA to permit a disparate impact cause of action. The Department of Justice ("DOJ"), which has enforcement responsibilities under the Act, *see, e.g.*, 42 U.S.C. §§ 3610(g)(2)(C), 3614, has successfully urged the courts to adopt an impact standard, both on behalf of HUD, *see Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) and *Pfaff v. HUD*, 88 F.3d 739, 745-46 (9th Cir. 1996), and on behalf of the United States. *See, e.g., United States v. City of Black Jack*, 508 F.2d 1179,

---

<sup>17</sup> The FHA's prohibitions in § 3604(a) and § 3604(b) were adopted almost verbatim in, respectively, § 3604(f)(1) and § 3604(f)(2), which outlaw handicap discrimination. In the FHA's other substantive provisions (§§ 3604(c)-(e), 3605, 3606, and 3617), "handicap" was simply added to the statute.

1184-85 (8th Cir. 1974); *United States v. Housing Authority of the City of Chickasaw*, 504 F. Supp. 716, 727, 729-33 (S.D. Ala. 1980). In 1994, DOJ joined HUD and eight other federal agencies that regulate financial institutions in adopting a joint *Interagency Policy Statement on Discrimination in Lending*, which recognized that proof of disparate impact may establish a violation of the FHA. *See* 59 Fed. Reg. 18266, 18269-70 (Apr. 15, 1994). The views of these other agencies are also entitled to *Skidmore* deference and confirm the propriety of HUD's determination that an impact standard exists under the FHA.

## F. Summary

The unanimous conclusion of the First through Eleventh Circuits that the FHA includes an impact standard are firmly grounded on Supreme Court rules of FHA construction, the Act's text, legislative history and purpose, and other relevant guides to the proper interpretation of the FHA. These appellate decisions form an overwhelming body of judicial precedent supporting HUD's conclusion that an impact standard along the lines of the Supreme Court's interpretation of Title VII in *Griggs* is appropriate under the FHA.

## III. Scope of an Impact Approach

### A. Impact Evidence Relevant to Both Impact and Intent Claims

In those circumstances in which the FHA outlaws an impact-producing practice, such a practice may be challenged in a particular case *either* on the basis that it produces an illegal impact *or* that it was undertaken based on discriminatory intent *or both*. *See, e.g., 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d at 678-85. Furthermore, claims that are based entirely on intentional discriminations may rely on evidence that the challenged practice produces a discriminatory impact as proof of the defendant's intent, as has always been appropriate. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (noting that the impact of the defendant's action – “whether it ‘bears more heavily on one race than another’ – may provide an important starting point” in determining whether “invidious discriminatory purpose was a motivating factor”) (citation omitted).

### B. “Perpetuation of Segregation” Claims

Many of the early appellate cases adopting the view that the FHA bars practices with discriminatory effects involved challenges to municipal zoning and other land-use restrictions that blocked proposals for integrated housing developments in predominantly white communities. In these cases, the courts often commented that, regardless of the defendants' motivation, the FHA could be violated by actions that had the effect of “perpetuating segregation” in an area. *See, e.g., Huntington Branch*, 844 F.2d at 937; *Keith v. Volpe*, 858 F.2d 467, 482-84 (9<sup>th</sup> Cir. 1988); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir.

1986); *Rizzo*, 564 F.2d at 146-49; *Arlington Heights*, 558 F.2d at 1290; *Black Jack*, 508 F.2d at 1184-85.

Unlike the disparate impact theory, the “perpetuating of segregation” theory does not have a ready analogy in Title VII precedents such as *Griggs*. Rather, it is based primarily on the FHA’s legislative history, which shows the statute’s purposes included replacing ghettos with integrated housing patterns.<sup>18</sup>

HUD’s determination here to recognize an impact standard under the FHA is not intended to address the additional theory that a practice may violate the FHA because it perpetuates segregation. A zoning ordinance or other practice may, of course, both perpetuate segregation and have a disparate impact based on a prohibited criteria. *See, e.g., Huntington Branch*, 844 F.2d at 937; *Arlington Heights*, 558 F.2d at 1290. In this situation, the approach suggested here would support liability based on a disparate impact theory and leave the courts free to determine on their own whether liability is also appropriate under the “perpetuation of segregation” theory.

### C. Same Standards Apply to Private and Public Defendants in Impact Cases

Another comment is prompted by the fact that so many of the early appellate decisions endorsing a discriminatory effect standard under the FHA involved municipalities and other governmental defendants. At the time of *Griggs*, Title VII litigation focused primarily on private employers, with the result that *Griggs* and its progeny often spoke of “business” purposes in considering whether an impact-producing practice could be sufficiently justified so as not to violate the statute. *See, e.g., Griggs*, 401 U.S. at 432 (noting that the defendant’s burden of justification in an impact case is to produce evidence of a “genuine business need” for the challenged practice). In contrast, the early FHA impact cases involving governmental defendants often used different language to describe the appropriate analysis, in particular that dealing with the defendant’s burden of justification. *See, e.g., Huntington Branch*, 844 F.2d at 936 (requiring the defendant to prove that its actions furthered “a legitimate bona fide governmental interest”); *Black Jack*, 508 F.2d at 1188 n. 4 (requiring the defendant “to demonstrate that its conduct was necessary to promote a compelling governmental interest”).

This situation led one district court in 1987 to opine that “liability under the Fair Housing

---

<sup>18</sup> *See, e.g., Huntington Branch*, 844 F.2d at 937; *see also Barrick Realty, Inc. v. City of Gary, Indiana*, 491 F.2d 161, 164 (7th Cir. 1974) (“the goal of our national housing policy is to ‘replace the ghettos’ with ‘truly integrated and balanced living patterns’ for persons of all races [citing *Trafficante*, 409 U.S. at 211]); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973) (concluding that the FHA was intended to promote “open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat”).

Act appears to depend upon whether the defendant is a governmental body or a private entity, suggesting that proof of discriminatory effect alone (without proof of discriminatory intent) is enough only when the defendant is a governmental body.” *Brown v. Artery Organization, Inc.*, 654 F. Supp. 1106, 1115 (D. D.C. 1987). This court went on to announce that it would decide non-intent FHA claims based on the following rules: “If the defendant is a governmental body, proof of discriminatory impact of its actions on the community for which it serves suffices to establish a *prima facie* case of violation of the Fair Housing Act. . . . If the defendant is not a governmental body, the plaintiff-tenants will be deemed not to have proved a violation of the Fair Housing Act if they demonstrate no more than that the defendant's actions have had or will have a discriminatory effect or impact: some proof of discriminatory intent . . . is necessary.” *Id.*

HUD should not adopt this approach. It has not been followed by other courts.<sup>19</sup> More importantly, there is no indication in the FHA's text or legislative history that Congress intended to impose different liability standards on public and private actors. Therefore, HUD believes that, to the extent a defendant's practice has a disparate impact on a protected class that is not sufficiently justified by the defendant, that practice violates the FHA, regardless of whether the defendant is public or private.

Determining that the FHA includes one standard for both public and private defendants in disparate impact cases means, however, that the relevant standard should be phrased in a way that does not include language appropriate only for private defendants (e.g., by using references to “business” justifications).<sup>20</sup> HUD's proposed approach therefore, should use more generic language, requiring, for example, that the defendant at the justification stage show that its challenged practice is justified by one or more legally sufficient legitimate purposes.<sup>21</sup>

---

<sup>19</sup> See, e.g., *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d. Cir. 1998) (transposing a formula derived from FHA cases against governmental defendants to one involving a private defendant by merely omitting the word “governmental” (i.e., concluding that a private defendant must “prove that its actions furthered, in theory and in practice a legitimate bona fide . . . interest” [quoting *Rizzo*, 564 F.2d at 148-49])); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59-60 (D. D.C. 2002) (rejecting the *Brown* approach in favor of applying an impact standard for FHA claims against both public and private defendants); cf. *Graoch Associates # 33 v. Louisville/Jefferson County*, 508 F.3d 366, 382-90 (6th Cir. 2007) (Nelson, J., concurring, suggesting that, while FHA impact cases may be brought against both public and private defendants, some parts of the analysis should differ depending on which type of defendant is involved); *Betsey*, 736 F.2d at 988 n.5 (quoted in next note).

