COMMENTS TO PROPOSED DISPARATE IMPACT RULE REVISIONS BY H.U.D.--COMMENTS FRIDAY, OCTOBER 18, 2019:

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Friday, October 18, 2019

TO: The Department of Housing and Urban Development

via https://www.regulations.gov/.

Re: Your proposed revisions to the Disparate Impact Rule.

Docket No.: FR-6111-P-02.

RIN: 2529-AA98.

Your proposed § 100.500(e) is arbitrary and capricious. Moreover it is a misguided attempt to "reverse preempt" current § 100.70(d)(4).

1. Your new paragraph (e) is arbitrary and capricious.

Your proposed new § 100.500(e) is arbitrary and capricious. You propose to proceed by case-by-case adjudication involving disparate-impact theories of liability concerning insurance, rather than rule-making. You have not provided a reasoned explanation for preferring case-by-case adjudication over rule-making which, after all, is the reason that HUD exists, i.e., to make rules. Under established law, as you know from a decision that you cite in your proposal, "[a]lthough HUD had discretion to decide whether to proceed by case-by-case adjudication or rule-making, it needs to provide a reasoned explanation for preferring case-by-case adjudication over rule-making. HUD's failure to do so was arbitrary and capricious." Prop. Cas. Ins. Ass'n of Am. v. Donovan, 66 F. Supp. 3d 1018, (N.D. Ill. 2014).

This holding was reached during judicial consideration of a previous version of this same regulation. So it is again regarding your current

version: Your proposed, revised regulation is arbitrary and capricious with respect to the business of insurance as you have addressed it here, including by your proposed paragraph (e) and your proposed new section 100.500.

2. Your new paragraph (e) contravenes the Fair Housing Act's own statutory provisions, which supersede any conflicting proposed regulations of an administrative agency, as here. Further, it is an invalid and void attempt to "reverse preempt" insurance companies from disparate-impact liability for discrimination under the Fair Housing Act, and for these reasons it is unauthorized and unreasonable, as well as arbitrary and capricious.

The HUD Disparate Impact regulation already addresses the denial of "property or hazard insurance" in § 100.70(d)(4):

> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:
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> * * *
>
> (4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

Because of § 100.70(d)(4), "denying 'property or hazard insurance' violates the FHA." Nat'l Fair Hous. Alliance v. Travelers Indem. Co., 261 F. Supp. 3d 20, 30 (D.D.C. 2017).

Your proposed addition of § 100.500(e) would risk immunizing insurance providers who otherwise violate the provisions of section 100.70(d)(4), quoted in full above:

(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.

84 F.R. at 42863.

The Fair Housing Act already contains a provision governing the effect on State laws including that the FHA shall not be construed to invalidate or limit any such conflicting law, with an exception that you do not recognize in your proposal. Under the FHA, Congress would invalidate any State or local law "that purports to require or permit any action that would be a discriminatory housing practice [under the FHA] shall to that extent be invalid." 42 U.S.C.A. § 3615. Your proposal is unreasonable in that it adds nothing to the law as it currently exists, in other words, there is simply no reason for your proposal. Further, your proposal conflicts with the Statute enacted by Congress on the same subject and your proposal is void as a result.

The McCarran-Ferguson Act, for its part, famously leaves the regulation of insurance to the States. The Congressional deference to the States in this regard is so strong that the McCarran-Ferguson Act includes a "reverse preemption" provision by which conflicting ***federal*** laws are deemed preempted by State insurance laws in appropriate circumstances. *See* 15 U.S.C.A. § 1012. It has been said that "the key issue in analyzing whether the McCarran-Ferguson Act reverse-preempts this application of the FHA is the specific details of the *state insurance law* that supposedly contradicts the FHA." Nat'l Fair Hous. Alliance v. Travelers Indem. Co., 261 F. Supp. 3d 20, 34 n.4 (D.D.C. 2017) (italics in original; emphasis by the court). Here as well you have not identified any specific details of any state insurance law that supposedly contradicts the FHA. Your attempt at reverse preemption with the addition of new § 100.500(e) is as a result both invalid and void.

Thank you for your consideration of these Comments. As was noted from the beginning, more Comments will follow.

Sincerely Yours,

Dennis J. Wall