No. 10-1032

In The Supreme Court of the United States

STEVE MAGNER, et al.,

Petitioners,

v.

THOMAS J. GALLAGHER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* HENRY G. CISNEROS, former Secretary of the United States Department of Housing and Urban Development; ANTONIO MONROIG, JUDITH Y. BRACHMAN, ROBERTA ACHTENBERG, ELIZABETH K. JULIAN, EVA PLAZA, and KIM KENDRICK, former Assistant Secretaries for the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development; J. MICHAEL DORSEY and JUDGE NELSON A. DIAZ, former General Counsel, Department of Housing and Urban Development; HARRY L. CAREY, former Associate General Counsel for Fair Housing; and LAURENCE PEARL, former Acting Deputy Assistant Secretary for Program Operations and Compliance IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS:

INTEREST OF *AMICI*[1]

The *Amici* are former Presidential appointees and career employees of the United States Department of Housing and Urban Development ("HUD"). During their tenure at HUD, each was responsible for various aspects of the administration and enforcement of the Fair Housing Act ("FHA") from as early as 1981 through 2009. These officials file this *amicus* brief to indicate that in the exercise of their responsibilities in connection with the investigation and adjudication of housing discrimination complaints they consistently used a disparate impact analysis, as well as a disparate treatment analysis, in determining whether a violation of the FHA had occurred or was about to occur.

The Presidential appointees are as follows, by title and dates of tenure: *Secretary of the Department of Housing and Urban Development*, Henry G. Cisneros (1993-1997); *Assistant Secretary for the Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development*, Antonio Monroig (1981-1987), Judith Y. Brachman (1987-1989), Roberta Achtenberg (1993-1995), Elizabeth K. Julian (1995-1997), Eva Plaza (1997-2001), and Kim Kendrick

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the undersigned counsel contributed financially to its preparation or submission. The parties have consented to the filing of this brief.

(2005-2009); *General Counsel of the Department of Housing and Urban Development*, J. Michael Dorsey (1987-1989) and Judge Nelson A. Diaz (1993-1997).

The additional *Amici* are Harry L. Carey, who retired as Associate General Counsel for Fair Housing in 2007 after more than thirty-five years at HUD, and Laurence Pearl, who retired as Acting Deputy Assistant Secretary for Program Operations and Compliance in 1998 after thirty years in the HUD Office of Fair Housing and Equal Opportunity.

SUMMARY OF ARGUMENT

As the chief administrative agency charged with enforcing the FHA, HUD has a broad legislative mandate. Since the original enactment of the FHA in 1968, HUD has been vested by Congress with the statutory authority to administer and enforce the FHA, including by investigating discrimination complaints. With the 1988 Amendments to the FHA, HUD became charged with the responsibility of conducting formal adjudications and making final agency decisions in administering and enforcing the FHA. HUD has consistently recognized a discriminatory effects theory of liability when carrying out its statutory authority. In final agency decisions, such as final orders issued after hearings before administrative law judges, for instance, HUD has repeatedly made findings of discrimination based on evidence of discriminatory effects. HUD has also recognized the

disparate impact theory in regulations issued, in part, based on its authority under the FHA; in joint statements of policy with other administrative agencies; in internal guidance memoranda issued by the Assistant Secretary for the Office of Fair Housing and Equal Opportunity ("FHEO") and/or the HUD Office of General Counsel; in internal training materials for HUD investigators; and most recently in the Notice of Proposed Rule-Making that reiterates and codifies the agency's long-standing recognition that the FHA reaches the effects of discrimination. As early as 1980, the HUD Secretary expressly recognized the agency's efforts to address the effects of discrimination. *See, e.g.,* 126 Cong. Rec. 31166-67 (1980) (statement of Sen. Charles Matthias) (reading into the record a letter from the Secretary of Housing and Urban Development describing the "so-called 'effects test'" as a "rational, thoughtful mode of analyzing evidence [that] is imperative to the success of civil rights law enforcement.") For over thirty years, HUD has unambiguously made the disparate impact theory a central part of its administration and enforcement of the FHA. HUD's long-standing and well-reasoned pronouncements are entitled to deference.

ARGUMENT

I. HUD'S LONG-STANDING AND AUTHORITATIVE INTERPRETATION OF THE FHA AS ENCOMPASSING DISPARATE IMPACT LIABILITY IS ENTITLED TO DEFERENCE

HUD's long-standing and authoritative pronouncements regarding the disparate impact theory of liability are entitled to deference. In 1968, Congress expressly gave HUD broad authority to administer and enforce the FHA. 42 U.S.C. 3608, 3610. The Fair Housing Act, as amended in 1988, provides the Secretary of HUD ("the Secretary") with the authority to accept and investigate housing discrimination complaints; to issue determinations of reasonable cause and charges of discrimination; to conduct formal adjudications; and to make final agency decisions. 42 U.S.C. 3610(g)(1), 3610(g)(2)(A), 3612(h)(1); 24 C.F.R. 103.400(a), 104.930. The 1988 Amendments also expressly vested the Secretary with the statutory authority to promulgate rules necessary for carrying out the FHA. 42 U.S.C. 3614a.

Given its broad legislative mandate, HUD's well-reasoned interpretation of the FHA as encompassing disparate impact claims is entitled to deference. HUD's formal adjudications and regulations are entitled to the full measure of deference pursuant to *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984); *see also Meyer v. Holley,* 537 U.S. 280, 287-89 (2003) (observing that this Court ordinarily defers to HUD's reasonable interpretation of the FHA); *United States*

v. Mead Corp., 533 U.S. 218, 230 & n. 12 (2001) (*Chevron* deference is applied to formal adjudications); *Smith v. City of Jackson,* 544 U.S. 228, 243-47 (2005) (Scalia, J., concurring in part and in the judgment) (deferring to an agency's reasonable views). HUD's exercise of its authority to initiate complaints pursuant to 42 U.S.C. 3610 based on a disparate impact theory of liability is also entitled to deference. *Dada v. Mukasey,* 554 U.S. 1, 20-21 (2008) ("Although not binding in the present case, the [Department of Justice's] proposed interpretation of the statutory and regulatory scheme . . . warrants respectful consideration.") (citations omitted); *Wisconsin Dep't of Health & Family Servs. v. Blumer,* 534 U.S. 473, 496 (2002) (stating that the position of the Secretary of Health and Human Services "who possess the authority to proscribe standards relevant to the issue here . . . warrants respectful consideration.") HUD's numerous other pronouncements, including over two decades of guidance in the form of departmental directives, notices, General Counsel memoranda, handbooks, and other training materials that have recognized and applied a disparate impact theory, are also entitled to deference as persuasive and informed agency pronouncements. *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944); *see also Meacham v. Knolls Atomic Power Lab.,* 554 U.S. 84, 102-03 (2008) (Scalia, J., concurring in the judgment) (noting that deference to the views of the Equal Employment Opportunity Commission ("EEOC") is warranted "[b]ecause administration of the ADEA has been placed in the hands of the Commission, and because the agency's positions

on the questions before us are unquestionably reasonable" and deferring to a brief submitted by the Solicitor General of the United States and signed by the EEOC's General Counsel).

