NIXON PEABODY LLP
ATTORNEYS AT LAW

401 9th Street N.W.
Suite 900
Washington, D.C. 20004-2128
(202) 585-8000
Fax: (202) 585-8080
Direct Dial: (202) 585-8712
E-Mail: hkelly@nixonpeabody.com

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VIA ELECTRONIC MAIL DELIVERY

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

RE: Comments on Proposed Regulations Titled:
"Implementation of the Fair Housing Act's Discriminatory Effects Standard"
Docket No. FR 5508-P-01 (76 Fed. Reg. 70922 (November 16, 2011)

Dear Sir or Madam:

These comments are submitted to the U.S. Department of Housing and Urban Development ("HUD") on behalf of the Council for Affordable Rural Housing ("CARH"), the National Apartment Association ("NAA"), the National Leased Housing Association ("NLHA") and the National Multi Housing Council ("NMHC") (jointly, CARH, NAA, NLHA, and NMHC are referred to as the "Commenters"). CARH represents the owners of affordable housing properties that receive mortgage insurance and/or rental assistance from the U.S. Department of Agriculture's Rural Development office. NLHA represents owners of properties that participate in the Section 8 rental assistance program. NMHC represents the principal officers of the multifamily housing industry's largest and most prominent firms. NAA is the largest national federation of state and local apartment associations with 170 state and local affiliates comprised of more than 50,000 members. Together, the Commenters speak on behalf of the owners of tens of thousands of multifamily housing units across the United States, all of whom deal with issues relating to the Fair Housing Act (the "FHAct") on a daily basis, including the FHAct's disparate effect standard, which is the subject of the above-referenced proposed rule (the "Rule"), published at 76 Fed. Reg. 70921 on November 16, 2011 (the "Notice").

As explained below, the Commenters believe that HUD should not move forward with further action on the Rule at the present time, in light of the pending action of the U.S. Supreme Court in connection with *Magner v. Gallagher*, No. 10-1032. As explained in more detail below, that case raises a number of important issues relating to the FHAct generally and disparate effect claims in particular, and HUD should delay action on the Rule until the Supreme Court issues its

decision in that case. Further, regardless of the additional guidance that the Supreme Court may provide, the Rule should be revised to eliminate onerous interpretations or misunderstandings that may result from the pending proposal. Claims arising from alleged disparate effect discrimination are particularly difficult to resolve because, almost by definition, they often arise from conflicts between well-intentioned policies and practices designed to achieve important management and operational goals. Any effort to clarify HUD's views on the subject and to standardize the elements of and procedures to establish disparate effects claims therefore should be taken with great care to ensure fairness to all parties.

1. **HUD Should Take No Further Action On The Rule Until the Supreme Court Issues Its Decision in *Magner v. Gallagher.***

Shortly before HUD issued the Rule, the U.S. Supreme Court announced that it had accepted the petition for certiorari filed by the petitioner in *Magner v. Gallagher*. The issues raised by the *Magner* case address a number of important matters relating to the FHAct and, in particular, the extent of non-intentional claims of discrimination. Specifically, the petitioner has asked the Supreme Court to determine whether "disparate impact" claims are recognized by the FHAct and, if so, whether they should be analyzed using a burden-shifting approach or some other approach. *See* Petitioner's Initial Brief ("Petitioner's Brief"), 2011 U.S. S. Ct. Briefs LEXIS 2812 *i, No. 10-1032 (U.S. Supreme Court Dec. 22, 2011). Of course, it is not clear which issues the Supreme Court will address or how it will rule on the substantive questions raised by the petitioners. Nevertheless, HUD should take no further action on the Rule until the Supreme Court rules in the *Magner* case, for several reasons.

