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Affordable Housing Alert

Developments in affordable housing law

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U.S. Supreme Court, HUD take aim at fair housing rules

By Harry J. Kelly

It's a big deal when the U.S. Supreme Court accepts a petition to review a fair housing case. It's also a big deal when, a few days later, HUD decides to issue new rules on the same subject, apparently to head off the Supreme Court's action. But that is exactly what has happened in the last few weeks, and owners, managers, tenants, and others interested in fair housing issues should pay close attention to these actions and their outcome.

The first development occurred on November 7, 2011, when the Supreme Court announced it would review the outcome of the Eighth Circuit's decision in *Magner v. Gallagher*, which applied a so-called "disparate treatment" test to determine whether local building code enforcement initiatives, although neutral on their face, had a discriminatory adverse effect on minority populations. Most of the federal circuits have adopted some sort of burden-shifting test to determine when such "neutral" acts may, even without an intent to discriminate, violate the Fair Housing Act (the "Act"). So it seems likely that the Supreme Court accepted review of the *Magner* decision because it is not satisfied with the prevailing standards governing non-intentional discriminatory conduct.

Less than two weeks after the Supreme Court acted, HUD announced new rules that address the prevailing theories of "disparate impact." 76 *Fed. Reg.* 70921 (November 16, 2011). The proposed rule does two things: first, it seeks to formalize the rules for finding "disparate impact" discrimination, including the shifting burdens of proof that the plaintiff and defendant must produce under these tests. Second, it expands the current list of discriminatory acts prohibited by HUD's rules to include, among other things, changing local government rules and practices in a manner that discriminates against persons protected by the Act or by adopting lending practices that have a similar harmful effect. Comments on the proposed rule are due by January 17, 2012.

The close timing of the Supreme Court's action and HUD's announcement is intriguing. It will be interesting to see how quickly HUD moves on its proposed rulemaking, and whether its actions have any impact on the Supreme Court's deliberations next year. Now that both HUD and the Supreme Court have decided to scrutinize disparate impact theory, everyone involved in multifamily housing should pay close attention.

Persons with further interest in these developments should feel free to contact Harry J. Kelly at 202-585-8712 or at hkelly@nixonpeabody.com.

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Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace designated as an extension to Class C airspace area for City of Colorado Springs Municipal Airport, Colorado Springs, CO. Airspace reconfiguration is necessary due to the decommissioning of the Black Forest TACAN. Also, the geographic coordinates of the airport would be updated to coincide with the FAA's aeronautical database. Controlled airspace is necessary for the safety and management of IFR operations at the Airport.

Class E airspace designations are published in paragraph 6003, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at City of Colorado Springs Municipal Airport, Colorado Springs, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6003 Class E airspace designated as an extension to Class C surface areas.

* * * * *

ANM CO E3 Colorado Springs, CO [Amended]

City of Colorado Springs Municipal Airport, CO

(Lat. 38°48′21″ N., long. 104°42′03″ W.)

That airspace extending upward from the surface within 2.4 miles northwest and 1.2 miles southeast of the City of Colorado Springs Municipal Airport 025° bearing extending from the 5-mile radius of the airport to 8.9 miles northeast and within 1.4 miles each side of the airport 360° bearing extending from the 5-mile radius of the airport to 7.7 miles north of the airport.

Issued in Seattle, Washington, on November 8, 2011.

William Buck,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–29635 Filed 11–15–11; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–5508–P–01]

RIN 2529–AA96

Implementation of the Fair Housing Act's Discriminatory Effects Standard

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or 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.[1] HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules implementing the Act, has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate.

The reasonableness of HUD's interpretation is confirmed by eleven United States Courts of Appeals, which agree that the Fair Housing Act imposes liability based on discriminatory effects. By the time the Fair Housing Amendments Act became effective in 1989, nine of the thirteen United States Courts of Appeals had determined that the Act prohibits housing practices with a discriminatory effect even absent an intent to discriminate. Two other United States Courts of Appeals have since reached the same conclusion, while another has assumed the same but did not need to reach the issue for purposes of deciding the case before it.

Although there has been some variation in the application of the discriminatory effects standard, neither HUD nor any Federal court has ever determined that liability under the Act requires a finding of discriminatory intent. The purpose of this proposed rule, therefore, is to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

DATES: *Comment due date:* January 17, 2012.