II. WHEN CARRYING OUT ITS FORMAL ADJUDICATION AUTHORITY UNDER THE FHA, HUD HAS CONSISTENTLY APPLIED A DISPARATE IMPACT THEORY OF LIABILITY

A. HUD Administrative Law Judge Orders, After A Thirty-Day Statutory Review Period, Are Final Agency Decisions Entitled To *Chevron* Deference

As part of its enforcement mandate, the FHA, as amended in 1988, provides HUD with the statutory authority to make final agency decisions through administrative law judge ("ALJ") determinations that the Secretary has the opportunity to review. 42 U.S.C. 3612(h). The FHA mandates that HUD administrative law judges commence hearings, "make findings of fact and conclusions of law," and "promptly issue" orders of relief. 42 U.S.C. 3612(g). The Secretary may review any ALJ finding, conclusion, or order within thirty days of its issuance; "otherwise, the finding conclusion, or order becomes final." *Id.* 3612(h). Any party aggrieved by a final order may appeal directly to the judicial circuit in which the discriminatory housing practice is alleged to have occurred. *Id.* The FHA provides the Secretary with the right to petition the relevant judicial circuit for

the enforcement of an ALJ order. *Id.* 3612(j). Given HUD's legislative mandate to make final agency decisions and enforce them through U.S. courts of appeals, HUD ALJ decisions that become final are entitled to the full measure of *Chevron* deference.

B. HUD Final Agency Decisions Have Applied An Effects Test To A Variety Of Discrimination Claims

Final orders issued by HUD have repeatedly interpreted the FHA's prohibition on discriminatory housing practices to encompass claims challenging the effects of otherwise neutral housing policies. In *HUD v. Mountain Side Mobile Estates P'ship,* No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec'y July 19, 1993) aff'd in relevant part, 56 F.3d 1243 (10th Cir. 1995), for instance, the HUD Secretary, upon review of an initial ALJ decision, applied a disparate impact analysis to a complaint alleging familial status discrimination. Using this framework, the Secretary determined that a three-person-per-dwelling maximum occupancy policy in a mobile home community had a discriminatory effect on families with children. When the final agency decision was appealed to the Tenth Circuit, the HUD Secretary, as the respondent, submitted a brief in support of this position, and cited statistics that the policy would exclude families with children at more than four times the rate of households without minor children. Brief for HUD Secretary as Respondent in *Mountain*

Side Mobile Estates P'ship v. HUD, No. 94-9509 (10th Cir. 1994).

Mountainside is also consistent with HUD's position in *HUD v. Pfaff,* No. 10-93-0084-8, 1994 WL 592199, at *17 (HUD ALJ Oct. 27, 1994), rev'd on other grounds, 88 F. 3d 739 (9th Cir. 1996), where a HUD ALJ determined, based in part on statistical evidence regarding household size, that a four-person maximum occupancy policy for a three-bedroom dwelling had a disparate impact on families with children. Upon appeal to the circuit court, the Secretary filed a brief discussing the legislative history and text of the FHA, as well as prior HUD pronouncements that a showing of discriminatory intent is not required to establish liability under the FHA. Brief for HUD Secretary as Respondent in *Pfaff v. HUD,* No. 94-70898 (9th Cir. 1996) 1995 WL 17017239.

In addition to *Mountainside* and *Pfaff,* HUD has issued other final agency decisions under the FHA based on disparate impact theory, including in familial status, sex, and disability cases. *See, e.g., HUD v. Carter,* No. 03-90-0058-1, 1992 WL 406520, at *5, (HUD ALJ May 1, 1992) (HUD ALJ final order noting that "the application of the discriminatory effects standard in cases under the Fair Housing Act is well established"); *HUD v. Carlson,* No. 08-91-0077, 1995 WL 365009 (HUD ALJ June 12, 1995) (HUD ALJ final order holding that a facially neutral four-occupant rule has a disparate impact on families with children).

In adjudicating sex discrimination claims, HUD has found that policies such as a landlord's refusal to accept tenants receiving public assistance violate the FHA. For instance, in *HUD v. Ross,* No. 01-92-0466-1, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994), a HUD ALJ issued a final order holding that a landlord's "no welfare" policy had a disparate impact on women, based in part on statistics showing that the overwhelming percentage of public assistance recipients in the landlord's county were women. In keeping with other HUD ALJ adjudications of housing discrimination complaints, the decision noted that "[a]bsent a showing of business necessity, facially neutral policies which have a discriminatory impact on a protected class violate the Act." *Id.*

Likewise, HUD ALJ orders have recognized the disparate impact theory in the disability discrimination context. For instance, HUD utilized the disparate impact theory of liability to analyze whether a policy that required tenants to purchase renters' liability insurance before the landlord would permit physical modifications to an apartment complex, such as the installation of ramps, violated the FHA and concluded that such a policy constituted discrimination based on disability. *See, e.g., HUD v. Twinbrook Vill. Apts.,* No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001).

C. Secretary-Initiated Complaints Have Recognized An Effects Test

The FHA provides the Secretary with the authority to investigate and file complaints alleging discriminatory housing practices on the Secretary's own initiative, even in the absence of an aggrieved person filing a complaint with HUD. 42 U.S.C. 3610(a) ("The Secretary, on the Secretary's own initiative, may also file such a complaint"). HUD has used this authority to commence investigations, and if there is sufficient evidence, to file complaints based on discriminatory effects. For instance, in 2008, HUD filed a Secretary-initiated complaint against a rental management company alleging that its three-person occupancy limit for two-bedroom apartments discriminated against families with children. Complaint, *HUD v. Cornerstone Residential Mgmt.*, FHEO No. 04-08-1085-8 (June 9, 2008). The Complaint alleged that the policy either denied housing to families with children or caused them to incur higher housing costs by requiring families to rent larger apartments. *Id*; *see also* HUD, *FY 2006 Annual Report to Congress on Fair Housing* 38 (Mar. 29, 2007) (Secretary-initiated complaint against the City of Manassas, Virginia alleging that a local ordinance limiting the number of unrelated people who could live together in a dwelling unlawfully discriminated against Hispanic households and families with children); HUD, *FY 2007 Annual Report to Congress on Fair Housing* 39 (Mar. 21, 2008) (Secretary-initiated complaint against Iberville Parish, Louisiana alleging that a facially

neutral resolution adopted after Hurricane Katrina that restricted the placement of FEMA trailer parks in the Parish was racially discriminatory). HUD's Secretary-initiated complaints further demonstrate the agency's use of the effects standard in enforcing the FHA.

III. HUD'S APPLICATION OF A DISPARATE IMPACT ANALYSIS TO GOVERNMENT SPONSORED ENTERPRISES AS CODIFIED BY REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

In issuing regulations based, in part, on its authority under the FHA to exercise administrative oversight over two Government Sponsored Enterprises ("GSEs") – the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) – HUD has expressly recognized the applicability of an effects test. *See* Prohibitions Against Discrimination, 24 C.F.R. 81.42 (prohibiting the GSEs from discrimination in "any manner that has a discriminatory effect"). In pronouncements leading to the issuance of 24 C.F.R. 81.42, HUD stressed the importance of the disparate impact theory. For instance, HUD cited to a joint statement it issued with nine other federal agencies that recognized disparate impact as one of the methods of proof of a violation of the FHA in lending discrimination cases. Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18266 (Apr. 15, 1994) ("the Policy Statement").

The Policy Statement was issued with the intent of being consistent with "the Fair Housing Act for purposes of administrative enforcement." *Id*. The agencies, including HUD, which issued the Policy Statement were concerned with discrimination faced by prospective home buyers in obtaining loans, and discussed how "[p]olicies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit." *Id.* The Policy Statement recognized that activities, such as a lender's facially neutral policy of refusing to extend loans for home purchases below a minimum loan amount, could be "shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live." *Id.* In which case, according to the Policy Statement, the lenders would be required to justify the "business necessity" for the policy. *Id.*

In issuing the GSE regulation applying the effects test, HUD explained the importance of the Policy Statement, stating that "[a]ll the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending" and have "jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act." HUD's Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie

Mac) 60 Fed. Reg. at 61846, 61867 (Dec. 1, 1995). HUD's stated intent in issuing a regulation that addresses the effects of discrimination in lending is entitled to deference. *Meyer,* 537 U.S. at 288 (analyzing HUD's intent in passing another regulation pursuant to the FHA).

