December 22, 2011

Department of Housing and Urban Development: Implementation of the Fair Housing Act's Discriminatory Effects Standard

Executive Summary

The Department of Housing and Urban Development (HUD) is proposing a rule that would officially incorporate a "discriminatory effect" standard into its regulations, and would establish uniform standards for determining when a housing practice with a discriminatory effect violates Title VII of the Civil Rights Act of 1968 (the "Fair Housing Act" or "Act").

The Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. Based on historic HUD practice and U.S. Courts of Appeals decisions, it is well established that liability under the Act can arise where a housing practice is intentionally discriminatory or where it has a discriminatory effect (even where no discriminatory intent is found). A discriminatory effect may be found where a housing practice has a disparate impact on a group of persons protected by the Act, or where a housing practice has the effect of creating, perpetuating, or increasing segregated housing patterns on a protracted basis. However, the precise tests used by courts and by HUD to determine a violation based on discriminatory effects vary.

HUD's proposed rule will officially add a discriminatory effects standard into its regulations, and will impose a uniform three-step burden-shifting test to determine whether a housing practice has a discriminatory effect, as follows:

- First, the plaintiff must make a "prima facie" case by showing that a housing practice caused, causes or will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin;

- If the plaintiff successfully makes its prima facie case, then the burden of proof shifts to the defendant to prove that the challenged practice has a "necessary and manifest relationship to one or more of the housing provider's legitimate, nondiscriminatory interests;"

- If the defendant successfully satisfies its burden, the plaintiff may still establish liability by demonstrating that these legitimate nondiscriminatory interests could be

served by an alternative policy or decision that produces a less discriminatory effect.

Comments must be submitted to HUD by January 17, 2011; please submit your comments directly to CUNA by **January 10, 2011**. Please email your comments to Senior Vice President and Deputy General Counsel Mary Dunn at mdunn@cuna.coop or Counsel for Special Projects Kristina Del Vecchio at kdelvecchio@cuna.coop. You can also mail them to CUNA's Regulatory Advocacy Department, 601 Pennsylvania Avenue, NW, South Building, 6th Floor, Washington, DC 20004. The proposed rules are available here.

Background

In passing the Act, Congress recognized that the Act "was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States." In following Congress's directive, HUD has repeatedly determined that the Act is directed to the consequences of housing practices, not just their purpose. Accordingly, HUD has concluded, and has long recognized, that the Act provides for liability based on discriminatory effects without the need for a finding of intentional discrimination.

HUD's proposal points out that it is well established that liability under the Act can arise where a housing practice is intentionally discriminatory or where it has a discriminatory effect (even where no discriminatory intent is found). A "discriminatory effect" may be found (a) where a housing practice has a disparate impact on a group of persons protected by the Act, or (b) where a housing practice has the effect of creating, perpetuating, or increasing segregated housing patterns on a protracted basis.

HUD administrative law judges have consistently held the Act is violated by facially neutral practices that have a disparate impact on protected classes. Further, all of the U.S. Courts of Appeals that have addressed this issue have held that liability under the Act may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group, or creates, perpetuates, or increases segregation, even if the policy or practice was not adopted for a discriminatory purpose. HUD's Title VIII Complaint Intake, Investigation and Conciliation Handbook currently recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases. Additionally, the discriminatory effects standard, as currently applied under the Act, is analogous to the discriminatory effects standard under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), which prohibits discriminatory employment practices. The U.S. Supreme Court held that Title VII reaches beyond intentional discrimination to include employment practices that have a discriminatory effect.

However, the tests applied by various courts and by HUD to determine whether a housing practice has a discriminatory effect have varied slightly depending on the specific court's preference, and depending on the type of case. To resolve this inconsistency, HUD's proposed rule standardizes the test that would be applied to all cases brought under the Act.