<sup>20</sup> See, e.g., *Betsey*, 736 F. 2d at 988 n.5 (“Obviously, a business necessity test is inapplicable in situations where the defendant is a public body. The *Clarkton* formulation [dealing with public defendants] similarly has no application to private defendants.”).

<sup>21</sup> Note, however, that, despite Title VII's applicability to certain governmental defendants, Congress's 1991 amendments to that statute articulated the burden placed on defendants to rebut impact cases as having to demonstrate “that the challenged practice is job

#### D. Impact Standard is Presumed to Govern All FHA’s Substantive Provisions

Certain substantive provisions of the FHA have been involved in impact-based claims more than others. For example, many of the early challenges to exclusionary zoning relied on § 3604(a)’s prohibition on practices that make housing “otherwise unavailable,” sometimes along with § 3617’s ban on interference with fair housing rights. *See, e.g., Arlington Heights*, 558 F.2d at 1290 (§ 3604(a) along with § 3617); *Black Jack*, 508 F.2d at 1184-85 (§ 3604(a) along with § 3617); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 323-24 (3d Cir. 1989) (§ 3604(a) alone); *Rizzo*, 564 F.2d at 146 (§ 3604(a) alone). Other FHA provisions, such as § 3604(b) and § 3605, have also regularly been the basis for impact-based claims. *See, e.g., Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, 887, 883-84 (8th Cir. 2003) (§ 3605 along with § 3604); *Hack v. President and Fellows of Yale College*, 237 F.3d 81, 87, 90-91 (2d Cir. 2000) (§ 3604(b) along with § 3604(a)); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1554-55 (5th Cir. 1996) (§ 3604(b) and § 3605); *Betsey*, 736 F.2d at 986-87 (§ 3604(b)).

On the other hand, some of the FHA’s substantive provisions have rarely been cited in impact-based claims. These include § 3604(c)’s prohibition of discriminatory advertisements, notices, and statements; § 3604(d)’s prohibition of misrepresentations of availability; § 3604(e)’s prohibition of “blockbusting”; and § 3606’s prohibition of discriminatory brokerage services. In addition, the Seventh Circuit, which endorsed the impact theory in 1977 in the *Arlington Heights* case, has since opined that some types of practices condemned by § 3604(a) and § 3604(b), such as racial steering, may be challenged only based on evidence of discriminatory intent. *See Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) (opining that some of the “variety of practices” covered by § 3604 “lend themselves to the disparate impact methods, other not” and holding that plaintiffs here were not entitled to challenge defendants’ alleged racial steering based on an “innocent in intent, discriminatory in impact” theory); *see also NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287, 292-93 (7th Cir. 1992) (suggesting that defendant’s concession that a FHA claim of insurance redlining may “be subject to proof under a disparate impact formula . . . may have been imprudent [citing *Bellwood*]”).

HUD’s view should be that, unless the text indicates otherwise, all of the FHA’s substantive prohibitions – and all practices outlawed by these prohibitions – include an impact standard.<sup>22</sup> This is consistent with the broad remedial purposes of the FHA, with the fact that

---

related for the position in question and consistent with *business necessity*.” *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added).

<sup>22</sup> One possible text-based exception is § 3604(f)(3), whose three subparts (A), (B), and (C) deal only with handicap discrimination and outlaw, respectively, refusals to permit reasonable modifications, refusals to make reasonable accommodations, and failures to include accessibility features in certain multifamily housing. Establishing a violation of these provisions often involves evidence that is different from that required in intent-based or impact-based

these purposes are similar to those underlying Title VII as set forth in *Griggs*, and with the fact that the FHA's text generally identifies prohibited practices without providing different liability standards for the practices outlawed. With respect to the Seventh Circuit decisions noted in the previous paragraph, HUD believes that, while the claims in *Bellwood* and *American Family* may have been properly analyzed under only an intent-based approach, other FHA claims challenging racial steering and insurance redlining might well be based on an impact approach. Indeed, in Appendix 2 below, specific examples of impact-based claims involving steering and insurance, as well as those involving practices outlawed by § 3604(c) and § 3606 are provided.

In short, HUD should conclude that, to the extent an impact standard is appropriate under the FHA, that standard should be available under all of the FHA's substantive provisions (with the possible exception discussed in note 22). HUD could, however, invite comments about this issue, and, specifically, whether commentators believe certain practices outlawed by these substantive prohibitions should not be subject to an impact standard, and if so, why these particular practices and/or prohibitions should be exempted and how HUD's proposed approach might be drafted to reflect such exemptions.<sup>23</sup>

#### IV. Plaintiff's Initial Burden

##### A. Prima Facie Case and Proper Statistical Focus<sup>24</sup>

The first step in determining whether a housing practice is outlawed by the FHA based on disparate impact is for the complaining party to make out a prima facie case. This requires a showing that the particular practice being challenged results in a substantial adverse impact on a class of persons protected by the FHA compared to its impact on other persons.

The existence of a disparate impact is generally established through review of how a particular practice operates with respect to those who are affected by it. Frequently, this is done through a quantitative or statistical analysis. Sometimes the operation of the practice is reviewed

---

claims, *see, e.g., Wisconsin Community Services, Inc. v. City of Milwaukee*, 485 F.3d 737, 753 (7th Cir. 2006) (en banc), although in certain circumstances, a defendant's practice of not accommodating individuals with disabilities could trigger both an impact claim and a § 3604(f)(3)(B) claim. *See, e.g., Lapid-Laurel, LLC v. Zoning Board of Adjustment of Township of Scotch Plains*, 284 F.3d 442, 459-68 (3d Cir. 2002). The handicap-only provisions in § 3604(f)(1) and § 3604(f)(2), being virtually identical to those prohibitions in § 3604(a) and § 3604(b), do include an impact standard. *See, e.g., Lapid-Laurel*, 284 F.3d at 446, 466-68.

<sup>23</sup> Three possible approaches to regulatory language are included in Appendix 1.

<sup>24</sup> This section relies on – and often uses phrases similar to those contained in – the *Interagency Policy Statement* (described in Part I-A) and the Supreme Court's opinion in *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989) (a Title VII decision described in Part V-A).

by analyzing its effect on an applicant pool; sometimes it consists of an analysis of the practice's effect on possible applicants, or on the population in general. Not every member of the group must be adversely affected for the practice to have a disparate impact. Evidence of discriminatory intent is not necessary to establish that a policy or practice that has a disparate impact in violation of the FHA.<sup>25</sup>

In a race case, for example, the proper comparison is between the racial composition of the at-issue housing opportunities and the racial composition of the qualified population in the relevant housing market. This comparison generally forms the proper basis for the initial inquiry in an impact case. Alternatively, in cases where such housing market statistics will be difficult or impossible to ascertain, certain other statistics – such as measures indicating the racial composition of “otherwise-qualified applicants” for the at-issue housing opportunities – are equally probative for this purpose. In fact, where figures for the general population might accurately reflect the pool of qualified housing applicants, a *prima facie* case may be established based on such statistics as well.

#### B. Causation; Need to Focus on Particular Practices<sup>26</sup>

The complaining party must also establish causation in an impact-based case. The plaintiff's burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities in the housing opportunities provided by the defendant. The plaintiff must begin by identifying the specific housing practice that is challenged. Especially in cases where a provider of housing opportunities combines subjective criteria with the use of more rigid standardized rules or standards, the plaintiff is responsible for isolating and identifying the specific housing practices that are allegedly responsible for any observed statistical disparities.