IV. GUIDANCE FROM HUD ASSISTANT SECRETARY FOR FHEO AND/OR HUD GENERAL COUNSEL IS ENTITLED TO DEFERENCE

As part of its authority to implement the FHA, HUD has issued a variety of guidance to ensure that its personnel are uniformly applying the FHA. In this guidance, HUD has consistently recognized an effects test. For instance, in a memorandum from General Counsel providing guidance to all HUD Regional Counsel in 1991, HUD made clear that enforcement of the FHA encompassed facially neutral policies that had a discriminatory effect, such as occupancy standards that operate to disproportionately exclude families with children. HUD, Office of General Counsel, *Fair Housing Enforcement Policy: Occupancy Cases* 2-3 (Mar. 20, 1991), HUD *Amici* App. 1-9. The General Counsel stated his expectations that all Regional Counsel "continue their vigilant efforts to proceed to formal enforcement in all cases in which there is reasonable cause to believe that a discriminatory housing practice under the Act has occurred or is about to occur." *Id.*, HUD *Amici* App. 2. The memorandum was circulated expressly because it was

"imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases." *Id.,* HUD *Amici* App. 3. The General Counsel stated that vigilant enforcement of the FHA was "particularly important in cases where occupancy restrictions are used to exclude families with children or to unreasonably limit the ability of families with children to obtain housing." *Id.,* HUD *Amici* App. 2-3. The memorandum provided hypothetical examples of how a "two person per bedroom" policy could have a disparate impact on families with children. *Id.,* HUD *Amici* App. 4-8.

In 1993*,* the HUD Assistant Secretary for FHEO issued a memorandum titled "The Applicability of Disparate Impact Analysis to Fair Housing Cases," which stated that housing discrimination complaints should be analyzed by FHEO investigators under a disparate impact theory of liability. HUD, Office of Fair Housing & Equal Opportunity, *The Applicability of Disparate Impact Analysis to Fair Housing Cases* (Dec. 17, 1993). The memorandum outlined the reasoning in HUD's final administrative decision in *Mountain Side Mobile Estates*, *see supra* Section II. B, and instructed HUD Regional Directors to investigate all justifications proffered by respondents for facially neutral policies that may operate to disproportionately disadvantage persons in violation of the FHA.

In 1994, HUD's General Counsel and Assistant Secretary for FHEO issued a memorandum regarding the issue of whether the facially neutral policy of

imposing a fee based on the number of occupants in a dwelling constituted unlawful familial status discrimination. HUD, Office of General Counsel and Office of Fair Housing & Equal Opportunity, *Occupancy Fees & Familial Status Discrimination Under the Fair Housing Act* (Mar. 29, 1994), HUD *Amici* App. 9-33. The memorandum stated that "[o]ccupancy fees which are structured to apply equally to all households with a certain number of occupants, regardless of the familial status of the occupants, may violate the Act, even if the fees are enforced in an even handed manner against all households of a certain size." *Id.,* HUD *Amici* App. 16-17. The memorandum discussed, for instance, how a policy of imposing fees based on the number of occupants in a unit would be expected to have a disparate impact on families with children, given that larger households are more likely to contain children, and cited to several decisions discussing HUD litigation involving facially neutral occupancy standards. *Id*., HUD *Amici* App. 26-31.

In 1996, in a notice circulated to all FHEO Directors, Multifamily Housing Directors, and Owners/Managers in HUD-Assisted Housing, HUD stated that the FHA applies to all programs receiving federal financial assistance and prohibits "disparate impact in provision of housing based on certain prohibited bases." HUD, Office of Fair Housing & Equal Opportunity, *Discretionary Preferences for Admission to Multifamily Housing Projects* (Oct. 28, 1996), HUD *Amici* App. 34. The notice stated that "FHEO is concerned that a preference which appears

neutral on its face could result in violations of various Civil Rights requirements," including those contained in the Fair Housing Act. *Id.,* HUD *Amici* App. 35.[2]

And recently, in a memorandum from the FHEO Deputy Assistant Secretary for Enforcement and Programs to FHEO Offices and Regional Directors, HUD discussed how facially neutral "zero-tolerance" rental policies regarding domestic violence could have a disparate impact on women. HUD, Office of Fair Housing & Equal Opportunity, *Assessing Claims of Housing Discrimination Against Victims of Domestic Violence Under the Fair Housing Act & the Violence Against Women Act* 5-6 (Feb. 9, 2011). HUD noted that "[d]isparate impact cases often arise in the context of 'zero-tolerance' policies, under which the entire household is evicted for the criminal activity of one household member. The theory is that, even when

[2] Three years later, HUD promulgated a final rule regarding the use of local preferences in admissions to Section 8 Housing Choice Voucher Programs administered by public housing authorities ("PHAs"). *Section 8 Tenant Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs,* 64 Fed. Reg. 56894 (Oct. 21, 1999). Pursuant to the regulation, PHAs may only use local residency preferences in accordance with the FHA and other federal anti-discrimination statutes. 24 C.F.R. 982.207(b)(1)(i) (citing to 24 C.F.R. 5.105(a)). HUD specifically incorporated a disparate impact standard into the regulation by requiring that local residency preferences "will not have the purpose or *effect* of delaying or otherwise denying admissions to the program based on race, color, ethnic origin, gender, religion, disability, or age of any member of the applicant family." *Id*. at 982.207(b)(1)(iii) (emphasis supplied).

consistently applied, women may be disproportionately affected by these policies" because they are the overwhelming victims of domestic violence. *Id.* As examples, the memorandum discussed cases where a "zero-tolerance" crime policy resulted in women being evicted after presenting landlords with temporary restraining orders or contacting the police during a domestic violence incident. *Id.* at 6-9 (discussing cases arising under, *inter alia,* 42 U.S.C. 3604(b)).

V. HUD FAIR HOUSING ACT INVESTIGATIVE HANDBOOKS HAVE CONSISTENTLY INCORPORATED A DISPARATE IMPACT THEORY

In carrying out its statutory responsibility to investigate complaints, 42 U.S.C. 3610, conduct formal adjudications, 42 U.S.C. 3612, and administer the FHA, 42 U.S.C. 3608, HUD published a Title VIII Complaint, Investigation, and Conciliation Handbook ("the Handbook") that provides instructions for HUD personnel on how to investigate and evaluate housing discrimination complaints. HUD, No. 8024.1, *Title VIII Complaint Intake, Investigation & Conciliation Handbook* (1995). As per HUD's policy, the Handbook was subjected to departmental review and clearance prior to being issued. HUD, No. 002. REV-2, *HUD Directives System* (Apr. 18, 2001) (describing handbooks as designed to "communicate information of a permanent nature (including clarification of policies, instructions, guidance, procedures, forms and reports) for HUD staff and/or program participants").

The original edition of the Handbook, issued in 1995, set forth HUD's guidelines for investigating and resolving FHA complaints. The Handbook specifically recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases. The Handbook states that the FHA is violated by an "action or policy [that] has a disproportionately negative effect upon persons of a particular race, color, religion, sex, familial status, national origin or handicap status." HUD, No. 8024.1, *Title VIII Complaint Intake, Investigation & Conciliation Handbook* at 3-25.

