



HOUSING
PARTNERSHIP
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LISC



October 18, 2019

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

RE: Docket No. FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom It May Concern:

Enterprise Community Partners (Enterprise), Housing Partnership Network (HPN), Local Initiatives Support Corporation (LISC), National Housing Trust (NHT), and Stewards of Affordable Housing for the Future (SAHF) are pleased to provide comments on the proposed rule amending HUD's interpretation of the Fair Housing Act's (Act) disparate impact standard.

Enterprise is a proven and powerful nonprofit that improves communities and people's lives by making well-designed homes affordable. We bring together the nationwide know-how, partners, policy leadership and investments to multiply the impact of local affordable housing development. Over more than 35 years, Enterprise has created 585,000 homes, invested more than \$43 billion and touched millions of lives.

Housing Partnership Network is a collective of nearly 100 top-performing, high-capacity nonprofit housing developers, owners and financial institutions with operations in all 50 states. Collectively, our members have developed and preserved 417,000 homes, and served 11.1 million low-income people through housing, community facilities and services. HPN's mission is to help millions of people gain access to affordable homes and thriving communities that offer economic opportunity and an enhanced quality of life.

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 35 cities and partnerships with 89 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.

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 4,200 units of multifamily housing across 13 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.

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 140,000 low-income families, seniors and disabled households across the country.

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

I) The Proposed Rule contradicts the Fair Housing Act, is unnecessary, and weakens HUD’s ability to uphold the law.

The Fair Housing Act prohibits intentional discriminatory acts and facially neutral policies that limit housing opportunities based on race, color, national origin, religion, sex, the presence of families with children, and people with disabilities. 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 view HUD’s current disparate impact Rule as a necessary tool in the ongoing effort to achieve open housing markets, free of discrimination, and to eliminate all forms of housing discrimination and illegal segregation.

HUD’s proposed revisions contradict the central purpose of the Fair Housing Act and would dramatically weaken HUD’s own ability to uphold it. Our organizations submitted comments in the prior comment period where we provided feedback on the risks of making substantial changes to an effective and established rule¹.

The current disparate impact rule has proven practical, effective, and consistent with the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507. 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 rule did not establish new discriminatory effect standards and instead clarified a regulation following law implemented by the courts and HUD. The 2013 final rule was issued

¹ https://www.lisc.org/media/filer_public/1a/85/1a855f68-3c1a-4c71-b905-a5fc4ba37c26/082018_policy_comments_sahf_ecp_nht_disparate_impact.pdf

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 to identify the substantial legitimate interest served by the policy and then shifting the burden back to the plaintiff. The burden-shifting tests provide a reasonable compliance framework for entities to comply with to ensure practices don't have discriminatory impacts. These standards are well accepted and businesses have been able to operate profitably under this framework for years.

It's important to note that there is no reason for HUD to update the disparate impact standard since Inclusive Communities only decided that disparate impact claims are cognizable under the Fair Housing Act. The court declined to accept the question on which standards and burdens of proof should apply to such cases. HUD's 2013 final rule was referenced multiple times in the court's opinion and as Justice Kennedy stated, disparate impact liability has been in effect for decades and "has not given rise to...dire consequences."²

HUD asserts that it is updating the disparate impact standard; however, in actuality HUD's proposal would make drastic changes to fundamentally weaken this long standing enforcement tool and would allow insurance companies, financial institutions, and other businesses to potentially engage in discriminatory practices with impunity. HUD's proposal would shift to a burdensome and confusing balancing test with nine subparts that puts an insurmountably high burden on individuals seeking to enforce the Fair Housing Act. The Proposed Rule is strongly biased against plaintiffs and would make it nearly impossible to establish disparate impact liability under the Fair Housing Act. Ultimately, the Proposed Rule contains a host of changes that, in practice, amount to insurmountable obstacles to proving what should be clear claims of housing discrimination, resulting in an inoperable disparate impact standard of liability. Accordingly, the Proposed Rule is directly contradictory to the Fair Housing Act and its basic purposes and HUD's responsibility in fair housing enforcement.

II) HUD's proposed rule would favor businesses, harm vulnerable populations and communities, and is not congruent with Congressional intent.

HUD's proposed changes steer companies and housing providers away from the practice of seeking out less discriminatory alternatives to harmful policies and practices. We are troubled that the proposed rule would create new loopholes and disincentive businesses from pursuing practices that do not have a discriminatory effect.

