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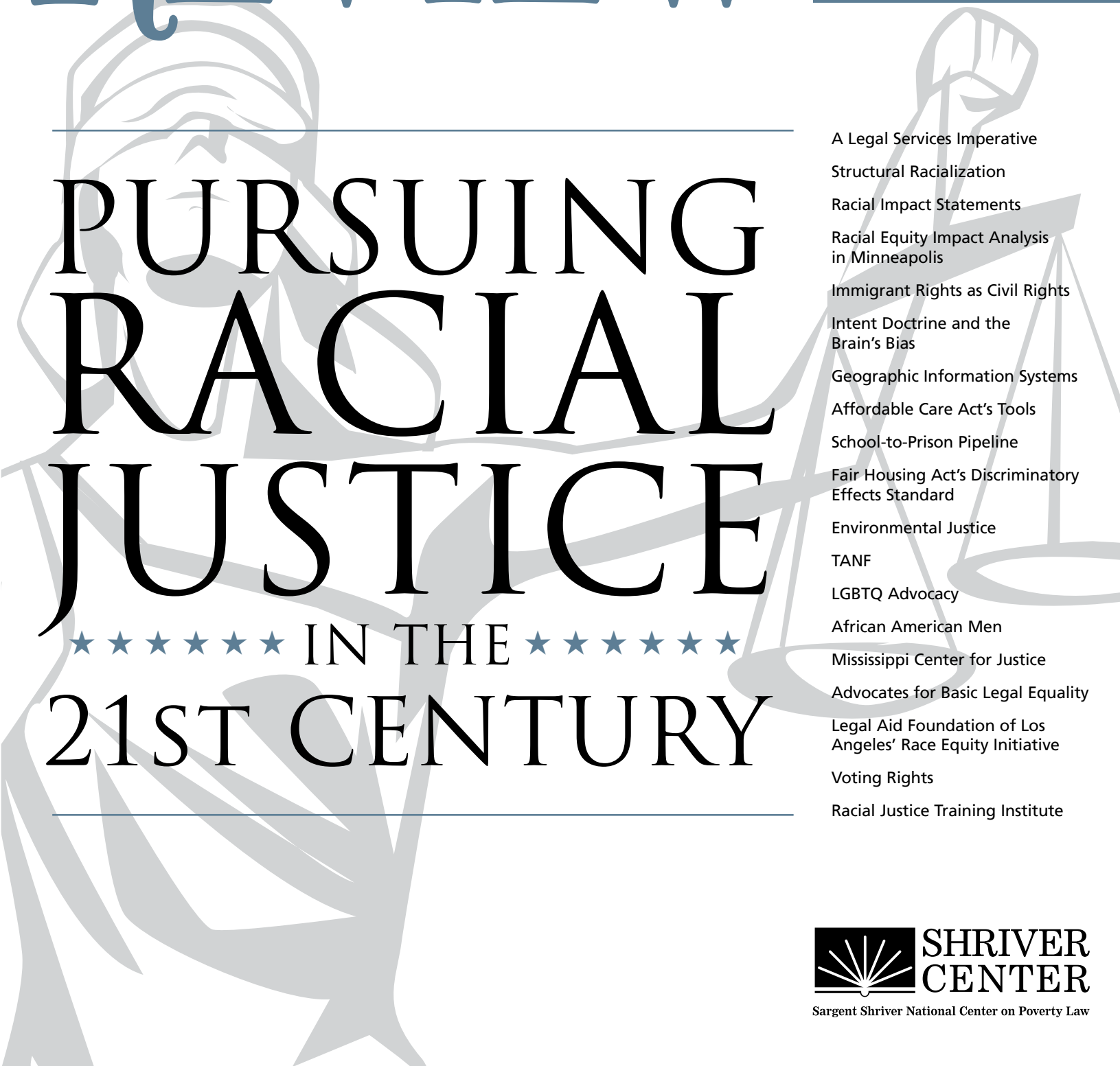
PURSUING RACIAL JUSTICE IN THE 21ST CENTURY



