August 20, 2018

Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW
Washington, D.C. 20410-0001

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

To Whom It May Concern:

Thank you for considering our comments regarding this important rule, which advances key social interests that benefit us as a nation: equality, open housing choice, and fair opportunities for both mobility and residential security. We urge HUD to leave the current rule intact. The 2013 Discriminatory Effects Rule was carefully constructed to implement longstanding interpretations of the Fair Housing Act, which are rooted in the statute's clear text and purpose. The Supreme Court reinforced this interpretation in 2015 in *Texas Department of Housing and Community Development v. Inclusive Communities Project*, a decision that is consistent with all aspects of the regulation itself. Further, the rule's structure has significant common-sense benefits: it delivers consistency across industries and issues, and its burden-shifting framework already protects legitimate policy and business interests. This provides for both clarity and flexibility in application from case to case, while safeguarding important statutory rights.

We support the comments filed by the National Fair Housing Alliance, the National Housing Law Project, the Lawyers' Committee for Civil Rights, and other civil rights and fair housing groups that detail how the rule is consistent with the *ICP* decision and with subsequent caselaw. We underscore the rule's significant benefits in protecting rights in numerous contexts, and making concrete differences to individuals and communities in life opportunities, public health, intergenerational poverty alleviation, educational attainment, and exposure to diversity.

In addition, we write specifically to emphasize the benefits and effectiveness of the rule, and its consistency with current law, in the context of affordable housing siting and production.

<u>Responses to Questions Posed:</u>

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?

In crafting and issuing the 2013 rule, HUD examined in depth the practical benefits of its burden-shifting framework. For example, it is most reasonable for the burden to be placed on the defendant at the second stage of the inquiry, because the defendant is best situated to identify, explain, and provide supporting information about its own underlying policy or business interests. The requirement that the defendant provide a "substantial legitimate justification"

provides clarity within the housing context (as distinguished from the "business necessity" of Title VII and the employment context, where defendants point more narrowly to business, rather than policy, goals) and ensures that the justification is not pretextual. In establishing the prima facie case at the first stage, plaintiffs seeking to bring fair housing cases must carefully establish adequate statistical evidence (in each case, appropriate to the context) in order to survive dismissal. Although the framework can in some instances raise challenges for plaintiffs seeking to vindicate their rights, it provides clarity and enables parties on both sides to protect meaningful rights, interests, and policy goals.

In addition, the rule's proper functioning to protect against discrimination would be impaired if plaintiffs were required to more narrowly pinpoint a "specific practice" than currently provided for. Housing discrimination may arise in complex market situations in which multiple policies and practices combine and are most appropriately assessed together. HUD previously determined that this is best evaluated on a case-by-case basis, and this logic remains intact and is consistent with current law.[1]

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 in the response to Question 1, the burden-shifting framework protects the interests of defendants in sound business and policy goals, but serves to root out justifications that are in fact pretextual or discriminatory. For example, barriers to the production and siting of affordable homes in predominantly white communities – which often also offer access to good schools and healthy neighborhoods – have been challenged where they lack sufficient justification or where an alternative, less discriminatory policy was available. See, e.g, *Huntington Branch, NAACP* v. *Huntington*, 844 F. 2d 926, 935–936 (2nd Cir. 1988); *United States* v. *Black Jack*, 508 F. 2d 1179 (8th Cir. 1974). Such cases advance core statutory goals of the Fair Housing Act in expanding choice and creating open and diverse communities, as well as boosting the production of housing in locations where it has traditionally been excluded.[2]

Similarly, in the context of revitalization and housing production in predominantly minority neighborhoods, the disparate impact rule implements clear statutory law in protecting against policies that deepen segregation and that cannot be justified. (For example, where subsidized housing effectively operates as a policy of "containment"[3] of people of color, even though alternative siting policies are available to the decision-maker.) Importantly, this standard does not impair the ability to engage in sound revitalization or preservation policies that have been thoughtfully constructed and that actually benefit communities, in particular where they are

[1] 78 Fed. Reg. 11469. See also, e.g., *Hargraves v. Capital City Mortg. Corp*, 140 F. Supp. 2d 7, 20–22 (D.D.C. 2000).

[2] See 2013 Rule Preamble at 11467 (citations omitted): "The Act's lead sponsor, Senator Walter Mondale, explained in the Senate debates that the broad purpose of the Act was to replace segregated neighborhoods with ''truly integrated and balanced living patterns.'' Senator Mondale recognized that segregation was caused not only by ''overt racial discrimination'' but also by ''[o]ld habits'' which became ''frozen rules'' [such as] the ''refusal by suburbs and other communities to accept low-income housing.''). See also Rule Preamble at 11469 (citing cases and additional legislative history).

[3] For further analysis, see Stacy E. Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 George Mason Law Review 663 (2017).

balanced with other development that creates access to a broader range of areas. Rather, the current standard allows for this to be considered on a case by case basis that examines local conditions and nuances in local policy.[4]

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?

See answers to (1) and (2) above, regarding the efficacy of the current standard. Furthermore, HUD's current definition implements established and longstanding caselaw, see discussion and citations at 78 Fed. Reg. 11463, as well as in the statutory history and text, see 78 Fed. Reg. 11469. This definition was reinforced by the *Inclusive Communities* decision.

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 current rule is consistent with *Inclusive Communities* and other rulings. The "robust causality" requirement referred to by the Court in *Inclusive Communities* simply articulates the long-standing principle that a disparate impact claim cannot be made through "bare statistics" alone, but must convincingly show that the policy or decision at issue caused the "effect" that is the subject of the case. This phrase did not set out a new requirement, but rather described an aspect of existing law (which was already incorporated into the regulation).

