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*Fair Housing Coach* [ISSN 1520-3093 (PRINT), 1938-3142 (ONLINE)] is published by Vendome Group, LLC, 6 East 32nd Street, New York, NY 10016.

### Volume 15, Issue 14

**Subscriptions/Customer Service:** To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, [www.vendomerealestatemedia.com](http://www.vendomerealestatemedia.com). Subscription rate: \$335 for 12 issues. **To Contact the Editor:** Fax: 212-228-1308; Email: [hogilvie@vendomegrp.com](mailto:hogilvie@vendomegrp.com)

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## Final Rule: Implementation of the Fair Housing Act's Discriminatory Effects Standard

- ◆ Recognizes that the Fair Housing Act (FHA) outlaws practices that have an unjustified discriminatory effect on protected classes, even if there's no intent to discriminate.
- ◆ Establishes national standards for determining whether a housing practice violates the FHA as the result of discriminatory effect.

## WHAT DOES THE LAW SAY?

The federal Fair Housing Act (FHA) prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, or disability. Among other things, it's a violation of fair housing law to refuse to rent "or otherwise make unavailable or deny" housing because of any of those protected characteristics.

The FHA clearly bans intentional discrimination against applicants and others because of a protected characteristic. Courts often refer to claims for intentional discrimination as "disparate treatment"—that is, intentionally denying housing or otherwise discriminating against applicants and residents because they—or someone associated with them—is a member of a protected class.

By contrast, there's another type of claim that does not require proof of discriminatory intent. These claims, referred to as "disparate impact," involve outwardly neutral policies that have an unfair discriminatory effect on members of protected groups. Generally, claims of disparate impact rely on statistical evidence to show that a particular practice has a significantly adverse or disproportionate effect on members of a protected class.

## Does the FHA Cover Disparate Impact Claims?

For decades, courts have recognized that the FHA covers both disparate treatment and disparate impact claims. In interpreting the FHA, courts often look to past rulings interpreting its counterparts in federal laws that ban employment discrimination. Since disparate impact claims are recognized under those laws, courts have found that they should be recognized under federal fair housing law.

In recent years, however, a controversy has been brewing over whether the FHA indeed covers disparate impact claims. Opponents point out that the FHA itself does not explicitly recognize disparate impact claims, and that the language of the law differs significantly from that used in the federal employment discrimination statutes. And, they note, the Supreme Court has ruled that the employment statute bans practices that have a disparate impact on protected classes, but it has never ruled that the same is true under the FHA.

Now that the Supreme Court has accepted an appeal on the issue, the controversy may finally be resolved. But it's not scheduled to be

considered until next fall. The case may end like the last—with a settlement that takes the matter out of the Court’s hands. Even if the case goes forward, it’s likely to be months before a decision comes down. Meanwhile, communities should be prepared to comply with HUD’s discriminatory effects final rules, which have already gone into effect.

### What Do the Regulations Say?

The regulations accomplish two things:

**1. Clarify that the FHA covers disparate impact claims.** The final rules formalize HUD’s long-standing interpretation of the FHA to cover disparate impact claims—though it uses the term “discriminatory effect.” HUD emphasizes that it’s not a new rule, pointing to rulings by nearly all the federal appeals courts over the past four decades recognizing liability under the FHA for facially neutral practices that have a discriminatory effect.

The regulations state that liability may be established under the FHA based on a practice’s discriminatory effect, even if the practice wasn’t motivated by a discriminatory intent. Under the rule, a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons, or creates, increases, reinforces, or perpetuates segregated housing patterns, because of race, color, religion, sex, handicap, familial status, or national origin.

Even if a practice has a discriminatory effect, it may still be lawful if supported by a “legally sufficient justification.” The regulations explain that a legally sufficient justification exists where the challenged practice:

- Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant; and
- Those interests could not be served by another practice that has a less discriminatory effect.

