

August [XX], 2018

SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

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

Dear Sir or Madam,

I write to you on behalf of [YOUR ORGANIZATION'S NAME HERE] to offer comments in response to the above-docketed notice (“Notice”) concerning the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development (“HUD”). The Disparate Impact Rule serves the American public by helping to eliminate policies that wrongly keep people from the opportunities they need to be successful in life. We strongly urge HUD to proceed with robust enforcement under the current Rule.

[MISSION STATEMENT].

As a nation we have a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics. The Fair Housing Act prohibits intentional discriminatory acts *and* facially “neutral” policies that may limit housing opportunities based on race, color, national origin, religion, or sex or the presence of families with children and people with disabilities. The Fair Housing Act also makes it the policy of the United States to foster and support the development of diverse, inclusive, neighborhoods where every person has the community assets necessary to lead a life of opportunity. Fully realizing the promises of the Fair Housing Act for every person in the United States is a central component of HUD’s mission.

The [YOUR ORGANIZATION] shares this central mission and we write to urge you to ensure that any reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard not put at risk the department’s critical obligation to achieve the goals of the Fair Housing Act. HUD’s current Disparate Impact Rule is a valuable tool in the ongoing effort to achieve open housing markets, free of discrimination. It has provided protection for families with children who would be priced out of housing they need and can afford by policies allowing only one person per bedroom in a housing unit. It has provided protection for victims of domestic abuse who faced eviction under policies that would penalize them for calling the police on their abusers. It has provided protection for veterans and others with disabilities who [...insert example]

In its current form, the Disparate Impact Rule is not only strong and effective, but it is also consistent with the standard set out in the 2015 Supreme Court decision in the *Inclusive Communities* case. It does not need to be revised. Instead, HUD must focus on vigorous enforcement of the Rule to remove unnecessary barriers to housing choice throughout our housing markets. We also support comments submitted by the National Fair Housing Alliance and others that address specific questions in the notice.

The Disparate Impact Rule Was Validated in the *Inclusive Communities* Decision, which Adopted Its Reasoning.

Lending and insurance industry representatives have claimed that *Inclusive Communities* requires HUD to reconsider the Disparate Impact Rule. Those claims are simply incorrect. The U.S. Supreme Court implicitly adopted the current Disparate Impact Rule in the *Inclusive Communities* decision. Nothing in the *Inclusive Communities* decision—in its holding or dicta—necessitates any reconsideration of the current Disparate Impact Rule. Since *Inclusive Communities*, multiple courts have found that the Rule is consistent with the Supreme Court’s decision.

- The Second Circuit held in *MHANY Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* “[t]he Supreme Court] implicitly adopted HUD’s approach.”¹
- The Northern District of Illinois issued a decision analyzing the relationship between the Rule and the Supreme Court decision and concluded that, “[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD’s burden-shifting approach that requires correction.”²
- The Massachusetts Supreme Judicial Court also found that *Inclusive Communities* adopted the Rule’s burden-shifting framework.³

Further, on remand from the Supreme Court and the Fifth Circuit, the district court noted that the Supreme Court had affirmed “the Fifth Circuit’s decision adopting the HUD regulations.”⁴ In short, as federal courts have recognized, nothing in the *Inclusive Communities* decision necessitates any reconsideration of the current Disparate Impact Rule.

The Insurance Industry Must Not Have a “Safe Harbor” From the Disparate Impact Rule

The Disparate Impact Rule and HUD’s supplemental response to insurance industry comments appropriately applies a case-by-case analysis under *Inclusive Communities* to all housing-related industries – including the insurance industry. In the more than twenty years since the Fair Housing Act was amended and HUD issued interpretive regulations, courts that have considered

¹ *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

² *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069 at *8 (N.D. Ill. June 20, 2017).

³ *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 126–27 (D. Mass. 2016).

⁴ *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs*, 2015 WL 5916220 at *3 (N.D. Tex. October 8, 2015).

the issue have consistently held that the Fair Housing Act prohibits acts of discrimination by homeowners' insurers.⁵ In response to disparate-impact challenges, insurers have refined their underwriting and pricing systems to eliminate unnecessary, arbitrary barriers to the availability of adequate homeowners' coverage.⁶ The Rule's burden-shifting approach accommodates underwriting decisions that are based on any legitimate business purposes. As such, the Rule is consistent with actuarially sound principles and only establishes liability for insurance policies and practices that are artificial, arbitrary, and unnecessary, i.e., that have the effect of discriminating on a protected basis without a business need to do so. Such practices are, by definition, not actuarially sound.⁷

The Disparate Impact Rule is Critical to Ensuring Fair Housing Act Compliance and Recourse for Victims of Systemic Discrimination.