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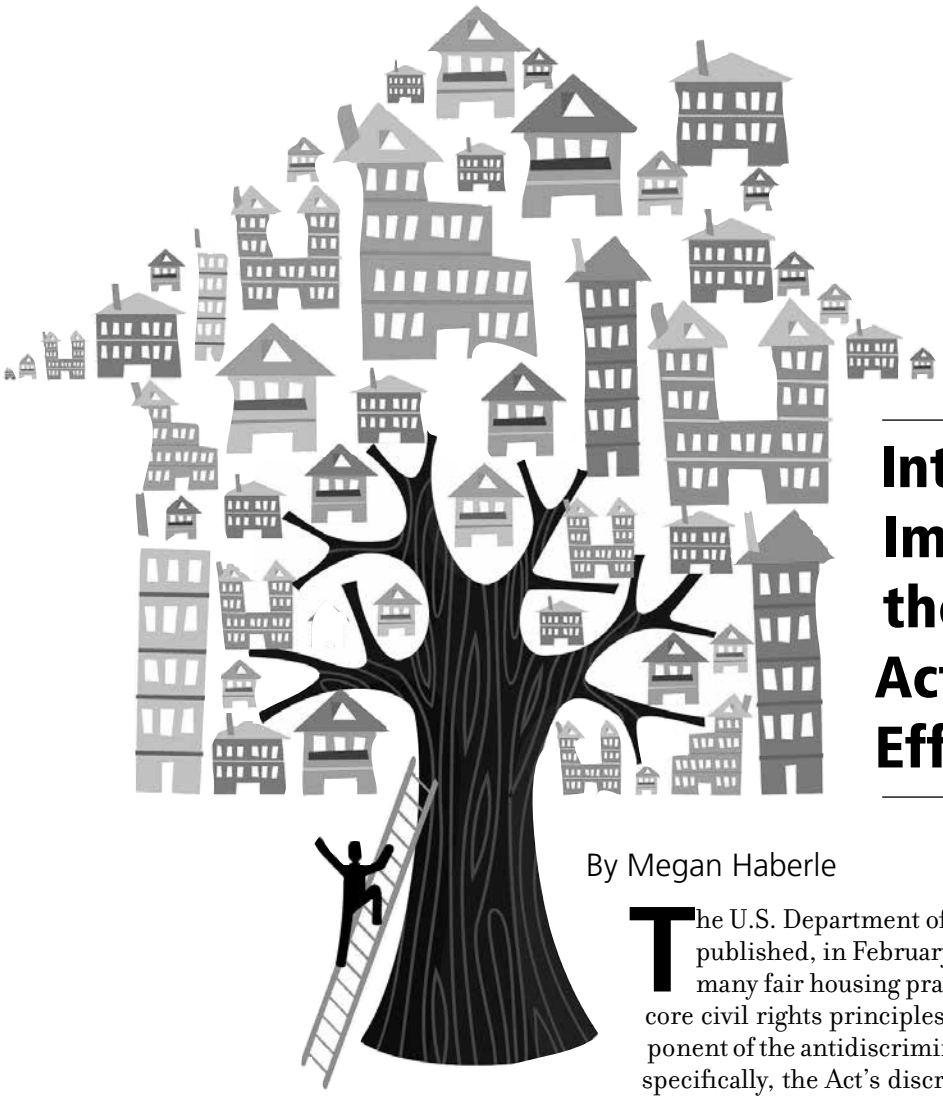

Introducing HUD's Implementation of the Fair Housing Act's Discriminatory Effects Standard

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The U.S. Department of Housing and Urban Development (HUD) published, in February 2013, a regulation that was, in the eyes of many fair housing practitioners, a long-awaited confirmation of core civil rights principles.[1] The rule implements an essential component of the antidiscrimination protections of the Fair Housing Act: specifically, the Act's discriminatory effects standard, an avenue for complainants to challenge unnecessary practices shown to have a disparate impact on the basis of race, color, sex, national origin, religion, handicap, or familial status.[2] As with other aspects of the Fair Housing Act, its discriminatory effects component has stood for decades as a corrective to the damage inflicted by residential discrimination and segregation—the thwarted opportunities (both educational and economic) and social divisiveness that prompted the Act and remain deeply felt.