ADDRESSES: Interested persons are invited to submit written comments regarding this proposed rule to the

[1] This preamble uses the term "disability" to refer to what the Act and its implementing regulations term a "handicap."

Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410. All communications should refer to the above docket number and title. There are two methods for submitting public comments.

1. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT:
Jeanine Worden, Associate General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–0500, telephone number (202) 402–5188. Persons with hearing and speech impairments may contact this phone number via TTY by calling the Federal Information Relay Service at (800) 877–8399.

SUPPLEMENTARY INFORMATION:

I. Background

A. History of Discriminatory Effects Liability Under the Fair Housing Act

The Fair Housing Act declares it to be "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[2] Congress considered the realization of this policy "to be of the highest priority."[3] The language of the Fair Housing Act prohibiting discrimination in housing is "broad and inclusive";[4] the purpose of its reach is to replace segregated neighborhoods with "truly integrated and balanced living patterns."[5] In commemorating the 40th anniversary of the Fair Housing Act and the 20th anniversary of the Fair Housing Amendments Act, the House of Representatives recognized that "the intent of Congress in passing the Fair Housing 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."[6]

In keeping with the "broad remedial intent" of Congress in passing the Fair Housing Act,[7] and consequently the Act's entitlement to a "generous construction,"[8] HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules to carry out the Act,[9] has repeatedly determined that the Fair Housing Act is directed to the consequences of housing practices, not simply their purpose. Under the Act, housing practices—regardless of any discriminatory motive or intent—cannot be maintained if they operate to deny protected groups equal housing opportunity or they create, perpetuate, or increase segregation without a legally sufficient justification.

Accordingly, HUD has concluded that the Act provides for liability based on discriminatory effects without the need for a finding of intentional discrimination. For example, HUD's Title VIII Complaint Intake, Investigation and Conciliation Handbook (Handbook), which sets forth HUD's guidelines for investigating and resolving Fair Housing Act complaints, recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases.[10] In adjudicating charges of discrimination filed by HUD under the Fair Housing Act, HUD administrative law judges have held that the Act is violated by facially neutral practices that have a disparate impact on protected classes.[11] HUD's regulations interpreting the Fair Housing Act prohibit practices that create, perpetuate, or increase segregated housing patterns.[12] HUD also joined with the Department of Justice and nine other Federal enforcement agencies to recognize that disparate impact is among the "methods of proof of lending discrimination under the * * * Act" and provide guidance on how to prove a disparate impact fair lending claim.[13]

In addition, in regulations implementing the Federal Housing Enterprises Financial Safety and Soundness Act, HUD prohibited mortgage purchase activities that have a discriminatory effect. In enacting these regulations,[14] which prescribe the fair lending responsibilities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), HUD noted that "the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law" and concluded that disparate impact law "is applicable to all

[2] *See* 42 U.S.C. 3601.

[3] *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal citation omitted).

[4] *Id.* at 209.

[5] *Id.* at 211.

[6] H. Res. 1095, 110th Cong., 2d Sess., 154 Cong. Rec. H2280–01 (April 15, 2008) (2008 WL 1733432).

[7] *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982).

[8] *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731–732 (1995).

[9] *See* 42 U.S.C. 3608(a) and 42 U.S.C. 3614a.

[10] *See, e.g.*, Handbook at 3–25 (the Act is violated by an "action or policy [that] has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status"); *id.* at 2–27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *id.* at 2–27 to 2–45 (HUD guidelines for investigating a disparate impact claim and establishing its elements).

[11] *See e.g.*, *HUD* v. *Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) ("A violation of the [Act] may be premised on a theory of disparate impact."); *HUD* v. *Ross*, 1994 WL 326437, at *5 (HUD ALJ July 7, 1994) ("Absent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act."); *HUD* v. *Carter*, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992) ("The application of the discriminatory effects standard in cases under the Fair Housing Act is well established.").

[12] *See* 24 CFR 100.70.

[13] *Policy Statement on Discrimination in Lending*, 59 FR 18,266, 18,268 (Apr. 15, 1994).