In 1998, the Handbook was modified and expanded to include a chapter titled "Theories of Discrimination" that incorporates disparate impact as one theory of discrimination under the FHA. *Id*. at 2-27 ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *Id.* at 2-27 to 2-45 (HUD guidelines for investigating a disparate impact claim and establishing its elements). The Handbook, which has provided definitive guidance to HUD investigators for over fifteen years, is another example of HUD's application of the disparate impact theory in carrying out its statutory responsibility to enforce the FHA.[3]

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[3] In 2004, HUD established the Patricia Roberts Harris National Fair Housing Training Academy that provides a five-week fair housing enforcement program for investigators, attorneys, and others from agencies that administer state and

(Continued on following page)

VI. HUD'S CURRENT PROPOSED RULE-MAKING CODIFIES NEARLY TWO DECADES OF HUD PRACTICE, GUIDANCE, AND FORMAL ADJUDICATIONS IN RECOGNIZING LIABILITY BASED ON AN EFFECTS THEORY

HUD's current Notice of Proposed Rule-Making (NPRM) reiterates HUD's consistent view that the FHA encompasses a disparate impact theory, and establishes a uniform standard for determining when a housing practice with a discriminatory effect violates the FHA. The NPRM cites to the text of the FHA, its legislative history, as well as HUD's prior policy statements and ALJ decisions, to demonstrate HUD's long-standing view that its legislative mandate includes enforcing the FHA against housing-related policies with discriminatory effects. The NPRM explains that HUD "has long interpreted the Act to prohibit housing practices with a discriminatory effect." 76 Fed. Reg. at 70921. Although a final rule has not yet been issued, HUD's NPRM should be recognized as a codification of long-existing policy and accorded deference.

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local fair housing laws that have been certified as substantially equivalent by HUD under Section 3610(f)(3) of the FHA. National Fair Housing Training Academy, *About NFHTA*, http://www.nfhta.org/about.htm (last visited Jan. 22, 2012). As with the Handbook, the training curriculum includes both the disparate treatment and effects theories of liability. *Id.*

CONCLUSION

For the foregoing reasons, this Court should hold that disparate impact claims are cognizable under Section 804(a) of the FHA.

Respectfully submitted,

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January 30, 2012

U. S. Department of Housing and Urban Development
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APPENDIX A

March 20, 1991

OFFICE OF GENERAL COUNSEL

MEMORANDUM FOR: All Regional Counsel

FROM: Frank Keating, G

SUBJECT: Fair Housing Enforcement Policy: Occupancy Cases

On February 21, 1991, I issued a memorandum designed to facilitate your review of cases involving occupancy policies under the Fair Housing Act. The memorandum was based on my review of a significant number of such cases and was intended to constitute internal guidance to be used by Regional Counsel in reviewing cases involving occupancy restrictions. It was not intended to create a definitive test for whether a landlord or manager would be liable in a particular case, nor was it intended to establish occupancy policies or requirements for any particular type of housing.

However, in discussions within the Department, and with the Department of Justice and the public, it is clear that the February 21 memorandum has resulted in a significant misunderstanding of the Department's position on the question of occupancy policies which would be reasonable under the Fair Housing Act. In this respect, many people mistakenly

viewed the February 21 memorandum as indicating that the Department was establishing an occupancy policy which it would consider reasonable in any fair housing case, rather than providing guidance to Regional Counsel on the evaluation of evidence in familial status cases which involve the use of an occupancy policy adopted by a housing provider.

As you know, assuring Fair Housing for all is one of Secretary Kemp's top priorities. Prompt and vigorous enforcement of all the provisions of the Fair Housing Act, including the protections in the Act for families with children, is a critical responsibility of mine and every person in the Office of General Counsel. I expect Headquarters and Regional Office staff to continue their vigilant efforts to proceed to formal enforcement in all cases in which there is reasonable cause to believe that a discriminatory housing practice under the Act has occurred or is about to occur. This is particularly important in cases where occupancy restrictions are used to exclude families with

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For example, there is a HUD Handbook provision regarding the size of the unit needed for public housing tenants. *See* Handbook 7465.1 REV-2, Public Housing Occupancy Handbook: Admission, revised section 5-1 (issued February 12, 1991). While that Handbook provision states that HUD does not specify the number of persons who may live in public housing units of various sizes, it provides guidance about the factors public housing agencies may consider in establishing reasonable occupancy policies. Neither this memorandum nor the memorandum of February 21, 1991 overrides the guidance that Handbook provides about program requirements.

children or to unreasonably limit the ability of families with children to obtain housing.

In order to assure that the Department's position in the area of occupancy policies is fully understood, I believe that it is imperative to articulate more fully the Department's position on reasonable occupancy policies and to describe the approach that the Department takes in its review of occupancy cases.

Specifically, the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act. The Department of Justice has advised us that this is the general policy it has incorporated in consent decrees and proposed orders, and such a general policy also is consistent with the guidance provided to housing providers in the HUD handbook referenced above. However, the reasonableness of any occupancy policy is rebuttable, and neither the February 21 memorandum nor this memorandum implies that the Department will determine compliance with the Fair Housing Act based *solely* on the number of people permitted in each bedroom. Indeed, as we stated in the final rule implementing the Fair Housing Amendments Act of 1988, the Department's position is as follows:

> [T]here is nothing in the legislative history which indicates any intent on the part of Congress to provide for the development of a national occupancy code. . . .

> On the other hand, there is no basis to conclude that Congress intended that an owner or manager of dwellings would be unable to restrict the number of occupants who could reside in a dwelling. Thus, the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children.

24 C.F.R. Chapter I, Subchapter A. Appendix I at 566-67 (1990).

Thus, in reviewing occupancy cases, HUD will consider the size and number of bedrooms and other special circumstances. The following principles and hypothetical examples should assist you in determining whether the size of the bedrooms or special circumstances would make an occupancy policy unreasonable.

Size of bedrooms and unit

Consider two theoretical situations in which a housing provider refused to permit a family of five to rent a two-bedroom dwelling based on a "two people

per bedroom" policy. In the first, the complainants are a family of five who applied to rent an apartment with two large bedrooms and spacious living areas. In the second, the complainants are a family of five who applied to rent a mobile home space on which they planned to live in a small two-bedroom mobile home. Depending on the other facts, issuance of a charge might be warranted in the first situation, but not in the second.

The size of the bedrooms also can be a factor suggesting that a determination of no reasonable cause is appropriate. For example, if a mobile home is advertised as a "two-bedroom" home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home to two people.

Age of children

The following hypotheticals involving two housing providers who refused to permit three people to share a bedroom illustrate this principle. In the first, the complainants are two adult parents who applied to rent a one-bedroom apartment with their infant child, and both the bedroom and the apartment were large. In the second, the complainants are a family of two adult parents and one teenager who applied to rent a one-bedroom apartment. Depending on the other facts, issuance of a charge might be warranted in the first hypothetical, but not in the second.

Configuration of unit

The following imaginary situations illustrate special circumstances involving unit configuration. Two condominium associations each reject a purchase by a family of two adults and three children based on a rule limiting sales to buyers who satisfy a "two people per bedroom" occupancy policy. The first association manages a building in which the family of the five sought to purchase a unit consisting of two bedrooms plus a den or study. The second manages a building in which the family of five sought to purchase a two-bedroom unit which did not have a study or den. Depending on the other facts, a charge might be warranted in the first situation, but not in the second.

Other physical limitations of housing

In addition to physical considerations such as the size of each bedroom and the overall size and configuration of the dwelling, the Department will consider limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems.

State and local law

If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to

indicate that the housing provider's occupancy policies are reasonable.

Other relevant factors

Other relevant factors supporting a reasonable cause recommendation based on the conclusion that the occupancy policies are pretextual would include evidence that the housing provider has: (1) made discriminatory statements; (2) adopted discriminatory rules governing the use of common facilities; (3) taken other steps to discourage families with children from living in its housing; or (4) enforced its occupancy policies only against families with children. For example, the fact that a development was previously marketed as an "adults only" development would militate in favor of issuing a charge. This is an especially strong factor if there is other evidence suggesting that the occupancy policies are a pretext for excluding families with children.

An occupancy policy which limits the number of *children* per unit is less likely to be reasonable than one which limits the number of *people* per unit.