**2. Establish national standard for disparate impact cases.** What’s new about the rules, according to HUD, is a national standard for determining whether a particular practice has an unjustified discriminatory effect, leading to liability under the FHA.

HUD says the regulation is necessary to provide consistency nationwide, since the statute itself doesn’t specify standards for proving a discriminatory effects

violation. And although HUD and the courts agree that practices with discriminatory effects may violate FHA, the agency noted some minor variations in the way the courts have applied the discriminatory effects standard.

To assess liability under the FHA, the regulation adopts a three-part test similar to that used in assessing claims for employment discrimination and civil rights violations. The three-part test shifts the burden of proof back and forth between the parties, starting with the party that has raised the claim. At each stage, that party must present enough evidence to satisfy the requirement; if it does, then the case goes to the next step; otherwise, it’s the end of the case and the other party wins.

Here’s how it works in action when an individual or group accuses a community of adopting or enforcing a policy that has an unjustified discriminatory effect on a protected class:

- The party filing the complaint must present evidence that a particular practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the party doesn’t present such evidence, the case ends—and the community wins. If the party does present the evidence, then the case moves to the second step, where the burden of proof shifts to...

- The community to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the community doesn’t prove this, then the case ends—and the other party wins. If it does prove this, then it’s on to the third step, where the burden of proof shifts to...

- The party filing the complaint to prove that the community’s substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect. If the party filing the complaint doesn’t prove this, then the case ends, and the community wins. If the party does prove this, it wins—and it’s up to the court (or jury) to decide whether the party filing the complaint is entitled to damages or other forms of relief, such as a court order prohibiting the community from enforcing the discriminatory policy.

## What Do the Regulations Mean for Your Community?

Given the pending Supreme Court case, it's difficult to predict the long-term effects of the new regulations. But as far as HUD is concerned, the new regulations simply formalize its longstanding position—and decades-old case law—that housing providers and others involved in housing transactions may face liability under the FHA for seemingly neutral policies that have an unjustified disparate impact based on race, color, religion, sex, disability, familial status, or national origin.

Nevertheless, the new regulations may signal greater willingness by fair housing enforcement officials to pursue disparate impact claims. That's particularly true for the lending and insurance industries, and for municipalities—in recent years, HUD has been actively pursuing disparate impact claims in disputes over lending policies and land-use ordinances.

It may take a bit longer for the multifamily housing industry to see the effects of the new regulations. In the meantime, it's a good idea to review community policies likely to trigger disparate impact claims. In particular, pay attention to policies governing occupancy standards, treatment of domestic violence survivors, criminal background screenings, and Section 8 vouchers. Fair housing advocates have long argued that these seemingly neutral policies have an unjustified discriminatory effect on racial and ethnic minorities, women, families with children, individuals with disabilities, and others protected under federal fair housing law.

### 4 RULES FOR COMPLYING WITH HUD'S DISCRIMINATORY EFFECT STANDARD

#### Rule #1: Review Occupancy Standards

Even before HUD issued the new discriminatory effects rule, the agency warned against overly restrictive occupancy standards that have the effect of excluding families with children. Fair housing law doesn't prevent communities from maintaining reasonable occupancy policies as long as they are applied consistently, but communities have faced liability for housing discrimination based on familial status because of the disparate impact that these seemingly neutral policies may have families with children.

**EXAMPLE:** Late last year, the Justice Department sued a Florida homeowners association and its former management company, accusing them of discriminating against families with children by imposing overly restrictive occupancy standards at the 249-townhome community. The complaint was filed on behalf of a couple who lived in a four-bedroom townhome with their six minor children. Shortly after they moved in, the family said, they were told that the community's occupancy policy allowed only six individuals to occupy the four-bedroom unit. Allegedly, this was far more stringent than what county law permitted. And according to the complaint, the community adopted similarly restrictive limitations on the number of individuals who could live in two- and three-bedroom units. Litigation in the matter is ongoing.