² Urban Institute. September 2019. *HUD's Proposal to Revise the Disparate Impact Standard Will Impede Efforts to Close the Homeownership Gap*.

For instance:

- A rule or policy that produces a profit will be immune from challenge for its discriminatory impact under the Proposed Rule unless there is an alternative approach that is nearly as profitable, even if the business could use alternate approaches that are less discriminatory while still being significantly profitable.
- A business practice that relies on statistics or algorithms and has some predictive value will almost always be immune from liability, such that credit scoring, pricing, marketing, or underwriting models would be exempt from the Fair Housing Act, even if it is clear that they result in the discriminatory denial of access to home loans.
- Businesses will no longer be incentivized to collect important data that can reveal discrimination. This will mean that victims of discrimination will be unable to identify whether discriminatory activity is occurring and lack the ability to challenge it if they do detect discrimination.

In practice, HUD is proposing to create Fair Housing Act safe harbors even though Congress did not provide the Department this authority. Congress explicitly provided exemptions to the Act although did not provide HUD authority to do so on its own. HUD's proposal on the use of algorithms would provide a safe harbor for lenders, insurance companies, fintech companies, and other entities, which is not congruent with Congressional intent. Algorithmic models used for credit scoring, pricing, marketing, and automated underwriting systems can have blatantly discriminatory effects which may difficult to attribute to any person or organization. HUD's proposed rule would effectively inoculate such covert discrimination.

As organizations that invest in, develop, own, and operate housing and that represent many stakeholders in the industry, we find these changes to be unnecessary and detrimental to the communities we serve. As we have noted, the current rule is standard industry practice and consistent with the effects test, only prohibits those practices not required for any entity's sound operation. The current rule sufficiently balances the tension between ensuring the ability to bring disparate impact cases while avoiding unnecessary litigation and practices which would hinder business operations.

III) The current disparate impact rule is critical to ensuring housing is free of systemic discrimination.

The existing disparate impact rule is critical to ensuring material compliance with the Fair Housing Act and providing victims of widespread discrimination with rightful recourse. Without an effective disparate impact tool, many discriminatory practices will go unchallenged and uncorrected, weakening fair housing protections and widening our nation's racial and social inequities.

Through our work, we have witnessed how policies and practices may be unintentionally discriminatory, and but for the ability to fairly pursue disparate impact claims, exacerbate fair housing issues. For example:

- Exclusionary zoning practices that limit affordable housing choice for people of color;

- Housing provider policies that prevent disabled people from renting an apartment because they do not have full-time jobs, even though they have adequate income to pay rent;
- A landlord's use of eligibility criteria or house rules that disproportionately exclude families with children, people of color or other protected classes.
- A lender's use of processes for determining financial eligibility that disproportionately exclude people of color; and
- A jurisdiction's use of residency preferences that exclude people of color.

The current disparate impact rule is critical to addressing systemic discriminatory policies and practices that limit housing opportunities and choice. Accordingly, HUD's existing rule should not be revised. Instead, HUD must focus on rigorous enforcement of the current rule to remove unnecessary barriers to housing choice throughout our housing markets. Many of our organizations act as intermediaries, dedicating resources and expertise toward the most efficient, effective, and equitable implementation and execution of HUD programs and policies. We strongly urge HUD to focus its limited resources on strengthening existing programs and policies, including upholding the Fair Housing Act, rather than rewriting well established and accepted regulations.

Conclusion

Rather than strengthening HUD's ability to uphold the Fair Housing Act, HUD's Proposed Rule operates to eliminate disparate impact liability, directly contradicting HUD's own mission, the Fair Housing Act, decades of legal precedent and the Supreme Court's recent decision in *Inclusive Communities*. We urge HUD to carefully consider how the Proposed Rule would further harm and restrict the rights of people suffering from housing or lending discrimination. It is not in the interest of HUD or the communities it serves, to advance the Proposed Rule. ***For these reasons, Enterprise, HPN, LISC, NHT, and SAHF strongly urge HUD to withdraw the proposed disparate impact rule.***

We would be happy to provide additional information on our comments. Please contact Sarah Brundage (sbrundage@enterprisecommunity.org), Shannon Ross (ross@housingpartnership.net), Mark Kudlowitz (mkudlowitz@lisc.org), Ellen Lurie Hoffman (eluriehoffman@nhtinc.org), or Andrea Ponsor (aponсор@sahfnet.org) with any questions.