National Association of Residential Property Managers

August 23, 2021

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500.

RE: Comments on HUD's Reinstatement of HUD's Discriminatory Effects Standard, Docket No. FR-6251-P-01

To Whom It May Concern:

I am writing on behalf of the National Association of Residential Property Managers (NARPM®) regarding HUD's proposed reversion to the 2013 Discriminatory Effects Standard. Founded in October 1988, NARPM® is an association of real estate professionals who know first-hand the unique problems and challenges of managing single-family and small residential properties. NARPM® promotes a high standard of business ethics, professionalism, and fair housing practice, going beyond the requirements of federal law to include sexual orientation and gender identity as protected classes, and binding our members to educate those with whom they are affiliated to comply with fair housing and anti-discrimination laws. The Association also certifies its members in the standards and practices of the residential property management industry and promotes continuing professional education. NARPM® members manage over 1 million residential properties across the nation, conservatively totaling over $200 billion of assets.

As an organization and an industry, we are committed in word, deed, and spirit to the principle of fair housing. In no uncertain terms, we condemn those who would discriminate in the provision of housing and housing-related services. That includes both those who would explicitly discriminate and those who would purposely use other factors as a proxy to discriminate based on someone's status as a member of a protected class. Those who would engage in either of these acts deserve prosecution to the fullest extent of the law and have no place in our industry. We do not speak for them.

Our interest in the issue of disparate impact is solely on behalf of our members who work hard to follow and adhere to fair housing laws. These men and women work hard to make sure that their practices and policies comply with applicable federal law. To that end, our intent is regulatory policy that provides clarity and certainty to the regulated community.

We support the structure and approach of the 2020 rule as it brings more consistency and predictability to what can be an unpredictable process for both complainant/plaintiffs and

respondent/defendants, and as such, we urge you retain it with some possible amendments to help address the concerns that have been raised by other stakeholders. One of the consistent observations from members has been that the current system is fraught with uncertainty and "gray area." Indeed, we continually hear, "Just tell me what is acceptable and what is not, and I will follow it in designing my tenant screening policies."

The provision in the current rule of positive defenses that may be offered by a respondent/defendant allows our members to understand the bounds of the law as written in statute and interpreted by the courts in case law, and with that understanding, design screening policies with more certainty that they comply in word and spirit with the Fair Housing Act. We acknowledge that some have raised concerns about the inclusion of positive defenses, and we want to make clear that our support for it is less about the actual method, and more about what it actually yields: clarity of the bounds of law that better allows managers and owners of real property to formulate tenant screening policies that comply with applicable federal law and that avoid inadvertent transgressions. While this model addresses our concerns, we remain open-minded to others that would do likewise in a similarly effective manner.

We strongly support the retention of language in the current rule that if the respondent states the practice in question is necessary to achieve a legitimate, nondiscriminatory interest, then "the plaintiff must prove by the preponderance of the evidence that a less discriminatory policy or practice exists that would serve the defendant's identified interest **in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant**." [emphasis added] Without this language, there exists no real limit on what would constitute a reasonable alternative practice. There needs to be some direction here. This represents a fair, reasonable approach.

Likewise, we support the way the current rule enumerates the elements of a prima facie case. Even cases that are resolved at the pleading level require time and expense. The language in the current rule helps that cases making it into the proverbial pipeline are those in which there is more likelihood to be substantive issues. This allows more time and focus on those most egregious cases, and it also helps to protect our members, many of whom are small "mom-and-pop" businesses, from having to expend precious resources to defend against baseless claims.

We also support the provision in the current rule that makes it clear that remedies need to concentrate on fixing problems, and we support the prohibition on punitive damages. Again, speaking on behalf of property managers who are working hard to follow the law, but who are at risk of some unintended oversight or misunderstanding getting them on the wrong side of a disparate impact action, we believe that the focus of resolving the case must be to correct the situation, educate the offending party, and make the harmed party whole.

Likewise, we support the retention of paragraph (d) in § 100.5 clarifying that the collection of data with respect to protected classes is not required or encouraged by the rule. The specific data a business collects and retains should be a decision driven by the needs of the business.

We support the overall end that HUD was trying to achieve in the current rule as it addresses a number of concerns we raised about the lack of clarity in the 2013 rule. We also recognize that other stakeholders have concerns about the current rule. In that vein, we are willing to consider other options if such arrangements could address our stated concerns in a manner as effective as the current rule does. Certainly, a reversion to the 2013 rule would not do so.

Thank you for the opportunity to comment on this proposal. If you have any questions, please do not hesitate to contact us.

Sincerely,

Scott Abernathy, MPM® RMP®
NARPM® President