Housing experts greeted the rule with fanfare because it formalized HUD's intent to continue fair housing enforcement across the breadth of the Fair Housing Act's protections and because it asserted a sensible and clear burden-shifting standard. HUD's implementation of the discriminatory effects standard reiterated several decades of established law with a balancing test at its core. Even if plaintiffs can show a disparate impact, the challenged practice will stand unless the respondent is unable to show that the practice is needed to achieve any substantial, legitimate, nondiscriminatory interest or unless the charging party proves the availability of a less-discriminatory alternative that can adequately serve that interest. In this way the rule protects the interests of all parties. From a broader perspective, it furthers the public interest by ensuring that where a practice will yield a deep social harm (that is, exclusion or disadvantage of a certain group), those designing it must consider whether

[1]Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified in scattered sections of 24 C.F.R. pt. 100 (2013)).

[2]See Fair Housing Act, 42 U.S.C. §§ 3601–3631. The U.S. Supreme Court recently granted certiorari to determine whether disparate impact claims are cognizable under the Fair Housing Act (*Township of Mount Holly v. Mt. Holly Gardens Citizens in Action Incorporated*, 658 F.3d 375 (3d Cir. 2011), cert. granted, 80 U.S.L.W. 3711 (U.S. June 17, 2013) (No. 11-1507)). While *Mount Holly*'s impact on the regulation from the U.S. Department of Housing and Urban Development (HUD) remains unclear, fair housing experts hope that the ruling will confirm the long-standing interpretation of the Fair Housing Act by HUD and other courts.

the practice also serves a social or commercial benefit and whether it could be crafted differently to minimize the harm.

While HUD's rule hardly blazed a new frontier in civil rights law, it is an important development for fair housing lawyers and their clients. The regulation sets a consistent, predictable standard for the way disparate impact claims are assessed. HUD's authoritative interpretation of the burden-shifting standard may be especially useful in jurisdictions where that standard has been in flux or has not been examined recently by the courts. Here I introduce the Fair Housing Act's discriminatory effects standard and describe how it is implemented by HUD's rule.

Understanding the Discriminatory Effects Standard

When the Fair Housing Act was passed in 1968, segregation had been the American way of life. The unrest of the civil rights movement and the assassination of Dr. Martin Luther King Jr. jarred Congress into recognizing the extent to which segregation was a malignant and unsustainable social design. By then, segregated living patterns, carrying stark disparities in opportunity and investment, had been entrenched through a blend of government sponsorship and private discrimination. Cognizant of these multiple causes of segregation and spurred by concern about the tolls of social exclusion, Congress enacted legislation intended to reach a broad array of housing discrimination.

The Fair Housing Act, which is Title VIII of the Civil Rights Act, is similar to Title VII of the Civil Rights Act, with both statutes taking aim at deeply embedded, self-perpetuating harms that are widely attributable to both private and public actors. Both statutes encompass practices—whether proven to be intentional or not—that "freeze the status quo" and perpetuate prior discrimination.[3] As one of the statute's sponsors noted, "[i]n part, this inability [of African Americans to move to higher opportunity neighborhoods] stems from a refusal by suburbs and other communities to accept low-income housing," as well as from "the racially discriminatory practices not only of property owners themselves, but also of real estate brokers," and "the policies and practices of agencies of government at all levels."[4]

In 1988 Congress reaffirmed the need for a broad Fair Housing Act when it amended the Act to add disability and familial status as protected classes. When it did so, Congress was aware that the Act had been interpreted by all courts of appeals that had considered the issue to encompass suits based on disparate impact claims.[5] Congress documented its concern that "highly segregated housing patterns still exist across the Nation" and carried grave social harms.[6] As the amendment's sponsor, Sen. Edward Kennedy, stated, "[r]esidential segregation is the primary obstacle to meaningful school integration. And as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment."[7]