Special circumstances also may be found where the housing provider limits the total number of dwellings he or she is willing to rent to families with children. For example, assume a landlord owns a building of two-bedroom units, in which a policy of four people per unit is reasonable. If the landlord adopts a four person per unit policy, but refuses to rent to a family of two adults and two children

because twenty of the thirty units already are occupied by families with children, a reasonable cause recommendation would be warranted.

If your review of the evidence indicates that these or other special circumstances are present, making application of a "two people per bedroom" policy unreasonably restrictive, you should prepare a reasonable cause determination. The Executive Summary should explain the special circumstances which support your recommendation.

U. S. Department of Housing
and Urban Development
Washington, D.C. 20410-0000

MAR 29 1994

MEMORANDUM FOR: All Regional Counsel

All Regional Directors of
Fair Housing and Equal
Opportunity

/s/ Nelson Diaz
FROM: Nelson A. Diaz, General Counsel, G

/s/ Roberta Achtenberg
Roberta Achtenberg, Assistant Secretary for
Fair Housing and Equal Opportunity, E

SUBJECT: Occupancy Fees and Familial Status Discrimination under the Fair Housing Act

This memorandum is designed to facilitate your review of complaints under the Fair Housing Act (the Act). The Department has received a number of complaints involving allegations that housing providers who impose additional fees on households based on the number of occupants in the dwelling discriminate because of familial status. This memorandum outlines the principles applicable to analyzing such complaints and discusses the experiences of the Office of General Counsel's Fair Housing Division with such cases.

The complaints that the Fair Housing Division has reviewed involving occupancy fees have thus far arisen in the rental context. However, the principles

for analyzing complaints involving occupancy based fees are equally applicable whether housing is rented, sold, or made available through other means. For example, if a condominium or home owners association were to assess fees based on the number of occupants in a dwelling, such a policy would be analyzed in the same manner as where landlords impose additional fees based on the number of occupants in a unit.

In some cases in which housing providers charge occupancy fees, the fees are only imposed on households in which children under the age of 18 are present. It has been the experience of the Fair Housing Division, however, that more often the fees are imposed on any households which contain more than a specified number of occupants, regardless of familial status. This memorandum discusses the discriminatory nature of each type of occupancy fee structure.

I. Occupancy Fees Imposed Only On Families With Children

Singling out families with children for additional occupancy fees is sometimes a product of an express policy, which on its face may make the fee applicable only where children are present. In other cases, uneven enforcement of a facially neutral policy by the housing provider may result in the fee, in practice, only being collected where children are present.

Whether by policy or enforcement practice, such fee practices violate the Act by treating families with

children less favorably because of the presence of children in the family. Therefore, it will be appropriate to issue charges of discrimination in cases where the evidence supports such a claim.

A. Disparate Treatment Standard

Occupancy fees applicable by policy or practice only where children are present in a household single out families with children for disparate treatment by increasing the cost of the dwelling unit to such families. Subsection 804(b) of the Act prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of . . . familial status. . . ." 42 U.S.C. § 3604(b); 24 C.F.R. § 100.65(a). The Department has implemented this statutory provision through regulations which provide, "Prohibited actions under this section include, but are not limited to: (1) Using different provisions in leases . . . , such as those relating to rental charges . . . and the terms of a lease . . . , because of . . . familial status. . . ." 24 C.F.R. § 100.65(b) (1993). Such occupancy fees violate these prohibitions by imposing a different term or condition (i.e., higher rent or charges) based on familial status in violation of subsection 804(b) of the Act.

In addition, especially in cases where the fees are high in absolute terms or relative to the base rent, the fees may discourage occupancy by families with children and result in their exclusion by making rental at the housing facility prohibitively expensive

or out of line with market rents for similarly sized units at other housing facilities in the area. Fees which operate in this manner may violate not only subsection 804(b), as discussed, *supra,* but subsection 804(a) of the Act as well. Subsection 804(a) prohibits making unavailable or denying a dwelling because of familial status. The Department has implemented subsection 804(a) through regulations which prohibit "Imposing different sales prices or rental charges for the sale or rental of a dwelling . . . because of familial status," 24 C.F.R. § 100.60(b)(3) (1993), and which prohibit "discouraging" persons from "inspecting, purchasing, or renting a dwelling because of . . . familial status," 24 C.F.R. § 100.70(c)(1) and (2) (1993). Fees targeted at families with children may violate both of these regulatory prohibitions.

B. Case Studies

The Fair Housing Division has issued determinations of reasonable cause and charges of discrimination in at least four cases that involved additional occupancy fees that were imposed differently depending upon the familial status of the household. In one case, the Department entered into a Consent Order resolving the matter. In the other three, an election was made to have the claims adjudicated in Federal district court and the Department of Justice ("Justice") entered into Consent Orders or Stipulated Judgments resolving the matters. All these cases are summarized below:

1. *HUD v. Wellington d/b/a Wellington Arms Apartments*, Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 05-89-0528-1 (May 12, 1992). In this case the Department alleged that the respondent discriminated because of familial status by charging the complainant, whose household consisted of one adult and three minor children, a higher rent than the respondent charged to households composed of two adults and two children. The Department alleged that the complainant was charged a base rent of $675 and additional occupancy fees of $100 per child for a total rent of $875, whereas the respondent generally rented two bedroom apartments for approximately $570 to $580. The Department alleged that the respondent imposed the additional charge to compel the complainant to rent a three bedroom apartment instead of a two bedroom apartment and in retaliation for the complainant having filed a fair housing complaint.

The Department entered into a Consent Order which required the respondents to compensate the complainant $8,500, to pay a $1,500 civil penalty, and which imposed a variety of record keeping, reporting, and employee education requirements. Most importantly, the Consent Order also required the respondent to revise its occupancy policies so as to allow at least two persons per bedroom regardless of whether the persons are adults or children, and to allow as many as two adults and three children in a two bedroom apartment under certain circumstances without subjecting such households to an additional

occupancy fee. *HUD v. Wellington d/b/a Wellington Arms Apartments*, HUDALJ 05-89-0528-1 (HUD Office of Admin. Law Judges 11-30-92) (Initial Decision and Consent Order).

2. *HUD v. Alfaya*, Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 05-89-0766-1 (Feb. 11, 1991). In this case, the Department alleged that the respondents discriminated because of familial status against the complainant, a family composed of a couple and a minor child. The respondent maintained a policy of charging $55 extra per month over a base rent of $395 per month if a unit were occupied by more than two persons, but only charged the extra fee if there were children present in the unit.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which required the respondents to pay $3,000 to compensate the complainant and which imposed a variety of reporting and record keeping requirements. Moreover, the Consent Order explicitly enjoined the respondents from "discriminating in the terms or conditions of rental on the basis of familial status, including imposing on families with children any charges in addition to the normal rent fixed for each apartment." *United States v. Alfaya,* No. C-1-91-229 (S.D. Ohio 1992) (Consent -Order).

3. *HUD v. Mahroom,* Determination of Reasonable Cause and Charge of Discrimination, HUDALJ

09-90-1257-1 (July 10, 1991). In this case, the Department alleged that the respondents discriminated because of familial status against the complainant, a family composed of one adult and six children. The respondent maintained a policy of charging $1,200 per month rent for the rental of a house if a husband and wife rented it, $1,300 if a husband, wife, and one child rented it, and $1,400 if a husband, wife, and two children rented it.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which required the respondents to pay $9,000 to compensate the complainants and which imposed employee education, advertising, and outreach requirements. The Consent Order also enjoined the respondents from "imposing different terms and conditions in the rental of dwelling on account of familial status." The Consent Order did not, however, specifically require a change in the rental fee structure. Indeed, the Consent Order categorized the case as one involving a refusal to rent due to the number of children without making reference to the discriminatory rent fee structure. *United States v. Mahroom,* No. C91-20538 JW (PVT) (N.D. Cal. 1992) (Consent Order).

