January 17, 2012

Via Electronic Submission

Regulations Division
Office of General Counsel, Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500
www.regulations.gov

RE: Docket No. FR-5508-P-01, RIN 2529–AA96; Implementation of the Fair Housing Act’s Discriminatory Effects Standard

Dear Rules Docket Clerk:

AARP appreciates the opportunity to provide comments supporting HUD’s proposed rule to implement the Fair Housing Act’s (“FHA”), discriminatory effects standard. We urge HUD to implement the proposed rule as quickly as possible to further fair and equal housing opportunities.

AARP is a nonprofit, nonpartisan membership organization that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. We produce AARP The Magazine, AARP Bulletin, AARP Viva, NRTA Live and Learn, and provide information via our website, www.aarp.org. AARP publications reach more households than any other publication in the United States. AARP advocates for policies that enhance and protect the economic security of individuals.

Obstacles to Aging in Place

The vast majority of older people prefer to age in place, yet inadequate housing, mobility options, and community supports can create serious obstacles to achievement of this desire. Without appropriate housing and transportation, older adults are at much greater risk of institutionalization when they stop driving or acquire mobility impairments. Keys to successful aging include access to affordable, accessible housing and adequate mobility options that provide access to necessary supports and services, received both in and out of the home.¹

¹ AARP Public Policy Institute, Fact Sheet 172, Housing Policy Solutions to Support Aging in Place (March 2010).
While age is not itself a protected class, people in each of the protected classes eventually age. Moreover, a person’s housing needs frequently change as they age. In particular, many older people eventually acquire a disability and become part of a protected class as a result. When a person whose housing opportunities have been limited by discrimination because of race or national origin becomes disabled, their housing opportunities may be even further narrowed by discrimination because of their dual protected status.

**The Fair Housing Act Protects Against Discriminatory Effects**

AARP supports adoption of the proposed rule, which reflects the long understood interpretation of HUD, the Department of Justice, and the courts that the FHA protects against policies and practices that have a discriminatory effect on a protected class.

The FHA’s discriminatory effects standard addresses facially neutral policies and practices that make housing unavailable to a protected class, regardless of intent or equal treatment. It has provided a means to combat “practices that are fair in form, but discriminatory in operation.” The disparate impact analysis “usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for these disparities” because this mode of analysis exposes practices that, while “adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”

Importantly, although people are not protected from housing discrimination based upon their age, the FHA protects people as they age. For example, protection against discrimination because of disability helps protect the frail elderly and those with disabilities from being forced into institutions. The disparate impact analysis is essential to reach the discriminatory effects of a wide range of practices that make housing unavailable to people as they age.

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2 See National Council on Disability, *The State of Housing in the 21st Century: A Disability Perspective*, 27 (2010) (“Recent federal research estimates that 54.4 million people with disabilities live in the civilian population in the United States, representing approximately 19 percent of the noninstitutionalized population. At all ages, women (24%) have a higher prevalence of disability when compared with men (19%). For all, the prevalence of disability increases with age, from 11 percent for people 18 to 44 years of age to 52 percent for people 65 years and older.”).

3 *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375, 385 (3d Cir. 2011) (finding “[i]n disparate impact cases, [e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.”) (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).


Subprime Mortgage Lending Discrimination Has a Discriminatory Effect on African American and Hispanic Borrowers and Threatens Their Financial Security

The wealth created by homeownership is a primary resource for older people to support them in their retirement years. Many African American and Hispanic borrowers have a markedly less secure financial future in comparison to other borrowers as a direct result of mortgage lending practices that have discriminatory effects.

The importance of the discriminatory effects standard in eliminating discrimination in mortgage lending cannot be overstated. According to a recent study of mortgage lending data, "even after years of public policy efforts, race and ethnicity remain an important determinant of the allocation of mortgage credit in both home purchase and home refinance markets." The study concluded that racial disparities in rates of subprime lending could not be explained by factors related to credit-worthiness.

Disparate effects in lending also meant that "borrowers in minority groups were much more likely to receive loans with product features associated with higher rates of foreclosure," i.e., loans with higher interests rates or with risky terms, like ballooning interest rates. These high disparities were "evident even within credit rates." Older minority borrowers are frequently impacted by such discriminatory lending practices, which often result in foreclosure.

A Discriminatory Effects Standard Is Necessary To Address Housing Discrimination against Persons with Disabilities That Interferes With Aging in Place

The vast majority of older people want to live out their lives in the home and community in which they currently live. Unfortunately, many will find it impossible to do so because their home will not match their changing physical, financial or cognitive needs, or their community lacks the home based services, supports, and features necessary to support aging in place.

