Persons interested in being placed on a mailing list for future NPRM’s should contact the FAA’s Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 49 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace designated as an extension to Class C airspace area for City of Colorado Springs Municipal Airport, Colorado Springs, CO. Airspace reconfiguration is necessary due to the decommissioning of the Black Forest TACAN. Also, the geographic coordinates of the airport would be updated to coincide with the FAA’s aeronautical database. Controlled airspace is necessary for the safety and management of IFR operations at the Airport.

Class E airspace designations are published in paragraph 6003, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle I, section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at City of Colorado Springs Municipal Airport, Colorado Springs, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:


§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6003 Class E airspace designated as an extension to Class C surface areas.

* * * * *

ANM CO E3 Colorado Springs, CO

[Amended]

City of Colorado Springs Municipal Airport, CO (Lat. 38°48′21″ N., long. 104°42′03″ W.)

That airspace extending upward from the surface within 2.4 miles northwest and 1.2 miles southeast of the City of Colorado Springs Municipal Airport 025° bearing extending from the 5-mile radius of the airport to 8.9 miles northeast and within 1.4 miles each side of the airport 360° bearing extending from the 5-mile radius of the airport to 7.7 miles north of the airport.

Issued in Seattle, Washington, on November 8, 2011.

William Buck,
Acting Manager, Operations Support Group, Western Service Center.

[Docket No. FR–5508–P–01]

RIN 2529–AA96

Implementation of the Fair Housing Act’s Discriminatory Effects Standard

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. 1 HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules implementing the Act, has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate.

The reasonableness of HUD’s interpretation is confirmed by eleven United States Courts of Appeals, which agree that the Fair Housing Act imposes liability based on discriminatory effects. By the time the Fair Housing Amendments Act became effective in 1989, nine of the thirteen United States Courts of Appeals had determined that the Act prohibits housing practices with a discriminatory effect even absent an intent to discriminate. Two other United States Courts of Appeals have since reached the same conclusion, while another has assumed the same but did not need to reach the issue for purposes of deciding the case before it.

Although there has been some variation in the application of the discriminatory effects standard, neither HUD nor any Federal court has ever determined that liability under the Act requires a finding of discriminatory intent. The purpose of this proposed rule, therefore, is to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

DATES: Comment due date: January 17, 2012.

ADDRESSES: Interested persons are invited to submit written comments regarding this proposed rule to the

1 This preamble uses the term “disability” to refer to what the Act and its implementing regulations term a “handicap.”
REGULATIONS DIVISION, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 451 7TH STREET SW., ROOM 10276, WASHINGTON, DC 20410.

All communications should refer to the above docket number and title. There are two methods for submitting public comments.

1. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at http://www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the http://www.regulations.gov Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8399.

FOR FURTHER INFORMATION CONTACT: Jeanine Worden, Associate General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–0500, telephone number (202) 402–5188. Persons with hearing and speech impairments may contact this phone number via TTY by calling the Federal Information Relay Service at (800) 877–8399.

SUPPLEMENTARY INFORMATION:

I. Background

A. History of Discriminatory Effects Liability Under the Fair Housing Act

The Fair Housing Act declares it to be “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 2 Congress considered the realization of this policy “to be of the highest priority.” 3 The language of the Fair Housing Act prohibiting discrimination in housing is “broad and inclusive” 4 and the purpose of its reach is to replace segregated neighborhoods with “truly integrated and balanced living patterns.” 5 In commemorating the 40th anniversary of the Fair Housing Act and the 20th anniversary of the Fair Housing Amendments Act, the House of Representatives recognized that “the intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.” 6

In keeping with the “broad remedial intent” of Congress in passing the Fair Housing Act, 7 and consequently the Act’s entitlement to a “generous construction,” 8 HUD, to which Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules to carry out the Act, 9 has repeatedly determined that the Fair Housing Act is directed to the consequences of housing practices, not simply their purpose. Under the Act, housing practices—regardless of any discriminatory motive or intent—cannot be maintained if they operate to deny protected groups equal housing opportunity or they create, perpetuate, or increase segregation without a legally sufficient justification.

