CHAPA
Citizens' Housing and Planning Association

August 17, 2018

SUBMITTED VIA REGULATIONS.GOV

Office of 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 Citizens' Housing and Planning Association (CHAPA) to offer comments in response to the above-docketed notice (Notice) concerning the disparate impact standard under the Fair Housing Act as interpreted by the United States Department of Housing and Urban Development (HUD). The Disparate Impact Rule serves the American public by forwarding the policy of the fair housing statutes "to provide a clear national policy against discrimination in housing."[1] We strongly urge HUD to proceed with robust enforcement under the current Rule.

CHAPA is a non-profit umbrella organization for affordable housing and community development throughout Massachusetts. Our mission is to encourage the production and preservation of housing that is affordable to low and moderate income households and to foster diverse and sustainable communities through planning and community development. The Fair Housing Act and the Disparate Impact Rule are essential tools for the execution of this mission.

For this reason, we 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.
We hope our comments reinforce that, 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 United States Supreme Court decision, *Inclusive Communities*. Moreover, we hope our comments bolster the argument for increased enforcement of the Rule and access to courts for plaintiffs to challenge practices, rules, and laws that have a discriminatory effect.

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[1] H.R. Rep. No. 100-711, 100th Cong., 2nd Sess., 15 (1988).

In the Notice, HUD indicated particular interest in six questions. The following are our comments to each question.

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. As noted in HUD's responses to comments during the rulemaking process, the rule "does not establish a new form of liability, but instead serves to formalize by regulation a standard that has been applied by HUD and the courts for decades, while providing nationwide uniformity of application."[2] The Court's decision in *Inclusive Communities* affirmed the long standing burden-shifting framework established by lower courts and the HUD rule. In fact, in *Inclusive Communities*, both the Fifth Circuit and the United States Supreme Court followed and relied on the HUD rule to discern who had the burden of proof in step three.[3]

We also comment on the importance of 24 CFR 100.500 (b) which requires that defendants prove two elements in order to establish a legally sufficient justification under the Fair Housing Act (FHA). A legally sufficient justification exists where the challenged practice "(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory, interests... and (ii) those interests could not be served by another practice that has a less discriminatory effect." Of particular importance is 24 CFR 100.500 (b) (1) (ii), the second element, which requires a defendant to prove that "the interests could not be served by another practice that has a less discriminatory effect." This element requires the defendant to offer a rationale behind the process used to arrive at their "legally sufficient justification." This is an important inquiry that assists not only the factfinder in deciding a case on the merits, but also, from a public policy perspective, encourages decision makers to evaluate the impacts of proposed rules, laws, and practices and take stock of potential alternative policies that may be less discriminatory.

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 current rule sufficiently ensures only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability.
In disparate impact cases, the analysis almost always turns on the second and third steps of the burden shifting framework.[4] The current rule should not be narrowed. A broad rule

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[2] Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule, 78 Fed. Reg. 11460, 11476 (Feb. 15, 2013).
[3] *Texas Department of Housing and Community Affairs et al, v. Inclusive Communities Project, et al.,* No 13-1371 (U.S. June 25, 2015).
[4] Rigel Oliveri, *Disparate Impact and Integration: with TDHCA v. Inclusive Communities the Supreme Court Retains an Uneasy Status Quo,* 24 Affordable Housing & Community Development 267, 280.

allows plaintiffs who've established a prima facie case in step one to examine and present evidence that, but for discovery, they otherwise would not have access to. At the same time, limiting the scope in a way that would prescript what it means for a practice to be an artificial, arbitrary, and unnecessary barrier could frustrate the purpose of the Fair Housing Act. As articulated by the United States Supreme Court, and reiterated by Congress, "the intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States."[5] This is particularly true in lawsuits that are "unlike the heartland of disparate-impact suits targeting artificial barriers to housing," but are more discretionary in nature and deal with resource allocation, investment targeting, and community development.[6]

It should be noted that disparate impact cases are increasingly difficult to prove. Of the 92 Fair Housing Act disparate impact claims considered by federal courts of appeals between 1974 and 2003, only 18 resulted in positive outcomes for plaintiffs.[7] In fact, the success rate of FHA disparate impact claims at the appellate level has dropped every decade since the 1980s.[8] The data suggests that only cases that meet a rigorous review by factfinders are finding disparate impact liability. Further limiting access to courts would cause housing discrimination and its evolving manifestations, both obvious and hidden, to go unchallenged.

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?

