February 22, 2018

MAHNKE PARK NCD
DISCRIMINATORY EFFECT AGAINST FAMILIES WITH YOUNG CHILDREN
SUMMARY OF EXHIBITS REGARDING THE FAIR HOUSING ACT

The Fair Housing Act provides that it is unlawful "to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin . . ." 42 U.S.C. § 3604(a), emphasis added.


A plaintiff may establish a violation of the FHA by showing either (1) that a defendant was motivated by an intent to discriminate (also referred to as "discriminatory intent" or "disparate treatment") or (2) that a defendant's otherwise neutral action has an improper discriminatory effect (commonly referred to as "disparate impact"). Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285, 289 (6th Cir. Mich. 1996), citing Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. Utah 1995).


EXHIBIT A
Part IV

Department of Housing and Urban Development

24 CFR Part 100
Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100
[Docket No. FR–5506–F–02]
RIN 2529–AA66

Implementation of the Fair Housing Act’s Discriminatory Effects Standard

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

ACTION: Final 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. HUD, which is statutorily charged with the authority and responsibility for interpreting and enforcing the Fair Housing Act and with the power to make rules implementing the Act, has long interpreted the Act to prohibit practices with an unjustified discriminatory effect, regardless of whether there was an intent to discriminate. The eleven federal courts of appeals that have ruled on this issue agree with this interpretation. While HUD and every federal appellate court have ruled on the issue have determined that liability under the Act may be established through proof of discriminatory effects, the statute itself does not specify a standard for proving a discriminatory effects violation. As a result, although HUD and courts are in agreement that practices with discriminatory effects may violate the Fair Housing Act, there has been some minor variation in the application of the discriminatory effects standard.

Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the Act, and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act. This final rule also adds to, and revises, illustrations of discriminatory housing practices found in HUD’s Fair Housing Act regulations. This final rule follows November 16, 2011, proposed rule and takes into consideration comments received on that proposed rule.

DATES: Effective Date: March 18, 2013.

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 who are deaf, are hard of hearing, or have speech impairments may contact this phone number via TTY by calling the Federal Relay Service at 800–877–8399.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of Regulatory Action

Need for the Regulation. This regulation is needed to formalize HUD’s long-held interpretation of the availability of “discriminatory effects” liability under the Fair Housing Act, 42 U.S.C. 3601 et seq., and to provide nationwide consistency in the application of that form of liability. HUD, through its longstanding interpretation of the Act, and the eleven federal courts of appeals that have addressed the issue agree that liability under the Fair Housing Act may arise from a facially neutral practice that has a discriminatory effect. The twelfth court of appeals has assumed that the Fair Housing Act includes discriminatory effects liability, but has not decided the issue. Through four decades of case-by-case application of the Fair Housing Act’s discriminatory effects standard by HUD and the courts, a small degree of variation has developed in the methodology of proving a claim of discriminatory effects liability. This inconsistency threatens to create uncertainty as to how parties’ conduct will be evaluated. This rule formally establishes a three-part burden-shifting test currently used by HUD and most federal courts, thereby providing greater clarity and predictability for all parties engaged in housing transactions as to how the discriminatory effects standard applies.

How the Rule Meets the Need. This rule serves the need described above by establishing a consistent standard for assessing claims that a facially neutral practice violates the Fair Housing Act and by incorporating that standard in HUD’s existing Fair Housing Act regulations at 24 CFR 100.500. By formalizing the three-part burden-shifting test for proving such liability under the Fair Housing Act, the rule provides for consistent and predictable application of the test on a national basis. It also offers clarity to persons seeking housing and persons engaged in housing transactions as to how to assess potential claims involving discriminatory effects.

Legal Authority for the Regulation. The legal authority for the regulation is found in the Fair Housing Act. Specifically, section 808(a) of the Act gives the Secretary of HUD the “authority and responsibility for administering this Act.” (42 U.S.C. 3608(a).) In addition, section 815 of the Act provides that “[t]he Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.” (42 U.S.C. 3615.) HUD also has general rulemaking authority, under the Department of Housing and Urban Development Act, to make such rules and regulations as may be necessary to carry out its functions, powers, and duties. (See 42 U.S.C. 3535(d).)

B. Summary of the Major Provisions

This rule formally establishes the three-part burden-shifting test for determining when a practice with a discriminatory effect violates the Fair Housing Act. Under this test, the charging party or plaintiff first bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the charging party or plaintiff proves a prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

This rule also adds and revises illustrations of practices that violate the Act through intentional discrimination or through a discriminatory effect under the standards outlined in § 100.500.

C. Costs and Benefits

Because the rule does not change decades-old substantive law articulated by HUD and the courts, but rather formalizes a clear, consistent, nationwide standard for litigating discriminatory effects cases under the Fair Housing Act, it adds no additional costs to housing providers and others engaged in housing transactions. Rather,

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1 This preamble uses the term “disability” to refer to what the Act and its implementing regulations term a “handicap.” Both terms have the same legal meaning. See Bolling v. Abbott, 351 U.S. 400, 551 (1956).

2 See 42 U.S.C. 3615, supra, discussing HUD administrative decisions and federal court rulings.
the rule will simplify compliance with the Fair Housing Act's discriminatory effects standard and decrease litigation associated with such claims by clearly allocating the burdens of proof and how such burdens are to be met.

II. Background

The Fair Housing Act was enacted in 1968 (Pub. L. 90-94, codified at 42 U.S.C. 3601—3619, 3631) to combat and prevent segregation and discrimination in housing, including in the sale or rental of housing and the provision of advertising, lending, and brokerage services related to housing. The Fair Housing Act’s “Declaration of Policy” specifies that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” Congress considered the realization of this policy “to be of the highest priority.”

The Fair Housing Act’s language prohibiting discrimination in housing is “broad and inclusive:” the purpose of its reach is to replace segregated neighborhoods with “truly integrated and balanced living patterns.” In commemorating the 40th anniversary of the Fair Housing Act and the 20th anniversary of the Fair Housing Amendments Act, the House of Representatives reiterated 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.” (See the preamble to the November 16, 2011, proposed rule at 76 FR 70922.)

The Fair Housing Act gives HUD the authority and responsibility for administering and enforcing the Act, including the authority to conduct formal adjudications of Fair Housing Act complaints and the power to promulgate rules to interpret and carry out the Act. In keeping with the Act’s “broad remedial intent,” HUD, as the following discussion reflects, has long interpreted the Act to prohibit practices that have an unjustified discriminatory effect, regardless of intent. (See also the preamble to the November 16, 2011, proposed rule at 76 FR 70922.)

In formal adjudications of charges of discrimination under the Fair Housing Act, HUD has consistently concluded that the Act is violated by facially neutral practices that have an unjustified discriminatory effect on the basis of a protected characteristic, regardless of intent. In one such formal adjudication, the Secretary of HUD reversed the initial decision of a HUD administrative law judge and issued a final order stating that practices with an unjustified discriminatory effect violate the Act. In that case, the Secretary found that a mobile home community’s occupancy limit of three persons per dwelling had a discriminatory effect on families with children. When the housing provider appealed the Secretary’s order to the United States Court of Appeals for the Tenth Circuit, the Secretary of HUD defended his order, arguing that statistics showed that the housing policy, while neutral on its face, had a discriminatory effect on families with children because it served to exclude them at more than four times the rate of families without children. Similarly, on appeal of another final agency decision holding that a housing policy had a disparate impact on families with children, the Secretary of HUD, in his brief defending the decision before the United States Court of Appeals for the Ninth Circuit, discussed in detail the text and legislative history of the Act, as well as prior pronouncements by HUD that proof of discriminatory intent is not required to establish liability under the Act.

HUD has interpreted the Act to include discriminatory effects liability not only in formal adjudications, but through various other means as well. In 1980, for example, Senator Charles Mathias read into the Congressional Record a letter that the Senator had received from the HUD Secretary describing discriminatory effects liability under the Act and explaining that such liability is “imperative to the success of civil rights law enforcement.” In 1994, HUD joined with the Department of Justice and nine other federal regulatory and enforcement agencies in approving and adopting a policy statement that, among other things, recognized that disparate impact is among the “methods of proof of lending discrimination under the... [Fair Housing Act].” In this Policy Statement on Discrimination in Lending (Joint Policy Statement), HUD and the other regulatory and enforcement agencies recognized that “[p]olicies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person’s access to credit,” and provided guidance on how to prove a disparate impact fair lending claim.

Additionally, HUD’s interpretation of the Act is further confirmed by regulations implementing the Federal Housing Enterprises Financial Safety and Soundness Act (FHEFSSA), in which HUD prohibited Fannie Mae and Freddie Mac from engaging in mortgage purchase activities that have a discriminatory effect in violation of FHEFSSA. In addressing a concern for how the impact theory might operate under FHEFSSA, HUD explained that “the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law” and concluded that this Fair Housing Act disparate impact law “is applicable to all segments of the housing marketplace, including the GSEs” (government-sponsored enterprises).

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3 42 U.S.C. 3601.


5 Id. at 209.

6 Id. at 211.


8 See 42 U.S.C. 3606(a).

9 See 42 U.S.C. 3610, 3612.


12 See, e.g., HUD v. Twinbrook Village Apts., No. 02-0002560-0025-2, 2001 WL 1632533, at *1 (HUD ALJ Nov. 9, 2001) (“A violation of the Act may be premised on a theory of disparate impact.”); HUD v. Carusone, No. 88-91-0077-1, 1995 WL 365609 [HUD ALJ June 13, 1995] (“A policy or practice that is neutral on its face may be found to be violative of the Act if the record establishes a prima facie case that the policy or practice has a disparate impact on members of a protected class, and the Respondent cannot prove that the policy is justified by business necessity.”); HUD v. Ross, No. 01-49-0046-18, 1994 WL 326457, 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, No. 02-99-0015-1, 1992 WL 405520, at *5 (HUD ALJ May 1, 1992) (“The application of the discriminatory effects standard in cases under the Fair Housing Act is well established.”).


14 Brief for HUD Secretary as Respondent, Mountain Side Mobile Estates P’ship v. HUD, No. 94-05090 (10th Cir. 1994).


16 Brief for HUD Secretary as Respondent, Pfaff v. HUD, No. 94-70098 (9th Cir. 1998).


19 Id.


22 Brief for HUD Secretary as Respondent, Pfaff v. HUD, No. 94-70098 (9th Cir. 1998).
promulgating this regulation, HUD also emphasized the importance of the Joint Policy Statement, explaining that “[a]ll the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending.” And have “jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act.”

Consistent with its longstanding interpretation of the Act, over the past two decades, HUD has regularly issued guidance to its staff that recognizes the discriminatory effects theory of liability under the Act. For instance, HUD’s Assistant Secretary for Fair Housing and Equal Opportunity (FHEO) issued a memorandum in 1993 instructing HUD investigators to be sure to analyze complaints under the disparate impact theory of liability. HUD’s 1995 Title VIII Complaint Intake, Investigation and Conciliation Handbook, which set forth guidelines for investigating and resolving Fair Housing Act complaints, emphasized HUD’s enforcement staff that disparate impact is one of “the principal theories of discrimination” under the Fair Housing Act and required HUD investigators to apply it when appropriate. HUD’s 1996 version of the Enforcement Handbook, which is currently in effect, also recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases nationwide.

In 1998, at Congress’s direction, HUD published in the Federal Register previously-internal guidance from 1991 explaining why occupancy limits may violate the Act’s prohibition of discrimination because of familial status, premised on the application of disparate impact liability. More recently, HUD posted on its Web site guidance to its staff and others discussing how factually neutral housing policies addressing domestic violence can have a disparate impact on women in violation of the Act. Although several of the HUD administrative decisions, federal court holdings, and HUD and other federal agency pronouncements on the discriminatory effects standard just noted were discussed in the preamble to HUD’s November 16, 2011, proposed rule, HUD has described these events in the preamble to this final rule to underscore that this rule is not establishing new substantive law. Rather, this final rule embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts. In this regard, HUD emphasizes that the title of this rulemaking, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” indicates that HUD is not proposing new law in this realm.

As discussed in the preamble to the proposed rule (76 FR 70921, 70923), all federal courts of appeals to have addressed the question agree that liability under the Act may be established based on a showing that a neutral policy or practice has a discriminatory effect even if such a policy or practice was not adopted for a discriminatory purpose. There is minor variation, however, in how evidence has been analyzed pursuant to this theory. For example, in adjudications, HUD has always used a three-step burden-shifting approach, as do many federal courts of appeals.

One federal court of appeals applies a multi-factor balancing test, other courts of appeals apply a hybrid between the two, and one court of appeals applies a different test for public and private defendants. Another source of variation in existing law is in the application of the burden-shifting test. Under the three-step burden-shifting approach applied by HUD and the courts, the plaintiff (or, in administrative adjudications, the charging party) first must make a prima facie showing of either a disparate impact or a segregated effect. 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, the third step comes into play. There has been a difference of approach among the various appellate courts and HUD adjudicators as to which party bears the burden of proof at this third step, which requires proof as to whether or not a less discriminatory alternative to the challenged practice exists. All but one of the federal courts of appeals that use a burden-shifting approach place the ultimate burden of proving that a less discriminatory alternative exists on the plaintiff, with some courts analogizing to the burden-shifting framework established for Title VII of the Civil Rights Act of 1964 (Title VII), which addresses employment discrimination. The remaining court of appeals places the burden on the

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22 Id.

23 Memorandum from the HUD Assistant Secretary for Fair Housing & Equal Opportunity, The POTENTIALITY of Disparate Impact Analysis to Fair Housing Cases (Dec. 17, 1993.)


25 HUD, No. 8024.1, Title VIII Complaint Intake, Investigation & Conciliation Handbook at 2-27 (1998) (“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 2-28 (delineating for investigating a disparate impact claim and establishing its elements).


28 See, e.g., Groen Associates Ltd., 63 L.P. v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366, 374-76 (6th Cir. 2007); Reinhart v. Lincoln County, 482 F.3d 1325, 1329 (10th Cir. 2007); Hallmark Developers, Inc. v. Fulton County, Ga., 456 F.3d 1278, 1286 (11th Cir. 2006); Charleston Hous. Auth. v. U.S. Dep’t of Agric., 419 F.3d 729, 740-41 (4th Cir. 2005); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000); Stowers v. First Gibraltar Bank, 83 F.3d 1546, 1555 (9th Cir. 1996); Jackson v. Okaloosa County Fl., 21 F.3d 1531, 1543 (11th Cir. 1994); Kelly v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 484 F.2d 926, 937-38 (2d Cir. 1973); aff’d, 488 U.S. 15 (1988) (per curiam); President Addison v. Rizzo, 354 F.2d 126, 126 (3d Cir. 1967); Betsey v. Turtle Creek Assoc., 736 F.2d 963, 967-69 & n.3 (4th Cir. 1984); Metro. Hous. Dev. Ctr. v. Vill. of Arlington Heights, 551 F.2d 717, 724 (7th Cir. 1977); United States v. City of Black Jack, 502 F.2d 1179, 1184-86 (8th Cir. 1974).


30 HUD. Carter, 922 WL 1050, at *6 (HUD ALJ May 1, 1992); see also Joint Policy Statement, 59 FR 18269.

31 See, e.g., Grasshopper v. 1234 F.3d at 642; Langlois, 207 F.3d at 49-50; Huntington Branch, 484 F.2d at 930.


33 See, e.g., Groen, 580 F.3d at 373 (balancing test incorporated as elements of proof after second step of burden-shifting framework); Mountain Side Mobile Estates v. City of HFD, 58 F.3d 1243, 1252, 1254 (10th Cir. 1995) (incorporating a three-factor balancing test into the burden-shifting framework to weigh defendant’s justification).

34 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 Assoc., 736 F.2d 963, 989 n.5 (4th Cir. 1984).

35 Compare McC. Hollis Grooms Citizens in Action, Inc. v. City of Moline, 708 F.3d 375, 382 (7th Cir. 2011) (burden of proving less discriminatory alternative ultimately on plaintiff); and Gugler v. Morgan, 619 F.2d 823, 834 (8th Cir. 2010) (same).