The Disparate Impact Rule is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of wide-spread discrimination with rightful recourse.

The disparate impact doctrine strengthens our communities and our nation by allowing victims of all types of systemic discrimination to seek recourse and change policies and practices that limit their housing opportunities or worse, put them in danger. For example, a landlord or municipality that adopts a policy that penalizes people who call emergency services for assistance more than once can cause eviction for victims of domestic violence. Additionally, an apartment complex that only allows people with full-time jobs, despite how much income they have, may bar veterans or elders with disabilities who cannot work, even if they can afford the apartment. These practices can be easily tailored to promote best practices in industry policy, and the burden-shifting framework involving assessment of less discriminatory alternative policies encourages housing providers to adopt less restrictive practices.⁸

In [your service area], systemic policies and practices limit housing opportunities and choices that the Disparate Impact Rule can be useful in addressing. Those include [local systemic fair housing issue that your organization has tackled].

HUD has a direct responsibility to ensure equal opportunity and freedom from discrimination, even if that discrimination is subtle. That means HUD must pay attention to how policies and

⁵ See, e.g., *Ojo v. Farmers Group Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110, 1117-1122 (W.D. Wash. 2004); *National Fair Hous. Alliance v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994).

⁶ Joseph B. Treaster, "Protest and Possible Profit Bring Back the Insurers," *New York Times*, October 30, 1996, available at: <http://www.nytimes.com/1996/10/30/business/protest-and-possible-profit-bring-back-the-insurers.html?pagewanted=all>.

⁷ *Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay*, Banking & Financial Services Policy Report, Vol. 33, No. 6 (June 2014), at pp. 1-12.

⁸ *The Potential Impact of Texas Department of Housing and of Community Affairs v. Inclusive Communities Project on Future Civil Rights Enforcement and Compliance*, *The Federal Lawyer*, Vol. 63, No. 5 (July 2016).

rules impact people, whether that impact is intentional or not. Disparate impact liability under the Fair Housing Act is critical for this end, and the Rule provides clear standards for assessing this responsibility in the market.

Responses to HUD Disparate Impact Rule Notice Questions.

The Notice seeks public comment on six specific questions. In lieu of listing out our answers in these comments, we instead endorse comments submitted by the National Fair Housing Alliance and others.

Conclusion

Any claims that *Inclusive Communities* requires HUD to reconsider the Disparate Impact Rule are simply unfounded. Should HUD reconsider the Rule based on incorrect interpretations of the Supreme Court's decision it would be acting in direct contradiction to HUD's mission and in violation of its own enabling legislation, which requires it to affirmatively further fair housing.⁹

HUD engaged in a thoughtful and thorough process before finalizing the Disparate Impact Rule in 2013. HUD sought comments and considered concerns from stakeholders across the country, including from both housing industry and consumer interests. HUD also considered decades of federal court jurisprudence applying the Fair Housing Act in determining how to appropriately fashion a rule that provides a uniform standard. And in 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. To disregard the extensive record and the plain import of *Inclusive Communities* by retreating from the Rule now would be arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.¹⁰ After the *Inclusive Communities* decision effectively adopted the HUD rule,¹¹ HUD would lack a reasoned basis for pulling back from the regulation.¹²

HUD must vigorously enforce the current Disparate Impact Rule. The Rule provides clarity and consistency under a single standard of liability for housing industry professionals when faced with disparate impact claims and gives the public a greater understanding of their rights. HUD has a strong legal foundation on which to pursue robust disparate impact enforcement.

Thank you for the opportunity to comment.

Sincerely,

⁹ 42 U.S.C. § 3608(d).

¹⁰ 5 U.S.C. § 706(2)(A).

¹¹ See, e.g., *Mhany Mgmt., Inc.*, 819 F.3d at 618.

¹² See, e.g., *Open Communities Alliance, et al. v. Carson, et al.*, No. 1:17-cv-02192 (D.D.C. 2018) (order granting preliminary injunction).