7 William Apgar et al., Dep’t Housing & Urban Development, Risk or Race: An Assessment of Subprime Lending Patterns in Nine Metropolitan Areas 45 (2009).
8 Bocian, et al., Center for Responsible Lending, Lost Ground 21 (2011).
9 Id.; see also Apgar & Calder, at 111-15 (summarizing research of subprime lending designed to “control[] for neighborhood and borrower characteristics, including several measures of risk” and concluding that those studies “confirm[] that race remains a factor”).
10 See AARP Public Policy Institute, forthcoming foreclosure study, expected publication February 2012 (For African Americans age 50+, the foreclosure rate on subprime loans was 10.4 percent in 2010, and for Hispanics 50+ the foreclosure rate on subprime loans was 15.3 percent. For prime loans in 2010, the foreclosure rate was 3.0 percent for African Americans and 3.9 percent for Hispanics age 50+).
11 See AARP Public Policy Institute, Fact Sheet 173, Supportive Housing (March 2010); National Conference of State Legislatures and AARP Public Policy Institute, In Brief 190, Aging in Place: A State Survey of Livability Policies (Dec. 2011).
Congress intended the FHA to eliminate the discriminatory effects of zoning and land use policies – such as family composition and “proper supervision” requirements -- that erect barriers to integration of people with disabilities in neighborhoods and communities.12

Congress recognized that discrimination against persons with disabilities exists as much because of “thoughtlessness” as intentional discrimination. The FHA thus protects against all forms of discrimination -- intentional as well as benign -- caused by the public’s perception of what is “best” for persons with disabilities."13 Although state and local governments have the authority to regulate land use, the FHA protections provide a remedy where “that authority has sometimes been used to restrict the ability of [persons with disabilities] to live in communities."14

Without the ability to challenge discrimination that results from discriminatory effects, it would be impossible to reach such practices even though they may dramatically limit housing choice or otherwise make housing unavailable. The FHA clearly contemplates protection against such injuries and the use of the discriminatory effects analysis to root them out.

In addition, the FHA reaches discriminatory effects of policies and practices of licensing agencies and housing providers that cater to serving the housing needs of older people. Discriminatory effects may result from decisions based either upon “thoughtlessness” or stereotypes and assumptions about people with disabilities.15 Common obstacles that older people face obtaining housing and aging in place often result from neutral policies – such as prohibition of supportive services provided in the home or restrictions on the use of mobility aids – that have a discriminatory effect on older people with disabilities.

A common justification asserted for such policies is the safety of residents. Under a discriminatory effects analysis, courts have required that legitimate safety rules be construed narrowly, in accord with Congressional intent in amending the FHA to end discrimination based on disability.

**Race and National Origin Discrimination in Housing Interferes with Aging in Place**

Housing options that support successful aging in place are disproportionately unavailable in racially concentrated segregated neighborhoods.16 African American and

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12 See H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 24 (1988) (“The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices.”); Housing Policy Solutions, supra note 1 (discussing barriers to integration).
14 See H.R. Rep No. 100-711.
15 See Cason, 748 F. Supp. at 1003.
16 David Barton Smith, Zhanlian Feng, Mary L. Fennell, Jacqueline Zinn, Vincent Mor, Racial Disparities in Access to Long-Term Care: The Illusive Pursuit of Equity, Journal of Health Politics, Policy and Law, Vol. 33, No. 5 (Oct. 2008); Mary L. Fennell, Zhanlian Feng, Melissa A. Clark, and Vincent Mor, “Elderly Hispanics More Likely to Reside In Poor Quality Nursing Homes,” Health Affairs, Vol. 29, Issue 1, pp. 65-73, 2010; David Barton Smith, Zhanlian Feng, Mary L. Fennell, Jacqueline S. Zinn, and Vincent Mor,
Hispanic residents, many of whom live in highly racially or ethnically concentrated neighborhoods, tend to live in older housing stock, built well before accessibility guidelines provided a minimal level of accessible features necessary to permit them to age in place.\textsuperscript{17} They also lack the supportive services and transportation options that are necessary to support successful aging. Unlike a person who lives in a community with more robust options and resources, people in protected classes who live in segregated communities may be forced as they age to make the Hobson’s choice of foregoing suitable housing and services, or breaking the social ties necessary to maintain mental and physical health in order to access such supports and services, in either a residential or institutional setting.\textsuperscript{18}

AARP applauds HUD for reaffirming through this rulemaking its longstanding interpretation of the FHA that where the adverse impact of a facially neutral zoning or land use policy falls more heavily on a protected class, such discriminatory effect violates the FHA.\textsuperscript{19} A discriminatory effects standard is essential to protect fair and equal housing opportunities throughout a person’s lifespan.