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[3]See *Griggs v. Duke Power Company*, 401 U.S. 424, 429–30 (1971) (Congress' objective in Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); 114 Cong. Rec. 2524 (statement of Sen. Edward Brooke) ("Unless we can lift that blockade and open the traditional path once more, permanent de facto segregation will unquestionably disrupt further progress toward the open society of free men we have proclaimed as our ideal.").

[4]114 Cong. Rec. 2277 (statement of Sen. Walter Mondale) (quoting U.S. Commission on Civil Rights, A Time to Listen … A Time to Act 60 (Nov. 1967), http://bit.ly/15tJmLH).

[5]See, e.g., H.R. Rep. No. 100-711, at 21, 90 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2182, 2225 (House Judiciary Committee report citing two circuit court decisions holding that adults-only housing may state claim of racial discrimination under Title VIII and discussing Second Circuit's decision recognizing disparate impact claims).

[6]134 Cong. Rec. H4603-02 (daily ed. June 22, 1988) (statement of Rep. Peter Rodino).

[7]*Id.* S10454, S10454 (daily ed. Aug. 1, 1988).

Housing discrimination and segregation continue to be powerful determinants of opportunity, reflecting patterns of concentrated poverty and disinvestment. The Fair Housing Act's discriminatory effects standard should be understood not simply as a means of protecting the members of certain classes from unfair treatment but—at its heart—as an instrument intended to benefit society at large by guarding against the accumulated harms of isolation and disadvantage.[8]

Implementation

During the decades since the Fair Housing Act's passage in 1968, the statute has been recognized to target not only intentionally discriminatory practices but also those with unjustified discriminatory effects. That the Act includes disparate impact claims has been the appellate courts' universal determination and HUD's long-standing practice.[9] However, the methodology used to implement the Act's discriminatory effects component varied somewhat with circuits, and a formal rule was necessary to resolve these inconsistencies and ensure predictability in the Act's application.[10] Accordingly, HUD promulgated a formal regulation clarifying the standard to be used in assessing liability for disparate impact discrimination.[11]

HUD's regulation formalized the use of a three-part burden-shifting test to determine liability for discriminatory effects under the Fair Housing Act. The rule states that if the charging party (that is, a victim of discrimination or the entity enforcing the victim's rights) proves a prima facie case showing a discriminatory effect on the basis of a protected characteristic, the burden then shifts to the defendant to prove that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest; if the defendant succeeds, the plaintiff may then prevail by proving that the interest could be served by a practice with a less discriminatory effect.[12]

The standard is consistent with that applied previously by HUD and numerous federal courts.[13] For example, the regulation states that "[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."[14] This language distills a

[8]This is a core concern of the Fair Housing Act generally (see, e.g., *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 111 (1979) (white plaintiffs granted standing on basis that "transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of 'the social and professional benefits of living in an integrated society"); *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211 (1972) (Act was intended to ensure benefits of integration for "whole community")).

[9]For decades before its release of the final rule discussed here, HUD consistently interpreted the Fair Housing Act to cover disparate impact discrimination (see, e.g., *HUD v. Twinbrook Village Apartments*, Nos. 02-00-0256-8, 02-00-0257-8, 02-00-0258-8 (HUD ALJ Nov. 9, 2001), http://1.usa.gov/17luY85; *HUD v. Ross*, No. 01-92-0466-8 (HUD ALJ July 7, 1994), http://1.usa.gov/110pbE6). Other federal agencies, including the U.S. Department of Justice, have applied the discriminatory effects standard (see Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18269–70 (April 15, 1994)). Each circuit court that has reviewed the issue has ruled that the Fair Housing Act prohibits disparate impact discrimination (see *Graoch Associates #33, Limited Partnership v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366, 374–78 (6th Cir. 2007); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers Incorporated v. Fulton County, Georgia*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Charleston Housing Authority v. U.S. Department of Agriculture*, 419 F.3d 729, 740–41 (8th Cir. 2005); *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa County, Florida*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 482–84 (9th Cir. 1988); *Huntington Branch National Association for the Advancement of Colored People v. Town of Huntington*, 844 F.2d 926, 937–38 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curiam); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 987–89 (4th Cir. 1984); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1290–91 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–86 (8th Cir. 1974)).