The complaining party is not permitted to make out its case by offering only one set of cumulative comparative statistics as evidence of the disparate impact of each and all of the defendant's housing practices. As is true under Title VII, FHA disparate-impact cases focus on the impact of *particular* practices on opportunities for protected-class members. As in Title VII, a FHA plaintiff does not make out an impact case simply by showing that, “at the bottom line,” there is racial *imbalance* in the housing opportunities provided by the defendant. As a general

---

<sup>25</sup> As the Eighth Circuit wrote in one of the earliest appellate decisions to endorse an impact standard under the FHA: “Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . ‘we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.’” *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

<sup>26</sup> This section relies on – and often uses phrases similar to those contained in – the Supreme Court's Title VII decision in *Wards Cove* (1989) and the amendments to Title VII enacted after *Wards Cove* in 1991.

matter, a plaintiff must demonstrate that it is the application of a specific or particular practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in an impact-based claim under the FHA.

Consider, for example, a case where a plaintiff alleges that one or more “objective” practices, as well as the use of “subjective decision-making” in the defendant’s selection process, have had a disparate impact on nonwhites, and the plaintiff bases this claim on statistics showing a disproportionately low percentage of nonwhites in the at-issue housing opportunities. Even if plaintiff can show that nonwhites are underrepresented in these housing opportunities in a manner that is acceptable under the standards set forth above, this alone will not suffice to make out a prima facie case of disparate impact. Plaintiff will also have to demonstrate that the disparity complained of is the result of one or more of the practices that are attacked, specifically showing that each challenged practice has a significantly disparate impact on housing opportunities for whites and nonwhites. Providers of housing opportunities are not liable for the various innocent causes that may lead to statistical imbalances in the racial composition of the opportunities they provide.

Therefore, with respect to demonstrating that a particular practice causes a disparate impact as described herein, the complaining party must demonstrate that each particular challenged practice causes a disparate impact. However, if the complaining party can demonstrate that the elements of a defendant's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one practice.

### C. Need to Show “Substantial” Disparate Impact

Many courts have held that, in order to violate the FHA, a defendant’s practice must produce a “substantial” disparate impact. *See, e.g., Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1217 (11th Cir. 2008); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118-19 (9<sup>th</sup> Cir. 2008) (same, citing *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9<sup>th</sup> Cir. 1997)); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10<sup>th</sup> Cir. 2007). The proposed approach reflects this view.

In determining whether the proven impact is substantial enough, no single test controls. *Cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995-96 n. 3 (1988) (Title VII case). A pertinent benchmark in the employment context is the EEOC’s four-fifths rule, *see* 29 C.F.R. § 1607.4(D), which some FHA decisions have considered. *See, e.g., Langlois v. Abington Housing Authority*, 207 F.3d 43, 50 (1st Cir. 2000). This four-fifths formula – like statistical formulas in general – becomes less reliable when the numbers are small, although even in small-number situations, this formula may provide some guidance. *See id.* The issue of whether a proven disparate impact is significant enough is fact-bound. Nothing in HUD’s proposed approach is intended to limit the evidence that may be considered in making this determination. The determination should be made based on evidence that has been considered persuasive in analogous FHA cases and in the employment discrimination context.

## D. Summary

Identifying the existence of a disparate impact is only the first step in proving unlawful discrimination. When a defendant's policy or practice has a disparate impact, the next step is to determine whether it is sufficiently justified by legitimate reasons and whether less discriminatory alternative exist. This step is discussed in Part V.

## V. Defendant's Burden of Justification; Less Discriminatory Alternatives

### A. Background; Different Articulations of the Proper Standard

Determining what the defendant's burden of justification should be in a FHA impact case is difficult. Part of this difficulty derives from the fact that the courts in FHA impact cases have tended to follow Title VII law, whose post-*Griggs* evolution has included a number of changes concerning the defendant's burden of justification.<sup>27</sup> The result is that only a few appellate decisions have carefully examined the burden of justification in a FHA impact case, and these decisions reflect, accurately, that some issues have not been authoritatively resolved.

Some of the early FHA decisions required a defendant to justify an impact-producing practice by showing a "business necessity." *See, e.g., Betsey*, 736 F. 2d at 988 (calling for "a business necessity that is sufficiently compelling to justify the challenged practice"). Other appellate decisions articulated the proper standard of justification in different ways. *See, e.g., Huntington Branch*, 844 F.2d at 936 (requiring the defendant to "prove that its actions furthered, in theory and in practice, a legitimate bona fide governmental interest"); *Rizzo*, 564 F.2d at 149

---

<sup>27</sup> A thoughtful analysis of the difficulties in FHA cases is contained in Judge Moran's opinion in *Hack v. President and Fellows of Yale College*, 237 F.3d 81, 87, 91-101 (2d. Cir. 2000) (Moran, J., dissenting in part), which noted that "although there is now consensus that Title VII standards govern claims under [the FHA], it has not always been easy to translate principles designed to regulate employment relations into the realm of public and private housing. For instance, "job performance" may be more closely related to employment qualifications than "tenant performance" is to rental criteria. . . . There are analogous, but not identical concerns at issue; just as there are analogous, but not identical provisions in the antidiscrimination statutes. The toughest challenge is "to translate a body of precedent that simultaneously is undergoing rapid evolution." . . . Because the nature of cases under the Fair Housing Act varies dramatically – from landlord/tenant disputes to Section 8 housing participation, from lending practices to urban zoning conflicts – this translation is best accomplished piece by piece, but with an eye toward the development of a coherent methodology. *Id.* at 96 (citations and footnotes omitted). *See also Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977) (discussing the difference between the defendant's burden of justification in employment-impact cases under Title VII and housing-impact cases under the FHA).

(holding that defendant’s rebuttal case is established if its practice is shown to “serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant”); *Black Jack*, 508 F.2d at 1188 n. 4 (calling for the defendant “to demonstrate that its conduct was necessary to promote a compelling governmental interest”). Whatever the standard, the courts were generally in agreement that the defendant had the burden of proof on this issue. *See, e.g., Betsey*, 736 F.2d at 988; *Rizzo*, 564 F.2d at 149. As noted above in Part II-D, this was the state of FHA impact law when Congress adopted the 1988 Fair Housing Amendments Act, which re-enacted the basic prohibitive language of the 1968 FHA.

In 1989 in *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989), the Supreme Court decided, by a 5-4 vote, a number of issues dealing with the burden of justification in a Title VII impact case. First, *Wards Cove* held that “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.” *Id.* at 659. This meant that there is “no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster.” *Id.* Second, *Wards Cove* held that, with respect to this issue, the defendant has only “the burden of producing evidence of a business justification for his employment practice,” while the “burden of persuasion . . . remains with the disparate-impact plaintiff.” *Id.* Finally, on the issue of less discriminatory alternatives, *Wards Cove* held that, if the plaintiff loses on the justification issue, he may still prevail if he can prove that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate [hiring] interests.” *Id.* at 660.<sup>28</sup>

In 1991, Congress overturned this part of *Wards Cove* in the Civil Rights Act of 1991. This law amended Title VII to explicitly recognize an impact standard and, for such cases, to place the full burden of proof (both production and persuasion) on the defendant to rebut a showing of disparate impact by demonstrating “that the challenged practice is job related for the position in question and consistent with business necessity.” *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). Furthermore, even if the defendant satisfied this burden, the 1991 amendments provided that a Title VII plaintiff could prevail if the plaintiff showed that the defendant refused to adopt an alternative employment practice “in accordance with the law as it existed on June 4, 1989 [the day before *Wards Cove* was decided], with respect to the concept of ‘alternative employment practice.’” *Id.* § 2000e-2(k)(1)(C).