Accordingly, HUD has concluded that the Act provides for liability based on discriminatory effects without the need for a finding of intentional discrimination. For example, HUD’s Title VIII Complaint Intake, Investigation and Conciliation Handbook (Handbook), which sets forth HUD’s guidelines for investigating and resolving Fair Housing Act complaints, recognizes the discriminatory effects theory of liability and requires HUD investigators to apply it in appropriate cases. 10 In adjudicating charges of discrimination filed by HUD under the Fair Housing Act, HUD administrative law judges have held that the Act is violated by facially neutral practices that have a disparate impact on protected classes. 11 HUD’s regulations interpreting the Fair Housing Act prohibit practices that create, perpetuate, or increase segregated housing patterns. 12 HUD also joined with the Department of Justice and nine other Federal enforcement agencies to recognize that disparate impact is among the “methods of proof of lending discrimination under the * * * Act” and provide guidance on how to prove a disparate impact fair lending claim. 13

In addition, in regulations implementing the Federal Housing Enterprises Financial Safety and Soundness Act, HUD prohibited mortgage purchase activities that have a discriminatory effect. In enacting these regulations, 14 which prescribe the fair lending responsibilities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), HUD noted that “the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law” and concluded that disparate impact law “is applicable to all...
segments of the housing marketplace, including the GSEs.\footnote{15} Moreover, all Federal courts of appeals to have addressed the question have held that liability under the Act may be established based on a showing that a neutral policy or practice either has a disparate impact on a protected group\footnote{16} or creates, perpetuates, or increases segregation,\footnote{17} even if such a policy or practice was not adopted for a discriminatory purpose.\footnote{18}

The Fair Housing Act’s discriminatory effects theory is analogous to the discriminatory effects standard under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), which prohibits discriminatory employment practices. The U.S. Supreme Court held that Title VII reaches beyond intentional discriminatory employment practices.\footnote{19} The Supreme Court explained that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”\footnote{19} It is thus well established that liability under the Fair Housing Act can arise where a housing practice is intentionally discriminatory or where it has a discriminatory effect.\footnote{20} A discriminatory effect may be found where a housing practice has a disparate impact on a group of persons protected by the Act, or where a housing practice has the effect of creating, perpetuating, or increasing segregated housing patterns on a protected basis.\footnote{21} B. Application of the Discriminatory Effects Standard Under the Fair Housing Act

While the discriminatory effects theory of liability under the Fair Housing Act has been established, there is minor variation in how HUD and the courts have applied that theory. For example, HUD has always used a three-step burden-shifting approach,\footnote{22} as do many Federal courts of appeals.\footnote{23} But some courts apply a multi-factor balancing test,\footnote{24} other courts apply a hybrid between the two,\footnote{25} and one court example, where a reasonable person would find a notice, statement, advertisement, or representation to be discriminatory, see 42 U.S.C. 3604(c), or where a reasonable accommodation is refused, see 42 U.S.C. 3604(f)(3). The Act also imposes an affirmative obligation on HUD and other executive departments and agencies to administer their programs and activities related to housing and urban development in a manner affirmatively to further the purposes of the Fair Housing Act. See 42 U.S.C. 3608(d); see also 3608(e)(5).

A “discriminatory effect” prohibited by the Act refers to either an “adverse impact” or the “perpetuation of segregation.” See, e.g., Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366, 379 (6th Cir. 2007) (there are “two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents inter racial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.”).


See, e.g., Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366, 378 (6th Cir. 2007) (there are “two types of discriminatory effects which a facially neutral housing decision can have: The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents inter racial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.”).

See, e.g., Gallagher v. Magnier, 619 F.3d 833, 834 (8th Cir. 2010); Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm’n, 508 F.3d 366, 378 (6th Cir. 2007) (“Louisville Mountain Side Mobile Estates v. Sec’y HUD, 56 F.3d 1243, 1254 (10th Cir. 1995).”)

See, e.g., Graoch, 508 F.3d at 373 (6th Cir. 2007) (“claims under Title VII and the Fair Housing Act generally should receive similar treatment”); Mountain Side Mobile Estates v. Sec’y HUD, 56 F.3d 1243, 1254 (10th Cir. 1995) (explaining that in interpreting Title VII, “the Supreme Court has repeatedly stated that the ultimate burden of proving that discrimination against a protected group has been caused by a specific practice rests with the plaintiff at all times” (internal citation omitted)).