36 See, e.g., Ferguson, 580 F.3d at 373-374 (same), Mountain Side Mobile Estates, 56 F.3d at 1254 (same), with Huntington Branch, 484 F.2d at 930 (burden of proving no less discriminatory alternative exists on defendant).

37 See, e.g., Groen, 580 F.3d at 373 (“Claims under Title VII and the Fair Housing Act generally should receive similar treatment.”).
defendant to show that no less discriminatory alternative to the challenged practice exists. HUD’s administrative law judges have, at times, placed this burden of proof concerning a less discriminatory alternative on the respondent and, at other times, on the charging party.

Through this rulemaking and interpretative authority under the Act, HUD formalizes its longstanding view that discriminatory effects liability is available under the Act and establishes uniform standards for determining when a practice with a discriminatory effect violates the Fair Housing Act.

III. The November 16, 2011, Proposed Rule

On November 16, 2011, HUD published a proposed rule in the Federal Register (76 FR 70921) addressing the discriminatory effects theory of liability under the Act. Specifically, HUD proposed adding a new subpart G to 24 CFR part 100, which would formalize the longstanding position held by HUD and the federal courts 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, and would establish uniform standards for determining when such a practice violates the Act.

In the proposed rule, HUD defined a housing practice with a “discriminatory effect” as one that “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.”

A housing practice with a discriminatory effect would still be lawful if supported by a “legally sufficient justification.” HUD proposed that 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 or defendant; and (2) those interests cannot be served by another practice that has a less discriminatory effect.

Consistent with its own past practice and that of many federal courts, HUD proposed a burden-shifting framework for determining whether liability exists under a discriminatory effects theory. Under the proposed burden-shifting approach, the charging party or plaintiff in an adjudication first bears the burden of proving that a challenged practice causes a discriminatory effect. If the charging party or plaintiff meets this burden, 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 its legitimate, nondiscriminatory interests. If the respondent or defendant satisfies this burden, the charging party or plaintiff may still establish liability by demonstrating that the legitimate, nondiscriminatory interest can be served by a less discriminatory practice that has a less discriminatory effect.

In the proposed rule, HUD explained that violations of various provisions of the Act may be established by proof of discriminatory effects, including 42 U.S.C. § 3604(a), § 3604(b), § 3604(d)(1), § 3604(f)(2), § 3605, and § 3606 (see 76 FR 70923 n.20) and that discriminatory effects liability applies to both public and private entities (see 76 FR 70924 n.40).

HUD also proposed to revise 24 CFR part 100 to add examples of practices that may violate the Act under the discriminatory effects theory.

IV. Changes Made at the Final Rule Stage

In response to public comment, a discussion of which is presented in the following section, and in further consideration of issues addressed at the proposed rule stage, HUD is making the following changes at this final rule stage:

A. Changes to Subpart G

The final rule makes several minor revisions to subpart G in the proposed rule for clarity. The final rule changes “housing practice” to “practice” throughout proposed subpart G to make clear that the standards set forth in subpart G are not limited to the practices addressed in subpart B, which is titled “Discriminatory Housing Practices.” The final rule replaces “under this subpart” with “under the Fair Housing Act” because subpart G outlines evidentiary standards for proving liability under the Fair Housing Act. The final rule also replaces the general phrase “prohibited intent” with the more specific “discriminatory intent.”

The final rule slightly revises the definition of discriminatory effect found in proposed § 100.500(a), without changing its meaning, to condense the definition and make it more consistent with terminology used in case law. Proposed § 100.500(a) provided that “[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.”

To clarify “legally sufficient justification” and in particular, what HUD meant in the proposed rule by “a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests,” HUD is revising the definition found in proposed § 100.500(b) to read as follows: “(1) A legally sufficient justification exists where the challenged practice: (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. § 3612, or defendant, with respect to claims brought under 42 U.S.C. § 3613 or § 3614; and (ii) Those interests could not be served by another practice that has a less discriminatory effect. (2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. * * * .”

This revision to the definition of “legally sufficient justification” includes changing “cannot be served,” the phrasing used in the proposed rule, to “could not be served.”

This revised definition of “legally sufficient justification” also appears in § 100.500(c)(2) and, in essentially the same form, in § 100.500(c)(3). The final rule also replaces the word “demonstrating” with “proving” in § 100.500(c)(3) in order to make clear that the burden found in that section is one of proof, not production.

In addition to these changes, the final rule makes several minor corrections to § 100.500. The final rule substitutes “42
established by a practice’s discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in §100.500.

The final rule revises the illustrations of discriminatory housing practices in the proposed rule, replacing them in more general terms. The language of the added illustrations, which in the proposed rule included paraphrasing the definition of discriminatory effect from subpart G, is revised to eliminate the paraphrasing, which is unnecessary after the addition to paragraph (b) of §100.5. This revision is also intended to eliminate any potential negative implication from the proposed rule that the existing illustrations in part 100 could not be proven through an effects theory. In addition to this general streamlining of the illustrations in the proposed rule, the final rule makes the following specific revisions to the illustrations.

In order to avoid redundancy in HUD’s Fair Housing Act regulations, this final rule eliminates proposed §100.65(b)(6). The substance of proposed §100.65(b)(6), which covers “Providing different, limited, or no governmental services such as water, sewer, or garbage collection” is already captured by existing §100.65(b)(4), which prohibits “Limiting the use of privileges, services, or facilities associated with a dwelling,” and existing §100.70(d)(4), which prohibits “Refusing to provide municipal services for dwellings or providing such services differently.”

In response to public comment, the final rule adds “enacting” and “ordinance” to §100.70(d)(4). These changes confirm that an ordinance is one type of land-use decision that is covered by the Act, under a theory of intentional discrimination or discriminatory effect, and that land-use decisions may discriminate from the moment of enactment. This final rule therefore revises proposed §100.70(d)(5) to give the following as an illustration of a prohibited practice: “Enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.” The final rule removes “cost” and “terms or conditions” from proposed §100.120(b)(2) and adds them to §100.130. This revision is not intended to make any substantive changes to HUD’s interpretation of the Act’s coverage, but rather is for organizational purposes only: §100.120 addresses discrimination in the making and provision of loans and other financial assistance, while §100.130 addresses discriminatory terms or conditions. Other minor streamlining changes are made to existing §100.120(b).

Accordingly, this final rule revises §100.120(b) to read as follows in the regulatory text of the rule:

The final rule amends existing §100.130(b)(2) to add “additions” and the term “cost” to the list of potentially discriminatory terms or conditions of loans or other financial assistance. It also adds new §100.130(b)(6), which, in response to a public comment, illustrates that receiving a condition of loans or other financial assistance delivered by section 805.41 Because, as noted above, at the final rule stage “terms and conditions” is removed from proposed §100.120(b)(2), new §100.130(b)(6) also addresses the provision of loans or other financial assistance with terms or conditions that have a discriminatory intent or effect. As a result of these changes, new §100.130(b)(6) reads as follows: “Servicing of loans or other financial assistance with respect to dwellings in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates, or providing such loans or financial assistance with other terms or conditions that discriminate, because of race, color, religion, sex, handicap, familial status, or national origin.”

V. The Public Comments

The public comment period for the November 16, 2011, proposed rule closed on January 17, 2012. Ninety-six public comments were received in response to the proposed rule. Comments were submitted by a wide variety of interested entities, including individuals, fair housing and legal aid organizations, state and local fair housing agencies, Attorneys General from several States, state housing finance agencies, public housing agencies, public housing trade associations, insurance companies, mortgage lenders, credit unions, banking trade associations, real estate agents, and law firms.42 This section of the preamble, which addresses significant issues raised in the public


42 All public comments on this rule can be found at www.regulations.gov, specifically at http://www.regulations.gov/
#searchResultsppp=50&pp=0&jkt=HUD-2011-0130.
the protection of persons with disabilities and in familial status cases; municipal land use decisions are more likely to have a discriminatory effect on minorities when they unreasonably attempt to restrict affordable housing; the effects analysis is important to environmental justice investigations; the discriminatory effects standard encourages housing providers to develop creative ways to achieve their economic objectives while promoting diversity; the effects standard gives HUD and fair housing advocates the tools to reveal the effects of racism, poverty, disability discrimination, and adverse environmental conditions on the health and well-being of individuals protected by the law; the rule provides practical administrative guidance for HUD attorneys and administrative law judges, as well as for the state and local fair housing agencies that share responsibility with HUD for adjudicating housing complaints; and the disparate impact standard is important in addressing discrimination in lending and denial of access to credit, which are often the results of neutral policies that have a disparate impact on protected groups.

Some commenters supported the proposed rule's allocation of the burden of proof, stating that the rule is practical and supported by longstanding precedent, and that it provides clear guidance to housing providers and government agencies in adopting rules and policies and an objective method for courts to evaluate discriminatory effect claims. A commenter stated that the perpetuation of segregation theory of effects liability is supported by the legislative history of Title VIII and the obligation to affirmatively further fair housing found in 42 U.S.C. 3608(d).

Following are the remaining issues raised by the public comments and HUD's responses:

A. Validity of Discriminatory Effects Liability Under the Act

Issue: Some commenters opposed the rule because, in their view, the Act's text cannot be interpreted to include liability under a discriminatory effects theory. Commenters stated that the Fair Housing Act does not include an effects standard because it does not use the phrase "adversely affect," as in Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans with Disabilities Act. One of these commenters stated that the Fair Housing Act does not include any of the words in other statutes that have been interpreted as giving rise to disparate impact claims, such as "affect" and "tend to." A commenter found the language in the Fair Housing Act unpersuasive evidence that Congress intended the Act to include an effects test because it is a catchall phrase at the end of a list of prohibited conduct, and it must be read as having a similar meaning as the specific items on the list.

Some commenters stated that the Act's prohibition of certain practices "because of," "on account of," or "based on" a protected classification necessitates a showing of discriminatory intent. A commenter stated that "because of" and "on account of," as used in every provision of the Act, require evidence of intent because the same phrases are used in two provisions of the Act that cannot plausibly be interpreted to employ discriminatory effects liability. In this regard, another commenter pointed to 42 U.S.C. 3631, which uses the phrase "because of" to create criminal liability for specific fair housing violations, and 42 U.S.C. 3617, which uses the phrase "on account of" to ban coercion and intimidation of those exercising fair-housing rights.

Other commenters expressed support for a rule setting out the discriminatory effects theory of liability. Some of these commenters stated that Congress intended that such liability exist and that the text of the Act readily supports this position. Commenters stated that discriminatory effects liability best effectuates Congress's broad, remedial intent in passing the Fair Housing Act and the Act's stated purpose of providing for fair housing, within constitutional limitations, throughout the country. Commenters pointed out that examples of neutral practices with discriminatory results that they have encountered, that an effects theory of liability continues to be vital in achieving the Act's broad goal.

Commenters stated that, consistent with HUD's interpretation of the Act, federal courts have unanimously held that liability may be established by proof of discriminatory effects.

HUD Response: As the preamble to the proposed rule and this final rule make clear, both HUD and the federal courts have long interpreted the Fair Housing Act to prohibit actions that have an unjustified discriminatory effect, regardless of whether the action was motivated by a discriminatory intent. Section 804(a) of the Act makes it unlawful "[t]o refused to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex,
familial status, or national origin.\textsuperscript{44} Similarly, section 804(f)(1) makes it unlawful "[t]o discriminate in the sale or rental of a dwelling otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."\textsuperscript{45} This "otherwise make unavailable or deny" formulation in the text of the Act focuses on the effects of a challenged action rather than the motivation of the actor. In this way, the provisions are similar to the "otherwise adversely affect" formulation that the Supreme Court found to support disparate impact liability under Title VII and the ADEA.\textsuperscript{46} And, indeed, the federal courts have drawn the analogy between Title VII and the Fair Housing Act in interpreting the Act to prohibit actions that have an unjustified discriminatory effect, regardless of intent.\textsuperscript{47, 48}

In addition, many of the Fair Housing Act's provisions make it unlawful "to discriminate" in certain housing-related transactions based on a protected characteristic.\textsuperscript{49} "Discriminate" is a term that may encompass actions that have a discriminatory effect but not a discriminatory intent.\textsuperscript{50} HUD's extensive experience in administering the Fair Housing Act and in investigating and adjudicating claims arising under the Act, which is
discussed in this preamble and that of the proposed rule,\textsuperscript{60} informs its conclusion that not only can the term "discriminate" be interpreted to encompass discriminatory effects liability, but it must be so interpreted in order to achieve the Act's stated purpose to provide for fair housing to the extent the Constitution allows.\textsuperscript{51} Indeed, as far back as 1980, the HUD Secretary explained to Congress why discriminatory effects liability under the Fair Housing Act is "imperative to the success of civil rights enforcement."\textsuperscript{52} Only by eliminating practices with an unnecessary disparate impact or that unnecessarily create, perpetuate, increase, or reinforce segregated housing patterns, can the Act's intended goal to advance equal housing opportunity and achieve integration be realized.\textsuperscript{53} In keeping with the broad remedial goals of the Fair Housing Act,\textsuperscript{54} HUD interprets the term "discriminate," as well as the language in sections 804(a) and 804(f)(1) of the Act, to encompass liability based on the results of a practice, as well as any intended effect. The "because of" phrase found in sections 804 and 805 of the Act\textsuperscript{55} and similar language such as "on account of" or "based on" does not signal that Congress intended to limit the Act's coverage to intentional discrimination. Both section 703(a)(2) of Title VII\textsuperscript{56} and section 4(a)(2) of the ADEA\textsuperscript{57} prohibit certain actions "because of" a protected characteristic, yet neither provision requires a finding of discriminatory intent.\textsuperscript{58} Moreover, the fact that the phrases "on account of" and "because of" appear in sections 817 and 831 of the Fair Housing Act\textsuperscript{59} does not

\textsuperscript{44} 42 U.S.C. 3604(a).
\textsuperscript{45} 42 U.S.C. 3604(f)(1).
\textsuperscript{46} See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII includes a disparate impact standard); Smith v. City of Jackson, Miss., 544 U.S. 228, 235 (2005) (affirming that the holding in Griggs represented the best reading of the Title VII text); id. at 240 (holding that section 4(a)(2) of the ADEA includes a disparate impact standard); see also Not! Cnty. Reinvestment Coalition v. Accredited Home Lenders Holding Co., 573 F. Supp. 2d 70, 79 (D.D.C. 2008) (holding that the Fair Housing Act encompasses disparate impact liability based on other reasons); language in the Act is analogous to language in the ADEA found by the Supreme Court to include disparate impact).
\textsuperscript{47} See Resident Advisory Bd. v. Rizzo, 554 F.2d 128, 146 (3d Cir. 1977) ([In Title VII cases, by analogy to Title VII cases, un(codec)proven substantive discrimination in one form or another is discriminatory in operation. The same analysis justifies the existence of disparate-impact liability under the FHA.]).
\textsuperscript{48} See 42 U.S.C. 3604(b), 3604(f)(1), 3604(f)(2), 3605, and 3606.
\textsuperscript{49} See, e.g., Alexander v. Choute, 469 U.S. 287, 290 (1985) (assuming without deciding that section 304 of the Act of 1973, which prohibits "[s]ubjecting to discrimination" otherwise qualified handicapped individuals, "reaches at least some cases in which the person has an unjustifiable disparate impact upon the handicapped"); Board of Ed. of Harris v. Harris, 444 U.S. 130, 140–41 (1979) (concluding that the term "discrimination," as used in the 1972 Emergency School Aid Act, was ambiguous and prescribed actions that had a disparate impact).
\textsuperscript{50} See supra nn. 12–27; preamble to the November 16, 2011, proposed rule at 76 FR 70923–25.
\textsuperscript{51} In enacting the Fair Housing Act, Congress expressed its desire to provide, within constitutional limitations, for fair housing throughout the United States. See 42 U.S.C. 3601.
\textsuperscript{53} See supra nn. 3–7; infra nn. 65–69.
\textsuperscript{54} See supra note 11.
\textsuperscript{55} 42 U.S.C. 3604 and 3605.
\textsuperscript{56} 42 U.S.C. 2000e–2(a)(2).
\textsuperscript{57} 29 U.S.C. 623(a)(2).
\textsuperscript{58} See Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 96 (2008) (explaining that, "in the typical disparate-impact case under the ADEA, "the employer's practice is without respect to age and its adverse impact (though 'because of' age) is attributable to a nonage factor"); Resident Advisory Bd. v. Rizzo, 554 F.2d 120, 127 (3d Cir. 1977) ("[T]he 'because of race' language is not unique to § 3604(a); that same language appears in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(b)", yet a prima facie case of Title VII liability is made out when a showing of a discriminatory effect (as distinct from intent) is established.").
\textsuperscript{59} 42 U.S.C. 3617 and 3631.
\textsuperscript{60} See supra note 26.
\textsuperscript{61} 42 U.S.C. 3607(b)(4).
The legislative history of the Act informs HUD’s interpretation. The Fair Housing Act was enacted after a report by the National Advisory Commission on Civil Disorders, which President Johnson had convened in response to major riots taking place throughout the country, warned that “[f]our Nation is moving toward two societies, one black, one white—separate and unequal.”

