

August 14, 2017

The Honorable Rachel L. Brand  
Associate Attorney General  
Chair, Regulatory Reform Task Force  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**RE: Docket No. OLP 164 – Enforcing the Regulatory Reform Agenda; Department of Justice Task Force on Regulatory Reform Under E.O. 13777**

Dear Ms. Brand:

On behalf of the National Association of Home Builders (NAHB), thank you for the opportunity to provide comments responding to the Department of Justice's (DOJ) request for public comment on Enforcing the Regulatory Reform Agenda; Department of Justice Task Force on Regulatory Reform Under E.O. 13777.<sup>1</sup> As an interested stakeholder in regulations promulgated by the federal government that impact the U.S. residential home building industry, NAHB is concerned with the manner in which DOJ applies the Fair Housing Act (FHA) Accessibility Guidelines in federal enforcement actions.<sup>2</sup>

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home builder associations around the country. NAHB's builder members construct about 80 percent of all new housing units, making housing a large engine of economic growth in the country.

Residential construction is a highly regulated industry and home builders comply with numerous federal, state, and local statutes and regulations during the course of operating their businesses. Because activities in Congress, the federal agencies, the courts, and state and local governments affect residential construction at all levels, NAHB remains actively engaged on many fronts to ensure its members receive up to date information and education on changing regulations and laws.

NAHB views DOJ's request for public comment as an opportunity to address an issue that has caused NAHB's members considerable frustration in their compliance efforts. The issue is not a lack of desire to comply with the statutory requirements of the FHA.<sup>3</sup> Rather, it is with DOJ and the Department of Housing and Urban Development's (HUD) application of the FHA Accessibility Guidelines as the baseline for compliance in enforcement actions. This approach contravenes the acknowledged availability of ten (10) safe harbors<sup>4</sup> that builders can use when designing and constructing their projects to comply with the FHA's accessibility requirements. It also ignores the intent of Congress in allowing a number of ways to accomplish greater accessibility. Accordingly, NAHB urges DOJ to

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<sup>1</sup> 82 Fed. Reg. 29248 (June 20, 2017).

<sup>2</sup> Final Housing Accessibility Guidelines, Dep't of Hous. & Urban Dev., 56 Fed. Reg. 9472 (Mar. 6, 1991).

<sup>3</sup> See 42 U.S.C. §§ 3601 *et seq.*

<sup>4</sup> [Design and Construction Requirements; Compliance With ANSI A117.1 Standards; Final Rule, Dept. of Hous. & Urban Dev., 73 Fed. Reg. 63610, 63613 \(Oct. 24, 2008\)](#) (codified at 24 C.F.R. Part 100) (ANSI A117.1 Standards).

withdraw its use of these guidelines as the baseline for assessing compliance during enforcement actions.

## I. Introduction

### a. The Fair Housing Act and the Fair Housing Act Accessibility Guidelines

The FHA provides protection against discrimination for a number of protected classes, but for purposes of these comments, NAHB is focusing only on that portion of the FHA that applies to accessibility provisions prohibiting housing discrimination on the basis of a “handicap.”<sup>5</sup> In the types of dwellings the statute seeks to regulate, the FHA requires that public areas must be “readily accessible to and usable by handicapped persons,” there must be an accessible entrance to each building on an accessible route, the doors must be wide enough to allow passage into and within the premises by people in wheelchairs, and the individual units must contain four enumerated features of “adaptive design.”<sup>6</sup>

With regard to how to meet the seven requirements of accessible design, there is no national building code of accessibility or any minimum standards mandated under the Act. In response to industry requests for examples of how to comply, the Act included a provision that “compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as ‘ANSI A117.1’) suffices” to meet the requirements of the Act. The Act also states that compliance with state or local accessibility laws would be “deemed to satisfy the requirements” of the Act. The legislative history confirms that Congress did not intend to require compliance solely with ANSI or local codes, but rather envisioned that architects and developers would find “creative” ways to design accessible housing.<sup>7</sup>

The statute charges the Secretary of HUD with enforcing these requirements by bringing administrative enforcement actions to correct non-compliant buildings.<sup>8</sup> Individuals (or organizations acting on behalf of disabled persons generally) who believe that they have been victims of an illegal housing practice may file a complaint with HUD, or file their own lawsuit in federal or state court. DOJ brings civil suits based on referrals from HUD. The FHA also allows the DOJ to commence civil actions in federal court against parties who engage in a pattern or practice of discrimination of this kind.