4. *HUD v. Spann d/b/a Valle Grande Mobile Home Park,* Determination of Reasonable Cause and Charge of Discrimination, HUDALJ 06-89-0372-1 (Oct. 15, 1990). In this case, the Department alleged that the respondents maintained several policies which discriminated because of familial status by

excluding families with children. One such policy involved charging $10 extra per month "if a baby is born after moving into the park." Another policy required residents to move out of the park once their children reached two years of age.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Stipulated Judgment in which the respondents agreed to pay $5,000 to compensate the complainants. The Stipulated Judgment did not include any provision requiring the respondents to eliminate their occupancy fee policy. *United States v. Valle Grande Mobile Home Park, Inc,. et al.,* No. 90-1149 JP (D.N.M. 1992) (Stipulated Judgment).

II. Fees that Apply Regardless of Familial Status

More common than fees which only apply to families with children are fees that are structured to apply to any household which contains more than a specified number of occupants, regardless of familial status. As housing providers continue to become more aware of the familial status protections of the Act and more subtle in their discriminatory practices, one would expect the incidence of this type of fee to remain more prevalent than fees which on their face apply only to families with children.

Occupancy fees which are structured to apply equally to all households with a certain number of occupants, regardless of the familial status of the occupants, may violate the Act, even if the fees are

enforced in an even handed manner against all households of a certain size. It is important to emphasize, however, that occupancy fees structured and enforced in this type of facially neutral manner do not necessarily violate the Act. Even in cases where, in practice, a disproportionate percentage of the households subject to the fees are families with children (due to the fact that larger-sized households tend disproportionately to be composed of families with children), the fees would not necessarily violate the Act. In order to determine if the fees violate the Act, consideration would have to be given not only to whether the fee structure imposes a disproportionate burden on families with children, but would also have to be given to whether the fee structure was compelled by business necessity and, if so, whether there were less discriminatory alternatives that would meet that business necessity.

In the preamble to its regulation, the Department discussed the application of 24 C.F.R. § 100.65(b), the regulation discussed, *supra,* that prohibits the use of different rental charges and terms of a lease because of familial status:

> [A] commenter indicated that charges for the provision of water, electricity, refuse collection and other services have been based on the number of persons who occupy a dwelling and asked whether such a policy would be permissible. In order to determine whether such a policy is permissible, it would be necessary to understand more fully why it was

> implemented and how it operates. . . . [P]olicies such as this would require review on a case by case basis. . . .

24 C.F.R. Subtitle B, Ch. I, Subch. A, App. I at 921 (1993).

Where there is evidence that an additional occupancy fee was implemented with a discriminatory intent, e.g., with the intent to discourage occupancy by families with children through an unfavorable rent structure, the fees violate the Act. Such fees violate the Act for much the same reasons as would fees imposed by rule or practice only upon families with children, as discussed, *supra*. Absent evidence of discriminatory intent, whether or not the occupancy fees violate the Act depends on the effect of the policy.

A. Discriminatory Effect Standard

Where the fee policy has an adverse discriminatory effect on families with children, the fee policy violates the Act unless there is a compelling business necessity for the fee policy and less discriminatory alternatives that would meet the housing provider's business necessity are not available.

1. Demonstrating Discriminatory Effect

Census statistics demonstrate what common sense suggests – that generally, households with more members are more likely than households with fewer members to contain one or more children under

age 18. The Appendix to this memorandum summarizes pertinent national census bureau statistics and provides relevant definitions. The Bureau of the Census does not maintain statistics that directly address the precise question applicable to determining if a disparate impact exists under the Act, i.e., what percentage of dwelling units of various numbers of occupants contain families with children. The Bureau does, however, provide data that are extremely helpful to estimating this answer. The Bureau provides data on the percentage of "families" of varying sizes in which children are domiciled with a parent, custodian, or designee.

The data show that families with three or more members are more likely to contain one or more children, as compared to two member families; families with four or five members are even more likely than three member families to contain children. Whereas only about 11 percent of two person families contain children, about 63 percent of three person families contain children, about 84 percent of four person families contain children, and about 88 percent of five person families contain children. Moreover, a policy that imposes additional charges only on families with 3 or more persons, will have no adverse consequences for about 73 percent of those families without children, whereas it will adversely affect about 91 percent of families with children, meaning that most families with children will be negatively affected, whereas most families without children will not be negatively affected. Even an occupancy fee

policy that only imposes a surcharge on families with 5 or more people, which would only adversely affect about 24 percent of families with children, will still have a disproportionate adverse effect on families with children. While 76 percent of families with children would suffer no negative consequences under such a policy, about 96 percent of families without children will suffer no adverse effect.

Thus, a policy of imposing occupancy fees based on the number of occupants in the unit would be expected to have a disproportionate adverse impact upon families with children. The discrepancy between the adverse effect on families with children and families without children would be expected to be most significant when the occupancy fee is one that imposes an additional surcharge for households with 3 or more, 4 or more, or 5 or more occupants. In contrast, if the occupancy fee only applies when households contain 6 or more persons or seven or more persons, relatively few families with or without children would be adversely affected, so the policy would have minimal adverse impact.

The statistics summarized in the Appendix that are available from the Bureau are nationwide statistics. Breakdowns for specific locales, states, or regions are not maintained or available from the Bureau. While it is possible that in any given locale large households may be disproportionately composed of unrelated adults (which the Bureau does not categorize as "families"), rather than families with children, national statistics may be used to prove disparate

impact. National statistics are used to prove discriminatory impact in employment discrimination cases. *E.g., Dothard v. Rawlinson,* 433 U.S. 321, 339 (1977). The Secretary's July 19, 1993 Decision and Order in *HUD v. Mountain Side Mobile Estates,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,053 (HUD Secretary 7-19-93), is strong precedent for applying national statistics to prove discriminatory impact in fair housing cases.

HUD v. Mountain Side Mobile Estates involved the legality of an occupancy limit, an issue closely related to the legality of occupancy fees. As the Secretary's decision held:

> It is possible that there may be greater variation among local populations with respect to percentage of households with children (even where the local and national percentage of households with four or more individuals that are families are virtually identical) than there is among local populations with respect to height and weight characteristics. However, in the absence of any showing of a large variation from the national statistics in the case of the locality in question, and where the economist discussing the statistics testified that the likelihood of finding a family household in the four-or-more-person household category in Jefferson County is apparently virtually identical to the national average, I believe that the possibility of such a significant variation is more speculative and unsupported than a supposition of its absence. As the Charging Party

> argues, if a party "discerns fallacies or deficiencies in the data offered by the plaintiff, [the party] is free to adduce countervailing evidence of his own." *Dothard, supra,* 433 U.S. at 331. In these circumstances, then, I conclude that the Charging Party established a prima facie case of disparate impact.

HUD v. Mountain Side Mobile Estates, supra, ¶ 25,053 at 25,493.

Therefore, national statistics may be used to determine if a disparate impact exists, when making a determination of reasonable cause. Such statistics, however, should be considered in the context of other evidence which may have been provided by the respondent or uncovered by the investigator during the course of the investigation that would bear on whether household composition in the locale reflects the national statistics for families.