The Act’s lead sponsor, Senator Walter Mondale, explained in the Senate debates that the broad purpose of the Act was to replace segregated neighborhoods with “truly integrated and balanced living patterns.” Senator Mondale recognized that segregation was caused not only by “overt racial discrimination” but also by “old habits” which became “frozen rules,” and he pointed to one such facially neutral practice—the “refusal by such communities to accept low-income housing.” He further explained some of the ways in which federal, state, and local policies had formerly operated to require segregation and argued that “Congress should now pass a fair housing act to undo the effects of these past discriminatory actions.”

Moreover, in the approximately 20 years between the Act’s enactment in 1968 and its amendment in 1988, the nine federal courts of appeals to address the issue held that the Act prohibited actions with a discriminatory effect. Congress was aware of this widespread judicial agreement when it significantly amended the Act in 1988. At that time, the House Committee on the Judiciary specifically rejected an amendment that would have provided that “a zoning decision is not a violation of the Act unless the decision was made with the intent to discriminate.” Instead of adding this intent requirement to the Act, Congress chose to maintain the Act’s operative text barring discrimination and making unavailable or denying housing, to extend those prohibitions to disability and familial status, and to establish the exemptions discussed above that presuppose the availability of a discriminatory effects theory of liability. The failed attempt in 1988 to impose an intent requirement on the Act followed five other failed attempts, in 1980, 1981, 1983, 1985, and 1987.

Issue: Two commenters stated that, when promulgating regulations implementing the Fair Housing Amendments Act of 1988, HUD stated in the preamble that the “regulations are not designed to resolve the question of whether intent is or is not required to show a violation” of the Act. A commenter faulted HUD for failing to explain what the commenter perceived as a change in the interpretation of the Act and urged HUD to eliminate disparate impact liability from the rule. Some commenters stated that President Reagan, when signing the Fair Housing Amendments Act of 1988, expressed his opinion that the amendment “does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [Fair Housing Act] violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent.” Some commenters also stated that, in 1988, the United States Solicitor General submitted an amicus brief to the U.S. Supreme Court in Huntington Branch, NAACP v. Town of Huntington, asserting that a violation of the Fair Housing Act requires a finding of intentional discrimination.

 Hud Response: While HUD chose not to use the regulations implementing the Fair Housing Amendments Act of 1988 to opine formally on whether a violation under the Act may be established absent discriminatory intent, it has never taken the position that the Act requires a finding of intentional discrimination. On the contrary, through formal adjudications and various other means, including other regulations, interpretive guidance, and statements to Congress, HUD has consistently construed the Act as encompassing discriminatory effects liability. HUD’s prior interpretations of the Act regarding the discriminatory effects standard are entitled to judicial deference.

Both before and after Huntington Branch, the Department of Justice and the Department of Housing and Urban Development has taken the position that the Fair Housing Act includes discriminatory effects liability.

B. Definition of Discriminatory Effect, §100.500(a)

In order to make it more concise and more consistent with terminology used in case law without changing its substance, this final rule slightly revises the definition of “discriminatory effect.” Proposed §100.500(a) provided that “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.” Final §100.500(a) provides that “[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of

22 Id. at 2777.
23 Id. at 2689.
24 See, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 925–36 (2d Cir.), aff’d, 488 U.S. 15 (1988); Hanson v. Veterans Admin., 900 F.2d 1391, 1386 (5th Cir. 1990); Arthur v. City of Toledo, 762 F.2d 585, 574–75 (6th Cir. 1985); United States v. Marengo City, Comm’n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); Smith v. Clarkston, 682 F.2d 1065, 1055 (4th Cir. 1982); Hulse v. Wend Inv. Corp., 672 F.2d 1311 (10th Cir. 1982); Resident Advisory Bd v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1263, 250 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974).
persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”

Comments raised a number of issues with respect to the definition of “discriminatory effect.”

Issue: Two commenters requested that HUD expand the definition of “housing practice” to include the language from the preamble to the proposed rule that provided examples of facially neutral actions that may result in a discriminatory effect, e.g., laws, rules, decisions, standards, policies, practices, or procedures, including those that allow for discretion or the use of subjective criteria,” to make clear that the Act does not apply only to housing “practices.”

HUD Response: The Act and HUD regulations define “discriminatory housing practice” broadly as “an act that is unlawful under section 804, 805, 806, or 818.” As HUD explained in the preamble to the proposed rule, any facially neutral actions, 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. Given the breadth of the definition of “discriminatory housing practice,” and the examples provided in the preamble to the proposed rule, HUD does not agree that it is necessary to provide those examples in the text of the regulation. The final rule does, however, replace “housing practice” with “practice” in order to make clear it applies to the full range of actions that may violate the Fair Housing Act under the Act.

Issue: A commenter stated that, in light of the Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes, HUD should “remove those aspects of the proposed rule that would give rise to disparate impact liability based on the exercise of discretion.”

HUD Response: HUD does not agree that the Supreme Court’s decision in Wal-Mart means that policies permitting discretion may not give rise to discriminatory effects liability under the Fair Housing Act. The opinion in Wal-Mart did not address the substantive standards under the Fair Housing Act but instead addressed the issue of class certification under Title VII. Moreover, even in that context, the opinion in Wal-Mart does not shield policies that allow for discretion from liability under Title VII. On the contrary, the Supreme Court confirmed that an employer who permits his managers to exercise discretion may be liable under Title VII pursuant to a disparate impact theory, “since an employer’s undisciplined system of subjective decision-making can have precisely the same effects as a system pervaded by impermissible intentional discrimination.”

Issue: Some commenters asked HUD to remove the word “predictably” from the proposed definition. One commenter made this request out of concern that such a definition would make good faith compliance with the Act difficult, and another because claims based on a predictable impact are too speculative. Another commenter expressed support for the inclusion of “predictably” in the definition because discrimination cases often involve members of a protected class who predictably would be impacted by the challenged practice. As an example, the commenter noted that a challenge to a zoning or land use ordinance might focus on persons who would be excluded from residency by application of the ordinance.

HUD Response: HUD agrees with the latter commenter that the Act is best interpreted as prohibiting actions that predictably result in an unjustified discriminatory effect. HUD’s interpretation is supported by the plain language of the Fair Housing Act, which defines “aggravated person” as any person who “believes that such person will be injured by a discriminatory housing practice that is about to occur,” and which specifically authorizes HUD to take enforcement action and ALJs and courts to order relief with respect to discrimination that “is about to occur.” Moreover, courts interpreting the Fair Housing Act have agreed that predictable discriminatory effects may violate the Act.

Issue: A commenter requested that the preamble or the text of the final rule make clear that reasonable data, such as data from the U.S. Census Bureau, data required by the Home Mortgage Disclosure Act (HMDA), and HUD data on the occupancy of subsidized housing units, can be used to demonstrate that a practice predictably results in a discriminatory effect.

HUD Response: The purpose of the rule, as identified in the September 16, 2011, proposed rule, is to formalize a long-recognized legal interpretation and establish a uniform legal standard, rather than to describe how data and statistics may be used in the application of the standard. The appropriate use of such data is discussed in other federal sources, including the Joint Policy Statement.

Issue: Several commenters expressed concern that the proposed rule did not explain the degree to which a practice must disproportionately impact one group over another. A few commenters expressed the opinion that, in order for a practice to violate the Act, the practice must result in a significant or non-trivial discriminatory effect. A commenter noted that members of a protected class must be impacted in a manner that is “meaningfully different” from any impact on other individuals. Another commenter suggested defining a disparate impact as a 20 percent difference between the relevant groups. Another stated that the impact should be “qualitatively different.” A commenter wrote that, in the lending context, a disparate impact should not exist where statistics only show that a protected class, on an aggregate basis, has not received as many loans as the general population. Another commented on the rule that the rule would allow small statistical differences in the pricing of loans to be actionable.

HUD Response: As stated in the response to the preceding issue, this rule concerns the formalization of a long-recognized legal interpretation and burden-shifting framework, rather than a codification of how data and statistics may be used in the application of the standard. To establish a prima facie case of discriminatory effects liability under the rule, the charging party or plaintiff must show that members of a protected class are disproportionately burdened by the challenged action, or that the practice has a segregative effect. Whether a particular practice results in a discriminatory effect is a fact-specific inquiry. Given the numerous and varied practices and wide variety of private and governmental entities covered by the Act, it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts. HUD’s decision not to codify a significance requirement for pleading purposes is consistent with the Joint
Policy Statement,101 the statutory codification of the disparate impact standard under Title VII,102 and the Consumer Financial Protection Bureau’s interpretation of the disparate impact standard under ECOA.103

Issue: Two commenters stated that, in order to establish a prima facie case of discriminatory effect liability, a charging party or plaintiff should have to identify a specific practice and show that the alleged discriminatory effect is caused by that specific practice, with a commenter referring to Wards Cove Packing Co. v. Atchison, 490 U.S. 642 (1989), in support of this position.

HUD Response: HUD addressed this issue at the proposed rule stage, and its analysis is not changed in this final rule. Under this rule, the charging party or plaintiff has the burden of proving that a challenged practice causes a discriminatory effect.104 In HUD’s experience, identifying the specific practice that caused the alleged discriminatory effect will depend on the facts of a particular situation and therefore must be determined on a case-by-case basis. Moreover, as recognized in the employment context under Title VII, the elements of a decision-making process may not be capable of separation for analysis,105 in which case it may be appropriate to challenge the decision-making process as a whole. For example, in a reverse redlining case, there may be multiple acts or policies which together result in a discriminatory effect.106

Issue: Commenters expressed concern with the definition of “discriminatory effect” because it included a practice that has “the effect of creating, perpetuating, or increasing segregated housing patterns” based on protected class. A commenter asked that “segregation” be removed from the proposed definition. Another commenter expressed concern that this portion of the definition would extend liability beyond the factual circumstances of the cases HUD cited as examples in the proposed rule’s preamble because, according to the commenter, most of those cases raised at least a suggestion of intentional discrimination. A commenter stated that “segregation” should be more clearly defined so that the rule states, for example, whether the term requires an attempt to segregate further, or merely a practice that continues existing patterns of segregation. Another commenter expressed the related opinion that “not explicitly fostering integration” should never form the basis for liability under the Act.

HUD Response: As discussed in the preamble to both the proposed rule and this final rule, the elimination of segregation is central to why the Fair Housing Act was enacted.107 HUD therefore declines to remove from the rule’s definition of “discriminatory effects” “creating, perpetuating, or increasing segregated housing patterns.”108 The Fair Housing Act was enacted to replace segregated neighborhoods with “truly integrated and balanced living patterns.”109 It was structured to address discriminatory housing practices that affect “the whole community” as well as particular segments of the community;110 with the goal of advancing equal opportunity in housing and also to “achieve racial integration for the benefit of all people in the United States.”111 Accordingly, the Act prohibits two kinds of unjustified discriminatory effects: (1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns.112 Recognizing liability for actions that impermissibly create, increase, reinforce, or perpetuate segregated housing patterns directly addresses the purpose of the Act to replace segregated neighborhoods with “truly integrated and balanced living patterns.” For example, the perpetuation of segregation theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all-white communities and thus has aided attempts to promote integration.113 Moreover, every federal court of appeals that has addressed the issue has agreed with HUD’s interpretation that the Act prohibits practices with the unjustified effect of perpetuating segregation.114 In one such case, for example, the court of appeals held that a zoning ordinance that prevents the construction of multifamily housing in areas that are primarily white may violate the Act by “reinforcing racial segregated housing patterns.”

101 See 24 CFR 100.36(c); see also 76 FR 70925.
102 See 24 CFR 100.36(c); see also 76 FR 70925.
103 See 24 CFR 100.36(c); see also 76 FR 70925.
104 See id. at 52 (internal citations omitted); Holland, Developers, Inc. v. Fulton County, 366 F. Supp. 2d 1369, 1367 (N.D.Ga. 2005) (“There are two kinds of racially discriminatory effects which can be produced by a facially neutral decision. If the decision or action perpetuates segregation and thereby prevents interracial association it will be considered vindictive under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.”).
106 See supra note 28.
1. Substantial, Legitimate, Nondiscriminatory Interests, § 100.500(b)(1)

Issue: Although some commenters supported the use of the phrase “legitimate, nondiscriminatory interest,” a commenter asked that the final rule provide a definition of the phrase to ensure that the standard is applied uniformly. Commenters stated that the word “substantial” or “clearly” should modify the phrase “nondiscriminatory interests,” reasoning that justifying discrimination with an interest that may be of little or no importance to the defendant or respondent would run contrary to Congress’s goal of providing for fair housing within constitutional limitations.

HUD Response: HUD agrees that, in order to effectuate the Fair Housing Act’s broad, remedial goal, practices with discriminatory effects cannot be justified based on interests of an insubstantial nature. Accordingly, HUD is making clear in this final rule that any interest justifying a practice with a discriminatory effect must be “substantial.” A “substantial” interest is a core interest of the organization that has a direct relationship to the function of that organization. The requirement that an entity’s interest be substantial is analogous to the Title VII requirement that an employer’s interest in an employment practice with a disparate impact be job related. HUD uses the more general standard of substantiality because there is no single objective, such as job-relatedness, against which every practice covered by the Fair Housing Act could be measured. The determination of whether goals, objectives, and activities are of substantial interest to a respondent or defendant such that they can justify actions with a discriminatory effect requires a case-specific, fact-based inquiry.

The word “legitimate,” used in its ordinary meaning, is intended to ensure that a justification is genuine and not false, while the word “nondiscriminatory” is intended to ensure that the justification for a challenged practice does not itself discriminate based on a protected characteristic. HUD and federal courts interpreting the Fair Housing Act have

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105 For consistency with the terminology used in this case law, the final rule adds the term “reinforces” to the definition of “discriminatory effect.”

106 See, e.g., Durst-Webb Tenants Ass’n v. St. Louis Housing Auth., 417 F.3d 886, 892 (8th Cir. 2005) (defendant must prove that challenged action is necessary to achieve “legitimate, nondiscriminatory policy objectives”); Charleston Hous. Auth. v. U.S. Dep’t of Agric., 419 F.3d 729 (same).

107 See, e.g., 1998 Enforcement Handbook at 2–30 (instructing HUD investigators that a respondent’s policy must be justified by a “business necessity”); HUD v. Carlson, 95 WL 365099, at *4 (HUD AJ) June 12, 1995 (“The Respondent has the burden to overcome the prima facie case by establishing a business necessity for the policy.”); Joint Policy Statement, 59 FR at 18269 (requiring a challenged policy or practice to be “justified by business necessity.”)


profit and nonprofit private entities because, as discussed below, neither the text of the Act nor its legislative history supports drawing a distinction among them. Accordingly, HUD has chosen terminology that, while equivalent to its previous guidance in the Joint Policy Statement, applies readily to all covered entities and all covered activities.

**Issue:** Some commenters expressed concern that the term “legitimate” allows for subjective review of a proffered justification.

