



Housing Opportunities Project for Excellence, Inc.
Ensuring fair and equal housing opportunities for all people.

January 17, 2011

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

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

To Whom It May Concern:

Housing Opportunities Project for Excellence, Inc. (HOPE) supports the Department's efforts to establish standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act. The Department has requested comments on the issue of which party bears the burden of proof to establish a less discriminatory alternative. The purpose of these comments is to respectfully request that the Department (1) follow the many federal courts that have held that the burden of proof is on the defendant/respondent; and (2) follow its previous guidance and adopt a "business necessity" defense for private entities in disparate impact cases under the Fair Housing Act.

(1) The burden of proof should be upon the defendant/respondent

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

There is no unanimity among the courts that have addressed the question of which party should have the burden of proof regarding less discriminatory alternatives. Many federal courts have held that the defendant/respondent has the burden of proof to demonstrate that there is no less discriminatory alternative. *See e.g. Huntington Branch, NAACP v. Town of Huntington*, 844

F.2d 926, 939 (2d Cir. 1988) (a defendant must show that there are no less discriminatory alternatives available); *Mt. Holly*, 658 F.3d at 385 (holding that defendants have the burden of showing that there is no less discriminatory alternative and that “[o]nly when the defendants make this showing does the burden shift back to the plaintiffs—where it ultimately remains—to provide evidence of such an alternative”); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000) (affirming the district court’s decision holding that the defendant failed to show a less discriminatory alternative); *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 503 (N.D. Tex. 2010); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000).

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

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

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

assess whether an alternative imposes an undue hardship upon it in the particular circumstances of the case and is consistent with its goals.

(2) The Department should follow its previous guidance and adopt a “business necessity” defense for private entities in disparate impact cases under the Fair Housing Act

HOPE respectfully suggests that “business necessity” is “the appropriate standard for private entities’ defense against disparate-claims made under the FHA.” *See Graoch Assoc. #33 LP v. Louisville/Jefferson County*, 508 F.3d 366, 387 (6th Cir. 2007) (Moore, J., concurring in part, dissenting in part). “Business necessity” more accurately defines the standard that respondents/defendants must meet in rebutting a complainant/plaintiff’s showing of discriminatory effect and is consistent with the standard previously adopted by the Department, other federal regulators and federal courts.

First, “business necessity” holds respondents/defendants to a higher standard than the more lenient term “legally sufficient justification” proposed in the regulation. *See id.* (comparing the business necessity standard to the business justifications test). “Necessity” connotes “an imperative requirement or need for something.” *Id.* at 388 (quoting *Random House Dictionary* 1284 (Stuart Berg Flexner ed., 2d ed. 1993)). By contrast, “justification” means “a lawful or sufficient reason for one’s acts or omissions.” *Black’s Law Dictionary* 870 (7th ed. 1999). Based on the plain meaning of the terms, “business necessity” more accurately describes the correct standard for a respondent/defendant’s rebuttal burden.

Second, the “legally sufficient justification” standard departs from the well established business necessity standard adopted by the Department and other federal regulators in determining whether a lender has employed practices having a discriminatory effect in violation of the Fair Housing Act. In the Secretary’s regulations of Fannie Mae and Freddie Mac, the Department interpreted the Fair Housing Act and its regulations to adopt a business necessity defense. The Department stated that “[t]he Fair Housing Act and its implementing regulations, which were promulgated in 1989, . . . set forth the *business necessity* defense to a disparate impact claim involving the purchasing of loans.” The Secretary of HUD’s Regulation of the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Association (Freddie Mac), 60 Fed. Reg. 61866, 61867 (Dec. 1, 1995) (codified at 24 C.F.R. Part 81) (emphasis added).

Similarly, the Department, as well as other federal regulators (including the Department of Justice, the Office of the Controller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve and the FDIC), adopted a business necessity standard in their *Policy Statement on Discrimination in Lending*. *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18266, 18269 (Apr. 15, 1994). The Department and the regulators stated

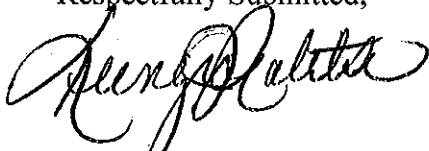
that “[w]hen an agency finds that a lender’s policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by ‘*business necessity*.’” *Id.* (emphasis added). Thus, the rebuttal standard in the proposed regulation conflicts with the established “business necessity” standard previously adopted by the Department and other federal regulators.

The ramifications of adopting a different rebuttal standard could be severe. By adopting a standard that departs from the previously established business necessity standard, the Department risks making “inconsistent and misleading representations to those those regulated by the FHA” such as lenders, insurers and other private entities. *See Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Adopting a different rebuttal standard may also endanger the deference usually afforded to enacted regulations by the courts. *Id.* As the Ninth Circuit has recognized, when the Department departs from previous interpretations of the Fair Housing Act and entities regulated under the Fair Housing Act relied on the previous interpretations, courts are not bound to afford the usual deference to the Department’s interpretations of the law. *Id.* (refusing to afford deference to compelling business necessity standard applied by a HUD administrative law in an occupancy limits case because HUD departed from the previous interpretations of the law and the public relied substantially and in good faith on the previous interpretation).

Third, the Department’s proposed rebuttal standard is at odds with federal court decisions that have adopted a business necessity standard in disparate impact cases under the Fair Housing Act involving private entity defendants. *See e.g., Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 988 (4th Cir. 1984) (“[W]hen confronted with a showing of disparate impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice.”); *United States v. Weiss*, 847 F. Supp. 829, 831 (D. Nev. 1994); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, 268 F.R.D. 627, 631 (N.D. Cal. 2009).

Thank you for the opportunity to comment on the proposed regulation implementing the Fair Housing Act’s discriminatory effect standard. We again commend the Department for promulgating the proposed regulations implementing the discriminatory effect standard under the Fair Housing Act. Please feel free to contact me at (305) 651-HOPE [4673] or keenya@hopefhc.com should you have any questions.

Respectfully Submitted,



Keenya J. Robertson,
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