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. As a general matter, federal statutes should be read to be consistent with federal civil rights laws. Congress has the power to make exceptions and create "safe harbors" to the Fair Housing Act, as it did in explicitly in the text of the Fair Housing Act by excepting certain specific tenant selection practices from disparate impact liability, but federal administrative agencies cannot, on their own, infer exceptions to civil rights laws that Congress has not explicitly adopted. As HUD has stated, in the specific context of the Fair Housing Act, doing so would be "counter to Congressional intent."[5]

We are familiar with only one other statutory provision that might "arguably"[6] provide a "safe harbor" from Fair Housing Act liability, in provisions of the U.S. Housing Act addressing public

[4] The Court in *Inclusive Communities* accordingly cited the current rule in explaining: "An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470." 135 S.Ct. at 2512.

[5] See analysis and citations at 78 Fed. Reg. 11466, 11475, 11467.

[6] In *McCardell v HUD*, 794 F.3d 510 (5th Cir. 2015), the only case to directly address this provision, the court noted, in ruling for HUD, that in spite of this "notwithstanding" language, the development was still subject to a set of regulatory criteria that included fair housing criteria such that the "site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons."

housing redevelopment – and as with the exceptions in the Fair Housing Act itself, Congress was very clear in its intentions:

> *Notwithstanding any other provision of law*, replacement public housing units for public housing units demolished in accordance with this section may be built on the original public housing location or in the same neighborhood as the original public housing location if the number of the replacement public housing units is significantly fewer than the number of units demolished. 42 U.S.C. § 1437p (d) (emphasis added).

As for other federal statutes that do *not* provide any Congressionally approved exception to the Fair Housing Act, but that that might arguably "limit a defendant's discretion," the burden-shifting standard currently set out in the disparate impact rule is fully adequate to protect potential defendants' interests, as defendants can argue that their policies or practices are intended to avoid conflict with other federal policies. Courts are fully capable of sorting out this type of defense in a specific factual context.

The federal Low Income Housing Tax Credit (LIHTC) is a good case in point. Like other federal housing programs, LIHTC is subject to the Fair Housing Act, and contains no provisions exempting state allocating agencies from Fair Housing Act compliance. Indeed, in the small number of Fair Housing Act claims brought against state allocating agencies,[7] there has been no suggestion that the FHA does not apply to LIHTC (indeed, the "general public use" regulations that govern the LIHTC program specifically reference the FHA[8] and the Internal Revenue Service has expressly acknowledged the need to implement LIHTC consistent with the Fair Housing Act[9]).

The one provision of the LIHTC statute that may, in a minor way, "limit a defendant's discretion" is the requirement that state "Qualified Allocation Plans" (QAPs) indicate a preference, among all projects selected for funding, for projects located in HUD-selected, higher poverty "Qualified Census Tracts" (QCTs) which "contribute to a concerted community revitalization plan," among other conditions.[10] Notably, this provision of the LIHTC statute is

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[7] See *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2514 (2015); See also *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 369 N.J. Super. 2, 15, 848 A.2d 1, 9 (App. Div. 2004); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 277 Conn. 238, 245, 890 A.2d 522, 527 (2006)

[8] 26 CFR § 1.42-9

[9] IRS Revenue Ruling 2016-29.

[10] 26 U.S.C. § 42 (m)(1)(B) (*Qualified allocation plan*) provides:

For purposes of this paragraph, the term "qualified allocation plan" means any plan—

- *(i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,*
- *(ii) which also gives preference in allocating housing credit dollar amounts among selected projects to—*
  - *(I) projects serving the lowest income tenants,*
  - *(II) projects obligated to serve qualified tenants for the longest periods, and*
  - *(III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan…*

(Emphasis added). The subsequent section of the Act, 26 U.S.C. § 42 (m)(1)(C) also sets forth additional selection criteria, including project location, housing needs characteristics, project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, projects intended for eventual tenant ownership, the energy efficiency of the project, and the historic nature of the project." See also IRS Notice 2016-77.

not an overarching requirement that states select developments in high poverty "qualified census tracts" – it merely requires *some preference* among projects *already selected* through the annual competitive allocation process, along with the additional conditions in that portion of the statute. Thus, a state QAP may generally prioritize access to high quality schools or residential integration as key competitive factors without running afoul of the QAP preference – in other words, while the language of the LIHTC statute may require some preference for QCTs, subject to certain conditions, in the final stage of the selection process, this procedure is not inconsistent with the Fair Housing Act, and state housing agencies are fully capable of balancing Fair Housing Act compliance with the LIHTC statute and community development goals. See, e.g. *In Re Adoption Of The 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 369 N.J.Super. 2 (Appellate Division, 2004).[11]

Similarly, the disparate impact rule is consistent with federal and state law in the insurance, lending, and other industries. With regard to insurance, specifically, a safe harbor would be counter to the broad consensus of the courts that disparate impact liability applies to the insurance market – a conclusion that is supported by HUD's own past interpretations, and that is consistent with *Inclusive Communities*.

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 urge HUD not to revise the rule, but to instead increase its activity in enforcement and public education around housing discrimination, in furtherance of its mission and service to the public.

Thank you for your consideration of these comments.

Best regards,

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[11] See also, e.g., *Building Opportunity II: Civil Rights Best Practices in the LIHTC Program*, available at https://prrac.org/building-opportunity-ii-a-fair-housing-assessment-of-state-low-income-housing-tax-credit-plans/; *Assessment Criteria for "Concerted Community Revitalization Plans": A Recommended Framework*, available at www.prrac.org/pdf/PRRAC_CCRP_recommendations_3_14_17.pdf.

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