[10]Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11460.

[11]*Id*. at 11461.

[12]24 C.F.R. § 100.500.

[13]See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11462–63; *Charleston*, 419 F.3d at 740–742; *Langlois*, 207 F.3d at 49–50; *Huntington Branch National Association for the Advancement of Colored People*, 844 F.2d at 939; *Twinbrook Village Apartments*, Nos. 02-00-0256-8, 02-00-0257-8, 02-00-0258-8; *Pfaff*, No. 10-93-0084-8.

[14]24 C.F.R. § 100.500(a).

uniform definition out of years of agency and judicial review of the Fair Housing Act across multiple industries, urban planning trends, and residential terrains. As HUD noted in publishing the rule, its definition of "discriminatory effect" affirms the Act's core aim of eradicating housing segregation and its resultant harms and is informed by practical experience in enforcing the Act over many decades.[15]

The regulation clarifies aspects of the standard that have been less consistent across jurisdictions, in particular how defendants can show a "legally sufficient justification" for a disparate impact. The regulation assigns the burdens of proof to avoid requiring either party to prove a negative and to be consistent with common judicial interpretations.[16] It defines "legally sufficient justification" to protect the interests of all parties by contemplating the full array of interests that may motivate housing practices: "A legally sufficient justification exists where the challenged practice: (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent … and (ii) Those interests could not be served by another practice that has a less discriminatory effect."[17] This standard adopts core elements of the discriminatory effects test used under Title VII and has served reliably in Title VIII cases in the past.[18] As HUD stated when publishing the final rule, the benefits of this uniform and proven standard are widespread:

> 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.… 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.[19]

■ ■ ■

HUD's discriminatory effects regulation directly applies in administrative proceedings to enforce fair housing law, but it will also be a resource in the courts. Practitioners may consult the new rule in interpreting and seeking updates to the proper standard for discrimination claims under the Fair Housing Act. Because Congress has endowed HUD with interpretative authority regarding the Fair Housing Act, HUD's implementation of the standard will be subject to deference by the courts—including those that have previously applied other analytical frameworks for assessing liability.[20] In this sense, HUD's regulation is a valuable evolutionary leap toward a predictable nationwide standard that embodies the congressional intent of the Fair Housing Act.

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[15]Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11461–63. See, e.g., *Huntington Branch National Association for the Advancement of Colored People*, 844 F.2d at 934, 937 (town's zoning ordinance, which prohibited development of private multifamily housing outside limited area with high-minority concentration, violated Fair Housing Act in part because town's objective—redeveloping area—could be achieved through less discriminatory alternative of offering financial incentives for building there without prohibiting development more broadly: "The Act's stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation.... The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation. … this second form of effect advances the principal purpose of Title VIII to promote, 'open, integrated residential housing patterns.'").

[16]See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11473–74.

[17]24 C.F.R. § 100.500(b).

[18]See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470–73.

[19]*Id*. at 11472.

[20]See *Meyer v. Holley*, 537 U.S. 280, 287–88 (2003) (deferring to HUD's interpretation of Fair Housing Act provisions); *Trafficante*, 409 U.S. at 210 (determining that HUD's internal interpretation of Fair Housing Act is "entitled to great weight"); see generally *Chevron U.S.A. v. Natural Resources Defense Council Incorporated*, 467 U.S. 837, 842–43 (1984) (courts defer to agency interpretations of statutes when congressional intent is unclear).

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