First, the *Magner* case raises serious questions about whether the FHAct actually recognizes disparate impact claims. Certainly, the text of the FHAct does not, on its face, manifest a clear design to address nonintentional practices that have a more harmful effect on a class of persons protected under the FHAct. As Petitioner's Brief explains (at 20 – 30), disparate impact theory was imported into the FHAct from employment and other areas of the law, but it is far from clear that Congress intended the same disparate impact theories should apply in the housing context and, if they do, what the specific elements are and who bears the burden of proving them. Given the potential sweep of the Supreme Court's decision in *Magner*, HUD should not presume to codify rules that may change dramatically in a matter of months'

Second, even if the Supreme Court takes a narrower view of the issues in *Magner*, HUD should not act until the Supreme Court provides rules. The Supreme Court rarely addresses the FHAct. Whatever issues it finally does address, the Supreme Court's *Magner* decision undoubtedly will provide important guidance relating to the disparate impact standard under the FHAct, which could have a direct impact on the Rule. For example, to the extent that the Supreme Court attempts to clarify the elements of a disparate impact claim, and who bears the burden with respect to proving each element of such a claim, its actions would likely require HUD to revise the Rule to reflect the Supreme Court's action.

Finally, premature action on the Rule engenders a number of troubling issues of administrative law. Rushing to finalize the Rule prior to the Supreme Court's decision in *Magner* would raise unsettling questions concerning to what extent, if at all, the Supreme Court should defer to hastily-adopted HUD regulations on related topics. Assuming the Court does clarify substantive areas of disparate impact law, HUD would be compelled to reissue its regulations, or find them subject to attack in administrative and judicial proceeding to the extent they differ from the holding in *Magner*. Finally, the FHAct was adopted in 1968 and HUD has waited more than 40 years to propose regulations codifying disparate effect standards. Prudence dictates, therefore, that HUD wait a little longer and take no further action on the Rule until the Supreme Court issues its decision in *Magner*. Of course, the Commenters expect that, pursuant to proper administrative procedure generally and HUD's existing regulations (24 CFR §10.1), HUD will engage in additional notice-and-comment rulemaking with respect to any modifications to the Rule that are made as a result of the *Magner* decision.

2. **Regardless of the Outcome of the *Magner* Decision, Additional Revisions To the Proposed Rules Are Necessary.**

Commenters believe that, regardless of the potential changes that may be compelled by the outcome of the *Magner* decision, the proposed Rule must be modified substantially. Commenters begin with the premise that a case involving a facially-neutral act or practice, in which there is no evidence of intentional discrimination, must be viewed differently from those cases in which intent is evident. In those instances in which facially neutral acts or policies are alleged to have a discriminatory effect on classes of persons protected by the FHAct in the absence of an actual intent, HUD and the courts should be reluctant to find a violation of the FHAct unless there is (a) clear evidence of a significant adverse impact on the protected population; (b) no showing that the challenged act or practice is rationally related to a legitimate, nondiscriminatory goal; and (c) clear evidence that a less discriminatory, but equally effective, alternative exists. At all times, the burden should be on the complainant/plaintiff to show the required elements of the case; in other words, the complainant (or plaintiff) should not be able to make a "prima facie" case solely by proving that a challenged act or practice had a marginally adverse impact on a protected class. For these reasons, Commenters believe that the Rule should be revised to provide better guidance to all parties and to assure that policies and practices adopted to accomplish legitimate, nondiscriminatory practices do not result in liability.

a. Any regulations codifying disparate effect standards should place the ultimate burden of proof on the party asserting a claim of discrimination. In the Notice, HUD specifically requests comments concerning "whether a burden-shifting approach should be used to determine when a housing practice with a discriminatory effect" violates the FHAct. Notice at 70925. In some cases, Federal courts examining liability for nonintentional forms of discrimination have utilized **some** form of burden-shifting, requiring the complainant or plaintiff to make out a "prima facie" case of disparate impact, and then shifting the burden to the respondent/defendant to show a legitimate purpose. In our legal system, the plaintiff normally carries the burden of making out the individual elements of its claim, and Commenters believe that the same rules should apply in the context of disparate impact claims under the FHAct. That

is, the complainant/plaintiff should have the burden of proving that it suffered a disparate impact (subject to the comments made below) and that there was no legitimate, nondiscriminatory purpose for the challenged practice. Again, where liability is premised on facially neutral policies that do not demonstrate actual intent to discriminate, it is inequitable and logically flawed to ask the respondent/defendant to prove their acts or practices were nondiscriminatory. The burden at all times should be on the party claiming injury to prove the elements of those claims. If HUD decides to adopt a burden-shifting approach, however, it should require that the complainant/plaintiff prove that it suffered a significant adverse impact and that there were other less discriminatory but equally effective alternatives, as described in more detail below, to prevent "false positive" findings of discrimination.