"Housing providers may set occupancy standards, but those standards cannot be so restrictive that they exclude families who, based on a home's overall size and configuration, should be able to live there," John Trasviña, HUD Assistant Secretary for Fair Housing and Equal Opportunity, said in a statement. "HUD and the Department of Justice are committed to taking action against anyone who unlawfully denies housing to families with children" [U.S. v. Townhomes of Kings Lake HOA, Inc., October 2012].

So take a close look at your occupancy standards to ensure that they satisfy fair housing guidelines as well as state and local requirements. When Congress enacted the familial status protections, it recognized that many state and local laws limit occupancy based on number of people or square footage. The FHA defers to those laws by specifically stating that it's not intended to "limit the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

Though there's no national occupancy code, HUD's informal guidelines state that two persons per bedroom is a reasonable occupancy standard, subject to state and local requirements. But remember, that's only a general rule of thumb, which is subject to exceptions based on other factors—such as the size of the bedroom, the size and configuration of the unit, the age of the children, other physical limitations of the housing, any state or local restrictions, and other relevant factors—which could make it reasonable to allow more people to live in a particular unit.

And don't forget to check applicable state and local laws, which may trump the general "two-people/bedroom" policy. Some state and local occupancy standards are based on square footage, while others allow more than two people per bedroom or don't count children under a certain age under the two-persons-per-bedroom standard. If state or local occupancy laws permit more than one person per bedroom, then you must comply with those laws—or risk triggering a fair housing complaint.

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**COACH'S TIP:** For more information on occupancy standards and other considerations based on familial status, see the COACH's February 2012 lesson, "Dealing with the Rise in Multigenerational Households," available in our online Archive at [www.fairhousingcoach.com/article/dealing-rise-multi-generational-households](http://www.fairhousingcoach.com/article/dealing-rise-multi-generational-households).

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### **Rule #2: Review Policies Affecting Victims of Domestic Violence**

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Likewise, HUD had, prior to issuing the final rule this year, adopted the position that facially neutral housing policies addressing domestic violence can have a disparate impact on women in violation of federal fair housing law.

In a 2011 memo, HUD explained that domestic violence survivors may pursue a federal fair housing claim based on sex if they face housing discrimination because of their history or the acts of their abusers. Since statistics show that women are overwhelmingly the victims of domestic violence, HUD reasoned that discrimination against domestic violence survivors is almost always discrimination against women. Consequently, HUD says that domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may be entitled to protection under the FHA provisions banning sex discrimination.

**EXAMPLE:** Last year, HUD charged the owner of a Mississippi community with violating the FHA's ban on sex discrimination by evicting a victim of domestic violence. The charge alleged that the owner evicted the female resident because of domestic violence by her estranged boyfriend under a policy terminating a lease if police are repeatedly called. According to HUD, enforcing the policy amounted to sex discrimi-

nation based on its discriminatory effect on women, pointing to statistics showing that most domestic violence victims are women [HUD v. Escatawpa Village Associates, L.P., February 2012].

To avoid fair housing problems, check your policies to ensure that they don't directly or indirectly exclude victims of domestic violence or otherwise treat them unfairly. Your community could face a discrimination complaint, for example, if your policy automatically requires eviction of anyone involved in violent or criminal acts, including the victim of a domestic violence incident.

Make sure that your policy complies with state and local laws aimed at protecting domestic violence victims. A handful of state and local governments specifically protect domestic violence victims from housing discrimination. Many more have adopted special provisions for domestic violence victims, including the right to defend eviction proceedings due to alleged criminal activity or other lease violations if they can prove that the incidents are related to domestic abuse.

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**COACH'S TIP:** For more information on domestic violence and sex discrimination, see the COACH's October 2011 lesson, "Complying With Fair Housing Rules Banning Sex Discrimination," available in our online Archive at [www.fairhousingcoach.com/article/complying-fair-housing-rules-banning-sex-discrimination](http://www.fairhousingcoach.com/article/complying-fair-housing-rules-banning-sex-discrimination).