The question of how, if at all, *Wards Cove* and the 1991 amendments to Title VII affect FHA impact law is a genuinely difficult one, as subsequent court decisions attest. One

---

<sup>28</sup> Further commenting on this point, the *Wards Cove* opinion noted that “any alternative practices which [plaintiffs] offer up in this respect must be equally effective as [defendants’] chosen hiring procedures in achieving [defendants’] legitimate employment goals. Moreover, ‘[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.’” *Id.* at 660 (quoting *Watson*, 487 U.S. at 998).

possibility is that the Title VII standards established by the 1991 amendments should govern, but this is problematic because those amendments by their terms apply only to Title VII and not also to other civil rights laws. Another possibility is that the *Wards Cove* standards, though “overruled” for purposes of Title VII by the 1991 amendments, should govern,<sup>29</sup> but this too seems problematic given Congress’s subsequent view that *Wards Cove* did not best reflect what was appropriate for Title VII. A third possibility is that the FHA standards are not governed by either of these sources and must be found elsewhere.

This third approach has generally been adopted by the post-1991 appellate decisions dealing with FHA impact cases. Among the more focused of these decisions (listed here in chronological order) are:

*Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243, 1254 (10<sup>th</sup> Cir.1995) (rejecting the view that a defendant in a FHA impact case must show a “compelling need or necessity” and instead holding that, in accordance with *Griggs*, such a defendant “must demonstrate that the discriminatory practice has a manifest relationship to the housing in question” (citing *Grigg’s* “manifest relationship to the employment in question” standard, *see* 401 U.S. at 432));

*Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d. Cir. 1998) (concluding that a defendant must “prove that its actions furthered, in theory and in practice, a legitimate, bona fide . . . interest” (quoting *Huntington Branch*, 844 F.2d at 936));

*Hack v. President and Fellows of Yale College*, 237 F.3d 81, 100-01 (2d. Cir. 2000) (Moran, J., dissenting in part) (advocating a “reasonably necessary to achieve an important business objective” standard);

*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”);

*Graoch Associates # 33 v. Louisville/Jefferson County*, 508 F.3d 366, 374 (6<sup>th</sup> Cir. 2007) (“the defendant must offer a ‘legitimate business reason’ for the challenged practice”);

*Graoch, supra*, 508 F.3d at 387 (Nelson, J., concurring) (concluding that “a consensus exists that business necessity is the appropriate test” and that this “business necessity” standard holds defendants to a higher standard than the more lenient “business justifications” test set forth in *Wards Cove*).

---

<sup>29</sup> *Cf. Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (noting that “*Wards Cove’s* pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA”).

## B. HUD's Position

HUD should adopt this third approach. While Title VII standards may be helpful as a starting point, the variety of cases covered by the FHA's substantive provisions and the special context of housing make a lock-step importation of Title VII standards inappropriate and inadequate.<sup>30</sup> This position is consistent with earlier views expressed by HUD, particularly two from the mid-1990s.

One of these is the 1994 *Interagency Policy Statement on Discrimination in Lending* (described in Part I-A), where HUD, along with the Justice Department and the eight other agencies, stated that 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 18269. Although this *Statement* here and elsewhere used the Title VII-like phrase "business necessity" to describe the defendant's burden of justification, *see id.* at 18268-69, it did so by often putting this phrase in quotation marks and in the context of providing guidance to private businesses while recognizing that "the precise contours of the law on disparate impact as it applies to lending discrimination are under development." *Id.* at 18269.

A second revealing indication of HUD's position occurred in 1995, when HUD, represented by the Justice Department, took the position before the Tenth Circuit in the *Mountain Side* case that the respondent there had "failed to rebut the prima facie case of disparate impact on the grounds of business necessity." 56 F.3d at 1254. The Tenth Circuit's opinion noted that "HUD argues that the Secretary applied the correct definition of business necessity when Mountain Side was required to show 'compelling need or necessity' not merely 'demonstrable relationship to . . . legitimate business interest.'" *Id.* In response to this argument, the Tenth Circuit held that HUD "correctly determined that the business necessity standard in Title VIII [FHA] cases is imported from employment discrimination case law under Title VII," but ruled that HUD went beyond the appropriate "business necessity" test and "incorrectly required that Mountain Side to demonstrate a 'compelling need or necessity.'" *Id.* Rather, the proper standard, according to the Tenth Circuit, was that in "FHA housing discrimination cases, the defendant must demonstrate that the discriminatory practice has a manifest relationship to the housing in question." *Id.* HUD should accept this ruling and adopt it.

---

<sup>30</sup> *See* note 26. It is also noteworthy that Title VII's text reflects a special concern against quota-like hiring that led the Supreme Court in *Wards Cove* to interpret that statute in a way that would not encourage such hiring. *See Wards Cove*, 490 U.S. at 652 (citing 42 U.S.C. § 2000e-2(j)). The FHA has no comparable provision, and, indeed, examples of pro-minority affirmative housing programs have been virtually non-existent throughout the FHA's history.

The defendant's justification must be stronger than the legitimate non-discriminatory reason that must be articulated under an unequal treatment analysis. *See, e.g., Huntington Branch*, 844 F.2d at 936; *Betsey*, 736 F.2d at 988; *Rizzo*, 564 F.2d at 148-49. Specifically, the justification in a FHA impact case must:

be substantial and not frivolous, *Mountain Side*, 56 F.3d at 1254 (“mere insubstantial justification . . . will not suffice”); 1994 *Interagency Policy Statement*, 59 Fed. Reg. at 18269 (the justification “may not be hypothetical or speculative”), compare *Huntington Branch NAACP v. Town of Huntington, New York*, 844 F.2d 926 (2<sup>nd</sup> Cir. 1988), concern may be non-frivolous, but may not be sufficient because it is not reflected in the record; must be legally sufficient and non-discriminatory, *Budnick v. Town of Carefree*, 518 F.3d 1109 (9<sup>th</sup> Cir. 2008) (citing *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006) (quoting *Pfaff*, 88 F.3d at 746-47)); have “a manifest relationship to the housing in question,” *Mountain Side*, 56 F.3d at 1254; *see also Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, 883 (8th Cir. 2003) (“manifest relationship”); 1994 *Interagency Policy Statement*, 59 Fed. Reg. at 18269 (the justification “must be manifest”); must bear a significant relationship to the housing, lending, or insurance opportunity, *Dehoyos v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 12366 (N.D.TX 2007); “serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant;” opportunity, *Rizzo*, 564 F. 2d at 149; *accord Lapid-Laurel, LLC v. Zoning Board of Adjustment of Township of Scotch Plains*, 284 F.3d 442, 468 (3d Cir. 2002); and, advance a “legitimate and substantial goal of the measure in question.” *Langlois*, 207 F.3d at 51.

Furthermore, HUD should take the position that the defendant should bear the full burden of proof (both of production and of persuasion) on this issue. This is consistent with FHA decisions both before and after *Wards Cove* and the 1991 amendments to Title VII. *See, e.g., Betsey*, 736 F.2d at 988 (“when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice”); *Mountain Side*, 56 F.3d at 1254 (“the defendant must demonstrate that the discriminatory practice has a manifest relationship to the housing in question”). It also reflects the fact that a FHA defendant is generally in a far superior position than the plaintiff to demonstrate what the defendant's legitimate purposes underlying its practices are and why these purposes justify the practice being challenged.

### C. Less Discriminatory Alternatives

There is general agreement about this element in a FHA impact case. *See, e.g., Huntington Branch*, 844 F.2d at 936 (“the defendant must prove . . . that no alternative would serve that interest with less discriminatory effect”); *Rizzo*, 564 F.2d at 149 (“the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact”). This is consistent with HUD's position in the 1994

*Interagency Policy Statement*, which provides:

Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect.  
59 Fed. Reg. at 18269.