b. HUD should define when particular practices have a "disparate impact" (proposed § 100.500(a)(1)). The Rule defines "disparate effect" cases as involving both practices that have a "disparate impact" (that is, a practice that has a disparate impact on a protected class) and those that have the effect of perpetuating segregated housing patterns. *See* proposed Rule, 24 CFR §100.500(a)(1) and (2).

At the same time, however, any such rule must recognize that there is a fundamental difference between policies that are intended to discriminate against persons in protected classes, and policies that only incidentally have a harsher impact on protected classes. Specifically, the Commenters believe that an owner or government agency should not face liability for adopting a policy or practice that on its face is neutral to protected classes, unless it can be shown that the policy or practice has an impact on a protected class that is, quantitatively and qualitatively, significantly different from the impact on other persons who are not in a protected class.

A serious problem with current case law is the absence of a standard to determine how much of a disparate impact is necessary to establish a violation of the FHAct. Is any disparate impact sufficient to violate the FHAct, or should there be some evidence that the impact must be non-trivial before liability may arise? As the Notice explains, there are some cases in which the local population demographics mean that a facially neutral policy will have a manifest impact on housing opportunities for protected classes. *See, e.g., Dews v. Town of Sunnyvale, Tex.*, 109 F.Supp. 2d 526 (N.D. Tex. 2000) (local zoning rules restricted minority housing opportunities in a city that was 94 percent white) and *United States v. City of Blackjack, Mo.*, 508 F.2d 1179 (8th Cir. 1974) (ordinance preventing construction of multifamily housing perpetuates segregation in city that was 99 percent white). In such cases, the disparate impact on protected classes is profound and obvious.

But there are other instances where a neutral policy may have a different, but much less extensive, impact on a protected class than on non-protected classes. Imagine a workforce housing proposal – that is, a proposal to provide housing to employees of public institutions, such as police, firefighters, teachers and others – in a city with a diverse ethnic population. For many reasons – level of education, employment experience, etc. – the demographics of the workforce may differ from the demographics of the market area generally. But unless the workforce demographics exactly coincide with the demographics of the market population generally, such a preference would likely expand housing opportunities for some groups – including some protected classes – while reducing opportunities for others. In such cases,

where there is at least some negative impact on a protected class, does the workforce preference violate the FHAct, or should there be some leeway allowed before a violation arises? In other words, is any disparate impact, no matter how small or trivial, sufficient to permit a complainant to establish the requisite impact? HUD should make clear that an impact is not disparate unless it has a non-trivial impact on a protected class.

In defining a disparate impact, the kind of impact also should be relevant in determining liability. If two persons, one in a protected class and one not in a protected class, experience exactly the same impact as a result of a facially neutral policy, it is difficult to argue that the person in the protected class has a discrimination claim, solely because he or she is in that protected class. In other words, in the absence of intent, something more than a mere numerical impact on a protected class should be required to prove a violation occurred. A person claiming a non-intentional violation of the FHAct should show, as part of any prima facie case, that the challenged policy or practice had a qualitatively different impact on him or her, as a member of that protected class, than it had on persons outside that class. For example, a mere economic impact should not, by itself, trigger liability if others outside the protected class experience the same sort of impact. In such a case, persons seeking to assert a disparate impact claim should be required to prove, as part of their prima facie case, that the challenged policy or practice not only affected them more harshly than others, but affected them more harshly ***because*** of their participation in that class.

