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HUD Proposes Amendments to Fair Housing Act's Discrimination Standards

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The Department of Housing and Urban Development (HUD) has issued a proposed rule amending the Fair Housing Act in order to "establish uniform standards for determining when a housing practice with a discriminatory effect violates" the Act. The proposed amendments arise from the need for uniformity of application of the discriminatory effects theory of liability under the Fair Housing Act. The additions will "establish a uniform standard of liability for facially neutral housing practices that have a discriminatory effect". (76 FR 70923)

Under the Fair Housing Act there need not be a finding of intentional discrimination in order to base liability on the discriminatory effects of a housing policy or procedure.

HUD has specified that the Fair Housing Act "is violated by facially neutral practices that have a disparate impact on protected classes" and also violated by facially neutral "practices that create, perpetuate, or increase segregated housing patterns". (76 FR 70922) The proposed rule will be applicable to both public and private entities.

Prohibiting Discriminatory Effects

The proposed rule intends to add a new Subpart G to the Fair Housing Act which would "confirm that the Fair Housing Act may be violated by a housing practice that has a discriminatory effect, regardless of whether the practice was adopted for a discriminatory purpose". (76 FR 70924) A discriminatory effect is further defined as occurring "where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons or on the community as a whole." (76 FR 70924)

Disparate impact occurs where a practice or policy results in a discriminatory effect on a group of persons on the basis of race, color, religion, sex, handicap, familial status or national origin. The proposed rule supplementary information discusses a few examples of where disparate impact may arise including zoning ordinances restricting multifamily housing construction to certain areas, the provision and

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pricing of homeowner's insurance, mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher interest rates unrelated to a borrower's creditworthiness, credit scoring overrides provided by a purchaser of loans and credit offered on predatory terms. (76 FR 70924)

Perpetuation of Segregation occurs where a practice or policy results in a discriminatory effect on the community as a whole by creating, perpetuating or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status or national origin. The proposed rule supplementary information discussion outlines some examples, such as a multifamily housing being restricted to a largely minority neighborhood "having the effect of perpetuating segregation 'by restricting low-income housing needed by minorities to an area already 25% minority'" and where towns had banned or restricted certain developments resulting in keeping minorities out of the towns which populations were already over 90% non-minority. (76 FR 70925)

Legally Sufficient Justification

The proposed rule further explains that a practice or policy found to have a discriminatory effect may not be a violation of the Act as long as there is a "legally sufficient justification." A legally sufficient justification is defined as existing where the "practice or policy (1) has a necessary and manifest relationship to the defendant's legitimate nondiscriminatory interests and (2) those interests cannot be served by another practice that has a less discriminatory effect." (76 FR 70925)

However, if intentional discrimination is alleged, the proposed rule states that legally sufficient justification may not be used as a defense. (76 FR 70927)

Three-step Burden-Shifting

The proposed rule outlines a "three-step burden-shifting" approach to determining which party bears the burden of proof at each step of the process.

1. The plaintiff must first prove that the "practice caused, causes, or will cause a discriminatory effect on" a protected group. (76 FR 70925)
2. After the plaintiff has proven their prima facie case, the burden then shifts to the defendant to prove that there is legally sufficient justification for the disputed practice.
3. Once the defendant has proven the practice is necessary and legitimate, the burden shifts once again to the plaintiff to show that the defendant's interests may be "served by a policy or decision that produces a less discriminatory effect." (76 FR 70924) If the plaintiff can prove this last portion, the defendant will still be liable under the Act even though they have proven their legally sufficient justification.

This three-step approach has been used in the past by HUD to determine liability in administrative decisions under the Fair Housing Act. The three-step burden-shifting approach has also been used for actions arising under the Equal Credit Opportunities Act (ECOA), often jointly with claims under the Fair Housing Act. The proposed rule will allow this burden of proof approach to be applied uniformly.

Amended Prohibited Conduct

In addition to Subpart G, the proposed rule seeks to amend existing Fair Housing Act sections to include further examples of prohibited conduct:

Section 100.65 Discrimination in terms, conditions and privileges and in services and facilities adds a prohibition on "providing different, limited, or no governmental services such as water, sewer or garbage collection" that results in a discriminatory effect.

Section 100.70 Other prohibited conduct is amended to include the implementation of "land-use rules, policies, or procedures that restrict or deny housing opportunities in a manner that" have a discriminatory effect.

Section 100.120 Discrimination in the making of loan and in the provision of other financial assistance is amended to include further examples of prohibited practices such as "failing or refusing to provide any person... information regarding the availability of loans or other financial assistance, application requirement, procedures or standards for review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others because" that person is a member of a protected class. Additionally prohibited is "providing loans or other financial assistance in a manner that results in disparities in their cost, rate of denial, or terms or conditions, or that has the effect of denying or discouraging their receipt on the basis" of being a member of a protected class.

Comment Period

Comments on the proposed rule are due by January 17, 2012.

View the entire Proposed Rule on AllRegs:

<http://www.allregs.com/ao/main.aspx?r=31663679-7a4a-4d40-805c-0a2635c5098c>