[14] *See* 24 CFR 81.42.

segments of the housing marketplace, including the GSEs." [15]

Moreover, all Federal courts of appeals to have addressed the question 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 [16] or creates, perpetuates, or increases segregation,[17] even if such a policy or practice was not adopted for a discriminatory purpose.

The Fair Housing Act's discriminatory effects standard 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.[18] The Supreme Court explained that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." [19]

It is thus well established that liability under the Fair Housing Act can arise where a housing practice is intentionally discriminatory or where it has a discriminatory effect.[20] 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 protected basis.[21]

B. Application of the Discriminatory Effects Standard Under the Fair Housing Act

While the discriminatory effects theory of liability under the Fair Housing Act is well established, there is minor variation in how HUD and the courts have applied that theory. For example, HUD has always used a three-step burden-shifting approach,[22] as do many Federal courts of appeals.[23] But some courts apply a multi-factor balancing test,[24] other courts apply a hybrid between the two,[25] and one court applies a different test for public and private defendants.[26]

Another source of variation is in the application of the burden-shifting test. Under the burden-shifting approach, the plaintiff (or, in administrative proceedings, the complainant) must make a prima facie showing of either disparate impact or perpetuation of segregation. If the discriminatory effect is shown, the burden of proof shifts to the defendant (or respondent) to justify its actions. If the defendant or respondent satisfies its burden, courts and HUD administrative law judges have differed as to which party bears the burden of proving whether a less discriminatory alternative to the challenged practice exists. The majority of Federal courts of appeals that use a burden-shifting approach place this burden on the plaintiff,[27] analogizing to Title VII's burden-shifting framework.[28] Other Federal courts of appeals have kept the burden with the defendant.[29] HUD has, at times, placed this burden of proving a less discriminatory alternative on the respondent and, at other times, on the complainant.[30]

C. Scope of the Proposed Rule

This proposed rule establishes a uniform standard of liability for facially neutral housing practices that have a discriminatory effect. Under this rule, liability is determined by a burden-shifting approach. The plaintiff or complainant first must bear the burden

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[15] The Secretary of HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 FR. 61,846, 61,867 (Dec. 1, 1995).

[16] *See, e.g., Graoch Assocs. #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007); *Reinhart* v. *Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Charleston Housing Auth.* v. *U.S. Dep't of Agric.*, 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Simms* v. *First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson* v. *Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith* v. *Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), judgment aff'd, 488 U.S. 15 (1988); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 149–50 (3d Cir. 1977); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); *Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[17] *See, e.g., Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007); *Hallmark Developers, Inc.* v. *Fulton County, Ga.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curium); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 987 n.3 (4th Cir. 1984); *Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290–1291 (7th Cir. 1977); *United States.* v. *City of Black Jack, Missouri*, 508 F.2d 1179, 1184–86 (8th Cir. 1974); *see also Trafficante*, 409 U.S. at 209–210.

[18] *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–34 (1971).

[19] Id. at 431.

[20] *See, e.g.*, 42 U.S.C. 3604(a), (b), (f)(1), (f)(2); 42 U.S.C. 3605; 42 U.S.C. 3606. Liability under the Fair Housing Act can also arise in other ways, for example, where a reasonable person would find a notice, statement, advertisement, or representation to be discriminatory, see 42 U.S.C. 3604(c), or where a reasonable accommodation is refused, see 42 U.S.C. 3604(f)(3). The Act also imposes an affirmative obligation on HUD and other executive departments and agencies to administer their programs and activities related to housing and urban development in a manner affirmatively to further the purposes of the Fair Housing Act. See 42 U.S.C. 3608(d); *see also* 3608(e)(5).

[21] A "discriminatory effect" prohibited by the Act refers to either a "disparate impact" or the "perpetuation of segregation." *See, e.g. Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007) (there are "two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.").

[22] See, e.g., *HUD* v. *Pfaff*, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994); *HUD* v. *Mountain Side Mobile Estates P'ship*, 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993); *HUD* v. *Carter*, 1992 WL 406520, at *6 (HUD ALJ May 1, 1992); *Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); *see also Policy Statement on Discrimination in Lending, 59 FR. 18,266, 18,269 (Apr. 15, 1994)* (applying three-step test without specifying where the burden lies at each step).