HUD should use the opportunity of issuing regulations dealing with disparate effect cases to clarify that persons alleging disparate impact claims should show they have experienced an impact that is, quantitatively or qualitatively, meaningfully different than from persons in a non-protected class. In order to do this, HUD should incorporate a definition of "disparate impact" in §100.500(a) that explains that a practice has a disparate impact only if:

i. With respect to those persons who are affected by the challenged practice, there is material difference – we suggest at least a 20 % difference – between the number of persons in the protected class who are affected by the challenged practice compared to the number of persons in the population generally who are impacted by the challenged practice; and

ii. Persons in the protected class are adversely impacted by the challenged practice in a manner that is different than persons who are not in a protected class.

Without such criteria, policies and practices that will have a beneficial impact on housing generally may be discouraged or prevented, for fear that someone in a protected class may assert an FHAct claim, even though the adverse impact on the protected class is not, qualitatively or quantitatively, significantly different from the impact on persons outside that class. In the long-run, adopting regulations that discourage reasonable policies and practices will diminish housing opportunities for all persons.

c. HUD should clarify when a practice "predictably" has a disparate effect (proposed §100.500(a). In identifying practices that have a "disparate effect," the Rule mentions practices that "actually or predictably" result in a disparate impact or perpetuating

segregation. Presumably, an "actual" practice is one that has occurred and can be measured factually; such practices present serious, but manageable, issues of proof.

Determining when a practice "predictably" has a disparate impact is much more difficult: In such cases, a practice by definition has not in fact yet caused discrimination and is being challenged without actual evidence that it has in fact caused a disparate impact.[1] Such impacts are far too speculative to support a bona fide claim for liability under the FHAct. The Rule, therefore, should be revised to exclude liability for impacts that may occur in the future. To the extent that HUD decides to address liability with respect to possible future impacts, HUD needs to specify what sort of evidence would be necessary to establish a violation of the FHAct.

d. HUD should disaggregate the concepts of a "legally sufficient justification" in connection with the burden-shifting mechanism contained in the Rule (proposed §100.500(b) and (c)). According to the burden-shifting mechanism proposed in the Rule, after the complainant makes out a prima facie disparate effects case, the parties divide the responsibility of showing whether there is a "legally sufficient justification" for the challenged practice. While it is conceptually correct to say that a disparate effects claim cannot prevail where there is a "legally sufficient justification" for the challenged practice, the approach taken by the Rule imposes awkward duties on the adversaries to establish different elements of the same concept. As noted above, all the elements of proving a disparate impact case should be carried by the complainant/plaintiff. To the extent HUD adopts a formal burden-shifting approach, however, it would be preferable to define separate evidentiary showings that each party must meet to carry their respective burden, rather than define a single standard ("legally sufficient justification") for which both parties share a burden of proof. Specifically, the elements that the parties must show should be clarified as follows:

i. **A policy or practice should be deemed to satisfy the "legally sufficient justification" standard if it is rationally related to a legitimate, nondiscriminatory interest.** Assuming a burden-shifting approach is allowed, HUD suggests that the respondent must show that there is a "necessary and manifest relationship" between the challenged practice and "one or more legitimate, nondiscriminatory interests." *See* Rule, proposed §100.500(c)(2). The proposed "necessary and manifest" standard is vague and is likely to lead to unnecessary confusion and litigation. It suggests that the respondent must show that the challenged practice is the only policy that could possibly be adopted, which in the absence of evidence of intent is far too strict. In the absence of an actual intent to discriminate, HUD should allow some leeway for owners and government agencies to adopt measures that are designed to accomplish legitimate, nondiscriminatory goals. If in fact the policy is nondiscriminatory on its face, the complainant should be

[1] Of course, if HUD adopts a more precise definition of "disparate impact," as discussed in section 2(b) above, at least some of the uncertainty will be eliminated, because predictions about future impacts will be more reliable where they can be shown to have a quantitatively and qualitatively harsher impact on protected classes than on nonprotected classes.

required to prove that the challenged policy or practice is not rationally related to the claimed interest.