In addition, Congress empowered HUD with the limited authority to “provide technical assistance to States and units of local government and other persons to implement the requirements of” the Act.<sup>9</sup> Pursuant to its authority to provide technical assistance, HUD recognizes ten safe harbors for compliance with the FHA’s design and construction requirements. One of the safe harbors is the FHA Accessibility Guidelines. While they serve as a protective shield against liability, safe harbors are not meant to be used as a “sword” to prove that a dwelling does not meet the Act. When it published the Guidelines, HUD made clear that failure to meet the Guidelines does not constitute “unlawful discrimination” because “there is no statutory authority to establish one nationally uniform set of

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<sup>5</sup> 42 U.S.C. § 3604(f).

<sup>6</sup> *Id.* § 3604(f)(3)(C).

<sup>7</sup> P.L. 100-430, Fair Housing Amendments Act of 1988, H.R. Rep. 100-711, 1988 U.S.C.C.A.N. 2173, 2188 (“[ ] this section is not intended to require that designers follow this standard exclusively, for there may be other local or state standards with which compliance is required or there may be other creative methods of meeting these standards. But if designers do follow this standard, then they have satisfied the Act’s requirements of adaptive design.”).

<sup>8</sup> See 42 U.S.C. § 3601 *et seq.*

<sup>9</sup> 42 U.S.C. § 3608(e)(3).

accessibility standards.” When the Guidelines were released, HUD specifically rejected the idea that the Guidelines could be considered minimum accessibility requirements.

**Comment.** A number of commenters requested that the Department categorize the final Guidelines as minimum requirements, and not as performance standards, because “recommended” guidelines are less effective in achieving the objectives of the Act. Another commenter noted that a safe harbor provision becomes a de facto minimum requirement, and that it should therefore be referred to as a minimum requirement.

**Response.** The Department has not categorized the final Guidelines as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act. The Guidelines adopted by the Department provide one way in which a builder or developer may achieve compliance with the Act's accessibility requirements. *There are other ways to achieve compliance with the Act's accessibility requirements, as for example, full compliance with ANSI A117.1. Given this fact, it would be inappropriate on the part of the Department to constrain designers by presenting the Fair Housing Accessibility Guidelines as minimum requirements.* Builders and developers should be free to use any reasonable design that obtains a result consistent with the Act's requirements. Accordingly, the design specifications presented in the final Guidelines are appropriately referred to as “recommended guidelines.”<sup>10</sup>

Further, HUD made it clear that the Accessibility Guidelines set design parameters that go beyond what is required under the statute in terms of scope and suggested design measurements.<sup>11</sup>

b. *The Nelson Order*

The *Nelson Order* is named for the administrative adjudication in which the HUD Secretary outlined how the agency would exercise its enforcement powers under the FHA.<sup>12</sup> Following adjudication by an Administrative Law Judge (ALJ) on an accessibility-related case, the HUD Secretary issued the following order in an appeal review:

The Charging Party may establish a prima facie case by proving a violation of the [FHA Accessibility] Guidelines. A respondent can then rebut the presumption established by the violation of the Guidelines by demonstrating compliance with a recognized, comparable, objective measure of accessibility. Giving the Guidelines the status of a rebuttable presumption, contrary to the ALJ, is not inconsistent with the concept that the Guidelines are not mandatory; because even if a respondent violates the Guidelines, the respondent can demonstrate that the property satisfies another

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<sup>10</sup> 56 Fed. Reg. at 9479 (emphasis added).