The most difficult issue concerning this “less discriminatory alternative” element is determining which party should bear the burden of proof. As noted above in Part V-A, *Wards Cove* put this burden on the plaintiff, but Congress changed this to being “in accordance with the law as it existed” prior to *Wards Cove* (without specifying what this was). The FHA cases before *Wards Cove* tended to put this burden on the defendant. *See, e.g., Huntington Branch*, 844 F.2d at 936; *Rizzo*, 564 F.2d at 149. Post-1991 FHA cases have generally continued to take this position. *See, e.g., Salute*, 136 F.3d at 302 (burden on the defendant); *Langlois*, 207 F.3d at 50 (same); *see also Graoch*, 508 F.3d at 388 (Nelson, J. concurring: “The consensus across the circuits . . . is that in the housing context defendants have the burden of proving the absence of a less discriminatory alternative.”); *see also United States v. Village of Island Park*, 888 F. Supp. 419 (E.D. N.Y. 1995), *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. TX 2000). *But see Graoch*, 508 F.3d at 374 (majority opinion, putting this burden on the plaintiff).

For reasons similar to those given in connection with the burden relating to the justification issue, HUD should take the position that the defendant should have both the burden of production and the burden of persuasion on the issue of whether a less discriminatory alternative exists. Court decisions both before 1991 and after 1991 have taken this position, and Congress explicitly overruled the Supreme Court’s contrary interpretation in the Title VII context.

In addition, a defendant will generally be in a far better position than a plaintiff to know what alternative practices are available, as well as the business advantages and disadvantages of these alternatives. A defendant is by definition in an industry where it will have greater access to alternative techniques that will meet its business needs and in general is better placed to explain its consideration of those alternatives in defending its conclusion about which approach it has taken. In addition, it seems fair to ask that a defendant who has chosen, among alternative practices, one that results in a substantial disparate impact be able to show why it chose that practice over less discriminatory alternatives. On this point, if HUD engaged in rule making, HUD could invite comments on which party should bear the burden of proof on the issue of whether there is a less discriminatory alternative, and why.<sup>31</sup>

---

<sup>31</sup> One possible variation on the approach advocated in the text would be to put the burden of production on the plaintiff (i.e., the plaintiff would have to produce evidence showing the existence of one or more specific alternatives and the fact that such alternative(s) would result in less discrimination), but leave the ultimate burden of persuasion on this issue on the

## APPENDIX

---

defendant. *Cf. Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002) (imposing, in “reasonable accommodation” case under the FHA’s § 3604(f)(3)(B), only an initial burden on the plaintiff, after which the burden is placed “on the defendant to show that the accommodation is unreasonable”); 42 U.S.C. § 2000e-2(k)(1)(A)(iii), (C) (Congress’s 1991 amendment regarding impact claims under Title VII, which provides that the “complaining party makes the demonstration . . .in accordance with” pre- *Wards Cove* law).

## **Appendix 1: Possible Regulatory Language: Impact Claims under the Fair Housing Act**

### I. Overview

There are a variety of ways to articulate an impact regulation and also different ways to place such a regulation in HUD's current fair housing regulations. Part II contains our suggestion for how to articulate a new impact regulation. Part III identifies some of the ways that this new regulation might be placed in HUD's current regulations.

### II. Proposed Impact Regulation

*Unjustified discriminatory impact:* Prohibited actions for purposes of this subsection include employing any practice that has an adverse impact based on race, color, religion, sex, familial status, national origin, or handicap unless that practice is shown by the party employing it to have a legally sufficient justification.

*For purposes of this subsection:*

– “practice” includes any practice, policy, procedure, process, standard, elements of practices, policies, procedures, processes, or standards that are not capable of being separated for analysis, and any other action that is intended to evaluate or affect a group of persons.

– “adverse impact” means a substantially different rate of selection which works to the disadvantage of members of a race, sex, ethnic group, religion, [etc.]. The term “substantially” means the same as it has been interpreted in prior judicial and HUD administrative decisions under this Act and in prior judicial decisions and administrative regulations under Title VII.<sup>32</sup>

– a “legally sufficient justification” is one that (1) furthers one or more of the user's legitimate, non-discriminatory interests; and (2) cannot be served by an alternative practice with a less discriminatory impact. A “legally sufficient justification” must:

- bear a manifest relationship to the practice that is challenged;
- have a significant correlation with important elements of the operation of the housing opportunity or business;
- involve a matter of substantial concern to the operation of the housing opportunity or business; and,
- be more effective in accomplishing its purpose than a less discriminatory alternative.

---

<sup>32</sup> This paragraph is based in part on the EEOC's 29 C.F.R. § 1607.16(B) and the 1991 amendments to Title VII of the Civil Rights Act of 1964.

A “legal sufficient justification” may not:  
be hypothetical, speculative, or insubstantial; or  
be facially discriminatory or otherwise reflect an intent to discriminate on a  
prohibited basis.

### III. Placement of a new regulation in HUD’s Current Fair Housing Regulations

Placement of this new regulatory language in HUD’s current fair housing regulations (24 C.F.R. Part 100) could be accomplished in any one of a variety of ways, including by placing it:

(1) once in the “Scope” section of the regulations (at 24 C.F.R. § 100.5, as a new subpart (d)).<sup>33</sup>

(2) once in the “Definitions” section of the regulations (at 24 C.F.R. § 100.20, as an additional part of the definition of “*Discriminatory housing practice*”).

(3) once in the “Definitions” section of the regulations (at 24 C.F.R. § 100.20, as a new definition of “*Because of race*”/“*based on race*”).

(4) in those parts of the regulations providing overall coverage of the FHA’s substantive prohibitions, as follows:

– As an amendment to 24 C.F.R. § 100.50 [applies to § 804 and § 806] , add the following subsection “(d)”:

– As an amendment to 24 C.F.R. § 100.110 [applies to § 805] , add the following subsection “(c)”:

– As an amendment to 24 C.F.R. § 100.400(c) [applies to § 818] , add the following subsection “(6)” or an a new subsection (d):<sup>34</sup>

(5) in every part of the regulations dealing with the FHA’s various substantive prohibitions, as follows:

– As an amendment to 24 C.F.R. § 100.60 [applies to § 804(a) and § 804(f)(1)] , add the following subsection “(d)(6)” or as a new subsection “(c)”:

– As an amendment to 24 C.F.R. § 100.65 [applies to § 804(b) and § 804(f)(2)] , add the following subsection “(b)(6)” or as a new subsection “(c)”:

– As an amendment to 24 C.F.R. § 100.70 [applies to § 804(a)-(b) and § 804(f)(1)-(2)] , add the following subsections “(c)(5)” and “(d)(5)” or as a new subsection “(e)”:

---

<sup>33</sup> This is our preferred alternative.

<sup>34</sup> This addition might be unnecessary to the extent that claims under § 818 are automatically included as a result of covering §§ 804-806 claims, but explicitly covering § 818 claims would eliminate any uncertainty on this matter and therefore seems the wiser technique.

- As an amendment to 24 C.F.R. § 100.75 [applies to § 804(c)] , add the following subsection “(c)(5)” or as a new subsection “(e)”:*
- As an amendment to 24 C.F.R. § 100.80 [applies to § 804(d)] , add the following subsection “(b)(6)” or as a new subsection “(c)”:*
- As an amendment to 24 C.F.R. § 100.85 [applies to § 804(e)] , add the following subsection “(c)(3)” or as a new subsection “(d)”:*
- As an amendment to 24 C.F.R. § 100.90 [applies to § 806] , add the following subsection “(b)(5)” or as a new subsection “(c)”:*
- As an amendment to 24 C.F.R. § 100.110 [applies to § 805] , add the following subsection “(c)”:*
- As an amendment to 24 C.F.R. § 100.202 [applies to § 804(f)(3)] , add the following as a new subsection “(e)”:*
- As an amendment to 24 C.F.R. § 100.400(c) [applies to § 818] , add the following subsection “(6)” or as a new subsection (d):*

Determining which is the best placement technique is a matter on which HUD presumably has expertise and will want to exercise its discretion.