**HUD Response:** HUD and courts have reviewed justifications proffered by covered entities for many years. While the review is very fact intensive, it is not subjective. Whether an interest is “legitimate” is judged on the basis of objective facts establishing that the proffered justification is genuine, and not fabricated or pretextual. HUD and courts have engaged in this inquiry for decades without encountering issues related to the subjectivity of the inquiry. HUD therefore believes that concerns about subjective reviews of proffered justifications are not warranted.

**Issue:** A commenter requested that the final rule expressly state that increasing profits, minimizing costs, and increasing market share qualify as legitimate, nondiscriminatory interests. Similarly, another commenter asked that the final rule codify examples of tenant screening criteria such as rental history, credit checks, income verification, and court records that would be presumed to qualify as legally sufficient justifications.

**HUD Response:** HUD is not adopting these suggestions because the Fair Housing Act covers many different types of entities and practices, and a determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity is fact-specific and must be determined on a case-by-case basis. Accordingly, the final rule does not provide examples of interests that would always qualify as substantial, legitimate, nondiscriminatory interests for every respondent or defendant in any context.

2. Relationship Between Challenged Practice and Asserted Interest, § 100.500(b)(1)

**Issue:** Several commenters expressed concern with HUD’s use of the term “manifest” in the proposed requirement that the challenged practice have a “necessary and manifest relationship” to one or more legitimate, nondiscriminatory interests of the respondent or defendant. Commenters expressed uncertainty about what the term was intended to mean and how it would be interpreted by HUD or by federal courts. Taken together, commenters expressed concern that the term “manifest” may involve a subjective evaluation and others did not understand the evidentiary concept embodied in the term. A commenter urged HUD to make clear in the language of the final rule, in addition to the preamble, that a justification may not be hypothetical or speculative.

**HUD Response:** In the proposed rule, the term “manifest” was used to convey defendants’ and respondents’ obligation to provide evidence of the actual need for the challenged practice, instead of relying on speculation, hypothesis, generalization, stereotype, or fear. HUD recognizes that some commenters were confused by the term “manifest.” In response to these concerns, HUD is replacing the term “manifest” in the final rule with the term “necessity”, added in § 100.500(b)(2), that “a legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.” This language is intended to convey that defendants and respondents, relying on a defense under § 100.500(b)(1), must be able to prove with evidence the substantial, legitimate, nondiscriminatory interest supporting the challenged practice and the necessity of the challenged practice to achieve that interest. This language is consistent with HUD’s longstanding application of effects liability under the Fair Housing Act, is easy to understand, can be uniformly applied by federal and state courts and administrative agencies, and is unlikely to cause confusion or unnecessary litigation about its meaning. HUD notes that this language is also consistent with the application of the standard by other federal regulatory and enforcement agencies under both the Fair Housing Act and ECOA, and with the approach taken under Title VII, and with the approach taken by a number of federal courts interpreting the Fair Housing Act.

**Issue:** A commenter suggested that the phrase “necessary and manifest” should be defined.

**HUD Response:** As discussed above, HUD has removed the term “manifest” in the final rule in order to avoid any potential confusion. Thus, § 100.500(b)(1) is slightly revised at this final rule stage to state that a respondent or defendant seeking to defend a challenged practice with a discriminatory effect must prove that the practice “is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests” of the respondent or defendant. In the proposed rule, as well as this final rule, HUD uses “necessary” in its ordinary, most commonly used sense.

**Issue:** Some commenters suggested that HUD remove the word “necessary” to make the standard found in § 100.500(b)(1) consistent with the Title VII standard set out in the Supreme Court’s opinion in Waters v. Atkinson, 481 U.S. 664 (1987).

Commenters supported various standards without the word “necessary,” including requiring that the challenged practice have “a legitimate business purpose,” that the challenged practice have “a legitimate nondiscriminatory purpose,” or that the challenged practice be “rationally related to a legitimate, nondiscriminatory goal.”

**HUD Response:** HUD declines to adopt the commenters’ suggestion to remove “necessary” from the rule. HUD’s substantial experience in administering the Fair Housing Act confirms that requiring a challenged practice with a discriminatory effect to be necessary most effectuates the broad remedial goal of the Act. Indeed, in 1994 HUD and ten other federal agencies notified lenders of the requirement to justify the discriminatory effect of a challenged lending practice under the Fair Housing Act and ECOA by showing that the practice is necessary to their business. Moreover, in 1997, HUD

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112 See Joint Policy Statement, 59 FR at 18269 (“The justification must be manifest and not be hypothetical or speculative.”)
113 See 42 U.S.C. 2000e-2(h)(3)(A)(ii) (the respondent must “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”) (emphasis added).
114 See, e.g., Charleston Hous. Auth. v. U.S. Dep’t of Agric., 430 F.3d 726, 741 (8th Cir. 2005) (the challenged practice must have a “manifest relationship” to the defendant’s objectives).
115 Resident Advisory Bd. v. Rizzo, 594 F.2d at 149 (“a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant”) (emphasis added); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d at 938, affd, 488 U.S. 15 (1988) (per curiam) (same).
116 See Joint Policy Statement, 59 FR 18,269 (the second step of a disparate impact analysis under the Fair Housing Act and ECOA is whether the policy or practice is justified by “business necessity,”) id. (giving an example of a policy that may violate the Fair Housing Act and ECOA since “the lender is unlikely to be able to show that the policy is compelled by business necessity”); see also Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision, National Credit Union Administration, The Interagency Fair Lending Examination Procedures app. at 28, August 2009, available at http://www.fjee.org/pdf/feinpmpx.pdf.
promulgated a regulation recognizing that section 605 of the Act does not permit the use of loan factors that are necessary to a business. In addition, in 1988 the House Committee on the Judiciary, in advancing a bill amending the Fair Housing Act, recognized that liability should not attach when a justification is necessary to the covered entity’s business. HUD’s view is also consistent with Congress’s 1991 enactment of legislation codifying that, in the employment context, a practice that has a disparate impact must be consistent with “business necessity” and must also be “job related.” HUD also notes that a similar necessity requirement is found in ECOA, which requires that a challenged practice “more substantially involves the practice of a legitimate business need.” HUD’s final rule therefore uses language that is consistent with its longstanding interpretation of the Fair Housing Act, comparable to the protections afforded under Title VII and ECOA, and fairly balances the interests of all parties.

Issue: A commenter expressed concern that requiring a “necessary” relationship may interfere with loss mitigation efforts, including those under the Home Affordable Modification Program (HAMP) and Home Affordable Refinance Program (HARP)—federal programs that encourage mortgage servicers to offer modifications of loans or refinances—because such efforts are voluntary and participation in them may not be perceived as “necessary.”

HUD Response: Since at least the date of issuance of the Joint Policy Statement in 1994, lenders have been on notice that they must prove the necessity of a challenged practice to their business under both the Fair Housing Act and ECOA. This requirement has not prevented lenders or services from engaging in effective loss mitigation efforts. The mere fact that a policy is voluntarily adopted does not preclude it from being necessary to achieve a substantial, legitimate, nondiscriminatory interest. By formalizing the process of proving business necessity in a rule that clearly allocates the burdens of proof among the parties, HUD is not changing substantive law, but merely clarifying the contours of an available defense so that lenders may rely upon it with greater clarity as to how it applies.

Issue: A commenter expressed concern that requiring a respondent or defendant to prove necessity would subject the respondent or defendant to unnecessary and possibly frivolous investigations and litigation. Another commenter took the opposite position, stating that the rule would not create excessive litigation exposure for respondents or defendants because numerous procedural mechanisms exist to dispose of meritless cases. A commenter stated that, at the second stage of the burden-shifting analysis, a defendant should have the opportunity to demonstrate a legally sufficient justification, but also that the charging party or plaintiff did not satisfy its prima facie case because the challenged practice did not result in a discriminatory effect.

HUD Response: Given how the discriminatory effects framework has been applied to date by HUD and by the courts, HUD does not believe that the rule will lead to frivolous investigations or create excessive litigation exposure for respondents or defendants. As discussed above, since at least 1994, when the Joint Policy Statement was issued, lenders have known that they must prove the necessity of a challenged practice to their business. Moreover, HUD believes that promulgation of this rule—with its clear allocation of burdens and clarification of the showings each party must make—has the potential to decrease or simplify this type of litigation. For example, with a clear, uniform standard, covered entities can conduct consistent self-testing and compliance reviews, document their substantial, legitimate nondiscriminatory interests, and resolve potential issues so as to prevent future litigation. A uniform standard is also a benefit to entities operating in multiple jurisdictions. To the extent that the rule results in more plaintiffs being aware of potential effects liability under the Fair Housing Act, it should have the same impact on covered entities, resulting in greater awareness and compliance with the Fair Housing Act. Additionally, as a commenter noted, the Federal Rules of Civil Procedure provide various means to dispose of meritless claims, including Rules 11, 12, and 56. Moreover, a respondent or defendant may avoid liability by rebutting the charging party’s or plaintiff’s proof of discriminatory effect. If the fact-finder decides that the charging party or plaintiff has not proven that the challenged practice resulted in a discriminatory effect, liability will not attach.

Issue: A commenter expressed concern that, under the proposed rule, a legally sufficient justification under § 100.500(b)(1) may not be hypothetical or speculative but a discriminatory effect under § 100.500(a) may be, creating an imbalance in the burden of proof in favor of the charging party or plaintiff.

HUD Response: This comment indicates a misunderstanding of what § 100.500 requires. Requiring the respondent or defendant to introduce evidence (instead of speculation) proving that a challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests in order to benefit from the defense to liability is not different in kind from requiring the charging party or plaintiff to introduce evidence (not speculation) proving that a challenged practice caused or will predictably cause a discriminatory effect. As discussed in this preamble, the language of the Act makes clear that it is intended to address discrimination that has occurred or is about to occur, and not hypothetical or speculative discrimination.

D. Less Discriminatory Alternative, § 100.500(b)(2)

Some comments were received with respect to § 100.500(b)(2) of the proposed rule. With that provision, HUD proposed that a practice with a discriminatory effect may be justified only if the respondent’s or defendant’s interests cannot be served by a less discriminatory practice. In response to these comments, the final rule makes one slight revision to the proposed provision by substituting “could not be served” for “cannot be served.”

Issue: A commenter requested that HUD replace “cannot be served” with “would not be served” because, under the Supreme Court’s analysis in Ward v. Cove, a plaintiff cannot prevail by showing that a less discriminatory alternative could in theory serve the defendant’s business interest. This commenter also stated that, in order for liability to attach, a less discriminatory alternative must have been known to and rejected by the respondent or
defendant. Other commenters stated that, in order for liability to attach, the alternative practice must be equally effective as the challenged practice, or at least as effective as the challenged practice, with some of these commenters pointing to Wards Cove in support of this position. A number of other commenters, on the other hand, cited to Fair Housing Act case law for the proposition that liability should attach unless the less discriminatory alternative would impose an undue hardship on the respondent or defendant under the circumstances of the particular case.

**HUD Response:** HUD agrees that a less discriminatory alternative must serve the respondent’s or defendant’s substantial, legitimate nondiscriminatory interests, must be supported by evidence, and may not be hypothetically speculative. For greater consistency with the terminology used in HUD’s (and other federal regulatory agencies’) previous guidance in the Joint Policy Statement, 123 the final rule replaces “cannot be served” with “could not be served.” A corresponding change of “can” to “could” is also made in § 100.500(c)(3) of the final rule. HUD does not believe the rule’s language needs to be further revised to state that the less discriminatory alternative must be “equally effective,” or “at least as effective,” or “as effective,” or “at least as effective,” in serving the respondent’s or defendant’s interests; the current language already states that the less discriminatory alternative must serve the respondent’s or defendant’s interests, and the current language is consistent with the Joint Policy Statement, with Congress’s codification of the disparate impact standard in the employment context, 124 and with judicial interpretations of the Fair Housing Act. 125 The additional modifier

123 See Joint Policy Statement, 59 FR at 18369 (“Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect.”)

124 See 42 U.S.C. 2000e-2(b)(1)(A)(i) (“the concept of ‘alternative employment practice’ under Title VII “shall be in accordance with the law as it existed on June 4, 1989”); Almendarez Paper Co. v. Moody, 422 U.S. 485, 425 (1975) (“It remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest.”).

125 See, e.g., Dorst-Webbe, 417 F.3d at 506 (“plaintiffs must offer a viable alternative that satisfies the Housing Authority’s legitimate policy objectives while reducing the challenged practice’s discriminatory impact”); Huntington, 644 F.2d at 939 (analyzing whether the “[s]tate’s goal ... can be achieved by less discriminatory means”); Rizzo, 564 F.2d at 159 (it must be analyzed whether an alternative ‘could be adopted “equally effective,” borrowed from the superseded Wards Cove case, is even less appropriate in the housing context than in the legal field in light of the wider range and variety of practices covered by the Act that are not readily quantifiable. For a similar reason, HUD does not adopt the suggestion that the less discriminatory alternative proffered by the charging party or plaintiff must be accepted unless it creates an “undue hardship” on the respondent or defendant. The “undue hardship” standard, which is borrowed from the reasonable accommodation doctrine in disability law, would place too heavy a burden on the respondent or defendant.

In addition, HUD does not agree with the commenter who stated that Wards Cove requires the charging party or plaintiff to show that, prior to litigation, a respondent or defendant knew of and rejected a less discriminatory alternative, 126 or that Wards Cove even governs Fair Housing Act claims. HUD believes that adopting this requirement in the housing context would be unjustified because it would create an incentive not to consider possible ways to produce a less discriminatory result. Encouraging covered entities not to consider alternatives would be inconsistent with Congress’s goal of providing for fair housing throughout the country.

**Issue:** Two commenters expressed concern that, under the proposed rule’s language, the discriminatory effect of an alternative would be considered but a lender’s concerns such as credit risk would be irrelevant.

**HUD Response:** HUD believes these commenters’ concerns will not be realized in practice because a less discriminatory alternative need not be adopted unless it could serve the substantial, legitimate, nondiscriminatory interest at issue. The final rule specifically provides that the interests supporting a challenged practice are relevant to the consideration of whether a less discriminatory alternative exists. As stated in § 100.500(c)(3), the charging party or plaintiff must show that the less discriminatory alternative could serve the “interests supporting the challenged practice.” Thus, if the lender’s interest in imposing the challenged practice relates to credit risk, the alternative would also need to effectively address the lender’s concerns about credit risk.

E. **Allocations of Burdens of Proof in § 100.500(c)**

In the proposed rule, HUD set forth a burden-shifting framework in which the plaintiff or charging party would bear the burden of proving a prima facie case of discriminatory effect, the defendant or respondent would bear the burden of proving a legitimate, nondiscriminatory interest for the challenged practice, and the plaintiff or charging party would bear the burden of proving that a less discriminatory alternative exists.

**Issue:** Some commenters stated that the plaintiff or charging party should bear the burden of proof at all stages of the proceedings, either citing Wards Cove in support of this position or reasoning that, in our legal system, the plaintiff normally carries the burden of proving each element of his claim. Other commenters asked HUD to modify § 100.500(c)(3) in order to place the burden of proving no less discriminatory alternative on the defendant or respondent. Those recommending that the burden of proof allocation be modified in this way reasoned that the respondent or defendant is in a better position to bear this burden because of greater knowledge of, and access to, information concerning the respondent’s or defendant’s interests and whether a less discriminatory alternative could serve them. Several commenters stated that this is particularly true in the context of government decisions, as complainants and plaintiffs will generally be outside the political decision-making process, and in the context of insurance and lending decisions, where proprietary information and formulas used in the decision making process may be vigorously protected.

Commenters stated that complainants and plaintiffs may not have the capacity to evaluate possible less discriminatory alternatives. Some commenters also pointed out that assigning this burden to the respondent or defendant may avoid intrusive and expensive discovery into a respondent’s or defendant’s decision-making process, and would incentivize entities subject to the Act to consider less discriminatory options when making decisions. Commenters also stated that courts have placed this burden of proof on the defendant, others have placed it on the party for whom proof is easiest, and reliance on Title VII is inappropriate because of the unique nature of less discriminatory alternatives in Fair Housing Act cases.

