

**Proposed Changes to 24 CFR Part 100 Under
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Proposed Rule, Docket No. FR-6111-P-02**

§ 100.5 Scope.

(a) It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

(b) This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions. ~~The illustrations-Allegations~~ of unlawful housing discrimination ~~in-under~~ this part may be established by a practice's discriminatory effect, even if not motivated by discriminatory intent, and defenses and rebuttals to such allegations may be made, consistent with the standards outlined in § 100.500.

(c) Nothing in this part relieves persons participating in a Federal or Federally-assisted program or activity from other requirements applicable to buildings and dwellings.

(d) Nothing in this part requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial status, or national origin. The absence of any such collection efforts shall not result in any adverse inference against a party.

§ 100.7 Liability for discriminatory housing practices.

(b) *Vicarious liability.* ~~A-Where a principal-agent relationship exists under common law, a person is may be held~~ vicariously liable for a discriminatory housing policy or practice by the person's agent or employee, ~~regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.~~

(c) Remedies in administrative proceedings. The remedy in an administrative discriminatory effect case should concentrate on eliminating or reforming the discriminatory practice so as to eliminate disparities between persons in a particular protected class and other persons through neutral means,

and may include equitable remedies, and, where pecuniary damage is proved, compensatory damages or restitution. Punitive or exemplary damages shall not be available as a remedy.

§ 100.70 Other prohibited sale and rental conduct.

(d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:

(5) Enacting or implementing land-use rules, ordinances, procedures, building codes, permitting rules, policies, or ~~procedures~~ requirements 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.

§ 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 that is materially~~ inaccurate or materially different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin; provided that nothing in this paragraph (b)(1) restricts providing accurate responses to requests for information related to an individual's particular circumstances.

§ 100.500 Discriminatory effect prohibited.

(a) General. Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect, as defined in paragraph (a) of this section, on members of a protected class under the Fair Housing Act even if the specific policy or 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; 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. 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.~~

(b) *Prima facie* burden. To allege a prima facie case based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff or the charging party (collectively, “plaintiff”) must state facts plausibly alleging each of the following elements:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

(3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct link between the disparate impact and the complaining party’s alleged injury.

(c) *Failure to allege a prima facie* case. A defendant, or responding party, may establish that a plaintiff’s allegations do not support a prima facie case of discriminatory effect under paragraph (b) of this section, if:

(1) The defendant shows that its discretion is materially limited by a third party such as through:

_____ (i) A Federal, state, or local law; or

_____ (ii) A binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement;

(2) Where a plaintiff alleges that the cause of a discriminatory effect is a model used by the defendant, such as a risk assessment algorithm, and the defendant:

_____ (i) Provides the material factors that make up the inputs used in the challenged model and shows that these factors do not rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act and that the model is predictive of credit risk or other similar valid objective;

_____ (ii) Shows that the challenged model is produced, maintained, or distributed by a recognized third party that determines industry standards, the inputs and methods within the model are not determined by the defendant, and the defendant is using the model as intended by the third party; or

_____ (iii) Shows that the model has been subjected to critical review and has been validated by an objective and unbiased neutral third party that has analyzed the challenged model and found that the model was empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives, and that none of the factors used in the algorithm

rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act; or

(3) The defendant demonstrates that the plaintiff has failed to allege sufficient facts under paragraph (b) of this section.

(d) Burdens of proof for discriminatory effect. If a case is not resolved at the pleading stage, the burden of proof to establish that a specific, identifiable policy or practice has a discriminatory effect, are as follows:

(1) Plaintiff's burden. (i) A plaintiff must prove by the preponderance of the evidence, through evidence that is not remote or speculative, each of the elements in paragraphs (b)(2) through (5) of this section; and

(ii) If the defendant rebuts a plaintiff's assertion that the policy or practice is arbitrary, artificial, and unnecessary under paragraph (b)(1) of this section by producing evidence showing that the challenged policy or practice advances a valid interest (or interests), the plaintiff must prove by the preponderance of the evidence that a less discriminatory policy or practice exists that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.

(2) Defendant's burden. The defendant may, as a complete defense:

(i) Prove any element identified under paragraph (c)(1) or (2) of this section;

(ii) Demonstrate that the plaintiff has not proven by the preponderance of the evidence an element identified under paragraph (d)(1)(i) of this section; or

(iii) Demonstrate that the alternative policy or practice identified by the plaintiff under paragraph (d)(1)(ii) of this section would not serve the valid interest identified by the defendant in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.

(e) Business of insurance laws. Nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.