## **Appendix 2: Examples of Impact-Producing Practices that Might Violate the FHA**

### List of Example Topics:

Residency requirement by public housing authority in predominantly white city

Residency requirement by all-white town for Sec. 8 vouchers

Rental Example #1 (Sex discrimination = refusal to consider alimony payments)

Rental Example #2 (Sex discrimination = eviction of tenants who receive welfare)

Rental - Occupancy standards (families with children)

Rental-No Section 8 policy

Rental payment due dates and penalties (disability discrimination, beyond refusal to make reasonable accommodations)

Rental - Landlord requires English speaker

Rental - Landlord requires U.S. citizenship

Rental- Landlord evicts victims of violence

Sales - Computer program generates listings based on prospect's current neighborhood

Group home (disability) barred by zoning allowing only blood-and-marriage families

Group-home restriction (disability discrimination)

Group-home restriction (disability discrimination, beyond refusal to permit reasonable modifications)

Advertising (familial status discrimination)

Advertising (disability discrimination)

Advertising (perfect for single or couple)

Lender Example #1-A (no home loans under \$100,000)

Lender Example #1-B (same: national origin discrimination)

Lender Example #2

Home-loan Pricing Example #1

Home-loan Pricing Example #2

Homeowners insurance – age-of-house denials

Homeowners insurance – rating territories

Homeowners insurance – replacement-coverage differentials

Homeowners insurance – marketing of products

*Residency requirement by public housing authority in predominantly white city*

– based on *United States v. Housing Authority of City of Chickasaw*, 504 F. Supp. 716 (D. Ala. 1980). A public housing authority (“PHA”) in a predominantly white city has a rule that only local residents are eligible for housing in its units. The overall metropolitan area in which the PHA is local has a substantial minority population, many of whom would qualify for the PHA’s units but for its local residency requirement. Even if this requirement were not adopted for discriminatory reasons, it is likely to violate the FHA based on its disparate impact in excluding minorities. The only way such a requirement could not violate the FHA under these circumstances would be for the PHA to show that the requirement is justified by a legitimate purpose and that this purpose could not be served by a less discriminatory alternative.

*Residency requirement by all-white town for Sec. 8 vouchers*

– based on *Langlois* + other cases

The Section 8 program for rental assistance is a federally funded and supervised rent subsidy program for low-income tenants, but it is administered primarily through local units called public housing authorities (“PHAs”), each of which is generally coextensive with a local town or city. A main form of assistance is the voucher, which a PHA may issue to certain low-income families. The voucher program requires a PHA to pay to the family's landlord the difference between the gross rent (or a “payment standard” adopted by the PHA) and a lesser amount paid by the family. Because of an excess of demand, PHAs often maintain a waiting list for applicants who will receive vouchers if and when existing vouchers are surrendered or appropriations increase.

Vouchers are awarded by local PHAs, but applicants need not be local residents when they apply, and they may apply for vouchers from any PHA in the state. A portability provision

permits the user to move after twelve months while retaining the voucher to any area in which a Section 8 program is administered. There is thus an incentive for persons to apply to one or more (sometimes many) PHAs outside communities where they live or work.

Assume that a PHA in a suburban town whose residents are predominantly white determines that its present waiting list will soon be exhausted. This PHA decides to hold a lottery to rank new applicants in which it proposes to give preference to local residents (defined as those currently living or working in the PHA's town), so that so that local residents would be listed ahead of those applicants currently residing outside of the PHA's town. Local preferences in the awarding of Section 8 vouchers do not explicitly violate any provision in the governing statute.

The PHA's local-residency-preference element is challenged by a Latino individual who has a low income, intends to apply to the PHA for a voucher, and does not reside or work in the PHA's town. The claim is that the PHA's local residency preference violates the FHA.

The key to determining whether the PHA's local residency preference violates the FHA would be, first, to determine the relative impact of this preference on Latinos versus non-Latinos in the local housing market (probably the greater metropolitan area). If a disparate impact is established, the next steps would be to determine whether a legitimate reason exists for the PHA's local residency preference and, if so, whether this reason could be advanced equally well with a less discriminatory alternative.

*Rental Example #1 (Sex discrimination = refusal to consider alimony payments)*

A landlord requires applicant to show a certain level of income in order to qualify for tenancy, but refuses to consider alimony payments in satisfaction of this requirement. A female applicant who is rejected as a result of this policy may challenge the landlord's action as being a discriminatory refusal to rent because of sex, assuming that a significantly higher proportion of alimony recipients are females and that more females than males would be disadvantaged by this policy.

If the evidence does establish that the landlord's policy disqualifies significantly more women than men, then the burden would shift to the landlord to justify its policy by a significant justification for the policy. If the landlord is unable to satisfy this burden, it would lose. If the landlord does satisfy this burden (say, by showing that a steadier source of income than alimony is critical to a tenant's ability to pay the rent consistently), the landlord would prevail unless a less discriminatory alternative is available that would equally well advance this goal.

*Rental Example #2 (Sex discrimination = eviction of tenants who receive welfare benefits)*  
*[from HUD Title VIII Manual]*

Assume that a landlord with a 100-unit building decides to evict all of its tenants who are receiving welfare benefits. A particular female who is about to be evicted under this policy files a claim based on the theory that this policy has a disparate impact against women and therefore violates the Fair Housing Act's prohibition against sex discrimination. Assume that the group to which the policy applies -- that is, the 100 tenants in the building -- is made up of 40 women (the protected class in this case) and 60 men (the nonprotected class). Within these two groups, there are ten women and three men who receive welfare benefits and are therefore faced with eviction under this policy. These statistics would establish a large enough disparate impact to shift the burden of justification for this policy to the landlord.

In *HUD v. Ross*, Fair Hous.-Fair Lend. Rptr. ¶ 25,075, at pp. 25,699-700 (HUD ALJ 1994), a HUD ALJ held that such a policy had an unlawful discriminatory impact on women, based on the fact that female-headed households accounted for an overwhelming proportion (about 95%) of the families that received welfare in the local area.

*Rental - Occupancy Standard [from HUD Title VIII Manual]*

A landlord adopts an occupancy restriction of two persons per bedroom (e.g., no more than two people are allowed in a one-bedroom apartment) and, pursuant to this policy, seeks to evict a couple who has just had a baby from a one-bedroom apartment. Assuming that the relevant statistics show that this occupancy policy has a significant disparate impact on families with children, it might violate the Fair Housing Act even if it was not adopted with the intent of discriminating against such families, unless the landlord shows that the policy is needed to achieve some substantial business goal.

*Landlord establishes a no Section 8 policy (race discrimination)*

A landlord with a 100 unit apartment complex, establishes a policy of not accepting any applicant, and of not retaining any resident, whose rent is paid through the Section 8 Housing Choice voucher program. Such a policy, when applied to current residents, will result in the eviction of 25 residents, 20 (or 80%) of whom are African American. Such a policy when applied to the recent applicants for units at the property, will result in disqualification of 100 applicants, 75% of whom are black. The policy has a disparate impact based on race.

---Based on holding in *Graoch v. Louis./Jeff Co. Human Relations Commission*, 508 F.3d 366 (6<sup>th</sup> Cir. 2007).