[23] *See, e.g., Oti Kaga, Inc.* v. *S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Lapid–Laurel, L.L.C.* v. *Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 466–67 (3d Cir. 2002); *Langlois* v. *Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Huntington Branch NAACP* v. *Town of Huntington, N.Y.*, 844 F.2d 926, 939 (2d Cir. 1988).

[24] *See, e.g., Metro. Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (four-factor balancing test).

[25] *See, e.g., Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1252, 1254 (10th Cir. 1995) (three-factor balancing test incorporated into burden shifting framework to weigh defendant's justification); *Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373 (6th Cir. 2007) (balancing test incorporated as elements of proof after second step of burden shifting framework).

[26] The Fourth Circuit has applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants. *See e.g., Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984).

[27] *See, e.g., Gallagher* v. *Magner*, 619 F.3d 823, 834 (8th Cir. 2010); *Graoch Associates # 33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373–74 (6th Cir. 2007); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995).

[28] *See, e.g., Graoch*, 508 F.3d at 373 (6th Cir. 2007) ("claims under Title VII and the [Fair Housing Act] generally should receive similar treatment"); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995) (explaining that in interpreting Title VII, "the Supreme Court has repeatedly stated that the ultimate burden of proving that discrimination against a protected group has been caused by a specific * * * practice remains with the plaintiff at all times") (internal citation omitted).

[29] *See, e.g., Huntington Branch NAACP* v. *Town of Huntington, N.Y.*, 844 F.2d 926, 939 (2d Cir. 1988); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977).

[30] *Compare, e.g., HUD* v. *Carter*, 1992 WL 406520, at *6 (HUD ALJ May 1, 1992) (respondent bears the burden of showing that no less discriminatory alternative exists), *and Twinbrook Village Apts.*, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001) (same), *with HUD* v. *Mountain Side Mobile Estates P'ship*, 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993) (complainant bears the burden of showing that a less discriminatory alternative exists), *and HUD* v. *Pfaff*, 1994 WL 592199, at *8 (HUD ALJ Oct. 27, 1994) (same).

of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden shifts to the defendant or respondent to prove that the challenged practice has a necessary and manifest relationship to one or more of the defendant's or respondent's legitimate, nondiscriminatory interests. If the defendant or respondent satisfies its burden, the plaintiff or complainant 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.[31]

HUD proposes this standard for several reasons. First, Title VII, enacted four years before the Fair Housing Act, has often been looked to for guidance in interpreting analogous provisions of the Fair Housing Act.[32] HUD's proposal is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII.[33] Second, HUD's proposal is consistent with the discriminatory effects standard applied under the Equal Credit Opportunities Act (ECOA),[34] which borrows from Title VII's burden-shifting framework.[35] There is significant overlap in coverage between ECOA, which prohibits discrimination in credit, and the Fair Housing Act, which prohibits discrimination in residential real estate-related transactions.[36] The interagency *Policy Statement on Discrimination in Lending* analyzed the standard for proving disparate impact discrimination in lending under the Fair Housing Act and under ECOA without differentiation.[37] Under HUD's proposed framework, parties litigating a claim brought under both the Fair Housing Act and ECOA will not face the burden of applying inconsistent methods of proof to factually indistinguishable claims. Third, by placing the burden of proving a necessary and manifest relationship to a legitimate, nondiscriminatory interest on the defendant or respondent and the burden of proving a less discriminatory alternative on the plaintiff or complainant, "neither party is saddled with having to prove a negative." [38]

II. This Proposed Rule

A. Subpart G—Discriminatory Effect

1. Discriminatory Effect Prohibited (§ 100.500)

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 Fair Housing 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 for a discriminatory purpose. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The respective burdens of proof for establishing or refuting an effects claim are set forth in § 100.500(c). Subsection 100.500(d) clarifies that a legally sufficient justification does not defeat liability for a discriminatory intent claim once the intent to discriminate has been established.[39]

This proposed rule would apply to both public and private entities because the definition of "discriminatory housing practice" under the Act makes no distinction between the two.[40]

2. Discriminatory Effect Defined (§ 100.500(a))

Under the Fair Housing Act and this proposed rule, a "discriminatory effect" occurs 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).[41] Any facially neutral action, *e.g.* laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act and this rule.