**HUD Response:** HUD believes that the burden of proof allocation in § 100.500(c) is the fairest and most
conclusion and more consistent decision making by the fact finder in jury trials. With respect to expressed concerns about the ability of plaintiffs or complainants to demonstrate a less discriminatory alternative, plaintiffs in litigation in federal courts may rely on Rule 26(b)(1) of the Federal Rules of Civil Procedure for the discovery of information “that is relevant to any party’s claim or defense,” and parties in an administrative proceeding may rely on Rule 26(b)(1) and a similar provision in HUD’s regulations. The application of those standards would likely provide for the discovery of information regarding the alternatives that exist to achieve an asserted interest, the extent to which such alternatives were considered, the reasons why such alternatives were rejected, and the data that a plaintiff or plaintiff’s expert could use to show that the defendant did not select the least discriminatory alternative. An appropriately tailored protective order can be issued by the court to provide access to proprietary information in the context of cases involving confidential business information, such as those involving insurance or lending, while providing to respondents and defendants adequate protection from disclosure of this information. Moreover, as noted above, in administrative adjudications, it is the charging party, not non-intervening complainants, who bear this burden of proof.

F. Application of Discriminatory Effects Liability

Comments were received with respect to how the discriminatory effects standard would be applied and how it might impact covered entities. These comments expressed varying concerns, including the retroactivity of the rule, its application to the insurance and lending industries, and its impact on developing affordable housing.

Issue: A commenter stated that each of the cases listed in the proposed rule as examples of practices with a segregation effect involved a government actor, while another commenter asked HUD to clarify whether liability may attach to private parties.

HUD Response: Liability for a practice that has an unjustified discriminatory effect may attach to either public or private parties according to the standards in § 100.500, because there is nothing in the text of the Act or its legislative history to indicate that Congress intended to distinguish the manner in which the Act applies to public versus private entities.

Issue: A commenter expressed the opinion that the Fair Housing Act does not grant HUD the power to promulgate retroactive rules, and therefore HUD should make clear that the final rule applies prospectively only.

HUD Response: This final rule embodying HUD’s and the federal courts’ longstanding interpretation of the Act to include a discriminatory effects standard will apply to pending and future cases. HUD has long recognized, as have the courts, that the Act supports an effects theory of liability. This rule is not a change in HUD’s position but rather a formal interpretation of the Act that clarifies the appropriate standards for proving a violation under an effects theory. As such, it “is no more retroactive in its operation than a judicial determination construed and applying a statute to a case in hand.”

Issue: A commenter stated that the most appropriate remedy for a violation of the Act under an effects theory is declaratory or injunctive relief. This commenter expressed the opinion that the use of penalties or punitive damages generally does not serve the underlying purpose of the Fair Housing Act to remedy housing discrimination.

HUD Response: HUD disagrees with the commenter. The Fair Housing Act specifically provides for the award of damages—both actual and punitive—and penalties.

Issue: Commenters from the insurance industry expressed a number of concerns about the application of the proposed rule to insurance practices. Some commenters stated that application of the disparate impact standard would interfere with state regulation of insurance in violation of the McCarran-Ferguson Act (15 U.S.C. 1011–1015) or the common law “filed rate doctrine.” Some commenters stated that HUD’s use of Ojo v. Farmers Group, Inc., 600 F.3d 1265 (9th Cir. 2010), in the preamble of the proposed rule was not appropriate.

137 See supra notes 29–33.
139 ECOA prohibits discrimination in credit on the basis of race and other enumerated criteria. See 15 U.S.C. 1691.
140 See supra note 94, at 4–5 (1976) ("[J]udicial constructions of antidiscrimination legislation in the employment field, in cases such as Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 425 (1975), are intended to serve as guides in the application of ECOA, especially with respect to the allocation of burdens of proof."). 12 CFR part 1002.6(a) ("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. 425 (1975), to be applicable to a creditor’s determination of creditworthiness."). 12 CFR part 1002, 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).").
138 See Joint Policy Statement, 50 FR 18206.
139 Note that the Joint Policy Statement analyzed the standard for proving disparate impact discrimination in lending under the Fair Housing Act and under ECOA without any differentiation. See 50 FR 18209.
141 See 24 CFR 180.50(b) ("parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the proceeding.")
HUD Response: HUD has long interpreted the Fair Housing Act to prohibit discriminatory practices in connection with homeowner’s insurance. See, e.g., Ojo v. Farmers Group. However, as discussed above, HUD has consistently interpreted the Act to permit violations to be established by proof of discriminatory effect. By formalizing the discriminatory effects standard, the rule will not, as one commenter suggested, “undermine the states’ regulation of insurance.” The McCarran-Ferguson Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act specifically relates to the business of insurance.” McCarran-Ferguson does not preclude HUD from issuing regulations that may apply to insurance policies. Rather, McCarran-Ferguson instructs courts on how to construe federal statutes, including the Act. How the Act should be construed in light of McCarran-Ferguson depends on the facts at issue and the language of the relevant State law “relating to the business of insurance.” Because this final rule does not alter the instruction of McCarran-Ferguson or its application as described in Ojo v. Farmers Group, it will not interfere with any State regulation of the insurance industry.

Issue: Some commenters stated that liability for insurance practices based on a disparate impact standard of proof is disproportionate because insurance is risk-based and often based on a multivariate analysis. A commenter wrote that “to avoid creating a disparate impact, an insurer would have to charge everyone the same rate, regardless of risk,” or might be forced to violate state laws that require insurance rates to be actuarially sound estimates of the expected value of all future costs associated with an individual risk transfer.

Issue: Another commenter expressed concern that the rule may create strict liability for entities complying with contractual obligations set by third parties, including the federal government.

HUD Response: The commenter misconstrues the discriminatory effects standard, which permits a defendant or respondent to defend against a claim of discriminatory effect by establishing a legally sufficient justification, as specified in § 100.500.

Issue: Another commenter expressed concern that the citation to Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251 (D. Mass. 2008), in the preamble rule is inconsistent with the decision in Meyer v. Holley, 537 U.S. 280 (2003). This commenter requested that HUD revise the proposed rule to articulate the standard set forth in Meyer. HUD Response: HUD does not agree with the commenter’s suggestion. HUD recognizes that pursuant to Meyer, liability under the Act for corporate officers is determined by agency law. The proposed rule cited Miller as an example of how a lender’s facially neutral policy allowing employees and mortgage brokers the discretion to price loans may be actions proscribed by the Fair Housing Act. The decision in Miller is not inconsistent with the Supreme Court’s ruling on agency in Meyer, and therefore HUD does not believe that the final rule needs to be revised in response to this comment.

Issue: Several commenters expressed concern that adoption of the proposed discriminatory effects standard would lead to lawsuits challenging lenders’ use of credit scores, other credit assessment standards, or automated underwriting. A commenter stated that a lender’s consideration of credit score or other credit assessment standards such as a borrower’s debt-to-income ratio may have a disparate impact because of demographic differences. This commenter cited studies which indicate that borrowers who live in zip codes with a higher concentration of minorities are more likely to have lower credit scores and fewer savings. A commenter stated that credit scores are often used as the determining factor in a lender’s origination practices and that certain underwriting software and investor securitization standards require a minimum credit score. The comment further stated that HUD’s Federal Housing Administration (FHA) program has recognized the value of credit scores in setting underwriting standards for FHA insured loans. According to the commenter, lenders have little ability or desire to override credit score standards, because manual underwriting is time consuming and staff-intensive. Another commenter expressed concern that, even if a lender was successful in defending its credit risk assessment practices under the burden-shifting approach, the lender would have to defend an expensive lawsuit and suffer harm to its reputation.

See, e.g., 24 CFR 100.70(d)(4) (Mar. 15, 1989) (defining “other prohibited sale and rental conduct” to include “refusing to provide * * * property or hazard insurance for dwellings or providing such * * * insurance differently because of a protected class”); 51 FR 44,092, 44,097 (Nov. 7, 1986) (proposing to proposed regulations stating that “discriminatory refusal to provide * * * adequate property or hazard insurance * * * has been interpreted by the Department and by courts to mean dwellings unavailable”); Ojo v. Farmers Group, Inc., 600 F.3d at 1208; NAACP v. American Family Mut. Ins. Co., 579 F.3d 487, 490 (7th Cir. 2009); Nationwide Mut. Ins. Co. v. Cassano, 52 F.3d 1351, 1355–1360 (6th Cir. 1995). But see Mackey v. Nationwide Ins. Co., 734 F.3d 419, 423–25 (4th Cir. 1986) (pre-Fair Housing Amendments Act and regulations pursuant thereto holding that Act does not cover insurance).

See Groch, 508 F.3d at 374–75. 

143 See Groch, 508 F.3d at 375 (“we cannot create categorical exceptions from the Act without a statutory basis” and “[m]aking in the text of the FHA instructions to create practice-specific exceptions”).
Commenters from the lending industry also stated that the rule may have a chilling effect on lending in lower income communities. A commenter stated that the rule will create uncertainty in a skittish market, so lenders will be cautious about lending in lower income communities for fear of a legal challenge. Some of these commenters reasoned that underwriting requirements and risk requirements pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act (Pub. L. 111–203, approved July 21, 2010)), such as ability to repay, down payment requirements, and qualified residential mortgages, may result in a disparate impact because of demographic differences. Another commenter explained that the rule would eliminate in-portfolio mortgage loans at community banks, which provide mortgage credit to borrowers who might not qualify for a secondary market transaction.

HUD Response: HUD does not believe that the rule will have a chilling effect on lending in lower income communities or that it will encourage lawsuits challenging credit scores, other credit assessment standards, or the requirements of the Dodd-Frank Act. As discussed above, the rule does not change the substantive law; eleven federal courts of appeals have recognized discriminatory effects liability under the Act and over the years courts have evaluated both meritorious and non-meritorious disparate effects claims challenging lending practices. As HUD has stated previously, the rule formalizes a substantive legal standard that is well recognized by both courts and participants in the lending industry for assessing claims of disparate treatment. Indeed, in the lending context, at least since the issuance of the Joint Policy Statement nearly 18 years ago, non-depository lenders, banks, thrifts, and credit unions have been on notice that federal regulatory and enforcement agencies, including HUD and the Department of Justice, may apply a disparate impact analysis in their examinations and investigations under both the Fair Housing Act and ECOA. The regulations and Staff Commentary implementing ECOA also explicitly prohibit unjustified discriminatory effects. Thus, neither a chilling effect nor a wealth of new lawsuits can be expected as a result of this rule. Rather, HUD anticipates that this rule will encourage the many lenders and other entities that already conduct internal discriminatory effects analyses of their policies to review those analyses in light of the new uniform standard for a legally sufficient justification found in §100.500. Indeed, lender compliance should become somewhat easier due to the rule’s clear and nationally uniform allocation of responsibility and clarification of the showings each party must make.

Issue: Some commenters expressed concern that faced with the threat of disparate impact liability, lenders might extend credit to persons not otherwise qualified for a loan. As discussed previously, the final rule formalizes a standard of liability under the Act that has been in effect for decades. HUD is unaware of any lender found liable under the discriminatory effects standard for failing to make a loan to a member of a minority group who did not meet legitimate, nondiscriminatory requirements.

Issue: Several other commenters expressed a concern that discriminatory effects liability might have a chilling effect on efforts designed to preserve or develop affordable housing, including pursuant to HUD’s own programs, because much of the existing affordable housing stock is located in areas of minority concentration. A commenter stated that resources designed to support the development of affordable housing will be “deflected” away so as to respond to claims of disparate impact discrimination. Another commenter requested that HUD issue guidance to the affordable housing industry as they administer HUD programs.

Other commenters expressed concern about potential liability for administrators of the federal Low Income Housing Tax Credit (LIHTC) program. These commenters reasoned that the concentration of affordable housing stock in low-income areas, combined with federal requirements and incentives which encourage the deployment of tax credits in a disproportionate manner, may result in discriminatory effects liability for agencies administering the LIHTC program. Several commenters asked HUD to specify in the final rule that the mere approval of LIHTC projects in minority areas alone does not establish a prima facie case of disparate impact under the Act or that locating LIHTC projects in low-income areas is a legally sufficient justification to claims of disparate impact discrimination. A commenter requested that HUD provide guidance to such agencies.

HUD Response: HUD does not expect the final rule to have a chilling effect on the development and preservation of affordable housing because, as discussed above, the rule does not establish a new form of liability, but instead serves to formalize by regulation a standard that has been applied by HUD for years, while providing nationwide uniformity of application. The rule does not mandate that affordable housing be located in neighborhoods with any particular characteristic, but requires, as the Fair Housing Act already does, only that housing development activities not have an unjustified discriminatory effect.

Concerns of a chilling effect on affordable housing activities are belied by the prevalence of cases where the discriminatory effects methods has been used by plaintiffs seeking to develop such housing and even by the less frequent instances where

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agencies administering affordable housing programs have been
defendants.\textsuperscript{144} Rather than indicating a chilling effect, existing case law shows
the use of the discriminatory effects framework has promoted the
development of affordable housing, while allowing due consideration for
substantial, legitimate, nondiscriminatory interests involved in
providing such housing. Moreover, recipients of HUD funds already must
comply with a variety of civil rights requirements. This includes the
obligation under Title VI of the Civil Rights Act of 1964 and its applicable
regulations to refrain from
discrimination, either by intent or effect, on the basis of race, color, or national
origin; the obligation under the Fair
Housing Act to affirmatively further fair housing in carrying out HUD programs;
and HUD program rules designed to
foster compliance with the Fair Housing Act and other civil rights laws. As
discussed throughout this preamble,
allegations of discriminatory effects
discrimination must be analyzed on a
case-by-case basis using the standards
set out in \$100.500. HUD will issue
guidance addressing the application of
the discriminatory effects standard with respect to HUD programs.

Issue: Like commenters who
requested “safe harbors” or exemptions for
the insurance and lending
industries, some commenters requested that the proposed rule be revised to
provide “safe harbors” or exemptions from liability for programs designed to
preserve affordable housing or revitalize existing communities. A commenter
requested that the final rule provide
safe harbors for state and local programs that
have legitimate policy and safety goals such as protecting water resources,
promoting transit oriented development, and revitalizing communities. Other
commenters requested safe harbors or exemptions for entities that are meeting requirements or
standards established by federal or state
law or regulation, such as the Federal
Credit Union Act, the Dodd-Frank Act,
HAMP and HARP, or by governmentsponsored enterprises or investors.

HUD Response: HUD does not
believe that the suggested safe harbors or exemptions from discriminatory effects
liability are appropriate or necessary. HUD notes that, in seeking these
exemptions, the commenters appear to misconstrue the discriminatory effects
standard, which permits practices with
discriminatory effects if they are
supported by a legally sufficient justification. The standard thus recognizes
may be lawful
even if it has a discriminatory effect. HUD notes further that Congress created
various exemptions from liability in the
text of the Act,\textsuperscript{146} and that in light of
this and the Act’s important remedial purposes, additional exemptions would
be contrary to Congressional intent.

Issue: Several commenters expressed
concern that in complying with the new
Dodd-Frank Act mortgage reforms,
including in determining that
consumers have an ability to repay, a lender necessarily “will face liability
under the Proposed Rule.”

HUD Response: HUD reiterates that
the lender is free to defend any allegations of discrimination
by meeting its burden of proof at
\$100.500. Moreover, if instances were
to arise in which a lender’s efforts to
comply with the Dodd-Frank Act were
challenged under the Fair Housing Act’s
discriminatory effects standard of
liability, those same activities most
likely would be subject to a similar challenge under ECOA and Regulation
B, which also prohibits lending practices
that have a discriminatory effect based
on numerous protected characteristics.\textsuperscript{147} The Dodd-Frank Act
created the Consumer Financial
Protection Bureau to combat both unfair and deceptive practices and
discriminatory practices in the
consumer financial industry, and it gave the
Consumer Financial Protection Bureau
authority to enforce
ECOA.\textsuperscript{148} See Dodd-Frank Act sections
1402–1403 (enacting section 129B of the
Truth in Lending Act “to assure that
consumers are offered and receive
residential mortgage loans on terms that
reasonably reflect their ability to repay
the loans and that are understandable and
not unfair, deceptive or abusive,”
and, as part of that section, requiring
the Consumer Financial Protection Bureau
to create regulations that prohibit
“abusive or unfair lending practices that
promote disparities among consumers of
equal credit worthiness but of different
race, ethnicity, gender, or age”); see also
Dodd-Frank Act section 1013(c)
(establishing the Consumer Financial Protection Bureau’s Office of Fair
Lending and Equal Opportunity
to provide enforcement of fair lending
laws, including ECOA, and coordinate
fair lending efforts within the Bureau
and with other federal and state
agencies); id. section 1083 (transferring
regulatory authority for ECOA to the
Consumer Financial Protection Bureau).