*Rental payment due dates and penalties (disability discrimination, beyond refusal to make reasonable accommodations)*

A landlord whose residents are mostly young adults with physical and mental disabilities requires that rental payments be made by the 5<sup>th</sup> of each month and imposes a \$50 late fee for payment after that date. The U.S. Social Security Administration's policy is to send SS disability checks on the day of the month corresponding to the recipient's date of birth, meaning that

recipients of such checks may routinely receive checks well after the due date for rental payments. Each disabled tenant may request a reasonable accommodation from the landlord's policy. In addition, that policy may have a disparate impact based on disability on the residents of its property.

*Rental - Landlord requires English speaker (national origin discrimination)*

– based on *Veles v. Lindow*, 2000 WL 1807851 (9<sup>th</sup> Cir. Nov. 1, 2000)

A landlord has a policy of renting only to tenant groups in which at least one adult member speaks fluent English, which results in rejection of a Latino family. Assuming that this policy was not adopted for discriminatory reason, it may still be challenged as violating the FHA if plaintiffs can show that it disproportionately excludes tenants on the basis of national origin. If such a showing is made, the landlord would have to provide a nondiscriminatory justification for this policy. The landlord might be able to do this by showing that its policy was necessary so that the landlord could communicate effectively with tenants in an emergency.

*Rental - Landlord requires U.S. citizenship (national origin discrimination)*

– based on *Martinez v. Partch*, 2008 WL 113907 (D.Colo. Jan. 9, 2008); *Corwin v. B'Nai B'Rith Senior Citizens Housing, Inc.*, 489 F. Supp. 2d 405 (D. Del. 2007); *United States v. Dittmar Co.*, 1 EOHHC ¶ 13,730 (E.D. Va. Oct. 2, 1975).

A landlord has a policy of renting only to U.S. citizens. Discrimination on the basis of citizenship is not explicitly outlawed by the FHA, although proof that this policy were adopted for discriminatory reasons or applied in a discriminatory way might establish an intent-based violation of the FHA. In addition, the landlord's policy might be challenged as violating the FHA if the evidence shows it disproportionately excludes tenants on the basis of national origin. If such a showing is made, the landlord would have to provide a nondiscriminatory justification for this policy that could not be achieved by a less discriminatory alternative.

*Rental--Landlord evicts victims of violence*

A landlord has a uniform policy of evicting all residents of a unit when there is a violent incident at the unit. Such a policy at a property, when 75% of such incidents involve domestic violence directed at an innocent female resident of the unit, has a disparate impact based on gender. Even when the property presents a substantial justification for its policy--the protection of the safety of residents, there is a less discriminatory alternative of evicting only the perpetrator of the violence.

---based on charge issued by the Department of Housing and Urban Development in *Secretary v. CBM Group, et al.* Case No. 10-99-0538-8, available on line at [http://www.aclu.org/images/asset\\_upload\\_file37\\_33994.pdf](http://www.aclu.org/images/asset_upload_file37_33994.pdf) and other cases.

*Sales - Computer program generates listings based on prospect's current neighborhood*

A real estate broker operates a website that offers to help homeseekers find listings of homes by entering certain information about the homeseeker. The computer program that drives this system uses characteristics of the homeseeker's current neighborhood to find "matching" neighborhoods in the metropolitan area that the homeseeker now seeks to move to. This program may include some race-based elements (e.g., the racial demographics of neighborhoods) or some other elements that correlate with race (e.g., local schools' ratings or test scores). Even if the broker is not aware of this (i.e., has no intent to discriminate), the result of using this system is that homeseekers who currently live in predominantly white or predominantly black neighborhoods will be given listings in different neighborhoods that correspond racially to the homeseekers' current neighborhoods. Thus, the broker's system results in racial steering that would violate the FHA, unless the broker can provide a legally sufficient justification for using this system and there is no less discriminatory alternative.

*Group home (disability) barred by zoning allowing only blood-and-marriage families*  
*[from HUD Title VIII Manual]*

Disparate impact has regularly occurred in the area of group home litigation (i.e., cases challenging zoning and other land-use restrictions on group homes for persons with disabilities). A typical example has involved a group of unrelated persons who are recovering from alcohol or drug addiction and who seek to occupy a home located in a single-family neighborhood. This group is blocked by the local municipality's zoning ordinance, which only permits, for example, families related by blood or marriage to occupy homes in this neighborhood. If this restriction is challenged for illegally discriminating against persons with disabilities, one of the theories supporting this challenge could be that the restriction has a disparate impact on the disabled group involved. (The restriction may also be challenged on other grounds under the FHA, such as the statute's prohibition against refusals to reasonably accommodate housing opportunities for persons with disabilities.)

*Group-home restriction (disability discrimination)*

A municipality adopts an ordinance requiring that all group homes be located more than one mile from any other group home. In this ordinance, "group homes" include communal housing for people with disabilities, transitional housing for parolees, housing for sexual offenders, and nursing homes. If the ordinance has a significant disproportionate effect on housing for people with disabilities (not including the housing for parolees and sexual offenders who are not persons with disabilities), it may have a disparate impact based on disability. In addition, if the ordinance defines group homes as exclusively housing serving people with disabilities, the ordinance on its face discriminates based on disability, and a disparate impact analysis need not be applied.

*Group-home restriction (disability discrimination, beyond refusal to permit reasonable modifications)*

The homeowners' association of a large condominium community has a policy of refusing

permission for any structural modifications to the entrance of individual units. As to a disabled individual who wishes to install a ramp to provide an accessible entrance and who makes a request for a reasonable modification, that person may request a reasonable modification pursuant to 42 U.S.C. § 3604(f)(1) of the Act. In addition, the policy of refusing to permit any structural modifications, in a condominium community [area/housing market] that has a significant population of physically disabled individuals, may also have a disparate impact based on disability.

*Advertising (familial status discrimination)*

A large landlord places a series of advertisements in local newspapers and the internet, advertising “Senior Discount.” Discrimination based on age is not prohibited by the Fair Housing Act, and the advertisements do not convey to a reasonable person a preference or limitation based on any protected class status (which would violate the FHA’s § 804(c)) . However, the evidence reveals that the “Senior Discount” policy has a disparate impact based on familial status and is not supported by a legitimate business justification. Therefore, the advertisement of the policy constitutes a separate violation of the Act’s prohibition in § 804(c) against making a statement or advertisement that indicates a limitation or preference based on familial status.

*Advertising (familial status discrimination)*

A landlord places advertisements routinely in a local newspaper advertising that her one bedroom apartments are “perfect for a single or couple.” A reasonable person reading this advertisement understands that the statement conveys to the reader a practice that limits occupancy to households without children (which would violate the FHA’s § 804(c)). Even if a reasonable reader would not understand the advertisements to convey such a discriminatory limitation, a policy of limiting occupancy in one bedroom units may, in specific circumstances, have a disparate impact based on familial status, and violate the Act’s prohibition against discrimination based on familial status. Similarly, a statement that a three bedroom apartment was “too small” for a family of five may be evidence of a policy that has a disparate impact based on familial status.

--- Based on *Guider v. Bauer*, 865 F. Supp. 492 (N.D. Il 1994), *United States v. Badgett*, 976 F.2d 1176 (8<sup>th</sup> Cir. 1992) and the facts in the *Secretary v. Pfaff*, HUDALJ 10- 93-0084- 8 (October 27, 1994).

*Advertising (disability discrimination)*

A large retirement community that qualified for the FHA’s “housing for older persons” exemption advertises itself as being for “Active Seniors.” The advertisements may convey to a reasonable person a preference or limitation based on disability (which would violate the FHA’s § 804(c)). Even if they do not, however, the evidence may reveal that the community uses its preference for “Active Seniors” as a policy that has a disparate impact based on disability and is not supported by a legitimate business justification. Therefore, the advertisement of the policy constitutes a separate violation of the Act’s prohibition in § 804(c) against making a statement or

advertisement that indicates a limitation or preference based on disability.