Disparate Impact. Examples of a housing policy or practice that may have a disparate impact on a class of persons delineated by characteristics protected by the Act include a zoning ordinance restricting private construction of multifamily housing to a largely minority area (*see Huntington Branch*, 844 F.2d at 937); the provision and pricing of homeowner's insurance (*see Ojo* v. *Farmers Group, Inc.*, 600 F.3d 1205, 1207–8 (9th Cir. 2010) (en banc)); mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher interest rates unrelated to a borrower's creditworthiness (*see Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 253 (D. Mass. 2008)); credit scoring overrides provided by a purchaser of loans (*see Beaulialice* v. *Federal Home Loan Mortg. Corp.*, 2007 WL 744646, *4 (M.D. Fla. Mar. 6, 2007)); and credit offered on predatory terms, (*see Hargraves* v. *Capitol City Mortgage*, 140 F. Supp. 2d 7, 20–21 (D.D.C. 2000)). Further examples of such claims can be found in the following court cases: *Keith* v. *Volpe*, 858 F.2d 467, 484 (9th Cir. 1988), where the city's land-use decisions that prevented the construction of two housing developments for city residents displaced by a freeway had a greater adverse impact on minorities than on whites because two-thirds of the persons who would have benefited from the housing were minorities; (*Langlois*, 207 F.3d at 50, where public housing authorities' use of local residency preferences to award Section 8 Housing

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[31] *See Graoch Associates #33, L.P.* v. *Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 373–74 (6th Cir. 2007); *Oti Kaga, Inc.* v. *S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Mountain Side Mobile Estates* v. *Sec'y HUD*, 56 F.3d 1243, 1254 (10th Cir. 1995).

[32] *See, e.g., Trafficante*, 409 U.S. at 205; The Secretary of HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 FR 61,846, 61,868 (Dec. 1, 1995). Short form cite see n. 15.

[33] *See* 42 U.S.C. 2000e–2(k).

[34] ECOA prohibits discrimination in credit on the basis of race and other enumerated criteria. *See* 15 U.S.C. 1691.

[35] *See* S. Rep. 94–589, 94th Cong., 2d Sess. (1976) ("judicial constructions of antidiscrimination legislation in the employment field, in cases such as *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), *and Albemarle Paper Co.* v. *Moody* (U.S. Supreme Court, June 25, 1975) [422 U.S. 405], are intended to serve as guides in the application of [ECOA], especially with respect to the allocations of burdens of proof."); 12 CFR 202.6(a), n. 2 (1997) ("The legislative history of [ECOA] indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."); 12 CFR part 202, Supp. I, Official Staff Commentary, Comment 6(a)–2 ("Effects test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e–2).").

[36] *See* 59 FR 18,266.

[37] *See* 59 FR 18,266, 18,269 (Apr. 15, 1994).

[38] *Hispanics United of DuPage Cnty.* v. *Vill. of Addison, Ill.*, 988 F.Supp. 1130, 1162 (N.D. Ill. 1997).

[39] It is possible to bring a claim alleging both discriminatory effect and discriminatory intent as alternative theories of liability. In addition, the discriminatory effect of a challenged practice may provide evidence of the discriminatory intent behind the practice. *See, e.g., Vill. of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). But proof of intent to discriminate is not necessary to prevail on a discriminatory effects claim. *See, e.g., Black Jack*, 508 F.2d at 1184–85.

[40] *See* 42 U.S.C. 3602(f) (defining "discriminatory housing practice" as "an act that is unlawful under Section 804, 805, 806, or 818," none of which distinguish between public and private entities); *see also Nat'l Fair Housing Alliance, Inc.* v. *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59–60 & n.7 (D.D.C. 2002) (applying the same impact analysis to a private entity as to public entities, noting that a "distinction between governmental and non-governmental bodies finds no support in the language of the [Act] or in [its] legislative history").

[41] *See, e.g., Graoch Associates # 33, L.P.*, 508 F.3d at 378.