C. Illustrations of Practices With
Discriminatory Effects

Consistent with HUD’s existing Fair
Housing Act regulations, which contain
illustrations of practices that violate the
Act, the proposed rule specified
additional illustrations of such
practices. The November 16, 2011, rule
proposed to add illustrations to 24 CFR
100.65, 100.70 and 100.120. The final
rule revises these illustrations in the
manner described below.

Because the illustrations in HUD’s
existing regulations include practices
of creating, perpetuating, or increasing
an internal or effects theory, and proposed
\$100.65(b)(6) describes conduct that is
already prohibited in \$100.65(b)(4)—the
provision of housing-related services—and
\$100.70(d)(4)—the provision of
municipal services—this final rule
eliminates proposed \$100.65(b)(6). This
will avoid redundancy in HUD’s Fair
Housing Act regulations, and its
elimination from the proposed rule is not
intended as a substantive change.

Commenters raised the following
issues with respect to the proposed
rule’s illustrations of discriminatory
practices.

Issue: A commenter stated that the
examples specified by the proposed rule
describe the types of actions that the
commenter’s “clients encounter
regularly.” Examples of potentially
discriminatory laws or ordinances cited
by commenters include ordinances in
largely white communities that establish
local residency requirements, limit the
use of vouchers under HUD’s Housing
Choice Voucher program, or set large-lot
density requirements. Commenters
suggested that language should be
added to proposed \$100.70(d)(5), which
provides, as an example,
“[l]eveling, or land use policies or
procedures that restrict or deny
housing opportunities in a manner that
has a disparate impact or has the effect
of perpetuating or increasing segregated housing patterns” based on a
protected class. Commenters stated that
this example should include not just the
word “leveling,” but also the
words “enacting” “maintaining,” and/or
“applying” because the discriminatory
effect of a land-use decision may occur
from the moment of enactment. A
commenter suggested that the word
“ ordinances” should be added to the
type to make clear that the Act
applies to all types of exclusionary land
use actions.

\textsuperscript{144} See, e.g., 42 U.S.C. 3603(b)(1)(1) (exempting from
most of section 804 of the Act an owner’s sale or
rental of his single-family house if certain
conditions are met.


\textsuperscript{147} See 12 U.S.C. 5491 et seq.
HUD Response: HUD reiterates that the illustrations contained in HUD's regulations are merely examples. The scope and variety of practices that may violate the Act make it impossible to list all examples in a rule. Nevertheless, HUD finds it appropriate to revise proposed § 100.70(d)(5) in this final rule in order to confirm that a land-use ordinance may be discriminatory from the moment of enactment. The final rule therefore changes "implementing land-use rules, policies, or procedures * * * to "[enacting or implementing land-use rules, ordinances, policies, or procedures * * *."] It is not necessary to add "maintaining" or "applying" to § 100.70(d)(5) because the meaning of these words in this context is indistinguishable from the meaning of "implementing."

Because the illustrated conduct may violate the Act under either an intent theory, an effects theory, or both, HUD also finds it appropriate to replace "in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns" because of a protected characteristic with "otherwise make unavailable or deny dwellings because of a protected characteristic." As discussed in the "Validity of Discriminatory Effects Liability under the Act" section above, the phrase "otherwise make unavailable or deny" encompasses discriminatory effects liability. This revised language, therefore, is broader because it describes land-use decisions that violate the Act because of either a prohibited intent or an unjustified discriminatory effect. The final rule is similar to each of the illustrations so they may cover violations based on intentional discrimination or discriminatory effects.

Issue: A commenter requested that HUD add as an example the practice of prohibiting from housing individuals with records of arrests or convictions. This commenter reasoned that such blanket prohibitions have a discriminatory effect because of the disproportionate numbers of minorities with such records. The commenter stated further that HUD should issue guidance on this topic similar to guidance issued by the Equal Employment Opportunity Commission. Another commenter expressed concern that the rule would restrict housing providers from screening tenants based on criminal arrest and conviction records. This commenter also asked HUD to issue guidance to housing providers on appropriate background screening.

HUD Response: Whether any discriminatory effect resulting from a housing provider's or operator's use of criminal arrest or conviction records to exclude persons from housing is supported by a legally sufficient justification depends on the facts of the situation. HUD believes it may be appropriate to explore the issue more fully and will consider issuing guidance for housing providers and operators.

Issue: Several comments suggested revisions to proposed § 100.120(b)(2), which specifies as an example "[p]roviding 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." These commenters stated that proposed § 100.120(b)(2) does not contain language concerning the second type of discriminatory effect, i.e., creating, perpetuating or increasing segregation. They urged HUD to add language making clear that the provision of loans or other financial assistance may result in either type of discriminatory effect.

In addition, several commenters asked HUD to clarify that mortgage servicing with a discriminatory effect based on a protected characteristic may violate the Act.

HUD Response: As discussed above, proposed § 100.120(b)(2) is revised in the final rule to cover both intentional discrimination and discriminatory effects. HUD also agrees that residential mortgage servicing is covered by the Act. It is a term or condition of a loan or other financial assistance, covered by section 805 of the Act. Accordingly, the final rule adds a § 100.130(b)(3), which provides an illustration of discrimination in the terms or conditions for making available loans or financial assistance, in order to show that discriminatory loan servicing (and other discriminatory terms or conditions of loans and other financial assistance) violate the Act’s proscription on "discrimination * * * in the terms or conditions of a residential real estate-related transaction."

Issue: A commenter expressed concern that the language in proposed § 100.120(b)(2) would allow for lawsuits based only on statistical data produced under HMDA.

HUD Response: HMDA and courts have recognized that analysis of loan level data identified though HMDA may indicate a disparate impact. Such a


showing, however, does not end the inquiry. The lender would have the opportunity to refute the existence of the alleged impact and establish a substantial, legitimate, nondiscriminatory interest for the challenged practice, and the charging party or plaintiff should have the opportunity to demonstrate that a less discriminatory alternative is available to the lender.

Issue: A commenter stated that HUD should not add any of the new examples unless the final rule makes clear that the specified practices are not per se violations of the Act, but rather must be assessed pursuant to the standards set forth in § 100.500. According to the commenter, the new examples may be misconstrued because they state only the initial finding described in § 100.500.

HUD Response: HUD agrees that, when a practice is challenged under a discriminatory effects theory, the practice must be reviewed under the standards specified in § 100.500. The final rule therefore adds a sentence to the end of § 100.5(b), which makes clear that discriminatory effects claims are assessed pursuant to the standards stated in § 100.500.

H. Other Issues

Issue: A commenter requested that HUD examine the overall compliance burden of the regulation on small businesses, noting that Executive Order 13563 requires a cost-benefit analysis.

HUD Response: In examining the compliance burden on small institutions, the governing authority is the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., which provides, among other things, that the requirements to do an initial and final regulatory flexibility analysis "shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Thus, the focus is on whether the rule—and not the underlying statute or preexisting administrative practice and case law—will have a significant economic impact.

For this rule, the impact primarily arises from the Fair Housing Act itself, not as interpreted by HUD, but also as interpreted by federal courts. Because this final rule provides a uniform burden-shifting test for determining
whether a given action or policy has an unjustified discriminatory effect, the rule serves to reduce regulatory burden for all entities, large or small, by establishing certainty and clarity with respect to how a determination of unjustified discriminatory effect is to be made.

The requirement under the Fair Housing Act not to discriminate in the provision of housing and related services is the law of the nation. We presume that the vast majority of entities both large and small are in compliance with the Fair Housing Act. Furthermore, for the minority of entities that have, in the over 40 years of the Fair Housing Act’s existence, failed to institutionalize methods to avoid engaging in illegal housing discrimination and plan to come into compliance as a result of this rule-making, the costs will simply be the costs of compliance with a preexisting statute, administrative practice, and case law. Compliance with the Fair Housing Act has for almost 40 years included the requirement to refrain from undertaking actions that have an unjustified discriminatory effect. The rule does not change that substantive obligation; it merely formalizes it in regulation, along with the applicable burden-shifting framework.

Variations in the well-established discriminatory effects theory of liability under the Fair Housing Act, discussed earlier in the preamble, are minor and making them uniform will not have a significant economic impact. The allocation of the burdens of proof among the parties, described in the rule, are methods of proof that only come into play if a complaint has been filed with HUD, a state or local agency or a federal or state court; that is, once an entity has been charged with discriminating under the Fair Housing Act. The only economic impact discernible from this rule is the cost of the difference, if any, between defense of litigation under the burden-shifting test on the one hand, and defense of litigation under the balancing or hybrid test on the other. In all the tests, the elements of proof are similar. Likewise, the costs to develop and defend such proof under either the burden-shifting or balancing tests are similar. The only difference is at which stage of the test particular evidence must be produced. There would not, however, be a significant economic impact on a substantial number of small entities as a result of this rule.

Executive Order 13563 (Improving Regulations and Regulatory Review) reaffirms Executive Order 12866, which requires that agencies conduct a benefit/cost assessment for rules that “have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, sector the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.” As stated in Section VII of this preamble below, this rule is not “economically significant” within the meaning in Executive 12866, and therefore a full benefit/cost assessment is not required. This final rule does not alter the established law that facially neutral actions that have an unjustified discriminatory effect are violations of the Fair Housing Act. What this rule does is formalize that well-settled interpretation of the Act and provide consistency in how such discriminatory effects claims are to be analyzed.

VI. This Final Rule

For the reasons presented in this preamble, this final rule formalizes the longstanding interpretation of the Fair Housing Act to include discriminatory effects liability and establishes a uniform standard of liability for facially neutral practices that have a discriminatory effect. Under this rule, liability is determined by a burden-shifting approach. The charging party or plaintiff in an adjudication first must bear the burden 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 is necessary to achieve one or more of the defendant’s or respondent’s substantial, legitimate, nondiscriminatory interests. If the defendant or respondent satisfies its burden, the charging party or plaintiff may still establish liability by demonstrating that these substantial, legitimate, nondiscriminatory interests could be served by a practice that has a less discriminatory effect.

A. Discriminatory Effect—Subpart G

1. Scope

This final rule adds a new sentence to the end of paragraph (b) in § 100.5, which states: “The illustrations of unlawful housing discrimination in this part may be established by a practice’s discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in § 100.500.”

2. Discriminatory Effect Prohibited

Consistent with HUD’s November 16, 2011, proposed rule, this final rule adds a new subpart G, entitled “Discriminatory Effect,” to its Fair Housing Act regulations in 24 CFR part 100. Section 100.500 provides that the Fair Housing Act may be violated by a practice that has a discriminatory effect, as defined in § 100.500(a), regardless of whether the practice was adopted for a discriminatory purpose. The 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). Section 100.500(d) clarifies that a legally sufficient justification may not be used as a defense against a claim of intentional discrimination. It should be noted that 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. This final rule applies to both public and private entities because the definition of “discriminatory housing practice” under the Act makes no distinction between the two.

3. Discriminatory Effect Defined

(§ 100.500(a))

Section 100.500(a) provides that a “discriminatory effect” occurs where a facially neutral practice actually or predictably results in a discriminatory effect on a group of persons protected by the Act (that is, has a disparate impact), or on the community as a whole on the basis of a protected characteristic (perpetuation of segregation). 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. For examples of court decisions regarding practices that may have a discriminatory effect, please see the preamble to the proposed rule at 76 FR 70924–25.

4. Legally Sufficient Justification

(§ 100.500(b))

Section 100.500(b), as set forth in the regulatory text of this final rule, provides that a practice or policy found to have a discriminatory effect may still be lawful if it has a “legally sufficient justification.”

5. Burden of Proof

Under § 100.500(c), the charging party or plaintiff first bears the burden of proving its prima facie case: that is, that a practice caused, causes, or predictably 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 charging party or the plaintiff has made its prima facie case, the burden of proof shifts to the respondent or defendant to prove that the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant. If the respondent or defendant satisfies its burden, the charging party or plaintiff may still establish liability by proving that these substantial, legitimate, nondiscriminatory interests could be served by another practice that has a less discriminatory effect.

B. Illustrations of Practices With Discriminatory Effects

This final rule adds or revises the following illustrations of discriminatory housing practices:

Section 100.589 adds to § 100.70 new paragraph (d)(5), which provides as an illustration of prohibited conduct “[e]nacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings because of race, color, religion, sex, handicap, familial status, or national origin.”

Section 100.120, which gives illustrations of discrimination in the making of loans and in the provision of other financial assistance, is streamlined, and paragraph (b)(2) now reads as set forth in the regulatory text of this final rule.

In § 100.130, the final rule also amends paragraph (b)(2) and adds new paragraph (b)(3). The words “or condition” is added after “terms,” and “or condition” is added to the list of terms or conditions in existing paragraph (b)(2).

New paragraph (b)(3) includes servicing as an illustration of terms or conditions of loans or other financial assistance covered by section 805 of the Act: “Servicing of loans or other financial assistance with respect to dwellings in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates, or providing such loans or financial assistance with other terms or conditions that discriminate, because of race, color, religion, sex, handicap, familial status, or national origin.”

VII. Findings and Certifications

Regulatory Review—Executive Orders 13563 and 12866

Executive Order 13563 ("Improving Regulation and Regulatory Review")

directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, emphasizes the importance of quantifying both costs and benefits, of harmonizing rules, of promoting flexibility, and of periodically reviewing existing rules to determine if they can be made more effective or less burdensome in achieving their objectives. Under Executive Order 12866 ("Regulatory Planning and Review"), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. This rule was determined to be a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

This rule formalizes the longstanding interpretation of the Fair Housing Act to include discriminatory effects liability, and establishes uniform, clear standards for determining whether a practice that has a discriminatory effect is in violation of the Fair Housing Act, regardless of whether the practice was adopted with intent to discriminate. As stated in the Executive Summary, the need for this rule arises because, although all federal courts of appeals that have considered the issue agree that Fair Housing Act liability may be based solely on discriminatory effects, there is a small degree of variation in the methodology of proof for a claim of effects liability. As has been discussed in the preamble to this rule, in establishing such standards HUD is exercising its rulemaking authority to bring uniformity, clarity, and certainty to an area of the law that has been approached by HUD and federal courts across the nation in generally the same way, but with minor variations in the allocation of the burdens of proof. 153 A uniform rule would simplify compliance with the Fair Housing Act’s discriminatory effects standard, and decrease litigation associated with such claims. By providing certainty in this area to housing providers, lenders, municipalities, realtors, individuals engaged in housing transactions, and courts, this rule would reduce the burden associated with litigating discriminatory effects cases under the Fair Housing Act by clearly establishing which party has the burden of proof, and how such burdens are to be met. Additionally, HUD believes the rule may even help to minimize litigation in this area by establishing uniform standards. With a uniform standard, entities are more likely to conduct self-testing and check that their practices comply with the Fair Housing Act, thus, reducing their liability and the risk of litigation. A uniform standard is also a benefit for entities operating in multiple jurisdictions. Also, legal and regulatory clarity generally serves to reduce litigation because it is clearer what each party’s rights and responsibilities are, whereas lack of consistency and clarity generally serves to increase litigation. For example, once disputes around the court-defined standards are eliminated by this rule, non-meritorious cases that cannot meet the burden under § 100.500(c)(1) are likely not to be brought in the first place, and a respondent or defendant that cannot meet the burden under § 100.500(c)(2) may be more inclined to settle at the pre-litigation stage.