[See Schwemm, Robert and Allen, Michael, "For the Rest of Their Lives: Seniors and the Fair Housing Act," <http://www.bazelon.org/issues/housing/articles/11-04iowalawreview.pdf>, cases at footnote 237. The footnotes lay out the various authorities that suggest that use of "active adult," together with other limiting actions, can be a §3604(c) violation on the basis of disability.

*Lender Example #1-A [from 1994 FFIEC Joint Statement]*

A mortgage lender's policy is not to extend loans for single family residences for less than \$100,000. This policy has been in effect for ten years. This minimum loan amount policy is shown to 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. The lender will be required to establish the business justification for the policy.

*Lender Example #1-B [from HUD Training Manual]*

A mortgage company has a policy of not making loans under \$100,000 to anyone, because it has determined that loans under this amount are not profitable. Based on this policy, the company refuses to deal with a Latino family who wants to apply for a home loan for less than this amount (e.g., \$70,000). Depending on the area's demographics regarding Latinos vs. non-Latinos who might seek mortgages under \$100,000, this policy could be challenged as being discriminatory on the basis of national origin in violation of the Fair Housing Act.

*Lender Example #2 [from 1994 FFIEC Joint Statement]*

A mortgage lender decides to switch its practice of primarily considering net income in making underwriting decisions to primarily considering gross income. However, in calculating gross income, the lender does not distinguish between taxable and nontaxable income even though nontaxable income is of more value than the equivalent amount of taxable income. The lender's policy may have a disparate impact on individuals with disabilities, who are more likely than the general applicant pool to receive substantial nontaxable income. The lender's policy is likely to be proven discriminatory. First, the lender is unlikely to be able to show that the policy is justified by a significant business reason or reasons. Second, even if the lender could show a significant business justification, the lender could achieve the same purpose with less discriminatory effect by "grossing up" nontaxable income (i.e., making it equivalent to gross taxable income by using formulas related to the applicant's tax bracket).

*Home-loan pricing #1*

– based on *Garcia v. Country Wide Financial Corp.*, 2008 U.S. Dist. LEXIS 106675 (C.D. Cal. Jan. 17, 2008) + other cases

A mortgage lender permits its loan officers to include non-risk based fees and higher rates in home purchase loans, which, although not violate of other federal laws, have a significant disparate impact on blacks and Latinos receiving loans from the lender. The result is that minorities receive higher priced loans, including loans with higher interest rates and higher costs.

The lender's policy of permitting subjective assessment of rates and fees that result in higher priced loans has a disparate impact based on race and national origin. The lender may defend its policy based on market and competition justifications, but the policy must be directly related to achieving those justifications and there must not be a less discriminatory way to accomplish these justifications.

#### *Home-loan pricing #2*

– based on *Hoffman v. Option One Mortgage Corp.*, 589 F. Supp. 2d 1009 (N.D. Ill. 2008) + other cases

A mortgage lender provides several home-loan products with different interest rates based on the credit scores of borrowers. However, the lender leaves to the discretion of its loan officers how this credit score system should be applied in particular situations. Even if the policy of using credit scores to establish differing interest rates is justified by a proven relationship between risk and credit score, the lender's practice of permitting loan officers to provide borrowers with different interest rates based on subjective, non-risk-based factors may have a disparate impact based on race or national origin where statistical evidence establishes that the policy results in higher priced loans for minority borrowers.

#### *Homeowners insurance-- age-of--house denials*

– based on *Toledo Fair Housing Center v. Nationwide*, 704 N.E.2d 667 (Ohio Comm. Pleas 1999)

A home insurer refuses to provide insurance on any home build before 1950 in an area where 50% of African-American homeowners compared to 25% of white homeowners live in such dwellings. Because this policy has a disparate impact on African-Americans, it would violate the FHA unless the insurer can provide a legally sufficient justification. The insurer claims that, because losses are higher and there is a greater risk in older houses, it cannot afford to insure these dwellings.

It is unlikely that the insurer's claimed justification will be sufficient. First, the insurer must produce empirical evidence to support the contention that losses are higher on older dwellings. Even if such evidence establishes this legitimate justification, there are likely to be less discriminatory alternatives that would serve the same business objective of the insurer (e.g., conducting an on-site inspection of the house or charging higher premiums to cover the added costs).

#### *Homeowners insurance – rating territories*

A regional home insurer divides a large metropolitan area into two rating territories, one consisting of the central city where the population is 30% African American and the second consisting of the suburban ring which is 5% African American. Frequency and severity of losses for insureds in the central city are approximately 10% higher than for those in the suburbs.

Consequently, the insurer charges residents in the central city 10% more than it charges suburban residents for the same policy.

The evidence shows that if the insurer had divided the metropolitan area in half by drawing a north-south line that created territories consisting of the east side and west side, losses on the east side would have been found to be approximately 10% higher than losses on the west side. A similar pattern would be found by drawing an east-west line that divided the metropolitan area into north-side and south-side rating territories, with losses in the north side 10% higher than in the south side. In these two alternative configurations (which the insurer never considered), the racial composition in both territories would be roughly equal, with African Americans accounting for 15% of each territory. Had the insurer drawn its boundaries in either of these two ways, therefore, African Americans would have accounted for just 15% of those residing in the area paying the higher premium instead of 30% as they are in the company's current configuration.

Under these circumstances, the insurer's current territorial rating classification has a disparate impact on minority communities and despite, evidence showing that this classification system serves a legitimate business purpose, less discriminatory alternatives are available that would serve this purpose and the current system would violate the FHA.

#### *Homeowners insurance – replacement-coverage differentials*

A large nationwide insurer refuses to provide full replacement cost coverage on homes that are older than 50 years of age in a community where 40% of residents in predominantly Hispanic neighborhoods compared to 15% of residents in predominantly white neighborhoods reside in homes older than 50 years. Consequently, this policy has a disparate impact based on the national origin of the affected neighborhoods, which prompts a FHA complaint by a resident of the predominantly Hispanic neighborhood.

By way of justification, the insurer presents evidence showing that average losses are higher in older homes than in newer homes. Plaintiff responds by contending that age of housing is in fact a poor predictor of losses and argues that a more appropriate underwriting guideline would utilize age of the major systems of the house (e.g., electric, heating, plumbing, roof), which would result in excluding fewer people and, in the particular metropolitan area from where the complaint is filed, a relatively smaller percentage of Hispanic residents. The insurer responds that it does obtain such information on its applications, but that it has not felt the need to incur the expense of analyzing the effects of the age of each system since age of the home generally has produced adequate results for its purposes.

Because this is a large nationwide insurer that provides insurance for homes of any age (though not replacement cost on homes over 50 years of age), it is reasonable to expect that the insurer could provide more detailed information on factors associated with loss than just the age of the home. In these circumstances, the insurer's practice of refusing to provide full replacement cost

policies on homes over 50 years of age would violate the FHA, because, even if the justification offered is legitimate, a less discriminatory alternative that serves the same business objective is available.

*Homeowners insurance – marketing of products*

– based on *Toledo Fair Housing Center v. Nationwide*, 704 N.E.2d 667 (Ohio Comm. Pleas 1999)

A regional home insurer decides where to market its products based on an area map that ranks certain zip codes by their desirability. Assume that this marketing technique has a disparate impact based on the racial make-up of the neighborhoods in the area; that is, the insurer does not make its products available in predominantly black neighborhoods with homes and risk factors similar to predominantly white neighborhoods where the insurer does make its products available. Even if the evidence fails to show that the insurer's marketing technique involves disparate treatment in violation of the FHA, it may still violate the FHA based on its disparate impact, unless the insurer can justify it based on legitimate business considerations and no less discriminatory alternatives exists.