<sup>11</sup> See Final Report of HUD Review of Model Building Codes, Dep't of Hous. & Urban Dev., 65 Fed. Reg. 15740, 15743 (Mar. 23, 2000); 56 Fed. Reg. at 9476.

<sup>12</sup> See *United States v. Mid-America Apartment Communities, Inc.*, No. 10–1866 (RJL), 2017 WL 1154944 (D.C. Cir. Mar. 27, 2017).

comparable and objective standard of accessibility and thus avoid a liability finding.<sup>13</sup>

On review, the Ninth Circuit Court of Appeals upheld the agency's internal practice of burden shifting.<sup>14</sup>

As the government's enforcement arm in these matters, DOJ has invoked the *Nelson* Order in several recent cases, including cases that did not arrive in federal court by way of appeal from a HUD ALJ. However, DOJ's position runs contrary to both Congressional intent, where Congress specifically stated that there can be a number of ways for parties to comply with the FHA's accessibility requirements, and HUD's own acknowledgement that it is inappropriate to constrain designers to use only the FHA Accessibility Guidelines. DOJ and HUD's position now, with respect to relying solely on the *Nelson Order* in enforcement actions, is accordingly not defensible.

## II. The *Nelson Order* Exceeds Agency Authority in the Fair Housing Act

DOJ's use of the *Nelson Order* against builders is inappropriate because the order goes beyond the intended scope and authority granted to HUD through the FHA. The FHA has only six broad requirements of accessibility, usability, and adaptability,<sup>15</sup> along with an additional seventh established by the regulations themselves.<sup>16</sup> In passing the legislation, Congress purposefully rejected "a standard of total accessibility [that] would require that every entrance, doorway, bathroom, parking space, and portion of buildings and grounds be accessible." Instead, they chose "to use a standard of 'adaptable' design" that would "provide usable housing for handicapped persons without necessarily being significantly different from conventional housing."<sup>17</sup> Further, Congress described the statute's requirements as "modest" and believed that the requirements would "result in features which do not look unusual and will not add significant additional costs."<sup>18</sup>

The FHA requires that common areas and covered multifamily dwelling units be designed to reasonably accommodate the needs of most persons with disabilities -- not the needs of every disabled person without regard to how extreme their disability might be. Additionally, it should be pointed out that rigidity in the FHA Accessibility Guidelines may lead to inaccessible outcomes for some disabled people. For example, individuals using walkers, individuals using wheelchairs, and individuals with vision impairments are all likely to prefer their thermostats to be mounted at different heights so that they may be used comfortably. Therefore, the whole concept of a universal or minimal standard for accessible design is inappropriate. Indeed, that approach has been flatly rejected. The FHA intends that the specific needs of disabled residents would be addressed on an as-needed basis through adaptation of the particular feature, reasonable accommodations, and reasonable modifications.<sup>19</sup>

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<sup>13</sup> *The Sec'y, United States Dep't of Hous. & Urban Dev., on Behalf of Montana Fair Hous., Inc., Charging Party, & Montana Fair Hous., Inc., Intervenor*, HUDALJ 05-068FH, 2006 WL 4573902, at \*5 (Sept. 21, 2006).

<sup>14</sup> See *U.S. Dep't of Hous. & Urban Dev. v. Nelson*, 320 Fed. Appx. 635 (9th Cir.2009).

<sup>15</sup> 42 U.S.C. § 3604(f)(3)(C).

<sup>16</sup> Under the FHA regulations, at least one entrance to the building itself must be accessible, 24 C.F.R. § 100.205(a).

<sup>17</sup> H. R. Rep. No. 100-711, at 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179, 2187.

<sup>18</sup> *Id.* at 2179.

<sup>19</sup> See 42 U.S.C. § 3604 (f)(3)(C)(iii) (requiring that dwellings contain four features of adaptive design); 42 U.S.C. § 3604 (f)(3)(A) (requiring reasonable modifications of properties to meet needs of disabled residents); 42 U.S.C. § 3604 (f)(3)(B) (requiring reasonable accommodations to rules, policies, practices or services to meet needs of disabled residents).