HUD proposes this standard for the following reasons:

(1) Since Title VII has often been looked to for guidance in interpreting analogous provisions in the Act, HUD's proposal is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII;

(2) HUD's proposal is also consistent with the discriminatory effects standard applied under the Equal Credit Opportunities Act (ECOA), which borrows from Title VII's burden-shifting framework and there is significant overlap in coverage between the ECOA and the Act; and

(3) By placing the burden of proving a necessary and manifest relationship to a legitimate, nondiscriminatory interest on the defendant and the burden of proving a less discriminatory alternative on the plaintiff, "neither party is saddled with having to prove a negative."

The Proposed Rule

HUD proposes adding a new subpart G, entitled "Prohibiting Discriminatory Effects" to its Fair Housing Act Regulations in 24 CFR part 100. Subpart G would confirm that the Act may be violated by a housing practice that has a discriminatory effect, as defined in §100.500(a), regardless of whether the practice was adopted with a discriminatory intent.

The housing practice may still be lawful if supported by a legally sufficient justification, as defined in §100.500(b). The "test" setting forth the respective burdens of proof would appear in §100.500(c), and §100.500(d) would clarify that a legally sufficient justification does not defeat liability for a discriminatory intent claim if the intent to discriminate has been established.

The subsections would thus appear as follows:

- §100.500(a): Discriminatory effect would be defined as occurring where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons (that is, a disparate impact), or on the community as a whole (perpetuation of segregation).

- §100.500(b): A "legally sufficient justification" exists where the housing 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.

- §100.500(c): (1) the plaintiff must first make a "prima facie" case by showing that a housing practice caused, causes or will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin; (2) If the plaintiff successfully makes its prima facie case, then the burden of proof shifts to the defendant to prove that the challenged practice has a "necessary and manifest relationship to one or more of the housing provider's

legitimate, nondiscriminatory interests;" (3) If the defendant successfully satisfies its burden, the plaintiff may still establish liability by demonstrating that these legitimate nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect.

- §100.500(d): Clarifies that a legally sufficient justification does not defeat liability for a discriminatory intent claim if the intent to discriminate has been established.

HUD has provided specific examples of cases and other situations where a discriminatory effect has been found, and has elaborated on each area of its proposal in its Federal Register publication, available here.

Applicability to Lenders

Lenders are already subject to the Act, and therefore the discriminatory effects standard. In one case cited by HUD, mortgage pricing policies that gave lenders or brokers discretion to impose additional charges or higher interest rates unrelated to a borrower's creditworthiness were found to have a disparate impact on a class of persons.[1] Similarly, discriminatory effects were found in cases where a purchaser of loans provided credit scoring overrides, and credit was offered on predatory terms.[2]

Typically, a lender would be the defendant in a case involving a violation of the Act. Therefore, under the proposed standard, the lender would have the burden of proving the challenged practice has a "necessary and manifest relationship to one or more of the housing provider's legitimate, nondiscriminatory interests." Without implementing a uniform standard under the Act, courts and HUD would continue to use different standards depending on the venue in which the case is brought and the type of claim. For example, courts and HUD judges have differed as to which party bears the burden of proving whether a less discriminatory alternative to the challenged practice exists. Additionally, some courts currently apply a multi-factor balancing test, and others apply a hybrid between the burden-shifting test and the balancing test. Finally, some courts apply different tests depending on whether the defendant is a public or private entity.

HUD is seeking comments specifically on:

- Whether a burden-shifting approach should be used?

- Where proof is required of the existence or nonexistence of a less discriminatory alternative to the challenged practice, which party should bear that burden (plaintiff or defendant?)?

Credit unions may also want to consider whether implementing a uniform standard best serves the purposes of the Fair Housing Act, and whether doing so will help to enhance clarity in the application of the Act to lending practices.

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[1] *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 253 (D.Mass. 2008).

[2] *Beaulialice v. Federal Home Loan Mortg. Corp.*, 2007 WL 744646, *4 (M.D.Fla. Mar. 6, 2007); *Hargraves v. Capitol City Mortg.*, 140 F.Supp. 2d 7, 20-21 (D.D.C. 2000).