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Office of General Counsel, Regulations Division
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, D.C. 20410-0001

Re: Docket No. FR-6111-A-01; Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

[Submitted via Regulations.gov](https://www.regulations.gov)

Dear Assistant Secretary Farias:

We write to you on behalf of The Fair Housing Justice Center (FHJC) expressing our strong opposition to any amendment to HUD's Fair Housing Act disparate impact rule (Rule). We submit this letter in response to HUD's June 20, 2018, Federal Register Notice (Notice), "Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," which seeks public comment on whether HUD's regulation implementing the Fair Housing Act disparate impact standard should be amended in light the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* or in light of industry comments from May 2017 asserting that the Rule created uncertainty for commercial decision making and public policymaking. The Notice also states that HUD is seeking public comments on possible amendment to the Rule in light of a U.S. Department of Treasury October 2017 report asking HUD to consider whether the Rule, as applied, is consistent with McCarran-Ferguson and existing state law, whether it would have a disruptive effect on the availability of homeowners insurance, and whether it is reconcilable with actuarially sound principles.

FHJC, a nonprofit civil rights organization, is dedicated to eliminating housing discrimination, promoting policies that foster open, accessible, and inclusive communities, and strengthening enforcement of fair housing laws. The FHJC serves all five boroughs of New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester, over 3% of the United States' population.

As an initial, general comment, the HUD Rule simply reiterates the same standard that has existed for forty years. It did not create a new standard for the housing industry to follow or housing consumers to apply. The courts have applied this standard since the mid-1970s, when they started applying to fair housing cases the Title VII disparate impact standard approved by the Supreme Court in *Griggs v. Duke Power Co.*¹ Before HUD issued its final rule Rule in 2013, the same theory had been used in litigation to successfully challenge or defend a myriad of practices including zoning practices, residency preferences, tenant screening criteria, and mortgage underwriting practices.² In our experience, the Rule has been clearly and appropriately applied, serving as the tool used to open up a number of housing opportunities including middle-income housing in predominately white suburbs and private rentals for people using housing subsidies.

1. Does the Disparate Impact Rule’s burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

Yes. The burden of proof standard for each step is clearly assigned in the text of the Rule; the Rule nowhere mentions or applies a burden of persuasion. 24 CFR 100.500(c)(1)-(3) explicitly states that the plaintiff “has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”³ If the plaintiff meets that initial burden, the burden then shifts to the defendant, who will then have “the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent.”⁴ At that point “the plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁵ The Rule, as currently written, lays out clearly what each party must undertake. In fact, the Supreme Court has given its express approval to disparate

¹ Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUM. L. REV. SIDEBAR 106, 107, 110-11 (2015). <http://columbiaalawreview.org/content/fair-housing-litigation-after-inclusive-communities-whats-new-and-whats-not/>.

² *Id.*

³ Discriminatory Conduct Under the Fair Housing Act, 24 CFR § 100.500(c) (2013) states in its entirety:

- (1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.
- (2) Once the charging party 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 necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.
- (3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

⁴ *Id.* at § 100.500(c)(2).

⁵ *Id.* at § 100.500(c)(3).

impact under the FHA and did not point out any part of HUD's burden shifting framework that needed to be amended.⁶

2. Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability?

The answer to this question, much like the one before it, is simply yes. This question uses the language of *Inclusive Communities*, which the Court uses to address a generic disparate impact claim. The specific burden-shifting standard set forth in HUD's rule achieves the same goals as the other civil rights disparate impact standards, but HUD's rule is tailored to the housing context. As the Court wrote in *Inclusive Communities* "the FHA aims to ensure that [governmental] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."⁷ The second and third steps of the Rule's framework serve to allow a respondent to show that a challenged practice is legitimate, but it can only survive if there is not a practice with a less discriminatory effect. As such, the Supreme Court states that disparate impact theory must "give housing authorities and private developers leeway to state and explain the valid interest served by their policies,"⁸ which is accomplished in the second step of HUD's framework.

3. Does the Disparate Impact Rule's definition of "discriminatory effect" in 24 CFR 100.500(a) in conjunction with the burden of proof for stating a prima facie case in 24 CFR 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

Much of the answer to this question reflects the answers to Questions (1) and (2) above. The current definition of discriminatory effect as "predictably results in a disparate impact on a group of persons or creates, increases or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national"⁹ tracks longstanding caselaw. This was supported by *Inclusive Communities*, which pointed out that disparate impact liability cannot result from bare statistical disparities, but must target "artificial, arbitrary, and unnecessary barriers."¹⁰ The Rule is fair and balanced, as exhibited by the burden-shifting approach discussed above. It allows for

⁶ *Property Casualty Insurers Assc. Of America v. Carson*, No. 1:13-CV-08564 at *20 (N.D. Ill. June 20, 2017); see also *Inclusive Cmty's. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-054-D, 2015 WL 5916220, at *1, *3 (N.D. Tex. Oct. 8, 2015) (the "Court did not disturb the Fifth Circuit's adoption of the HUD burden-shifting regimen").