2. Demonstrating Business Necessity and Lack of Less Discriminatory Alternatives

Once it is determined that an occupancy fee policy creates a discriminatory adverse impact for families with children, consideration should then turn to whether the need for the occupancy fee policy is compelled by business necessity. The Secretary's October 20, 1993 Decision and Order in *HUD v. Mountain Side Mobile Estates,* reflects that establishing a business necessity is a rigorous standard. It is *not* sufficient that a challenged practice bears a demonstrable relationship to a housing provider's

legitimate business interests. *HUD v. Mountain Side Mobile Estates,* HUDALJs 08-92-0010-1 and 08-920011-1 (HUD Secretary 10-20-93), *slip op.* at 10. Rather, "[T]he standard for a business necessity can only be met by establishing compelling need or necessity." *Id.* As the Secretary's decision held:

> As with current Title VII law, under Title VIII law, the need for a true necessity is also required. In *Betsy [v. Turtle Creek Associates,* 736 F.2d 983 (4th Cir. 1984)], the court held that when confronted with a showing of discriminatory impact, "defendants must prove a business necessity *sufficiently compelling* to justify the challenged practice." *Id*. at 988 (emphasis added). In *United States v. City of Black Jack, Mo*., 508 F.2d 1179, 1186 (8th Cir. 1974), the court held that after the finding of a prima facie case, the defendant was required to "demonstrate a *compelling* . . . interest." (Emphasis added.) Clearly, the word "compelling" correlates to the word "necessary."

HUD v. Mountain Side Mobile Estates, supra, slip op. at 9.

As the Secretary also held, under Title VIII, as under Title VII, only objective evidence, as opposed to mere speculation or subjective opinion, can establish a legal rebuttal demonstrating that a practice is compelled by business necessity. *HUD v. Mountain Side Mobile Estates, supra, slip op.* at 9 and 11 (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 428 n.23 (1975) and *Keith v. Volpe,* 858 F.2d 467 (9th Cir.

1988)). In addition, *post hoc* rationalizations for a practice are to be accorded little weight. *HUD v. Mountain Side Mobile Estates, supra, slip op.* at 9 and 11 (citing *Huntington Branch, NAACP v. Town of Huntington, NY*, 844 F.2d 926 (2d Cir. 1988)).

The type of information that housing providers most commonly provide to attempt to justify their occupancy fees is information on the housing facility's variable costs. For example, housing providers may attempt to demonstrate that the amount of the fee is based on the amount that charges or taxes for water, sewage, or garbage collection increase for each additional occupant who is added to a unit. Whatever information the housing provider provides should be analyzed to determine if the increased costs are truly variable costs or are in actuality fixed costs that the housing provider would incur regardless of the number of residents in a unit. The figures provided should also be scrutinized to assess whether the occupancy fee charge is limited to the amount which variable costs increase based on the number of occupants in a unit, or whether the fee exceeds that amount, even factoring in a reasonable profit margin.

Housing providers may also assert that the occupancy fee is justified by the increased wear and tear on a unit from each additional occupant. As with claims concerning increased variable costs, housing providers should be asked for information demonstrating the link between costs such as repairs to units or replacement of parts per unit and the number

of occupants in the dwelling, rather than mere speculation.

Even if an occupancy fee policy were determined to be compelled by business necessity, consideration must also be given to whether less discriminatory alternatives exist which would meet the respondents' business necessity with less discriminatory impact. *HUD v. Carter,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,029 at 25,317 (HUD Office of Admin. Law Judges 5-1-92) (citing *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978)). As part of the investigation of such complaints, the respondents should be asked to explain whether alternatives were considered, and, if so, why such alternatives would not meet their business necessity.

For example, housing providers could raise the base rent for all units rather than imposing additional fees based on the number of occupants. Housing providers could meter utilities and bill each dwelling unit based on actual usage of utilities, rather than charging households based on speculative concepts of how usage may vary depending on the number of occupants. Housing providers could recoup the costs of repairs and replacements based on actual wear and tear on a unit caused by the unit's occupants through neutrally imposed and enforced maintenance surcharges assessed per call or through security deposits-(as is more common). Where respondents assert that alternatives are not feasible, they should be asked for credible and objective evidence to support

their position. Exploring the availability of alternatives with respondents is not only relevant to determining whether an occupancy fee policy is compelled by business necessity, but may also be useful in facilitating conciliation.

B. Case Studies

The Fair Housing Division has issued charges in at least five cases which contained an allegation that a facially neutral occupancy fee discriminated because of its discriminatory effect on families with children. In one case, the Department litigated the issue and lost that claim before an administrative law judge ("ALJ"). In another, the Department entered into a Consent Order resolving the matter. In the other three, an election was made to have the claims adjudicated in Federal district court. In one of these cases, Justice litigated the issue and won an injunction against the practice. *In* the other two, Justice entered into Consent Orders resolving the matters. These cases are summarized below:

1. *HUD v. Murphy,* HUDALJs 02-89-0202-1, 0203-1, 0204-1, 0205-1, 0206-1, 0209-1, 0212-1, 0213-1, 0243-1, Determination of Reasonable Cause and Charge of Discrimination (Nov. 15, 1989). In this case, the Department alleged that the respondents had discriminated against families with children through a variety of policies and practices. Among the policies which the Department alleged were discriminatory was a policy of charging $5 per person for each occupant

in excess of one person (if a single person) or in excess of two persons (if a married couple). The complainants included households which in addition to base rents of approximately $200 per month were also charged either $5 or $10 per month in additional occupancy fees depending on the number of occupants in the unit.

While the main focus of the case was the respondent's failure to qualify its mobile home park as housing for older persons age 55 or older, the ALJ decision briefly addressed the Department's allegation that the $5 fee discriminated. The ALJ ruled that while the respondent had discriminated in a number of other respects, the Department had failed to demonstrate that this particular policy was discriminatory. Rather, the ALJ indicated that the rule served legitimate purposes, such as maintaining the condition of existing facilities. *HUD v. Murphy,* 2 Fair Housing-Fair Lending (P-H), ¶ 25,002 at 25,020 and 25,053 (HUD Office of Admin. Law Judges 7-13-90).

This allegation, however, was not central to the Department's case and the issue was not fully litigated. The Department did not make a disparate impact argument against the policy. Thus, the challenge to the practice proceeded solely on the disparate treatment theory. The decision did not address directly whether such a policy could violate the Act due to its disparate impact and should not be taken as precluding this type of claim in other cases.

2. *HUD v. Reyes*, HUDALJ 09-91-1699-1, Determination of Reasonable Cause and Charge of Discrimination (Aug. 3, 1992). In this case, the Department alleged that the respondent discriminated because of familial status by imposing an occupancy fee of $100 per person for each person in excess of two persons in a two bedroom apartment. The complainant was a single woman who sought to rent a two bedroom apartment for herself, her live in companion, one child, and an additional child who would reside part time in the unit. Both children were under age 18.

The Department entered into a Consent Order that required the respondent to pay the complainant $1,500 and imposed a variety of record keeping and reporting requirements. In addition, the Consent Order required the respondent to reduce the occupancy fee for families with children from $100 per person to $15 per person. While the justification for the $15 per person occupancy fee is not stated in the Consent Order, the basis for the fee was supported by evidence that this portion of the fee was related to variable casts (for water usage and garbage collection) that increased on average approximately $15 for each occupant over two. The Consent Order did not, however, require the respondents to abandon the occupancy fee entirely and adopt less discriminatory alternatives, such as recouping these costs by raising the basic apartment rent for all units. *HUD v.* Reyes, HUDALJ 09-91-1699-1 (HUD Office of Admin. Law Judges 4-30-93) (Initial Decision and Consent Order).

3. *HUD v. Dickinson,* HUDALJ 10-89-0402-1, Determination of Reasonable Cause and Charge of Discrimination (Dec. 5, 1990). In this case, the Department alleged that the respondents discriminated because of familial status through a policy of charging an occupancy fee of $85 for each person in excess of two persons for the rental of a townhouse. The complainant was a woman who sought to rent a unit for herself, her husband, and a minor child.