See, e.g., Huntington Branch NAACP v. Town of Huntington, N.Y., 844 F.2d 926, 939 (2d Cir. 1988); Resident Advisory Board v. Rizzo, 564 F.2d 126, 146–48 (3d Cir. 1977).

of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden shifts to the defendant or respondent to prove that the challenged practice has a necessary and manifest relationship to one or more of the defendant’s or respondent’s legitimate, nondiscriminatory interests. If the defendant or respondent satisfies its burden, the plaintiff or complainant may still establish liability by demonstrating that these legitimate nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect.

HUD proposes this standard for several reasons. First, Title VII, enacted four years before the Fair Housing Act, has often been looked to for guidance in interpreting analogous provisions of the Fair Housing Act. Second, HUD’s proposal is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII. Third, HUD’s proposal is consistent with the discriminatory effects standard applied under the Equal Credit Opportunities Act (ECOA), which borrows from Title VII’s burden-shifting framework. There is significant overlap in coverage between ECOA, which prohibits discrimination in credit, and the Fair Housing Act, which prohibits discrimination in residential real estate-related transactions. The interagency Policy Statement on Discrimination in Lending analyzed the standard for proving disparate impact discrimination in lending under the Fair Housing Act and under ECOA without differentiation. Under HUD’s proposed framework, parties litigating a claim brought under both the Fair Housing Act and ECOA will not face the burden of applying inconsistent methods of proof to factually indistinguishable claims. Third, by placing the burden of proving a necessary and manifest relationship to a legitimate, nondiscriminatory interest on the defendant or respondent and the burden of proving a less discriminatory alternative on the plaintiff or complainant, “neither party is saddled with having to prove a negative.”

II. This Proposed Rule

A. Subpart G—Discriminatory Effect

1. Discriminatory Effect Prohibited ($100,500)

HUD proposes adding a new subpart G, entitled “Prohibiting Discriminatory Effects,” to its Fair Housing Act regulations in 24 CFR part 100. Subpart G would confirm that the Fair Housing Act may be violated by a housing practice that has a discriminatory effect, as defined in § 100.500(a), regardless of whether the practice was adopted for a discriminatory purpose. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The respective burdens of proof for establishing or refuting an effects claim are set forth in § 100.500(c). Subsection 100.500(d) clarifies that a legally sufficient justification does not defeat liability for a discriminatory intent claim once the intent to discriminate has been established.

This proposed rule would apply to both public and private entities because the definition of “discriminatory housing practice” under the Act makes no distinction between the two.


32 See, e.g., Trafficante, 409 U.S. at 205; The Secretary of HUD’s Regulation of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), 60 FR 61,846, 61,866 (Dec. 1, 1995). Short form see 15 U.S.C. 1691.


34 ECOA prohibits discrimination in credit on the basis of race and other enumerated criteria. See 15 U.S.C. 1691.

35 See S.Rep. 94–589, 94th Cong., 2d Sess. (1976) (“judicial constructions of antidiscrimination legislation in the employment field, in cases such as Griggs v. Duke Power Company, 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, U.S. Supreme Court, June 25, 1975) [422 U.S. 405], are intended to serve as guides in the application of [ECOA], especially with respect to the allocations of burdens of proof.”); 12 CFR 202.6(a), n. 2 (1997) (“The legislative history of [ECOA] indicates that the Congress intended an “effects test” concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor’s determination of creditworthiness.”); 12 CFR part 202, Subpart I, Official Staff Commentary, Comment 6(a)–2 (“Effects Test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII and the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e–2).”).

36 See 59 FR 18,266.

37 See 59 FR 18,266, 18,269 (Apr. 15, 1994).


39 It is possible to bring a claim alleging both discriminatory effect and discriminatory intent as alternative theories of liability. In addition, the discriminatory effect of a challenged practice may provide evidence of the discriminatory intent behind the practice. See, e.g., Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 260 (1977). But proof of intent to discriminate is not necessary to prevail on a discriminatory effects claim. See, e.g., Black Jack, 506 F.2d at 1184–85.