Congress did not mandate any specific technical design criteria in order to satisfy the requirements of the FHA. It also did not grant any federal entity the authority to promulgate binding standards to enact proscriptive technical criteria that builders must follow, or else risk federal prosecution. Rather, the FHA empowers HUD with the *limited* authority to “provide technical assistance to States and units of local government and other persons to implement the requirements of the Act.”<sup>20</sup>

Congress did provide some explicit guidance for those seeking clear measures of compliance. If one builds in accordance with the requirements of the American National Standards Institute Inc. (“ANSI”) accessibility standards (commonly known as ANSI A117.1), that “suffices to satisfy” the FHA.<sup>21</sup> That said, FHA legislative history makes clear that Congress did not intend to require compliance with only one standard. Instead, Congress envisioned a structure that would allow for other creative methods of meeting the Act.<sup>22</sup> HUD in the past has even conceded both that it lacks authority to promulgate such a standard<sup>23</sup> and that it would be impractical to implement one in light of the continual introduction into the housing market of new building and interior designs.<sup>24</sup>

Therefore, accessibility itself is the ultimate touchstone by which conformity with the FHA is determined.<sup>25</sup> And, the sole dispositive question at issue in an FHA design and construction case is whether the dwelling units and common areas as designed and constructed are reasonably accessible to most persons with disabilities.<sup>26</sup>

DOJ aggressively investigates and files suits against multifamily housing owners alleging a pattern and practice of discrimination. It is very rare for such cases to originate from a HUD referral or the complaint of an aggrieved person. Rather, DOJ either sends testers to properties under the false pretenses that they are there to rent an apartment or simply sends letters notifying owners that they are initiating an investigation of compliance with the FHA. Typically DOJ’s experts rely on the 1991 FHA Guidelines as the baseline for measuring compliance. Thus, during an inspection if they find any measurement that fails to meet the Guidelines it is flagged as a “violation” of the FHA. It is common for the inspection teams to find hundreds of “violations” at properties using this methodology. In particular, older properties tend to have many issues. This is the result of normal wear and tear as well as an evolution in how architects designed buildings and understood how to comply with the Act (given how vague it is and the fact that there is no single standard).

Despite the fact that the Guidelines state on their face that they are not required, the DOJ acts as if they are mandatory. HUD does not inspect buildings during construction and builders have no way of obtaining certification that the building meets the broad requirements of the Act. Yet, they are later told that the building should have met one of the safe harbors (which may be inconsistent with the mandatory local building codes requiring updated standards).

Given the statutory scheme and the words of the safe harbors themselves, it therefore makes little sense for the government to automatically bring suit against a builder when it suspects a builder is not in compliance with the FHA Accessibility Guidelines, and then force the builder to prove compliance in

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<sup>20</sup> See 42 U.S.C. § 3604(f)(5)(C). See also 24 C.F.R. § 100.205(f).

<sup>21</sup> 42 U.S.C. § 3604(f)(4).

<sup>22</sup> See H.R. Rep. No. 100-711, at 27 n.7.

<sup>23</sup> Guidelines, 56 Fed. Reg. at 9478.

<sup>24</sup> Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, Dep’t of Hous. & Urban Dev., 59 Fed. Reg. 3362-3363, 3362 (June 28, 1994).

<sup>25</sup> *United States v. Taigen & Sons, Inc.*, 303 F. Supp.2d 1129, 1151 (D. Idaho 2003).

<sup>26</sup> See *Fair Hous. Council, Inc. v. Vill. Of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 482 (6th Cir. 2006).

court and to retrofit their buildings to a non-mandatory standard that does not universally address all types of disabilities. However, DOJ has repeatedly used this policy – the *Nelson Order* – in court when bringing suit and to force settlement. DOJ, under HUD recommendation, is using a guidance policy as a *de facto* minimum, despite the government’s specific acknowledgement that it is not a minimum, and expecting to be given *Chevron*<sup>27</sup> deference for its interpretation of the FHA. Moreover, use of these FHA Accessibility Guidelines as a baseline compliance assessment tool is without statutory authority and must be withdrawn. The results in court have been mixed, highlighting another issue with DOJ and HUD’s continued application of the policy.

