

August 20, 2018

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, SW, Room 10276
Washington, DC 20410-0500

RE: Docket Number FR-6111-A-01, Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom It May Concern:

The Local Initiatives Support Corporation (LISC), Stewards of Affordable Housing for the Future (SAHF), National Housing Trust (NHT), and Enterprise Community Partners are pleased to provide comments on possible amendments to the Department of Housing and Urban Development's (HUD) 2013 final rule implementing the Fair Housing Act's (Act) disparate impact standard (2013 final rule). The Act's disparate impact standards provide important protections for policies and practices which have a discriminatory impact, regardless if there was intent to discriminate.

Established in 1979, LISC is a national nonprofit housing and community development organization that is dedicated to helping community residents transform distressed neighborhoods into healthy and sustainable communities of choice and opportunity. LISC mobilizes corporate, government and philanthropic support to provide local community development organizations with loans, grants and equity investments; as well as technical and management assistance. Our organization has a nationwide footprint, with local offices in 31 cities and partnerships with 86 different organizations serving rural communities throughout the country. LISC invests approximately \$1.4 billion each year in these communities and our work covers a wide range of activities, including housing, economic development, building family wealth and incomes, education, and creating healthy communities.

SAHF is a collaborative of thirteen multistate nonprofit affordable housing providers who are committed to sustainable ownership and continued affordability of multifamily rental properties that provide a platform for residents to improve their lives. Together, SAHF members own and operate housing in 49 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands—providing rental homes to more than 138,000 low-income families, seniors and disabled households across the country.

The National Housing Trust has been dedicated to preserving and improving affordable rental housing for over 25 years. NHT engages in policy work in all 50 states and owns over 3,500 units of multifamily housing across 10 states and the District of Columbia. Since its inception, NHT has preserved and improved more than 36,000 affordable homes through real estate development, lending, and technical assistance, leveraging more than \$1.2 billion in investment

for affordable housing. Most properties that NHT has preserved have HUD subsidized mortgages or project-based rental assistance. The majority of the residents we assist are persons of color and quite often our work involves working areas of concentrated poverty. In all cases, we are working with residents and tenant leaders to help them stay in their homes if that is their choice.

Enterprise Community Partners is a leading provider of the development capital and expertise it takes to create decent, affordable homes and rebuild communities. Since 1982, we have raised and invested \$36 billion in equity, grants and loans to help build or preserve nearly 529,000 affordable homes in diverse, thriving communities. We bring together public and private resources to create strong neighborhoods of opportunity for low- and moderate-income people, and we believe opportunity begins when people have a safe, healthy and affordable place to call home.

With the above as context, we offer the following comments with respect to the proposed regulatory amendments.

General Comments

This year marks the 50th anniversary of the passage of the Fair Housing Act of 1968. The Act is responsible for the elimination of many discriminatory housing practices which historically impeded housing and economic opportunities for racial, ethnic, and religious minorities, women, and others. While the Act does not prevent all discriminatory practices, it provides important legal protections to ensure that all Americans have equal access to housing.

The Act has long been understood to provide protections from direct discrimination in the housing market and discrimination which results from a policy or practice with a disparate impact. In July 2015, the Supreme Court upheld disparate impact liability in *Texas Department of Housing and Community Affairs v. Inclusive Communities Projects* (Inclusive Communities). In addition, the Court declared the limitations of disparate impact liability, including the need to establish direct connections to the discriminatory practice from a given policy and the need to protect defendants from frivolous or abusive claims.

Our organizations were pleased that Inclusive Communities upheld disparate impact liability while continuing to target its application. As affordable housing advocates and practitioners, our organizations understand the importance of the Fair Housing Act and support its role in providing protections from both direct discrimination and disparate impacts from policies and objectives that could be achieved in a less discriminatory manner. We also understand the need for a balanced approach so the development of affordable housing is not subject to unnecessary delays and higher overall costs. The Supreme Court's Inclusive Communities decision recognized the need for an evenhanded and targeted application of disparate impact when the majority opinion recognized the "important and appropriate means of ensuring that disparate impact liability is properly limited." Disparate impact liability, as the Court notes "has

always been properly limited in key respects...” which helps mitigate unnecessary costs and uncertainty.

We encourage HUD to keep in mind the Fair Housing Act’s overall purpose, the Department’s responsibility in administering it, and the Court’s reaffirmation of evenhanded disparate impact application as the Department works to refine the 2013 final rule in light of the Supreme Court’s ruling in *Inclusive Communities*. Our responses to questions posed in the advanced notice of proposed rulemaking follow.

Specific Comments

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?*

HUD’s 2013 final rule formally established the three-part burden-shifting test for determining when a practice with a discriminatory effect violates the Fair Housing Act. The three-part rule states:

1. The plaintiff bears the burden of showing a challenged practice caused or will predictably cause disproportionate harm to members of a group protected by the Fair Housing Act.
2. If the plaintiff proves a prima facie case, the burden shifts to the defendant to prove that challenged practice is justified by a legitimate, non-discriminatory purpose.
3. If the defendant satisfies this burden, the plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has less of a discriminatory effect.