Yes. The Disparate Impact Rule is a recitation of existing law and strikes a proper and fair balance between uniformity and flexibility. HUD has made clear, "the rule does not change the substantive law; eleven federal courts of appeals have recognized discriminatory effects liability under the Act and over the years courts have evaluated both meritorious and non-meritorious discriminatory effects claims..."[9] Moreover, as *Inclusive Communities* made clear, unmeritorious claims are disposed of quickly if they fail to connect a defendant's policy to a statistical disparity. [10]

The Rule protects individuals from intentional discrimination as well as the legitimate and lawful actions of state and private actors. In doing so, the Rule provides avenues for novel theories of liability to be tested. Therefore, the definition of "discriminatory effect"

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[5] H. Res. 1095, 110th Cong., 2d Sess.,154 Cong. Rec. H2280-01 (April 15, 2008). See also *Trafficante v. Metro . Life Ins. Co.*, 409 U.S. 205, 211 (1972).

[6] See *Inclusive Communities* at 18.

[7] See Brief of Massachusetts, et al. as Amicus Curiae in Support of the Respondent, p. 33, *Texas Department of Housing and Community Affairs et al, v. Inclusive Communities Project, et al.*, No 13-1371 (U.S. June 25, 2015).

[8] Id.

[9] See *Inclusive Communities* at 20.

[10] See Id. ("It is well established that a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing the disparity.")

must be broad so it can encompass a variety of rules, laws, or practices that impact segregated housing patterns. As described above, encouraging legal action is essential to disparate impact claims because of the rich information that is available to plaintiffs through discovery. Access to judicial review also encourages decision makers to take steps to rigorously comply with the statute to avoid arbitrary impacts on protected classes.

The argument for encouraging legal action is bolstered by an amicus brief submitted to the Supreme Court in *Inclusive Communities* and signed by seventeen state attorneys general. The attorneys general pointed to the increasingly difficult task of proving a disparate impact claim, but also the rich information that can be unearthed through the litigation process, suggesting the rule strikes the proper balance of encouraging legal action while avoiding unmeritorious claims. They wrote, "far from construing disparate impact liability expansively, courts have engaged in increasingly rigorous analyses of FHA disparate impact claims across a range of contexts... and have often unmasked intentionally exclusionary housing policies.

For these reasons, we believe the Rule strikes a fair balance in encouraging legal action and avoiding unmeritorious claims. We also believe that limiting or discouraging legal action would be contrary to the purpose of the Fair Housing Act and could result in unchallenged policies that not only have a discriminatory effect, but also, when analyzed more closely, reveal a housing policy that is intentionally exclusionary.

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?

No. Giving plaintiffs broad latitude in showing forms of causation allows the FHA to continue to evolve and uncover the root causes of segregation and discrimination.

The plain language of the rule states that the plaintiff has the "burden of proving that a challenged practice *caused* or predictably will *cause* a discriminatory effect."[11] In *Inclusive Communities,* Justice Kennedy noted that a "robust causality requirement ensures that 'racial imbalance... does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."[12] It is true that casualty is easier to prove in housing barrier lawsuits where the challenged practice is a zoning or land use decision as opposed to a lawsuit like *Inclusive Communities*, which dealt with the allocation of housing resources. But HUD should not further define casualty in the rule because it is critical for the jurisprudence to evolve and capture the causes of discrimination, including those currently unknown.

As the Attorneys General noted in their amicus brief to the Supreme Court in *Inclusive Communities*, it can be the case that the nature of certain industries, like lending and underwriting, makes it difficult to root out discrimination, and without broad latitude for claiming disparate impact, the discrimination could have continued. As the Attorneys

[11] 24 CFR §100.500(c)(1) (2014) (emphasis added).
[12] See *Inclusive Communities* at 20.

General noted, "mortgage lending is a complicated multistep process involving numerous decision-makers making discretionary judgments...the discretionary decision making scheme obscures the factors the defendants use to make decisions. And because the ultimate result is the cumulative product of multiple actors, it is difficult, if not impossible to isolate where the taint of discriminatory motive infects the decisional chain."[13]

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)?