### III. The *Nelson Order* has Created Different Results Among the Federal Courts

The federal courts are split in the weight they grant the *Nelson Order* in cases where DOJ has brought suit; some courts believe it carries the rule of law and is due *Chevron* deference, others that it does not. This confusion is harmful for NAHB members, who, in some jurisdictions, may find themselves automatically responsible for proving in a court of law that they are in compliance with one of the accessibility standards – a task which often comes at high personal expense. The dissonant rulings in *United States v. Noble Homes*<sup>28</sup> and *United States v. Mid-America Apartment Communities*<sup>29</sup> highlight the confusion the *Nelson Order* has caused in this area of the law.

#### a. *Noble Homes*

In 2013 the United States filed suit against Noble Homes, Inc. for alleged violations of the FHA Accessibility Guidelines. There was a motion for summary judgement on several issues, including the issue of liability under the FHA.

Defendant Noble Homes contended the plaintiffs had mischaracterized what is required by the FHA. Noble Homes pointed out that the Guidelines themselves make clear that they are not mandatory, but rather constitute one of a number of recognized safe harbors.<sup>30</sup> It was further argued that the government was incorrect to assume that the *Nelson Order* should be given *Chevron* deference by an Article III court. To be given *Chevron* deference, HUD should first have been acting in a capacity intended by Congress to carry the force of law. Noble Homes further claimed the FHA was not ambiguous, and clearly did not intend to limit compliance to any one of the safe harbors or to the FHA Accessibility Guidelines. Further, even if the FHA was found to be ambiguous in this regard, deference should only be given if the agency’s action is reasonable. Noble Homes contended the *Nelson Order* is not reasonable because it is inconsistent with the authority granted in the statute.<sup>31</sup> Finally, Noble Homes pointed out that formal administrative adjudication does not elevate the deference given to the *Nelson Order* because HUD disregarded the statute and gave itself authority that Congress expressly did not.<sup>32</sup>

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<sup>27</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984).

<sup>28</sup> *Noble Homes*, 173 F.Supp.3d at 573.

<sup>29</sup> *Mid-America*, 2017 WL 1154944, at \*1.

<sup>30</sup> See Def.’s Resp. in Opp’n to Pl.’s Mot. for Partial Summ. J. at 8 (Dec. 19, 2014).

<sup>31</sup> *Id.* (citing *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 232 n.4 (1994) (“Administrative agencies are ‘bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed for the pursuit of those purposes.’”); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 843-45 (1984)).

<sup>32</sup> *Id.* (citing *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Stevens, J. concurring) (noting that formal procedures are “not a sufficient condition [for *Chevron* deference] because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of

The court did not agree with *Noble Homes*.<sup>33</sup> It ruled that because the burden shifting of the *Nelson Order* was upheld in *HUD v. Nelson*,<sup>34</sup> the order was entitled to *Chevron* deference. The court, while acknowledging that HUD did not have the authority to set any accessibility standard as a “minimum standard,” believed the *Nelson Order* was an appropriate policy.<sup>35</sup> It did not find HUD’s interpretation of the FHA to be arbitrary and capricious, and so deferred to the agency’s “expertise” and granted the government’s motion for summary judgement.<sup>36</sup>

*b. Mid-America*

The *Mid-America* case<sup>37</sup> presents a nearly identical situation as *Noble Homes*, but the court in that case reached the opposite conclusion. The government brought action against Mid-America Apartment Communities for alleged violations of the FHA Accessibility Guidelines. The D.C. Circuit issued a ruling on cross-motions to clarify critical legal issues before trial, among them the issue of the burden of proof outlined in the *Nelson Order*.