Choice Vouchers likely would result in an adverse impact based on race; *United States* v. *Incorporated Village of Island Park*, 888 F. Supp. 419, 447 (E.D.N.Y. 1995), where a housing program's preference for residents of the Village, most of whom were white, had a disparate impact on African-Americans; *Charleston Housing Auth.*, 419 F.3d at 741–42, where the housing authority's plan to demolish 50 low-income public housing units—46 of which were occupied by African Americans—would disproportionately impact African Americans based on an analysis of the housing authority's waiting list population, the population of individuals income-eligible for public housing, or the current tenant population; and *Smith* v. *Town of Clarkton, N.C.*, 682 F.2d 1055, 1065–66 (4th Cir. 1982), where the town's withdrawal from a multi-municipality housing authority effectively blocked construction of 50 units of public housing, adversely affecting African American residents of the county, who were those most in need of new construction to replace substandard dwellings).

Perpetuation of Segregation. A person or entity may be liable for a housing policy or practice that has a discriminatory effect on the community because the practice has the effect of creating, perpetuating, or increasing housing patterns that segregate by race, color, religion, sex, familial status, national origin, or disability. Examples of such claims can be found in the following court cases: *Huntington Branch*, 844 F.2d at 934, 937, where the town's zoning ordinance, which limited private construction of multifamily housing to a largely minority neighborhood, had the effect of perpetuating segregation "by restricting low-income housing needed by minorities to an area already 52% minority"; *Dews* v. *Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000), where the town's zoning ordinance that banned multifamily housing and required single-family lots of at least one acre had the effect of perpetuating segregation by keeping minorities out of a town that was 94 percent white; *Black Jack*, 508 F.2d at 1186, where a city ordinance preventing the construction of low-income multifamily housing "would contribute to the perpetuation of segregation in a community which was 99% white"; and *Inclusive Communities Projects, Inc.* v. *Texas Dep't of Housing & Community Affairs*, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010), where the state's disproportionate denial of tax credits for nonelderly housing in predominately white neighborhoods had a segregative impact on the community.

3. Legally Sufficient Justification (§ 100.500(b))

A housing practice or policy found to have a discriminatory effect may still be lawful if it has a "legally sufficient justification." A "legally sufficient justification" exists where the housing practice or policy: (1) Has a necessary and manifest relationship to the defendant's or respondent's legitimate, nondiscriminatory interests;[42] and (2) those interests cannot be served by another practice that has a less discriminatory effect.[43] A legally sufficient justification may not be hypothetical or speculative. In addition, a legally sufficient justification does not defeat liability for a discriminatory *intent* claim once the intent to discriminate has been established.

4. Burdens of Proof (§ 100.500(c))

The burden-shifting framework set forth in the proposed rule for discriminatory effect claims finds support in judicial interpretations of the Act, and is also consistent with the burdens of proof Congress assigned in disparate impact employment discrimination cases. *See* 42 U.S.C. § 2000e-2(k). In the proposed rule, the complainant or plaintiff first bears the burden of proving its prima facie case, that is, 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.

Once the complainant or plaintiff has made its prima facie case, the burden of proof shifts to the respondent or 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 respondent or defendant satisfies its burden, the complainant or 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.

B. Examples of Housing Practices With Discriminatory Effects

Violations of various provisions of the Act may be established by proof of discriminatory effects. For example, under 42 U.S.C. subsections 3604(a) and 3604(f)(1), discriminatory effects claims may be brought under the Act's provisions that make it unlawful to "otherwise make unavailable or deny [ ] a dwelling" because of a protected characteristic. Discriminatory effects claims may be brought pursuant to subsections 3604(b) and 3604(f)(2) of the Act prohibiting discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of" a protected characteristic. For residential real estate-related transactions, discriminatory effects claims may be brought under section 3605, which bars "discrimination against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of" a protected characteristic. Discriminatory effects claims may also be brought under section 3606, prohibiting discrimination in the provision of brokerage services.

HUD's existing Fair Housing Act regulations provide examples of housing practices that may violate the Act, based on an intent theory, an effects theory, or both. The proposed rule adds examples of discriminatory housing practices that may violate the new subsection G because they have a discriminatory effect. The cases cited in Section II.A.2 of this preamble identify housing practices found by courts to create discriminatory effects that violate or may violate the Act. These cases are provided as examples only and should not be viewed as the only ways to establish a violation of the Act based on a discriminatory effects theory.