⁷ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

⁸ *Id.*

⁹ 24 CFR § 100.500(a).

¹⁰ *Inclusive Cmty's. Project, Inc.*, 135 S. Ct. at 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

defendants to protect sound policy goals, while assuring that discriminatory practices cannot hide behind pretext.

4. Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under *Inclusive Communities* and other Supreme Court rulings?

The causality standard already exists in the Rule: the “plaintiff...has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”¹¹ As such, there is no need to amend it. Justice Kennedy wrote in *Inclusive Communities*:

A disparate impact claim relying on statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact...¹²

From this it can be easily deduced that the legal challenges must focus on the policies causing disparities rather than on the disparities themselves. We’ve seen this same standard applied in disparate impact litigation our organization has brought. In our case *FHJC et al. v. Edgewater Park et al.*, the respondent co-op lost its summary judgement motion alleging there was no disparate impact claim. In evaluating our claim, the court applied the rule that “a plaintiff must show that the challenged facially neutral policy, actually results in discrimination.”¹³ The courts have established that challenges based solely on racial imbalances will fail; instead plaintiffs must identify a neutral policy that gave rise to this disparity. As the Court is just mirroring what the Rule has made this clear, there is no reason to amend the Disparate Impact Rule to clarify this standard.

5. Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant’s discretion or another federal state requires adherence to state statutes)?

The Fair Housing Act by statute contains certain defense to liability. There is no need or even ability for HUD to exempt any class of defendants, or any class of activities, by regulatory fiat. Fair Housing Act claims are highly fact specific. If in a certain case a

¹¹ 24 CFR § 100.500(c)(1).

¹² *Tex. Dep’t of Hous. & Cmty. Affairs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015), citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989).

¹³ *Fair Hous. Just. Center v. Edgewater Park Owner’s Cooperative*, No. 10-CV-912 at *19 (S.D.N.Y. Mar. 8, 2012), citing *Tsombanidis v. West-Haven Fire Dep’t.*, 352 F.3d 565, 574-75 (2d Cir. 2003).

defendant is not liable because, for example, it did not have the power to act, or the challenged conduct is not covered by the Act, it can assert those raise as defense to a fair housing claim.

With respect to the Department of Treasury's request that HUD consider, in essence, whether homeowners insurance is a covered activity, we point out that for more than twenty years, the Fair Housing Act has applied to homeowner's insurance companies, and there is no need to alter that now. In the 2016 Rule HUD acknowledged these concerns and in clarifying concerns from the insurance industry, it re-emphasized its position that "case-by-case adjudication [in accordance with the 2013 final rule] is preferable to creating . . . exemptions or safe harbors"¹⁴ in light of the FHA's "broad remedial purpose" and HUD's own statutory mandate to "affirmatively further fair housing in all of its housing-related programs and activities."¹⁵ Furthermore, HUD acknowledged that "The case-by-case approach appropriately balances [insurance industry commenters'] concerns against HUD's obligation to give maximum force to the [Fair Housing] Act by taking into account the diversity of potential discriminatory effects claims, as well as the variety of insurer business practices and differing insurance laws of the states..."¹⁶ To add a safe harbor now would detract from the core purpose of the Fair Housing Act. In fact this is a power left to Congress. A federal agency on its own cannot create a new exception to or safe harbor from a civil rights law.

6. Are there revisions to the Disparate Impact Rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful?

The Disparate Impact Rule and Inclusive Communities simply clarify the same standard of liability that has existed in fair housing litigation for over forty years. In this time, the housing industry has not been plagued by unnecessary or arbitrary lawsuits. This basis of liability has allowed thousands of housing units to become open to all people and eliminated discriminatory barriers from home ownership. We live in a nation that continues to be plagued by disparities based upon race, sex, national origin, and disability. Now, more than ever, it is important to have a robust legal framework for combating these inequities. We would urge HUD to spend its resources not on amending a well-written Rule that sets out a clear standard that has been in use for decades, but rather to focus these resources on vigorous enforcement of the Fair Housing Act.

¹⁴ Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 193, 69017 (Oct. 5, 2016).

¹⁵ Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. at 69013.

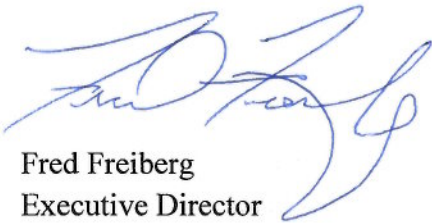
¹⁶ *Id.*

Questions

1. Many of the questions in this notice speak to some degree of hesitancy around the disparate impact standard and concerns that it is resulting in unmeritorious claims. What is the data to support these implications? In order to engage in rulemaking, administrative agencies are required to put forth some showing of evidence in support. The cases to date have shown that disparate impact is an important tool in dismantling segregation. If evidence exists to the contrary, we would urge HUD to make this publicly available.
2. If HUD chooses to create safe harbors or exemptions to disparate impact liability under the Fair Housing Act, how would the agency square this with existing case law?

Thank you for your consideration of these comments.

Sincerely,



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