In its ruling, the court found that the *Nelson Order* was *not* due *Chevron* deference. Using many of the same points made by the defense in *Noble Homes*, the court wrote that by using the Guidelines as a minimum, and not the safe harbor they were intended to be, the government “is here seeking to turn this shield into a sword.”<sup>38</sup> Further, *Mid-America* did not involve federal court review of an internal HUD proceeding before an ALJ. Like *Noble Homes*, it was a civil action originating in federal court. The court ruled therefore that as an internal procedure “the *Nelson Order* does not purport to bind federal courts in any way,” and is only due *Skidmore* persuasive authority.<sup>39</sup>

The court went on to deny the government’s request for a legal ruling that the *Nelson Order*’s burden-shifting framework should be applied. Citing expert testimony arguing that some elements of the FHA Accessibility Guidelines are more stringent than some of the other accepted safe harbors, the *Mid-America* court was not persuaded the government should be allowed a *prima facie* case in federal court.<sup>40</sup>

The *Noble Homes* and *Mid-America* cases represent just two recent examples of the disparate treatment by federal courts with respect to application of the *Nelson Order* in FHA enforcement actions. These cases should serve to illustrate the flaws inherent with a policy that disregards both Congress, and the agency’s own recognition that it would be “inappropriate on the part of [HUD] to constrain designers by presenting the FHA Accessibility Guidelines as minimum requirements.”<sup>41</sup>

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the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.”)).

<sup>33</sup> See *Noble Homes*, 173 F.Supp.3d at 573.

<sup>34</sup> 320 Fed.Appx. 635 (9th Cir. 2009).

<sup>35</sup> See *Noble Homes*, 173 F.Supp.3d at 574.

<sup>36</sup> *Id.* at 575.

<sup>37</sup> *Mid-America*, 2017 WL 1154944, at \*1.

<sup>38</sup> *Mid-America*, 2017 WL 1154944, at \*2.

<sup>39</sup> *Id.* at 3 (referencing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

<sup>40</sup> *Id.* at 4.

<sup>41</sup> FHA Accessibility Guidelines, 56 Fed. Reg. at 9479.

#### **IV. The *Nelson Order* Meets the Harmful Regulation Criteria Identified by Executive Order 13777**

DOJ's Regulatory Reform Task Force is seeking comments from the public on the "various kinds of actions taken by the Department's components that the public perceives to be regulatory in nature."<sup>42</sup> The task force is specifically charged with identifying regulatory actions that either: (1) eliminate jobs; (2) are outdated, unnecessary, or ineffective; (3) impose costs that exceed benefits; (4) are inconsistent with the Information Quality Act; or (5) derive from or implement past Executive Orders or other Presidential directives that have subsequently been rescinded or substantially modified.<sup>43</sup>

Although the *Nelson Order* has not passed through notice-and-comment rulemaking,<sup>44</sup> it clearly is an agency action perceived to be regulatory in nature. This is unquestionably true when it is only an internal HUD policy, yet used by HUD and DOJ to set minimum compliance requirements under the FHA Accessibility Guidelines. Moreover, it additionally serves a regulatory purpose for DOJ, for whom this comment is intended. DOJ, tasked with bringing FHA accessibility civil suits based on HUD recommendation, has repeatedly used the *Nelson Order* as a way to establish a *prima facie* case of noncompliance with the FHA in enforcement proceedings.<sup>45</sup> As a result, legal consequences flow from DOJ's application of the *Nelson Order*, and those consequences are neither predictable, nor are they authorized by the FHA itself. When, as is the case with the *Nelson Order*, the agency treats its policy like a substantive rule, it should be subject to legal challenge.<sup>46</sup> Because neither HUD nor DOJ have been delegated the authority to issue regulations requiring just one method of compliance with the FHA, their use of the *Nelson Order* is inappropriate.