**Standard of Proof**

AARP endorses evaluating discriminatory effects claims under a three-step burden shifting analysis.\textsuperscript{20} Such an approach is practical and supported by longstanding precedent in the evaluation of discriminatory effect claims under a variety of statutes, including Title VII, upon which the Fair Housing Act is modeled.

While AARP applauds HUD’s efforts to standardize the analysis of discriminatory effects claims, we urge HUD to strengthen it in order to further the goals of the FHA. In particular, while HUD proposes to assign to the plaintiff the burden in the third step of the analysis to produce evidence of a less discriminatory alternative, AARP urges HUD to recognize that the defendant in a Fair Housing Act discriminatory effects case appropriately bears the burden to show a less discriminatory alternative is not available. Placing the burden on the defendant is practical and not overly burdensome, as

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\textsuperscript{17} MetLife, *Aging In Place 2.0*, Rethinking Solutions to the Home Care Challenge, 18-19 (Sept. 2010).
\textsuperscript{19} See *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*, 658 F.3d 375, 384 (3d Cir. 2011) (“All of the courts of appeal that have considered the matter . . . have concluded that plaintiffs can show the FHA has been violated through policies that have a disparate impact. . . .”). As federal courts have consistently held, “[i]n disparate impact cases, [e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.” *Id.* at 385 (quoting *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976)).
\textsuperscript{20} Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921, 70925 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. § 100.500(c)(3)).
demonstrated by the fact that many of the judicial circuits have long assigned defendants that burden.21

One reason HUD cites for proposing this rule is to eliminate the waste of time and resources spent litigating the availability and analysis of a discriminatory effects claim under the FHA. This motivation is eminently reasonable. By placing the burden on plaintiffs to prove a less discriminatory alternative, however, HUD has not eliminated time-wasting disputes. Placing the burden on the plaintiffs will only shift when those disputes occur because plaintiffs will be required to conduct extensive discovery to obtain from the defendants the information necessary to develop the less discriminatory alternative.

Undoubtedly, defendants will oppose providing such information based upon any number of common defenses to providing discovery in litigation. Even if defendants are compelled to provide the necessary information, in many cases, plaintiffs will not have the resources or expertise to propose effective alternatives. In the war of attrition, the defendants will have an overwhelming advantage that unnecessarily limits enforcement of FHA discriminatory effects claims. Such time-wasting discovery disputes will be avoided, however, if HUD places the burden on defendant’s experts -- who were likely involved in developing the challenged plan -- to evaluate the alternatives.

Moreover, HUD misconstrues the nature of the burden on either party under such an analysis. HUD cites the virtue of relieving defendants of the necessity of proving a negative, but that is not what is required to evaluate a discriminatory effects claim. The FHA does not address the simple existence or non-existence of a binary fact. It addresses the permutations of highly complex decisions and actions of a housing provider or governmental agency with many competing priorities and obligations.22 Thus, defendants are often in the best position to evaluate and chose between the alternatives to arrive at a less discriminatory outcome that also meets their competing goals. Moreover, assigning to defendants the burden to show no less discriminatory alternative is available gives government entities greater flexibility to determine how best to accomplish their myriad goals in light of limited public funds. Providers of assisted living and nursing facilities can determine how best to navigate overlapping regulatory requirements.

Assigning the burden in the third step to the defendant encourages housing providers to be more cognizant of and responsible for the impact of their practices on protected classes, which itself furthers the goals of the FHA. Although enforcement of the FHA is

21 See e.g. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988) (a defendant must show that there are no less discriminatory alternatives available); Mt. Holly, 658 F.3d at 385 (holding that defendants have the burden of showing that there is no less discriminatory alternative); Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000) (same); Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 503 (N.D. Tex. 2010) (same); Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 565 (N.D. Tex. 2000) (same).
22 Huntington, 844 F.2d at 937-38 (noting that in zoning cases under the FHA a defendant’s justifications are “normally based on a variety of circumstances”);
typically an adversarial process, its goals are best met when the parties work together to arrive at a mutually beneficial result. Placing the burden on the defendant provides an important incentive for housing providers to work cooperatively with protected classes to implement policies that do not have discriminatory effects adverse to a protected class.

**Conclusion**

AARP appreciates the opportunity to comment on the proposed rule, as it is vital to ensure successful aging in one’s home and community. If you have questions or need additional information, please contact Cristina Martin-Firvida at 202-434-6194.

Sincerely,

David Certner  
Legislative Counsel and Legislative Policy Director