ii. **The complainant should be deemed to satisfy its burden if it can show that (1) there is a less discriminatory alternative to the challenged practice and (2) the alternative is at least as effective as the challenged practice to satisfy the legitimate, nondiscriminatory interest.** Assuming a burden-shifting approach is allowed, the Rule proposes that a complainant can prevail if it can show that there is an alternative that has a less discriminatory effect. *See* Rule, proposed §100.500(c)(3). Proving that a less discriminatory alternative exists is necessary, but not sufficient. In order to carry its final burden, the complainant must show not only that there is a less discriminatory altemative, but that the alternative is at least as likely as the challenged practice to accomplish its legitimate, nondiscriminatory goal. This should not be controversial – an alternative is not, in fact, an "alternative" if it is not likely to accomplish the same legitimate, nondiscriminatory goals as the challenged practice. HUD should revise the Rule to indicate that, in order to meet its final burden, the complainant must show that, if a less discriminatory "alternative" in fact exists, it is likely to produce the same beneficial result as the challenged practice.

e. The Rule should not incorporate examples of alleged "disparate effects" cases (proposed §§100.65(b)(6), .70(d)(5), and .120(d)(5)&(6)). HUD proposes to adopt a series of additional provisions describing specific types of conduct that it considers to demonstrate "discriminatory effects" to be inserted at §§100.65(b)(6), .70(d)(5), and .120(d)(5)&(6)). But as HUD acknowledges, these are at best "examples of housing practices with discriminatory effects" (76 FR at 70925) and are not themselves sufficient to constitute actual violations of the FHAct. If retained in the Rule, these examples in fact are likely to create significant confusion, because, as written here, the "examples" are stated as *per se* violations of the FHAct.[2] As drafted, the examples suggest that there is a violation of the FHAct whenever the described conduct occurs. Specifically, HUD fails to signal how the complicated burden-shifting analysis described in §100.500 would apply here. There is nothing on the face of these examples that make them examples of "discriminatory effect" type violations.

Without some attempt to describe the relation between the standards of liability and burden-shifting contained in §100.500, these examples suggest that the listed practices violate the FHAct without need to engage in the burden-shifting analysis set out in §100.500. Certainly, HUD would assert that the failure to list a challenged act or practice in Part 100 does not mean that the challenged act or practice should be presumed to be lawful. Conversely, HUD should not expand the list of prohibited acts in §§100.65, .70 and .120 unless it makes clear that the additional practices are not in fact *per se* violations of the FHAct, but require proof pursuant to the standards of proof set forth in §100.500. The Commenters believe that it is unwise to insert such "examples" into HUD regulations generally without making clear that, before a violation

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[2] Indeed, as drafted by HUD, many of the forms of conduct listed in proposed §§100.65, .70 and .120 could reflect intentional discrimination, rather than nonintentional discriminatory effect.

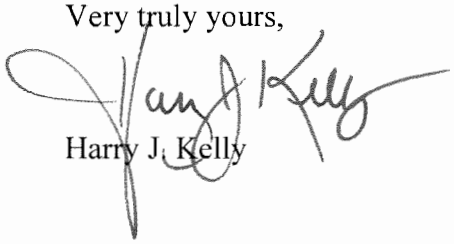
can be found, the fact-finder must analyze them pursuant to whatever disparate impact procedures are finally adopted. Accordingly, HUD should delete these examples entirely from the Rule, or, if it decides to retain them, substantially alter them to describe the specific elements that must establish to satisfy the requirements of §100.500.

Conclusions

It is important that any regulation add definitiveness to the implementation of the FHAct, as there has been much vagueness and confusion in addressing alleged acts of nonintentional discrimination. For the reasons stated above, the Commenters urge HUD to refrain from taking any further action with respect to the Rule until after the Supreme Court rules in the *Magner* case, because that case is likely to provide important guidance relating to the issues addressed by the Rule, and HUD's rule may be obsolete in part shortly after issuance. To the extent that HUD moves forward to finalize the Rule at any point, it should revise the Rule to reflect the comments above, to assure, on the one hand, that persons in protected classes who are in fact adversely impacted by nonintentional discriminatory acts are protected, while, on the other hand, assuring that owners, government agencies, and other persons are able to pursue legitimate, nondiscriminatory goals in housing without placing themselves in jeopardy of inadvertently violating the FHAct.

Please feel free to contact me if you have any questions.

Very truly yours,



Harry J. Kelly