

COMMENTS TO PROPOSED DISPARATE IMPACT RULE REVISIONS  
BY H.U.D.--BEGIN COMMENTS THURSDAY, OCTOBER 17, 2019:

THIS IS .2.

Thursday, October 17, 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 revisions to the current Disparate Impact Rule are found at 84 F.R. 42854 -42863, with your Summary and your Supplementary Information.

The Comments below continue several comments on your proposed revisions.

Your proposed § 100.500(d) mis-states FHA law and would impose new, additional requirements not found either in the Fair Housing Act or in FHA law. You simply do not have the authority to rewrite any statutes nor any judicial decisions including ones that you do not like.

1. Your new paragraph (d)(1) incorrectly imposes burdens on persons pursuing discrimination claims on a disparate impact theory that the FHA and that FHA case law do not impose. It is not your place to impose them where Congress and the courts have refused to do so.

(i) The "elements in paragraphs (b)(2) through (5) of this section" as you call them are not proper elements of proof in the context of such claims.

Please see our earlier Comments concerning your new paragraphs (b)(2) through (5) of this section in particular, which are expressly incorporated herein by reference. A pdf copy will be appended to these Comments for this purpose and for your ease of reference.

- (ii) This subparagraph (ii) in your new paragraph (d)(1) is an attempt on your part to introduce entirely new legal requirements in FHA law. You would effectively provide that even if an FHA plaintiff has proven the availability of less restrictive means for the defendant to pursue its policy objectives, then still the plaintiff must also prove yet another thing. You would require the FHA plaintiff at that point in a disparate impact discrimination liability case to also prove that the alternative means would not "impos[e] materially greater costs on, or creat[e] other material burdens for, the defendant." This requirement in your new subparagraph (ii) has no justification and no reason for existence.

By proposing your new requirements in subparagraph (ii), you would heap up burdens on FHA disparate treatment discrimination plaintiffs that never previously existed. This you may not do. You completely lack the authority to do so.

2. Your new paragraph (d)(2) incorrectly allows defenses to be raised by defendants in FHA discrimination claims that are based on a disparate impact theory, that the FHA and that FHA case law do not recognize.

- (i) and (ii). What has been said above applies to these subparagraphs as well. The above Comments, and the Comments that were left previously to your § 100.500(b) (please see attached pdf, for example), are expressly incorporated herein by reference.

(iii). It bears repeating that your introduction of an unrecognized issue that a defendant in such an FHA discrimination case can escape liability by evidence that less restrictive alternatives to the defendant's discriminatory policies "would materially impose greater costs" or would "creat[e] other material burdens for the defendant," do not exist in the statutory language chosen by Congress or in the judicial opinions written by judges in the FHA case law. You do not have the authority to rewrite any of them.

Moreover, your statutory charge is to implement the FHA concerning the *effects of discrimination*.

Your duties are described in the Fair Housing Act. The Congressional statement of purpose is to facilitate relief from discrimination in the national housing market. Your duties do not include shielding defendants from "materially greater costs" or "other material burdens" as a consequence of their proven discrimination.

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

Sincerely Yours,

Dennis J. Wall