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### **Rule #3: Review Policies on Criminal Background Screening**

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It's too soon to tell, but the new disparate impact rule may sharpen the focus on the potentially discriminatory effect of criminal background screenings on members of racial and ethnic groups. Advocacy groups have long argued that relying on criminal background checks to exclude individuals from employment or housing has a disparate impact on African Americans and Hispanics.

Federal officials have signaled a willingness to accept the argument, particularly with respect to employment discrimination claims. Last year, the Equal Employment Opportunity Commission (EEOC) issued new rules on the use of criminal arrest and conviction records in employment decisions,

acknowledging that exclusionary criminal records policies may have a disparate impact based on race and national origin. The EEOC's new guidance cites statistical evidence that arrest and incarceration rates are particularly high for African Americans and Hispanics at rates disproportionate to their numbers in the general population. In January 2013, the Labor Department followed suit by issuing a directive to federal contractors on criminal record restrictions and discrimination based on race and national origin.

So far, HUD has not yet formally addressed the issue under federal fair housing law, but there are indications that it's on the agency's radar. In commentary accompanying the new discriminatory effects standards, HUD responded to those who submitted comments about how the rules may apply to criminal background checks. One commenter asked the agency to specifically address the discriminatory effects of blanket prohibitions against individuals with criminal arrest or convictions because of the disproportionate numbers of minorities with such records. Another expressed concern that the new rule would restrict housing providers from screening tenants based on criminal arrest and conviction records, and requested guidance for housing providers on appropriate background screenings.

HUD declined to specifically address criminal background checks in the new rules, stating that whether any discriminatory effect resulting from a housing provider's use of criminal arrest or conviction records to exclude people from housing is supported by a legally sufficient justification depends on the facts of a particular situation. Nevertheless, it stated, "HUD believes it may be appropriate to explore the issue more fully and will consider issuing guidance for housing providers and operators."

When those guidelines may be issued and what they may say is anyone's guess, but it's probably a good time to review your community's policies related to criminal background checks to ensure that they satisfy fair housing concerns. Currently, a few states limit the use of certain criminal history in housing decisions, but only a handful of local governments have added fair housing protections to individuals based on arrest and conviction records.

Subject to state or local restrictions, conventional communities may adopt reasonable criminal background policies that are related to their substantial, legitimate, nondiscriminatory interests in protecting

residents' safety and preventing criminal activity on their property. But beware of overly broad policies that exclude anyone with a criminal record—without considering whether it's an arrest or conviction, the severity of the offense, or how long ago it occurred. Be careful in using arrest, as opposed to conviction, records—and set reasonable limits about the age and type of criminal activity that would disqualify an applicant from living there. The more severe and recent the crime, the more likely it will be a bar to living at the rental property.

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**COACH'S TIP:** For more information about criminal background checks, see the COACH's June 2012 lesson, "The Dos & Don'ts of Conducting Criminal Background Checks," available in our online Archive at [www.fairhousingcoach.com/article/dos-donts-conducting-criminal-background-checks](http://www.fairhousingcoach.com/article/dos-donts-conducting-criminal-background-checks).

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#### **Rule #4: Review Policies on Section 8 Housing Vouchers**

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Likewise, the new discriminatory effects standard may open the door to discrimination complaints based on policies that exclude individuals with housing subsidies, most notably Section 8 housing vouchers. Despite its name change to the Housing Choice Voucher program, many still use "Section 8" to refer to the federal government's major housing program that helps very low-income families, the elderly, and disabled individuals afford housing in the private market.

In many jurisdictions, state or local laws ban discrimination based on source of income, including Section 8 housing vouchers, but the FHA doesn't provide similar protections. And since federal law doesn't require private communities to participate in the program, many communities don't accept renters who intend to pay their rent with Section 8 housing vouchers.

Increasingly, fair housing advocates are raising concerns about the discriminatory effects of such policies. In a recent report, the National Fair Housing Alliance called attention to the issue, arguing that discrimination against voucher holders disproportionately affects low-income women and families, people of color, and people with disabilities.