Accordingly, while this rule is a significant regulatory action under Executive Order 12866 in that it establishes, for the first time in regulation, uniform standards for determining whether a housing action or policy has a discriminatory effect on a protected group, it is not an economically significant regulatory action. The burden reduction that HUD believes will be achieved through uniform standards will not reach an annual impact on the economy of $100 million or more, because HUD’s approach is not a significant departure from HUD’s interpretation to date or that of the majority of federal courts. Although the burden reduction provided by this rule will not result in economically significant impact on the economy, it nevertheless provides some burden reduction through the uniformity and clarity presented by HUD’s standards promulgated through this final rule and is therefore consistent with Executive Order 13563.

The docket file is available for public inspection in the Regulations Division, Office of the General Counsel, Room 10276, 451 7th Street SW., Washington, DC 20410–5000. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (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.

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. For the reasons stated earlier in this preamble in response to public comment on the issue of undue burden on small entities, and discussed here, HUD certifies that this rule will not have significant economic impact on a substantial number of small entities.

It has long been the position of HUD, confirmed by federal courts, that practices with discriminatory effects may violate the Fair Housing Act. As noted in the preamble to the proposed rule (76 FR 70921) and this preamble to the final rule, this standing interpretation has been supported by HUD policy documents issued over the last decades, is consistent with the position of other Executive Branch agencies, and has been adopted and applied by every federal court of appeals to have reached the question. Given, however, the variation in how the courts and even HUD’s own ALJs have applied that standard, this final rule provides for consistency and uniformity in this area, and hence predictability, and will therefore reduce the burden for all seeking to comply with the Fair Housing Act. Furthermore, HUD presumes that given the over 40-year history of the Fair Housing Act, the majority of entities, large or small, currently comply and will remain in compliance with the Fair Housing Act. For the minority of entities that have, in the over 40 years of the Fair Housing Act’s existence, failed to institutionalize methods to avoid engaging in illegal housing discrimination and plan to come into compliance as a result of this rulemaking, the costs will simply be the costs of compliance with a preexisting statute. The rule does not change that substantive obligation; it merely sets forth in a regulation. While this rule provides uniformity as to specifics such as burden of proof, HUD’s rule does not alter the substantive prohibitions against discrimination in fair housing law, which were established by statute and developed over time by administrative and federal court case law. Any burden on small entities is simply incidental to the pre-existing requirements to comply with this body of law. Accordingly, the undersigned certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact
This final 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 final rule does not have federalism implications and does 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 final rule does 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 amends 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

§ 100.2 Authority citation for 24 CFR part 100 continues to read as follows: Authority: 42 U.S.C. 3535(d), 3600–3620.

Subpart A—General

§ 100.5 Scope.

(b) * * * The illustrations of unlawful housing discrimination in this rule may be established by a practice’s discriminatory effect, even if not motivated by discriminatory intent, consistent with the standards outlined in §100.500.

Subpart B—Discriminatory Housing Practices

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

§100.70 Other prohibited conduct.

(d) * * *

(5) Enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin.

Subpart C—Discrimination in Residential Real Estate-Related Transactions

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

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

(b) * * * * * Practices prohibited under this section in connection with a residential real estate-related transaction include, but are not limited to:

(1) Failing or refusing to provide to any person 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, failing to provide, or discouraging the receipt of loans or other financial assistance in a manner that discriminates in their denial rate or otherwise discriminates in their availability because of race, color, religion, sex, handicap, familial status, or national origin.

5. In §100.130, revise paragraph (b)(2) and add new paragraph (b)(3) to read as follows:

§100.130 Discrimination in the terms and conditions for making available loans or other financial assistance.

(b) * * * * * * (2) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, cost, duration or other terms or conditions for a loan or
other financial assistance for a dwelling or which is secured by residential real estate, because of race, color, religion, sex, handicap, familial status, or national origin.

(3) Servicing of loans or other financial assistance with respect to dwellings in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates, or providing such loans or financial assistance with other terms or conditions that discriminate, because of race, color, religion, sex, handicap, familial status, or national origin.

§ 100.500 Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice’s discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) **Discriminatory effect.** A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

(b) **Legally sufficient justification.**

(1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614;

(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

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

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party 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 is necessary to achieve one or more substantial, 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 charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

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

Dated: February 6, 2013.

John Trasvina,
Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2013-03375 Filed 2-14-13; 8:45 am]

BILLING CODE 4210-67-P
EXHIBIT B
Backover Fact Sheet

In the U.S., 50 children are backed over EVERY WEEK because a driver could not see them. Rearview cameras can be installed on any vehicle to end these predictable tragedies.

Blindzones... every vehicle has them
A blindzone is the area behind a vehicle where the driver cannot see even when looking back and using their rear and side view mirrors correctly. (Blindzones are also in front of cars but are not as large)
- Average blindzone = 15 to 25 feet
- Shorter drivers = larger blindzones
- Over 60% of backovers involve a larger vehicle (truck, van, SUV)

Circumstances
- Backovers take place mainly in driveways and parking lots.
- In over 70% of these incidents, a parent or close relative is the driver behind the wheel.
- Bye-Bye Syndrome™: Children don't want to be left behind when they hear the words 'bye-bye.' Many times children follow behind the person who is leaving. The driver is unaware the child snuck out, thinking they are still safe inside. The child stands behind the vehicle where they cannot be seen and is backed over.

Contributing Factors
You cannot avoid hitting something you literally cannot see.
- Most drivers are unaware of the very large, dangerous blindzone that is found behind ALL vehicles.
- Children do not understand the danger of a slow moving vehicle; they believe if they see the vehicle, the driver can see them.
- Children do not recognize boundaries (property lines, sidewalks, driveways or parking spaces) and are very impulsive.

Age
- The predominant age of backover victims is one-year-old. (12-23 months). Toddlers have just started walking/running at this age, testing the limits and trying new things.
- Children younger than 5-years-old are at the most risk, but children of all ages can be backed over.

Statistics
On average 232 fatalities and 13,000 injuries occur every year due to backovers.*

Thousands of children are seriously injured or killed every year because a driver backing up was not able to see them behind their vehicle. Many elderly people are also backed over by vehicles.

Rear Visibility Standard:
To reduce the risk of devastating backover crashes involving vulnerable populations (especially very young children), KidsAndCars.org and their partners, worked to prevent these predictable and preventable tragedies for over one-decade. A rear visibility standard was issued on April 7, 2014 as mandated by the Cameron Gulbransen Kids Transportation Safety Act.

For more information visit www.KidsAndCars.org or contact us at email@KidsAndCars.org.
The Department of Transportation (DOT) issued the final rule to expand the required field of view for all passenger vehicles weighing less than 10,000 pounds.

This new standard specifies the area behind a vehicle which must be visible to the driver when the vehicle is placed into reverse. The agency anticipates that in the near term, vehicle manufacturers will use rearview camera systems and in-vehicle visual displays to meet the requirements of this rule. All motor vehicles sold or leased in the U.S. must comply with this regulation by May 2018.

KidsAndCars.org anticipates that the rear visibility rule will significantly reduce backover crashes. Education and awareness of backover crashes will continue to be critical for decades because most older-model vehicles do not have rearview cameras. All vehicles can and should be retrofitted to include rearview technology.

**Prevention/Safety Tips:**
KidsAndCars.org urges everyone to install a rearview camera and sensors on their vehicle. Many drivers [incorrectly] believe they have to wait until they purchase a new vehicle to have a rearview camera system; but an after-market rearview camera and/or sensors can be installed on ANY vehicle.

Drivers should also heighten their awareness before engaging a vehicle into reverse; especially when children are present. Young children are impulsive and unpredictable; still have very poor judgment and little understanding of danger.

- Always walk around and behind a vehicle prior to moving it.
- Know where your children are. Make sure they move away from your vehicle to a place where they are in full view before moving the car. Verify that another adult is directly supervising children before moving your vehicle.
- Install a rearview camera, back-up sensors and/or additional mirrors on your vehicles. Use these devices in addition to looking around and behind your vehicle carefully to detect if anything is in your path before backing.
- Make sure children hold hands with an adult in parking lots at ALL times. If you have multiple children and not enough hands, create a hand-holding train or fasten the younger children into a stroller and make sure everyone stays together.
- Teach children that “parked” vehicles might move and make sure they understand that the driver might not be able to see them, even if they can see the driver.
- Teach your children to never play in, around or behind a vehicle. The driveway is not a safe place to play.
- If you have an adult passenger with you, ask them to stand outside the vehicle and watch for children or animals as you back out. Ensure they are a safe distance away from the vehicle so that they are not in any danger.
- Be aware that steep inclines and large SUV’s, vans and trucks can add to the difficulty of seeing behind a vehicle.
- Keep toys, bikes and other sports equipment out of the driveway.
- Trim landscaping around the driveway to ensure drivers can see the sidewalk, street and pedestrians clearly when backing out of their driveway. Pedestrians also need to be able to see a vehicle pulling out of the driveway.
- Install extra locks on doors inside the home high enough so children cannot reach them and toddlers cannot slip outside on their own.
- Roll down the driver’s side window when backing so you can hear if someone is warning you to stop.
- Be especially careful about keeping children safe in and around cars during busy times, schedule changes and periods of crisis or holidays.

Please share these important safety tips with your childcare providers, teachers, relatives, friends, family and neighbors...

**These precautions can save lives.**


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EXHIBIT C
Risky Play and Children’s Safety: Balancing Priorities for Optimal Child Development

Mariana Brussoni 1,*, Lise L. Olsen 2, Ian Pike 3 and David A. Sleet 4

1 Department of Pediatrics, School of Population and Public Health, British Columbia Injury Research and Prevention Unit, Child and Family Research Institute, University of British Columbia, British Columbia Children’s Hospital, L408-4480 Oak Street, Vancouver, V6H 3V4 BC, Canada
2 British Columbia Injury Research and Prevention Unit, Child and Family Research Institute, L408-4480 Oak Street, Vancouver, V6H 3V4 BC, Canada; E-Mail: lolsen@cw.bc.ca
3 Department of Pediatrics, British Columbia Injury Research and Prevention Unit, Child and Family Research Institute, University of British Columbia, British Columbia Children’s Hospital, L408-4480 Oak Street, Vancouver, V6H 3V4 BC, Canada; E-Mail: ipike@cw.bc.ca
4 Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, 4770 Buford Highway NE F-62, Atlanta, GA 30341, USA; E-Mail: dds6@cdc.gov

* Author to whom correspondence should be addressed; E-Mail: mbrussoni@cw.bc.ca; Tel.: +1-604-875-3712; Fax: +1-604-875-3569.

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Abstract: Injury prevention plays a key role in keeping children safe, but emerging research suggests that imposing too many restrictions on children’s outdoor risky play hinders their development. We explore the relationship between child development, play, and conceptions of risk taking with the aim of informing child injury prevention. Generational trends indicate children’s diminishing engagement in outdoor play is influenced by parental and societal concerns. We outline the importance of play as a necessary ingredient for healthy child development and review the evidence for arguments supporting the need for outdoor risky play, including: (1) children have a natural propensity towards risky play; and, (2) keeping children safe involves letting them take and manage risks. Literature from many disciplines supports the notion that safety efforts should be balanced with opportunities for child development through outdoor risky play. New avenues for investigation and action are emerging seeking optimal strategies for keeping children “as safe as necessary,” not “as safe as possible.” This paradigm shift...
represents a potential for epistemological growth as well as cross-disciplinary collaboration to foster optimal child development while preserving children’s safety.

**Keywords:** injury prevention; outdoor play; risky play; active play; child development; playground safety

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1. Introduction

Unintentional injuries are a leading cause of death and hospitalization for children worldwide, taking the lives of nearly a million children each year [1]. As deaths from communicable diseases are decreasing, injuries remain a leading cause of childhood mortality and morbidity and represent an increasingly significant public health burden [2]. The grim statistics that on average 720 Canadian [3], over 12,000 American children [4] and 42,000 European children [5] ages 0–19 die every year from injuries make the need for injury prevention abundantly clear.

Injury prevention plays a key role in promoting children’s safety, which is considered to involve keeping children free from the occurrence or risk of injury. However, emerging research suggests that imposing too many restrictions on children’s outdoor risky play may be hampering their development. Like safety, play is deemed so critical to child development and their physical and mental health that it is included in Article 31 of the United Nations Convention on the Rights of the Child. Thus, limitations on children’s play opportunities may be fundamentally hindering their health and well-being. Eager and Little [6] describe a risk deprived child as more prone to problems such as obesity, mental health concerns, lack of independence, and a decrease in learning, perception and judgment skills, created when risk is removed from play and restrictions are too high. Findings from disciplines such as psychology, sociology, landscape architecture and leisure studies, challenge the notion that child safety is paramount and that efforts to optimize child safety in all circumstances is the best approach for child development [7–10]. Furthermore, parents, popular culture, the media, and researchers in other disciplines have expressed views that child safety efforts promote overprotection of children [9,11]. For example, numerous media stories have suggested that excessive health and safety regulations and overprotective parenting practices serve to diminish children’s outdoor risky play opportunities [12–14]. Likewise, numerous parenting books disparagingly describe parents perceived to be excessively curtailing their children’s independence and voluntary physical risk taking opportunities [15–18]. These have the potential to trigger a backlash against proven safety promotion strategies, such as child safety seats or necessary supervision [19], possibly reversing the significant gains that have been made in reducing child injuries [20,21]. In short, it is timely and important to reflect on our approach towards safety with respect to children’s outdoor risky play opportunities and to consider the impact on healthy child development.

In this paper, we explore from an interdisciplinary, public health oriented perspective, the relationship between child development, play, and conceptions of risk taking relating to outdoor risky play. Our aim is to contribute to the discussion on whether the goal of unintentional physical injury prevention should be to keep children as safe as possible or as safe as necessary. We conclude with recommendations for child play safety efforts based on key empirical and theoretical findings.
2. What is Free Play?

No matter how you define play, it is a dominant activity of children’s daily life in all cultures [22]. The study of play has been truly interdisciplinary, yielding research literature from nearly every field affecting human health and well-being. By definition, free play is intrinsically motivated and not provoked by instrumental goal-directed behavior [23]. It is a goal in itself and lacks external rules and structure [23]. Thus, activities such as organized sports would not be considered free play.

Three main types of free play have been well described in the literature: physical activity play (e.g., exercise play, rough-and-tumble play); object play (e.g., manipulating objects, toys); and pretend play (e.g., socio-dramatic) [24]. Risky play is subsumed within physical activity play and has been defined as thrilling and exciting and where there is a risk of physical injury [25]. Sandseter [26] further categorizes risky play into play involving: heights, speed, dangerous tools, or near dangerous elements (e.g., fall into something), and where children can get lost. The focus of this paper is on free play with specific attention to risky play occurring in the outdoors.

Why is Free Play Important?

Children’s free play has been recognized as a major agent in young children’s development and learning [27]. Through play, children learn societal roles, norms, and values and develop physical and cognitive competencies, creativity, self-worth and efficacy [24,28]. Play has been described as the work of children which helps them develop intrinsic interests, learn how to make decisions, problem-solve, exert self-control, follow rules, regulate emotions, and develop and maintain peer relationships [23]. Risk taking in play helps children test their physical limits, develop their perceptual-motor capacity, and learn to avoid and adjust to dangerous environments and activities [29]. Play is biologically based and provides an evolutionary contribution to human development and changes [22]. Furthermore, children also report being happiest when at play [30].

A U.S. longitudinal study provides compelling evidence of the importance of free play on healthy development [31]. Sixty-eight disadvantaged children were randomly assigned to participate in one of three preschool curricula at ages 3 to 4 years. Two of the classes included at least 21% free play and child-initiated activity component. The third class focused on direct instruction of academic skills and allowed for only 2% of free play activities. When tested at age 15, children in the latter class were significantly more likely than the other classes to experience misconduct, and less likely to participate in active sports or contribute to their family or community. Furthermore, at age 23, problems worsened with significantly higher levels of work suspensions and arrests [31]. These findings underline that free play is fundamental to healthy child development, and that restriction of free play in the preschool years might potentially have lifelong repercussions.