III. Solicitation of Comments

The Department welcomes comments on the standards proposed in this rule, including whether a burden-shifting approach should be used to determine when a housing practice with a discriminatory effect violates the Fair Housing Act and, where proof is required of the existence or nonexistence of a less discriminatory alternative to the challenged practice, which party should bear that burden. These comments will help the Department in its effort to craft final regulations that best serve the broad, remedial goals of the Fair Housing Act.

[42] *See, e.g., Charleston Housing Auth.*, 419 F.3d at 741 ("[u]nder the second step of the disparate impact burden shifting analysis, the [defendant] must demonstrate that the proposed action has a manifest relationship to the legitimate non-discriminatory policy objectives" and "is necessary to the attainment of these objectives") (internal quotation marks omitted); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 988–89 (4th Cir. 1984); 24 CFR 100.125(c); 59 FR 18,266, 18,269; *see also* 60 FR at 61,868.

[43] *See, e.g., Oti Kaga, Inc.* v. *South Dakota Housing Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003).

IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). The proposed rule has been determined to be a "significant regulatory action," as defined in section 3(f) of the Order, but not economically significant under section 3(f)(1) of the Order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule proposes to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

Discriminatory effects liability is consistent with the position of other Executive Branch agencies and has been applied by every Federal court of appeals to have reached the question. Given the variation in how the courts have applied that standard, HUD's objective in this proposed rule is to achieve consistency and uniformity in this area, and therefore reduce burden for all who may be involved in a challenged practice. Accordingly, the undersigned certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 100

Civil rights, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

2. In § 100.65, a new paragraph (b)(6) is added to as follows:

§ 100.65 Discrimination in terms, conditions and privileges and in services and facilities.

* * * * *

(b) * * *

(6) Providing different, limited, or no governmental services such as water, sewer, or garbage collection in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

3. In § 100.70, add a new paragraph (d)(5) to read as follows:

§ 100.70 Other prohibited conduct.

* * * * *

(d) * * *

(5) Implementing land-use rules, policies, or procedures that restrict or deny housing opportunities in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

4. In § 100.120, amend paragraph (b) to read as follows:

§ 100.120 Discrimination in the making of loans and in the provision of other financial assistance.

* * * * *

(b) Prohibited practices under this section include, but are not limited to:

(1) Failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures, or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) 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 race, color, religion, sex, handicap, familial status, or national origin.

5. In part 100, add a subpart G as follows:

Subpart G—Discriminatory Effect

§ 100.500 Discriminatory Effect Prohibited

Liability may be established under this subpart based on a housing practice's *discriminatory effect*, as defined in § 100.500(a), even if the housing practice is not motivated by a prohibited intent. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The burdens of proof for establishing a violation under this subpart are set forth in § 100.500(c).

(a) *Discriminatory effect defined.* A housing practice has a *discriminatory effect* where it actually or predictably:

(1) Results in a disparate impact on a group of persons on the basis of race, color, religion, sex, handicap, familial status, or national origin; or

(2) Has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.

(b) *Legally sufficient justification.* A *legally sufficient justification* exists where the challenged housing practice: (1) Has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3610, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and (2) those interests cannot be served by another practice that has a less discriminatory effect. The burdens of proof for establishing each of the two elements of a *legally sufficient justification* are set forth in § 100.500(c)(2)–(c)(3).

(c) *Burdens of proof in discriminatory effects cases.*

(1) A complainant, with respect to claims brought under 42 U.S.C. 3610, or a plaintiff, with respect to claims brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice causes a *discriminatory effect.*

(2) Once a complainant or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory interests supporting the challenged practice can be served by another practice that has a less *discriminatory effect.*

(d) *Relationship to discriminatory intent.* A demonstration that a housing practice is supported by a *legally sufficient justification,* as defined in § 100.500(b), may not be used as a defense against a claim of intentional discrimination.

Dated: October 4, 2011.