40 See 42 U.S.C. 3602(f) (defining “discriminatory housing practice” as “an act that is unlawful under
Choice Vouchers likely would result in an adverse impact based on race; United States v. Incorporated Village of Island Park, 888 F. Supp. 419, 447 (E.D.N.Y. 1995), where a housing program’s preference for residents of the Village, most of whom were white, had a disparate impact on African-Americans; Charleston Housing Auth. v. Smith, 419 F.3d at 741–42, where the housing authority’s plan to demolish 50 low-income public housing units—46 of which were occupied by African Americans—would disproportionately affect African Americans based on an analysis of the housing authority’s waiting list population, the population of individuals income-eligible for public housing, or the current tenant population; and Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065–66 (4th Cir. 1982), where the town’s withdrawal from a multi-municipality housing authority effectively blocked construction of 50 units of public housing, adversely affecting African American residents of the county, who were those most in need of new construction to replace substandard dwellings.

Perpetuation of Segregation. A person or entity may be liable for a housing policy or practice that has a discriminatory effect on the community if the practice has the effect of creating, perpetuating, or increasing housing patterns that segregate by race, color, religion, sex, familial status, national origin, or disability. Examples of such claims can be found in the following court cases: Huntington Branch, 844 F.2d at 934, 937, where the town’s zoning ordinance, which limited private construction of multifamily housing to a largely minority neighborhood, had the effect of perpetuating segregation “by restricting low-income housing needed by minorities to an area already 52% minority”; Dews v. Town of Sunnyvale, Tex., 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000), where the town’s zoning ordinance that banned multifamily housing and required single-family lots of at least one acre had the effect of perpetuating segregation by keeping minorities out of a town that was 94 percent white; Black Jack, 508 F.2d at 1186, where a city ordinance preventing the construction of low-income multifamily housing “would contribute to the perpetuation of segregation in a community which was 99% white”; and Inclusive Communities Projects, Inc. v. Texas Dept’ of Housing & Community Affairs, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010), where the state’s disproportionate denial of tax credits for nonelderly housing in predominately white neighborhoods had a segregative impact on the community.

3. Legally Sufficient Justification ($100,500(b))

A housing practice or policy found to have a discriminatory effect may still be lawful if it has a “legally sufficient justification.” A “legally sufficient justification” exists where the housing practice or policy: (1) Has a necessary and manifest relationship to the defendant’s or respondent’s legitimate, nondiscriminatory interests; and (2) those interests cannot be served by another practice that has a less discriminatory effect. A legally sufficient justification may not be hypothetical or speculative. In addition, a legally sufficient justification does not defeat liability for a discriminatory intent claim once the intent to discriminate has been established.

4. Burdens of Proof ($100,500(c))

The burden-shifting framework set forth in the proposed rule for discriminatory effect claims finds support in judicial interpretations of the Act, and is also consistent with the burdens of proof Congress assigned in disparate impact employment discrimination cases. See 42 U.S.C. § 2000e-2(k). In the proposed rule, the complainant or plaintiff first bears the burden of proving its prima facie case, that is, that a housing practice caused, causes, or will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin.

Once the complainant or plaintiff has made its prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice has a necessary and manifest relationship to one or more of the housing provider’s legitimate, nondiscriminatory interests. If the respondent or defendant satisfies its burden, the complainant or plaintiff may still establish liability by demonstrating that these legitimate, nondiscriminatory interests could be

32 See, e.g., Charleston Housing Auth. v. Smith, 419 F.3d at 741 (“[u]nder the second step of the disparate impact burden shifting analysis, the [defendant] must demonstrate that the proposed action has a manifest relationship to the legitimate non-discriminatory policy objectives” and “is necessary to the attainment of these objectives”) (internal quotation marks omitted); Betsey v. Turtle Creek Assoc., 736 F.2d 963, 968–69 (4th Cir. 1984); 24 CFR 100.125(c); 59 FR 18,266, 18,269; see also 60 FR at 61,868.


HUD’s existing Fair Housing Act regulations provide examples of housing practices that may violate the Act, based on an intent theory, an effects theory, or both. The proposed rule adds examples of discriminatory housing practices that may violate the new subsection G because they have a discriminatory effect. The cases cited in Section II.A.2 of this preamble identify housing practices found by courts to create discriminatory effects that violate or may violate the Act. These cases are provided as examples only and should not be viewed as the only ways to establish a violation of the Act based on a discriminatory effects theory.