No. We agree with HUD's assessment in their supplemental document issued on October 5, 2016, in response to certain insurance industry comments requesting exemptions and safe harbors for certain, and in some cases, all insurance and underwriting practices.[14]

The Fair Housing Act's broad prohibitions on discrimination in housing are intended to eliminate segregated living patterns while moving the nation toward a more integrated society.[15] The history of discrimination in the homeowner's insurance industry is long and well documented.[16] That is why case-by-case adjudication is preferable to creating the requested exemptions or safe harbors for insurance practices. This approach gives maximum force to the 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, as they currently exist or may exist in the future.[17] We also agree, that from a practical standpoint, it is impossible for HUD to define the scope of insurance practices covered by an exemption or safe harbor with enough precision to avoid case-by-case disputes. Lastly, we also agree with HUD that Congress never intended for the insurance industry to be exempt from the Act. Congress, in its enactment and subsequent amendment to the Fair Housing Act, established exemptions for certain practices, but not for insurance.[18]

With respect to safe harbors and defenses to liability for compliance with other statutes, the Massachusetts experience after *Inclusive Communities* is instructive. In *Burbank Apartments Tenant Association v. Kargman*, the state's highest court, the Supreme Judicial Court (SJC), rejected the adoption of a per se rule that would have precluded disparate impact liability where a challenged action was reached in compliance with applicable statutes and regulations.[19] The defendant was the owner of an expiring use development with a project-based section 8 contract with HUD. In 2011, as its Section

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[13] See Brief of Massachusetts, et al. as Amicus Curiae in Support of the Respondent, p. 28-29, *Texas Department of Housing and Community Affairs et al, v. Inclusive Communities Project, et al.,* No 13-1371 (U.S. June 25, 2015).
[14] Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance; Supplement to implementation of the Fair Housing Act's Discriminatory Effects Standard, 81 Fed. Reg. 69012, 69013 (Oct. 5, 2016).
[15] Id.
[16] Id. at 69014
[17] Id. at 69013.
[18] Id. at 69013.
[19] See *Burbank Apartments Tenant Association & others v. William M. Kargman & others,* 474 Mass. 107 (2016)

221 mortgage subsidy contract expired, and in accordance with state and federal law, the defendant chose to not renew the project based vouchers, instead opting for Section 8 enhanced vouchers. This enabled the tenants to remain, but under an alternative housing program. The tenants claimed that the project based contract lapse violated state and federal fair housing laws under a disparate impact theory.

The lower court adopted a per se rule that would have precluded disparate impact liability where the decision not to renew a subsidy was reached in compliance with applicable statutes and regulations.

The SJC rejected this safe harbor rule, finding that "a bright-line rule prohibiting disparate impact liability where a property owner follows the project-based section 8 statutory scheme, absent evidence of intentional discrimination, would run counter to those policies preventing housing discrimination in all forms that were delineated by both congress and the legislature."[20] The court in *Burbank* went on to say, "we will not shoehorn into fair housing statutes what HUD would describe as an 'additional exemption that would be contrary to Congressional intent.'" [21]

The court in *Burbank* acknowledged that the defendant followed the federal and state requirements and never breached the Section 8 contract. The court noted, however, "this alone does not end the inquiry. Instead, our disparate impact analysis will consider whether such actions were sufficient to insulate protected classes from discriminatory negative impacts the defendants might have caused."[22] Ultimately, the court found that the plaintiffs were unable to show causation of a disparate impact by the defendant's choice to not renew the project-based contract because all tenants were able to remain housed in the same complex.

6) Are there revisions to the rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist regulated entities in determining what is lawful?

In light of the U.S. Supreme Court decision in *Inclusive Communities*, and the *Burbank* decision in Massachusetts, HUD should examine how local communities can engage in bona fide affordable housing and anti-displacement efforts without running afoul of the Rule. While we do not advocate for a per se safe harbor for community-driven decisions, we do believe that bottom-up affordable housing priorities are distinguishable from the top-down tax credit distribution in *Inclusive Communities* and an individual landlord's decision in *Burbank*. Specific guidance for neighborhoods working against displacement and towards revitalization would assist municipalities in their work with community and grassroots advocates in complying with the Rule and furthering the Act's purpose.

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[20] Id. at 124.
[21] Id., *quoting* 79 fed. Reg. 11460, 1477.
[22] Id.

Conclusion

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. This process allowed HUD to fashion a final rule that provides a uniform standard. Moreover, in 2016, when the insurance industry raised concerns, HUD responded with thoughtful consideration of additional federal court jurisprudence and again issued a well-reasoned supplement to the industry's concerns. To disregard the extensive record, the thorough rulemaking process, the history of the Act and its judicial interpretation and retreat from the Rule now would not only be arbitrary and capricious, but also contrary to the Fair Housing Act and its purpose.

Thank you for the opportunity to comment.

Sincerely,

Rachel Heller

Rachel Heller
Chief Executive Officer
Citizens' Housing and Planning Association