John Trasviña,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2011–29515 Filed 11–15–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

USACE's Plan for Retrospective Review Under E.O. 13563

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is seeking public input on its plan to retrospectively review its Regulations implementing the USACE Regulatory Program at 33 CFR parts 320–332 and 334. Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O.), issued on January 18, 2011, directs Federal agencies to review existing significant regulations and identify those that can be made more effective or less burdensome in achieving regulatory objectives. The Regulations are essential for implementation of the Regulatory mission; thus, USACE believes they are a significant rule warranting review pursuant to E.O. 13563. The E.O. further directs each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. Section 404(e) of the Clean Water Act authorizes USACE to development general permits, including nationwide permits (NWPs), for minor activities in waters of the U.S. for a period of five years. Accordingly, every five years, USACE undergoes a reauthorization process for the NWP program and includes public notice and provides an opportunity for public hearing. Comments for the NWP program are submitted during the reauthorization process. Therefore, USACE is currently complying with the E.O. 13563 direction to periodically review its existing significant regulations. Other regulations will be reviewed on an as-needed basis in accordance with new laws, court cases, etc.

DATES: Written comments must be submitted on or before January 17, 2012.

ADDRESSES: You may submit comments, identified by docket number COE–2011–0028, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: regulatory.review@usace.army.mil Include the docket number, COE–2011–0028, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECW–CO–R (Ms. Amy S. Klein), 441 G Street NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2011–0028. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

S. 3406

One Hundred Tenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight

An Act

To restore the intent and protections of the Americans with Disabilities Act of 1990.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Amendments Act of 2008".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) PURPOSES.—The purposes of this Act are—

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society,

yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;";

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) DEFINITION OF DISABILITY.—Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

"SEC. 3. DEFINITION OF DISABILITY.

"As used in this Act:

"(1) DISABILITY.—The term 'disability' means, with respect to an individual—

"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment (as described in paragraph (3)).

"(2) MAJOR LIFE ACTIVITIES.—

"(A) IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

"(B) MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"(3) REGARDED AS HAVING SUCH AN IMPAIRMENT.—For purposes of paragraph (1)(C):

"(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

"(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

"(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY.—The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

"(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

"(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

"(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

"(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

"(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

"(II) use of assistive technology;

"(III) reasonable accommodations or auxiliary aids or services; or

"(IV) learned behavioral or adaptive neurological modifications.

"(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

"(iii) As used in this subparagraph—

"(I) the term 'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

"(II) the term 'low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.".

(b) CONFORMING AMENDMENT.—The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

"SEC. 4. ADDITIONAL DEFINITIONS.

"As used in this Act:

"(1) AUXILIARY AIDS AND SERVICES.—The term 'auxiliary aids and services' includes—

"(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

"(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

"(C) acquisition or modification of equipment or devices; and

"(D) other similar services and actions.

"(2) STATE.—The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.".

(c) AMENDMENT TO THE TABLE OF CONTENTS.—The table of contents contained in section 1(b) of the Americans with Disabilities

Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

"Sec. 3. Definition of disability.
"Sec. 4. Additional definitions.".

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) ON THE BASIS OF DISABILITY.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(1) in subsection (a), by striking "with a disability because of the disability of such individual" and inserting "on the basis of disability"; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking "discriminate" and inserting "discriminate against a qualified individual on the basis of disability".

(b) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

"(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION.—Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.".

(c) CONFORMING AMENDMENTS.—

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended—

(A) in the paragraph heading, by striking "WITH A DISABILITY"; and

(B) by striking "with a disability" after "individual" both places it appears.

(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking "the term 'qualified individual with a disability' shall" and inserting "a qualified individual with a disability shall".

SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended—

(1) by adding at the end of section 501 the following:

"(e) BENEFITS UNDER STATE WORKER'S COMPENSATION LAWS.—Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

"(f) FUNDAMENTAL ALTERATION.—Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

"(g) CLAIMS OF NO DISABILITY.—Nothing in this Act shall provide the basis for a claim by an individual without a disability

that the individual was subject to discrimination because of the individual's lack of disability.

"(h) REASONABLE ACCOMMODATIONS AND MODIFICATIONS.—A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.";

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

"SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

"The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008."; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking "511(b)(3)" and inserting "512(b)(3)".

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

"Sec. 506. Rule of construction regarding regulatory authority.".

SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended—

(1) in paragraph (9)(B), by striking "a physical" and all that follows through "major life activities", and inserting "the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)"; and

(2) in paragraph (20)(B), by striking "any person who" and all that follows through the period at the end, and inserting "any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).".

SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.