The 2013 final rule emphasizes that HUD did not establish new discriminatory effects standards by issuing the final rule. Instead, the Department clarified a regulation following law implemented by the courts and HUD. The 2013 final rule was issued because there had been some minor variation in the application of the discriminatory effects standard.

The burden of proof standard for each step in the three-part burden-shifting test are well established through administrative law and HUD policy and practice. The burdens are appropriately assigned and consistent with the *Inclusive Communities* decision in that they require plaintiffs to show causation (actual or predictable) between the challenged practice and the discriminatory impact. This requirement would preclude claims based solely on statistical evidence as cautioned by the *Inclusive Communities* decision. Further, the second and third step acknowledge the discretion and balanced approach that must be permitted and provide protection for that discretion by allowing the defendant/respondent to identify the substantial legitimate interest served by the policy and then shifting the burden back to the plaintiff/claimant. The burden-shifting tests provide a reasonable compliance framework for entities to comply with to ensure practices don’t have discriminatory impacts.

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?*

As noted above, we believe the three-part burden shifting test is well established and appropriate for establishing a disparate impact liability framework.

3. *Does the Disparate Impacts 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?*

The 2013 final rule's definition of "discriminatory effect" and the burden of proof for stating a prima facie case strike a proper balance in encouraging legitimate action. The "discriminatory effect" definition is appropriately case specific. Due to the wide variety of possible practices that may be subject to challenge, federal jurisprudence, and the 2013 final rule appropriately reject any single test for evaluating statistical evidence in housing cases.

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 2013 final rule does not need to be amended to clarify the causality standard since it already requires the charging party to prove that the challenged practice "caused or predictably will cause a discriminatory effect." This causation requirement is consistent with the majority opinion in Inclusive Communities that "{a} plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." While the Disparate Impact Rule already includes a causality requirement, it may be helpful to note in sub-regulatory guidance that this standard may not be met with statistical evidence alone.

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 statute requires adherence to state statutes)?*

The 2013 final rule and the 2016 Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance (2016 supplement) provide a strong rationale for why there is no need to create safe harbors, including for the insurance industry which is regulated by states. HUD stated, and we continue to believe, that reviewing concerns on a case-by-case basis is the most appropriate policy and that the burden shifting framework accommodates legitimate justification defenses. HUD's rationale was that creating safe harbors would work against their responsibility in administering the Fair Housing Act and it would be unworkable to define all exemptions. As noted in the 2016 supplement, "to create exemptions or safe harbors would undermine the efficacy of the Act and run counter to the Act's purpose and HUD's statutory responsibilities." HUD argued in the 2016 supplement that creating exemptions or safe harbors

“...would allow to go uncorrected at least some discriminatory insurance practices that can be subject to disparate impact challenges consistent with McCarran-Ferguson.” HUD would be in violation of its statutory responsibility to enforce the Fair Housing Act, including disparate impact liability, if it created exemptions.

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?

We don't believe there is any need for substantial revisions to the 2013 final rule. Helpful minor clarifications resulting from the Inclusive Communities ruling can be provided in sub-regulatory guidance. The rule does not overly burden regulated entities and in fact, provides a predictable and known framework for understanding disparate impact liability. We encourage HUD to lessen any burden or uncertainty by providing the necessary fair housing technical assistance resources to the public.

Thank you for the opportunity comment on this Advanced Notice of Proposed Rulemaking. We appreciate HUD's attention to its statutory obligation to enforce the Fair Housing Act, including the disparate impact standard. As affordable housing advocates and practitioners, we appreciate the need for clear regulatory guidance that safeguards against discrimination in all forms, but also respects the need for discretion in carrying out substantial, legitimate policy interests. We believe that the Disparate Impact Rule provides a clear framework for evaluating policies in the wide variety of contexts to which the Fair Housing Act applies. To the extent that HUD proceeds with revisions to the Disparate Impact Rule, we encourage it to limit revisions to general clarifications applicable to all claims and to avoid an overly prescriptive rule that could inadvertently impede the discretion needed by housing providers and other actors to advance legitimate interests or hinder the enforcement of the discriminatory effect standard.

We would be happy to provide additional information on our comments. Please contact Mark Kudlowitz (mkudlowitz@lisc.org), Ellen Lurie Hoffman (eluriehoffman@nhtinc.org), Andrea Ponsor (aponsor@sahfnet.org), or Marion McFadden (mmcfadden@enterprisecommunity.org) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt d. Josephs", with a long horizontal flourish extending to the right.

Matt Josephs

Senior Vice President for Policy

Local Initiatives Support Corporation



Ellen Lurie Hoffman

Federal Policy Director

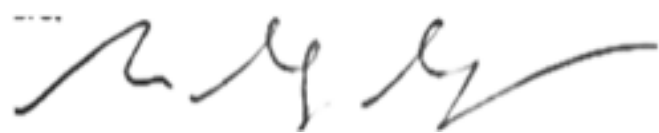
National Housing Trust



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