III. Solicitation of Comments

The Department welcomes comments on the standards proposed in this rule, including whether a burden-shifting approach should be used to determine when a housing practice with a discriminatory effect violates the Fair Housing Act and, where proof is required of the existence or nonexistence of a less discriminatory alternative to the challenged practice, which party should bear that burden. These comments will help the Department in its effort to craft final regulations that best serve the broad, remedial goals of the Fair Housing Act.
IV. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this proposed rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). The proposed rule has been determined to be a “significant regulatory action,” as defined in section 3(f) of the Order, but not economically significant under section 3(f)(1) of the Order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule proposes to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

 Discriminatory effects liability is consistent with the position of other Executive Branch agencies and has been applied by every Federal court of appeals to have reached the question. Given the variation in how the courts have applied that standard, HUD’s objective in this proposed rule is to achieve consistency and uniformity in this area, and therefore reduce burden for all who may be involved in a challenged practice. Accordingly, the undersigned certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 100

Civil rights, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 100 as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3620.

2. In §100.120, amend paragraph (b) as follows:

§100.120 Discrimination in the making of loans and in the provision of other financial assistance.

(b) Prohibited practices under this section include, but are not limited to:

(1) Failing or refusing to provide to any person, in connection with a residential real estate-related transaction, information regarding the availability of loans or other financial assistance, application requirements, procedures, or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Providing loans or other financial assistance in a manner that results in disparities in their cost, rate of denial, or terms or conditions, or that has the effect of denying or discouraging their receipt on the basis of race, color, religion, sex, handicap, familial status, or national origin.

3. In §100.70, add a new paragraph (d)(5) to read as follows:

§100.70 Other prohibited conduct.

(d) * * * *(5) Implementing land-use rules, policies, or procedures that restrict or deny housing opportunities in a manner that has a disparate impact or has the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.
(b) Legally sufficient justification. A legally sufficient justification exists where the challenged housing practice:

(1) Has a necessary and manifest relationship to one or more legitimate, nondiscriminatory purposes or interests of the respondent, with respect to claims brought under 42 U.S.C. 3610, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(2) those interests cannot be served by another practice that has a less discriminatory effect. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in § 100.500(c)(2)–(c)(3).

(c) Burdens of proof in discriminatory effects cases.

(1) A complainant, with respect to claims brought under 42 U.S.C. 3610, or a plaintiff, with respect to claims brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice causes a discriminatory effect.

(2) Once a complainant or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is supported by a legally sufficient justification, as defined in § 100.500(b), may not be used as a sufficient justification, legally sufficient justification or as a defense against a claim of intentional discrimination.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the complainant or plaintiff may still prevail upon demonstrating that the legitimate, nondiscriminatory purposes or interests supporting the challenged practice can be served by another practice that has a less discriminatory effect.

(d) Relationship to discriminatory intent. A demonstration that a housing practice is supported by a legally sufficient justification, as defined in § 100.500(b), may not be used as a defense against a claim of intentional discrimination.

Dated: October 4, 2011.

John Trasvina,
Assistant Secretary for Fair Housing and Equal Opportunity.

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

USACE’s Plan for Retrospective Review Under E.O. 13563

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is seeking public input on its plan to retrospectively review its Regulations implementing the USACE Regulatory Program at 33 CFR parts 320–332 and 334. Executive Order 13563, “Improving Regulation and Regulatory Review” (E.O.), issued on January 18, 2011, directs Federal agencies to review existing significant regulations and identify those that can be made more effective or less burdensome in achieving regulatory objectives. The Regulations are essential for implementation of the Regulatory mission; thus, USACE believes they are a significant rule warranting review pursuant to E.O. 13563. The E.O. further directs each agency to periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives. Section 404(e) of the Clean Water Act authorizes USACE to development general permits, including nationwide permits (NWPs), for minor activities in waters of the U.S. for a period of five years. Accordingly, every five years, USACE undergoes a reauthorization process for the NWP program and includes public notice and provides an opportunity for public hearing. Comments for the NWP program are submitted during the reauthorization process. Therefore, USACE is currently complying with the E.O. 13563 direction to periodically review its existing significant regulations. Other regulations will be reviewed on an as-needed basis in accordance with new laws, court cases, etc.

DATES: Written comments must be submitted on or before January 17, 2012.

ADDRESSES: You may submit comments, identified by docket number COE–2011–0028, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Email: regulatory.review@usace.army.mil


Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2011–0028. All comments received will be included in the public docket without change and may be made available on-line at http://www.regulations.gov, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.