The *Nelson Order* cannot be supported by the HUD Secretary's FHA authority, and therefore, the HUD order should not be given *Chevron* deference in cases brought by DOJ. Beyond that, however, the inherent unfairness of this policy should also be emphasized. Because DOJ believes it has the authority to bring civil cases against builders it suspects may not be in compliance with the FHA Accessibility Guidelines, cases can and have been initiated against builders who have constructed accessible facilities – accessible in the spirit of the FHA, and even accessible according to the criteria set by the nine other "safe harbors." It is then up to the builder to prove in court their buildings are accessible. This is often a costly endeavor, which leads to a large number of settlements outside of court for parties that cannot afford to counter DOJ's excessive discovery requests (which are all one-sided) and battle with the government's multiple experts.

The *Nelson Order* imposes costs that exceed not only the agency's statutory authority, but exceed any expected benefits. Again, NAHB members have no issue with building accessible multifamily homes. The issue arises when builders who have constructed accessible buildings are brought to court for not being strictly in compliance with *just one* of the ten "safe harbors," and find themselves burdened with proving themselves innocent of wrongdoing.

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<sup>42</sup> Enforcing the Regulatory Reform Agenda; Department of Justice Task Force on Regulatory Reform Under E.O. 13777, 82 Fed. Reg. 29248 (June 28, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

<sup>45</sup> See *Mid-America*, 2017 WL 1154944, at 5; *Noble Homes*, 173 F.Supp.3d at 578.

<sup>46</sup> See, e.g., *Hudson v. Federal Aviation Admin.*, 192 F.3d 1031, 1034 (D.C. Cir. 1999). See also, *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) (stating "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties ... is a legislative rule," while "[a]n agency action that merely explains how the agency will enforce a statute or regulation ... is a general statement of policy").



NAHB can find no clear benefit for the disabled community when HUD and DOJ, to paraphrase the court in *Mid-America*, “turn this shield into a sword”<sup>47</sup> and bring action against compliant builders. However, the costs of legal representation and experts can be extremely high for builders, who are forced to defend construction and design decisions that may have taken place decades ago. The FHA’s purpose is not to harass builders and developers for failing to build to only one standard, but rather to help those who face the risk of housing discrimination. The government is capable of both achieving that purpose and providing compliance guidance assistance and enforcement in a manner that treats all parties in a consistent and lawful manner.

**V. Use of the *Nelson Order* as the Sole Method for Assessing Compliance with the Fair Housing Act Disregards the Remaining Nine Safe Harbors and Should be Withdrawn**

The *Nelson Order*, which erroneously applies a *prima facie* case against any alleged violation of the FHA Accessibility Guidelines, and shifts the burden of proving FHA compliance to the builder, should be withdrawn by HUD and DOJ. Nothing in the statute authorizes HUD or DOJ to use the *Nelson Order* to create a *de facto* minimum standard by which all builders must comply or risk sanctions and civil liability. Moreover, its application during litigation ignores the other DOJ-HUD recognized safe harbors available when designing and construction buildings in compliance with the FHA.

Additionally, the *Nelson Order* has caused conflicting results in federal courts both to its application, and with respect to how much judicial deference should be given to an internal HUD policy. These conflicting results cannot be appropriately reconciled, particularly in light of very similar facts. These conflicts highlight the problems with the order’s application.

Finally, the *Nelson Order* falls squarely within the criteria of a harmful and costly regulation identified by President Trump’s Executive Order 13777. The home building community is a core element of the American economy, and should no longer live under the specter of the *Nelson Order*.

NAHB strongly urges DOJ and HUD to reconsider how the *Nelson Order* is used in litigation, and withdraw its application as the sole measure of assessing a builder’s compliance with the FHA.

NAHB appreciates the opportunity to submit these comments for review and is available to answer any questions or provide additional information. Please contact Felicia Watson via telephone at 202.266.8229 or via email at [fwatson@nahb.org](mailto:fwatson@nahb.org), or Jeffrey Augello via telephone at 202.266.8490 or email at [jaugello@nahb.org](mailto:jaugello@nahb.org).

Sincerely,

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<sup>47</sup> *Mid-America*, 2017 WL 1154944, at \*2.