Nevertheless, it's too soon to tell how HUD's new discriminatory effects rules will affect the debate over Section 8 housing vouchers. For now, private communities may choose not to accept Section 8 housing vouchers, absent state or local source-of-income laws requiring them to do so. Review your policies in light of all applicable laws, and ask your attorney to keep you posted on proposals to add or expand fair housing protections based on source of income, including housing subsidies.

**COACH'S TIP:** For more information about source-of-income rules, see the COACH's July 2013 lesson, "Complying with Fair Housing Laws Protecting Source of Income" available in our online Archive at [www.fairhousingcoach.com/article/complying-fair-housing-laws-protecting-source-income](http://www.fairhousingcoach.com/article/complying-fair-housing-laws-protecting-source-income).

- Fair Housing Act: 42 USC §3601 *et seq.*
- HUD Final Rule: Implementation of the Fair Housing Act's Discriminatory Effects Standard: <http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf>.

## COACH'S QUIZ

We've suggested four rules for complying with HUD's discriminatory effects standard. Now let's look at how the rules might apply in the real world. Take the **COACH's Quiz** to see what you've learned.

**INSTRUCTIONS:** Each of the following questions has only one correct answer. On a separate piece of paper, write down the number of each question, followed by the answer you think is correct—for example, (1) b, (2) a, and so on. The correct answers (with explanations) follow the quiz. Good luck!

### QUESTION #1

Communities may be liable for violating federal fair housing law only if they intentionally discriminate based on race, color, religion, national origin, sex, familial status, or disability. True or false?

- True.
- False.

### QUESTION #2

Federal fair housing law permits communities to adopt reasonable occupancy policies, but you could face a discrimination complaint for enforcing overly restrictive occupancy standards that have the effect of excluding families with children. True or false?

- True.
- False.

### QUESTION #3

A female applicant discloses that she was evicted from a previous residence because of domestic disturbances and property damage caused by her ex-boyfriend. She says that she's no longer involved with him, but you're concerned that they may reconcile and cause similar problems at your community. If you reject her application, you could trigger a fair housing complaint. True or false?

- True.
- False.

### QUESTION #4

Communities have a legitimate interest in protecting resident safety, but you could trigger a fair housing complaint for enforcing a policy to exclude all applicants who have any kind of criminal record. True or false?

- True.
- False.

## COACH'S ANSWERS & EXPLANATIONS

### QUESTION #1

**Correct answer: b**

According to HUD's new discriminatory effects regulations, communities may be liable for violating the FHA for housing practices that have an unjustified discriminatory effect on protected classes, regardless of whether there was an intent to discriminate.

HUD has said that domestic violence survivors may pursue a federal fair housing claim based on sex if they face housing discrimination because of their history or the acts of their abusers. Since statistics show that women are overwhelmingly the victims of domestic violence, HUD reasoned that discrimination against domestic violence survivors is almost always discrimination against women.

### QUESTION #2

**Correct answer: a**

**Reason:** Rule #1 applies here:

#### Rule #1: Review Your Occupancy Standards

Although communities are free to adopt reasonable occupancy standards, courts and HUD have long agreed that the FHA prohibits the use of overly restrictive occupancy standards that effectively prevent families with children from living there.

**Correct answer: a**

**Reason:** Rule # 3 applies here:

#### Rule #3: Review Policies on Criminal Background Screening

Many have raised questions about the disparate effect of exclusionary criminal records policies on racial and ethnic minorities. Despite substantial, legitimate, nondiscriminatory interests in protecting resident safety, communities could face a fair housing complaint based on overly broad criminal background policies that exclude anyone with a criminal record—without considering whether it's an arrest or conviction, the severity of the offense, or how long ago it occurred.

### QUESTION #3

**Correct answer: a**

**Reason:** Rule #2 applies here:

#### Rule #2: Review Policies Affecting Victims of Domestic Violence