Animal research provides further evidence of the impact of early free play on healthy development. Rats isolated during the two weeks of development when they most frequently play (weeks 4 and 5) displayed subsequent social disturbances [32]. Additional research with rats indicated that plentiful free play opportunities facilitated maturation of the frontal lobe and thus executive functioning [33,34]. In children, these brain areas house regulatory skills, which help control impulsive urges and promote self-reflection, creativity and empathy.
Outdoor free play, especially in versatile natural environments, is important for developing motor fitness and abilities, environmental awareness and navigation competencies, as well as promoting creativity [24,35]. A Scandinavian study comparing an experimental group of 46 children aged 5 to 7 years in a kindergarten with ready access to a natural play environment with 29 children from two kindergartens with access to traditional outdoor playgrounds found that children in the experimental group used the environment to play in more versatile ways and, nine months later, showed significantly greater improvement in various measures of motor ability [36]. The studies described above and many others [37] strongly support abundant opportunities for outdoor free play as a basic and essential need for healthy child development.

3. Declining Opportunities for Outdoor Free Play

There is considerable evidence that children’s opportunities to engage in outdoor free play and their geographic freedom have steadily declined across the past several generations [38–41]. A recent U.S. study reported almost half of preschool children were not being taken outside to play by a parent on a daily basis [42]; and while 70% of U.S. mothers reported daily outdoor free play when they were children, only 31% reported that their own children did the same [43]. One study of U.S. childhood experiences from 1915 to 1976 showed substantial decreases in children’s free play and access to their neighbourhoods beginning in the 1940s and declining steadily over time [44].

Children’s ready access to computers and televisions has contributed to an increased proportion of their leisure time being spent indoors, both historically and as children age; and outdoor free play activities are being substituted with organized sporting or other activities such as music lessons [10]. U.S. reports showed a 37% decline in participation in outdoor activities for children aged 6 to 12 years from 1997 to 2003 [39]. Furthermore, in one study 59% of children aged 5 to 12 years preferred indoor play to any other location [45]. In Canada, a study of 878 children aged 6 to 11 years wearing accelerometers indicated 7.6 hours of sedentary time per day [46]. Their parent reported an average of 2.5 hours/day of this was screen time. In a survey of 51,922 Canadian children and youth in Grades 6 to 12 (aged approximately 11–18 years), they self-reported an average of 7.8 hours of screen time daily [47]. These studies suggest that children and adolescents increase their sedentary behaviour and screen time as they age. By all accounts, children’s leisure lives appear to be moving indoors.

The changes in children’s play habits and subsequent effects on their physical and mental health are concerning. Childhood obesity rates have steadily increased, which have been linked to a decrease in physical activity. In 1978–1979, 15% of Canadian children were considered overweight or obese [48]. The figure rose to 26% in 2004 and continues to climb. In the U.S., childhood obesity rates have tripled in 30 years [49]. In 2008, 30% of children were considered overweight or obese [50]. Research in Europe also indicates increasing paediatric obesity [51], with current estimates for 6 to 9 year olds at 24% [52]. Research has indicated the importance of encouraging free play as an antidote to rising obesity and as a means to increase daily physical activity [53].

A recent review documents the decline of outdoor play and the rise of psychopathology in children and adolescents suggesting a causal link [54]. Gray [54] argues that play deprivation can contribute to a reduced sense of personal control, reduced ability to control emotions, increased social isolation, and reduced happiness; all of which are associated with anxiety and/or depression. Indeed, anxiety and
depression scores on standardised measurement tools have increased sharply since the 1950’s, with current generations of young people having five to eight times more clinically significant scores [55,56].

*Why Outdoor Free Play is Declining*

Societal influences on parents have been cited as important drivers of changes in children’s outdoor play opportunities. Increased societal concerns about child safety have heightened parental concerns, especially with regard to traffic dangers and child abduction by strangers [10,43,45,57]. For example, in a U.K. study of 1,011 parents, 43% believed that children under the age of 14 years should not be allowed outside unsupervised, and half of those parents felt they should not be allowed outside unsupervised until they were 16 years of age [58]. Parents’ perceptions about danger can be disproportionate to actual dangers. While traffic concerns are borne out by statistics, child abductions by strangers are exceedingly rare. Ironically, “stranger-danger” concerns have resulted in increasing volumes of traffic, with corresponding increases in traffic-related dangers [57].

Furthermore, current Western middle class social pressures to maximize children’s opportunities and adhere to practices of “intensive parenting” support the notion that parents should have children attend the “best” schools, participate in a multitude of organized activities, and provide as much protection as possible—potentially more than they personally perceive as necessary [10,57,59–61]. The result has been creation of a “backseat generation” with little unstructured play time and reliance on automobile-based commuting from one activity to the next [38].

In an Australian study asking 50 children aged 4 to 8 years old to photograph their daily activities, half of the children included photographs of being driven [59]. Additionally in a U.K. study, girls from middle class backgrounds displayed less knowledge about their neighbourhoods than girls from less affluent backgrounds, because more of their leisure time was spent indoors or in supervised activities, which could affect their ability to negotiate public space safely [10]. These changes in exposure to opportunities to interact with the environment can deprive children of the opportunity to learn important survival skills that only experience with risk can provide. The goal should not be to eliminate all risks, but to control risk, and teach children and adolescents how best to manage risks [62].

Recent decades have seen changes in societal perceptions of children’s competencies and resilience [61]. From once considering children as actively responsible and capable, we have more recently moved to viewing them as inadequate by comparison to adults, leading to a perception that children need to be protected from their own inadequacies [10,63]. These trends have contributed to placing limits on children’s exploration and access to outdoor free play opportunities [10,64]. For example, stemming from their study of children’s use of playspaces in 16 childcare centres, Herrington and Nicholls [9] argued that the Canadian Standards Association’s own standards for children’s playspaces and equipment did not reflect children’s developmental and play needs, but rather the goals of risk reduction.

In a similar study examining the play preferences and playground equipment usage of Australian boys and girls ages 48 to 64 months, the authors noted children’s preference for equipment and activities that allowed them to experience the sensations of height and speed such as slides, swings, monkey bars and climbing ropes [8]. They also noted that the equipment at the five parks studied provided few opportunities for building on or mastery of existing skills, or for learning new skills.
They concluded that the equipment provided reflected the priorities of local government (with perhaps a strong focus on safety) rather than those of the children and their preferences for risky play [8]. Jambor [65] noted the concern that insufficient challenge can easily lead to boredom, potentially promoting inappropriate equipment use and excessive risk taking behaviour that is often associated with unintentional injury.

The result of parental and societal fears and influences has been a decline in play spaces offering children opportunities to test out their competencies and imagination. This is despite indications that fears are at odds with trends showing steady decreases in injury rates [20,21] and the relative rarity of playground-related deaths. For example, Ball [7] estimated the odds of playground-related death in the U.K. as less than 1 in 30 million children per annum for children aged 0 to 16 years. While we do not advocate dangerous play environments, we believe it is appropriate to consider how to optimize play opportunities to support children’s developmental needs while considering safety.

4. Support for Outdoor Risky Play

Research indicates that children have a need for outdoor risky play opportunities. Two main bodies of evidence are reviewed below.

4.1. Children Have a Natural Propensity towards Outdoor Risky Play

Undoubtedly, some children have greater appetite for risks than others [66,67]. However, children’s propensity for some degree of risky play appears to be universal [25,37]. Naturalistic observations of preschool children engaging in outdoor free play indicate deliberate exposures to risk, such as playing at heights and high speeds [68]. The author notes that children appeared to understand their personal competencies and the level of risk they were comfortable with and moderated their risky play to these internal boundaries. They also understood and accepted that peers would have different levels of comfort and ability.

A study of Australian children ages 48 to 64 months that collected observational and interview data on 38 children indicated that when provided with a choice 74% of participants preferred to play on the more challenging playground equipment. Furthermore, while only 21% to 34% of children had experience using the higher risk equipment (e.g., flying fox, space net, tubular slide), 70% to 90% expressed the desire to play on this type of equipment [8]. While there may be the need to use caution in interpreting these results, as children’s stated desires may not equate to behaviours, Morrongiello [69] has found a correlation between children’s willingness to engage in risk taking behaviours and actual risk taking behaviours.

Animal research demonstrates the propensity for risk taking during play across species. For example, primates at play deliberately expose themselves to moderately frightening situations where they repeatedly lose and regain control of bodily movements [70]. During play fighting, rats prefer the riskier, more physically and emotionally challenging subordinate position [71].

Research suggests that if children perceive they are not obtaining challenging and interesting risky play opportunities in public play areas, they may seek these opportunities elsewhere. A survey of 1,973 children aged 11 to 14 years in a deprived area of England indicated that over 40% regularly visited and played in wastelands, building sites, underpasses, rivers, abandoned buildings and quarries [72].
These children were also more likely to have sustained an injury in the previous month. The surveyed children overwhelmingly reported wanting their local area to be made safer and have more interesting things to do, suggesting that they recognized the danger and risk of injury of their chosen play spaces but had little choice of available and desirable play spaces.

There is evidence to support concerns that absence of opportunities for outdoor risky play will result in children disengaging from physical activity. One Canadian study documenting preschool children’s use of play equipment in 16 childcare centres found that play equipment was used only 13% of the time and was used as intended only 3% of the time [73]. U.S. childcare providers in one study expressed concerns that overly strict standards had rendered outdoor play areas unchallenging and uninteresting to children, thus hampering their physical activity [74]. Furthermore, participants noted that some children used equipment in unsafe ways to maintain challenge.

4.2. Keeping Children Safe Involves Letting Them Take and Manage Risks

Parental concerns regarding children’s safety have been shown to be the most significant influence on children’s access to independent play [40,45]. Research has found that parents recognize that their early restrictions on children’s play has the potential for putting their children at increased risk once they gain more independence [10,11]. Numerous studies indicate that children want to be trusted with decisions with respect to managing risks and safety [10,75,76]. In one U.K. study, focus groups were conducted with 93 children aged 7 to 11 years and living in urban and rural areas. Results showed that the children felt strongly about being afforded opportunities for assessing risk for themselves [75]. They created identities reflecting maturity and competence and which included being able to display their ability to manage risks. Taking risks allowed them to display courage and physical skills to themselves and their peers. Interestingly, while they viewed minor injuries as a way to show that risks had been taken, there was an understanding that too many injuries indicated carelessness or clumsiness, which was perceived in derogatory ways [75]. Thus, they appeared to have their own regulatory system for maintaining risks and injuries at a manageable level.

Children in other U.K. research [10] perceived themselves as competent at negotiating their own safety. Furthermore, they felt that they, and not their parents, were primarily responsible for their own safety. In many cases the children had more detailed knowledge of the local area than their parents and used it to negotiate spaces safely.

There is evidence that children learn risk management strategies for themselves and their peers as a result of risky play experiences. Observational studies of children at play found they exposed themselves to risk but displayed clear strategies for mitigating harm [68,76]. Australian children, for the most part, engaged in behaviours that were well within their current capabilities [8]. Children appeared aware of potential dangers and adjusted activities accordingly. Notably, children drew on their risk experiences not only to develop understanding of their own constitutions and skills, but also of playmates. These understandings facilitated support for each other’s risk engagement and safety [76].

Sandseter and Kennair [25] theorized that children’s engagement in risky play has an adaptive function in reducing fear of stimuli (e.g., heights) through repeatedly naturally and progressively exposing themselves to the stimuli. They argued that if children were not provided with sufficient risky play opportunities, they will not experience their ability to cope with fear-inducing situations.
Furthermore, they will maintain their fear, which may translate into anxiety disorders. Support for these arguments also comes from animal research, which has shown that young rhesus monkeys and rats deprived of play during critical development points later show excessive fear, inappropriate aggression and exaggerated emotional reactions in stressful situations [71,77]. Importantly, anxiety disorders are the most prevalent mental disorder in children and adolescents and parental overprotection has been associated with increased rates [78].

5. Alternative Free Play Environments that Manage Risks

“Adventure playgrounds” may be a potential solution to providing safe play environments that afford opportunities for risk taking [79]. First established in 1943 by Danish landscape architect Sørensen after observing children’s play in construction sites and junkyards, he sought to provide children with dedicated space to foster otherwise prohibited play [80,81]. Adventure playgrounds were subsequently championed in England during the postwar era in reaction to the lack of interest children showed to conventional playgrounds and in seeking to provide creative spaces appealing to boys and girls of all ages [80]. They emerged as staffed and unstaffed play spaces where play workers could provide supervision and assistance, while still giving children the freedom to pursue their own interests. Adventure playgrounds provide child-centered and child-directed play spaces where children create and modify their own environments [80]. Children have access to raw materials such as building supplies and tools, as well as sand, dirt and water. In some cases, adventure playgrounds include trained play workers and volunteers for supervision and “professional scaffolding” that facilitates children’s play and removes play barriers [81]. Different opportunities exist for children of varying developmental levels and interests to try new things, such as climbing that is graded for developmental requirements, allowing children to select risk they are comfortable with. Some adventure playgrounds in proximity to farms or community gardens provide children with the opportunity to interact with and care for animals, and grow and cook their own food [81]. While there are estimates of approximately 1,000 adventure playgrounds in Europe, they have not been widespread in North America, which is believed to be the result of culture-specific safety concerns [81].

Research on adventure playgrounds, safety and child development is in its infancy and few academic peer-reviewed articles are available. There are accounts in the grey literature indicating lower injury rates than conventional playgrounds [81], reductions in aggressive behaviour and gains in social responsibility and social problem solving [82]. Organizations such as Play England [79] are exploring methods for promoting playground settings and adventure playgrounds that do not have the same cost implications of staffed adventure playgrounds, yet manage injury risk. Their guide describes how to undertake a risk-benefit assessment to determine the benefits and risks of a play area and activity focusing on “hazards with the potential to cause real harm” and incorporating considerations with respect to local circumstances and needs [79]. Clearly further investigation is required to understand the developmental and safety implications of adventure playgrounds. However, early data are promising and encourage serious consideration of this model in promoting child risky play.
6. Conclusions

Children’s need for play has been globally recognized as a basic childhood right. Numerous developmental and health advantages have also been linked to children’s need for outdoor risky play as a means to learn through experience. Societal trends limiting children’s access to outdoor risky play opportunities combined with a culturally dominant excessive focus on safety can pose a threat to healthy child development. Eager and Little [6] have coined the term “Risk Deficit Disorder” to describe a set of problems that children can experience resulting from attempts to remove risk from their lives. Our examination of the evidence would suggest that such a label is premature. However, we share their concerns with respect to the trends evident in aspects of child safety efforts relating to outdoor play.

We would encourage the injury prevention field to foster opportunities to engage in outdoor risky play that align with safety efforts. An approach can be encouraged that focuses on eliminating hazards, which Wallach [83] (as cited in [65]) defines as a source of harm that is not obvious to the child, such that the potential for injury is hidden, such as a broken railing; but does not eliminate all risks, which involve a situation that allows the child to recognize and evaluate the challenge and decide on a course of action that is not dangerous, but may still involve an element of risk. This approach has been advocated elsewhere [84] and is a central component of the Adventure Playground movement. Notably, European and Australian organizations and researchers appear to be attempting to operationalise this idea in practice, with North American efforts lagging. For example, the National Institute for Health and Clinical Excellence in the U.K. released injury prevention guidelines that called for policies that counter “excessive risk aversion” and promote children’s need “to develop skills to assess and manage risks, according to their age and ability” [85]. Both injury and play organizations, such as the U.K.’s Royal Society for the Prevention of Accidents [62] and Play Safety Forum [84] promote the idea of keeping children as safe as necessary, not as safe as possible. International collaboration would benefit from translating this into practice in a manner that is sensitive to concerns for child safety and children’s developmental needs for risky play.

Research is emerging which considers optimal strategies for providing children with outdoor risky play opportunities that minimize hazards, such as adventure playgrounds [6,79,86] or provision of unstructured play materials that can be freely manipulated in conventional playgrounds [73,87]. These novel areas of investigation have the potential to open up many exciting avenues for injury prevention and represent an opportunity for epistemological growth, cross-disciplinary and international collaboration to foster optimal child development.

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Conflict of Interest

The authors declare no conflict of interest.

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