An election was made in this case to have the claims adjudicated in Federal district court. Justice filed suit in Federal district court. Prior to trial, the respondents made a motion for summary judgment. Justice responded to the summary judgment motion by arguing that the case involved disparate treatment, without making a disparate impact argument. The judge denied summary judgment on the ground that there was a genuine issue of fact as to whether the defendants intended to discriminate and whether the fee was reasonable. Justice proceeded to litigate the case on the disparate treatment-theory before a jury. The jury returned a verdict in favor of the complainant, but awarded only $5 in damages. After the jury verdict, the judge ordered "that the defendants shall discontinue Imposing and shall not impose on families with children any per-person rental or other per-person charge connected with the rental of an apartment . . . in excess of the basic rental rate for an apartment." *United States v. Dickinson,* No. C91-73Z (W.D. Wash. 1992), *slip op*. at 2 (Order).

4. *HUD v. McMahan,* HUDALJ 05-91-0430-1, Determination of Reasonable Cause and Charge of Discrimination (Aug. 3, 1992). In this case, the Department alleged that the respondents discriminated because of familial status through a policy of imposing an additional $15 per month fee for each occupant in excess of two persons per mobile home lot. The complainant was a woman who rented a lot in which she, her husband, and four minor children resided. They were charged occupancy fees of $60 per month in addition to a basic lot rent which varied from $105 to $115 per month over the course of their residency. The evidence submitted by the respondents to support its necessity for an occupancy fee arguably supported a claim that variable costs for items such as water and sewage increased $8 to $9 for each additional occupant added to a unit, but did not support the $15 fee charged, nor did the respondents explain why alternative methods of increasing revenues, such as raising the basic lot rent for all units, or installing water saving devices or water meters to charge units based on actual usage were not available alternatives that would have a less discriminatory effect.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which ordered the respondents to compensate the complainant $1,605. The Consent Order also enjoined the respondents from discriminating because of familial status in any aspect of the ownership or management of the mobile

home park, but did not specifically state that respondents were enjoined from charging an occupancy fee. The Consent Order did make clear, however, that the allegation in the case was that the additional occupancy fee policy discriminated because of familial status. *United States v. McMahan,* No. C-3-92-389 (S.D. Ohio 1993) (Consent Order).

5. *HUD v. Colonial Inn Mobile Home Park and Guccini,* HUDALJ 08-89-0146-1, Determination of Reasonable Cause and Charge of Discrimination (Nov. 2, 1990). In this case, the Department alleged that the respondents discriminated because of familial status through a variety of policies, including charging a $50 per month occupancy fee for each occupant in excess of two persons per mobile home lot, in addition to a basic lot rent of $215 per month.

An election was made in this case to have the claims adjudicated in Federal district court. Justice entered into a Consent Order which ordered the respondents to compensate the complainant $10,000 and imposed a variety of reporting and record keeping requirements. In addition, the Consent Order required the respondents to change their rules in order to ensure that all spaces would be available on a nondiscriminatory basis. The required rules deleted reference to a charge of any additional occupancy fees. *United States v. Guccini d/b/a Colonial Inn Mobile Home Park,* No. 90 N 2278 (D. Colo. 1991) (Consent Order).

III. Conclusion

While this memorandum focuses on the experience of the Fair Housing Division, Regional Counsels and Regional Directors of Fair Housing and Equal Opportunity (FHEO) no doubt have additional valuable experiences handling occupancy fee cases. Sharing this information with headquarters and the regions would benefit all involved. Therefore, the regions are encouraged to contact the Fair Housing Division to share their insights and experiences in investigating, reviewing, and litigating these cases and to provide their reaction to the framework set forth in this memorandum. Supplementary guidance may be provided based on the comments received from the regions.

If you wish to comment on this memorandum, relate your experiences or insights, or pose questions directly related that you believe could be addressed in supplementary guidance, please write or call the Fair Housing Division or headquarters FHEO within 30 days of the date of this memorandum. The contact person in the Fair Housing Division is Richard Bennett, Attorney, tel. (202) 708-0340. The contact person in FHEO is Waite H. Madison, III, Deputy Director of Investigations, tel. (202) 708-4211.

Attachment (Appendix)

APPENDIX

Note: The statistics used to compile these table are taken from in: Bureau of the Census, U.S. Department of Commerce, Pub. No. P20-467, Current Population Reports – Population Characteristics – Household and Family Characteristics 85 (March 1992), relevant pages of which follow this Appendix

TABLE 1

Family Size (# of people)	# of Families	# with Own/Adopted Children under 18	% with Own/Adopted Children under 18
2	28,202,000	3,100,000	10.99
3	15,594,000	9,836,000	63.08
4	14,162,000	11,844,000	83.63
5	6,030,000	5,287,000	87.68
6	1,986,000	1,698,000	85.50
7 or more	1,200,000	980,000	81.67
Total	67,173,000	32,746,000	

Note: Columns may not compute due to rounding.

TABLE 2

A policy of imposing an occupancy fee on all households with A or more members would not adversely affect B percent of families with children, would adversely affect C percent of families with children, would not adversely affect D percent of families without children, and would adversely affect E percent of families without children where A, B, C, D, and E are:

A # in household	B % Families w/ Children No Effect	C % Families w/ Children Neg. Effect	D % Families w/o Children No Effect	E % Families w/o Children Neg. Effect
2 or more	0.0	100.0	0.0	100.0
3 or more	9.5	90.5	72.9	27.1
4 or more	39.5	60.5	89.6	10.4
5 or more	75.7	24.3	96.4	3.6
6 or more	91.8	8.2	98.5	1.5
7 or more	97.0	3.0	99.4	0.6

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity

Special Attention of:
All FHEO Directors
All Multifamily Housing Directors
All Owners/Managers HUD Assisted Housing

Notice FHEO 96-4
Issued: October 28, 1996
Expires: October 28, 1997

Cross References: Public Law # 104-99
Public Law # 104-204
Housing Notice H-96-7, PIH Notice 96-7

Subject: Discretionary Preferences for Admission to Multifamily Housing Projects

Title VIII of the Civil Rights Act of 1968 which applies to all housing providers and Title VI of the Civil Rights Act of 1964 which applies to all programs which receive Federal financial assistance prohibit discrimination and disparate impact in provision of housing based on certain prohibited bases.

Section 402(d)(4) of Public Law No. 104-99, The Balanced Budget Downpayment Act, 1, signed into law on January 26, 1996, suspended mandatory Federal Preferences in Section 8 and certain other programs. This suspension included any local preferences then in effect. The law expired September 30, 1996 but the suspension was extended through September 30, 1997 by Public Law No. 104-204 (FY 1997 HUD-VA-Independent Agencies Appropriations Act) signed into law on September 30, 1996.

PIH Notice 96-7 states that Housing Authorities must provide public notice and opportunity to comment for any change to their preferences even if only to drop the Federal Preferences. The Notice gives additional guidance and requires HUD approval of any changes to residency preferences.

Housing Notice H 96-7 advises owners and managers of HUD-assisted-and insured housing previously subject to federal preferences that they may voluntarily choose to maintain their Federal and local preference system or to implement other preferences of their own choosing (so long as it is consistent with their Affirmative Fair Housing Marketing Plans). The Office of Housing did not require notice or approval of changes to Federal preferences for multifamily housing owners. Housing Notice H 96-7 encourages, but does not require, owners who make any changes to their preference system (including the elimination of any preferences) to provide appropriate notification to applicants on the waiting list and other interested persons. FHEO is concerned that a preference which appears neutral on its face could result in violations of various Civil Rights requirements contained in Title VI, Title VIII and other Civil Rights statute.

EPSS: Distribution: W-3-1

This Notice is expanding that guidance. In cases where owners adopt preferences not previously in effect, a copy of the change should be sent to the HUD

FHEO field office for review of its consistency with Civil Rights law and Civil Rights related program requirements. All applicants should be appropriately notified of their position on a revised waiting list in accordance with the procedures set out at 24 CFR 5.410(f).

Elizabeth K. Julian
Assistant Secretary for Fair Housing
and Equal Opportunity