



August 20, 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: Docket No. FR-6111-A-01: “Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard”

To the Office of the General Counsel:

The following comments are submitted by the National Housing Law Project (NHLP) and the undersigned organizations concerning the Advance Notice of Proposed Rulemaking (Notice) entitled “Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard.”<sup>1</sup> NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for those groups protected by civil rights statutes, including the Fair Housing Act. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

HUD must refrain from making changes to the Discriminatory Effects Rule (Rule), including the discriminatory effects method of proof. Disparate impact liability has existed under the Fair Housing Act for decades. The Rule did not create this form of Fair Housing Act liability, but it does formalize and harmonize decades of disparate impact jurisprudence, and also reflects HUD’s own longstanding interpretation of the Fair Housing Act.<sup>2</sup> The Rule clarifies and simplifies this complex area of law, facilitating compliance and more uniform, predictable interpretation for all parties. The Rule does nothing to upset the rigorous standards that have long existed.

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<sup>1</sup>83 Fed. Reg. 28,560 (June 20, 2018).

<sup>2</sup>See generally Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule, 78 Fed. Reg. 11,460, 11,460-63 (Feb. 15, 2013) (noting, at 11,462, that the Rule “embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts”).

The U.S. Supreme Court affirmed disparate impact liability in the *Inclusive Communities* decision, recognizing that the Fair Housing Act has a “continuing role in moving the Nation toward a more integrated society.”<sup>3</sup> The Court implicitly endorsed<sup>4</sup> the burden-shifting framework outlined in HUD’s Rule. HUD should continue the progress toward a more integrated society, and in accordance with its obligation to affirmatively further fair housing,<sup>5</sup> must not weaken the Rule’s ability to prevent and address discriminatory housing policies and practices.

**A. *Inclusive Communities* and subsequent cases underscore the consistency between the HUD Rule and the Supreme Court’s opinion.**

The Supreme Court’s opinion in *Inclusive Communities* does not necessitate any changes to HUD’s Rule. Instead, the Court’s opinion affirmed longstanding Fair Housing Act case law interpreting the Act to encompass disparate-impact liability, and cited to the Rule’s preamble to support the Court’s analysis.<sup>6</sup> The Court expressed no reservations about the Rule’s framework, nor indicated any significant differences between the Rule and the contours of disparate impact liability. Post-*Inclusive Communities* cases have echoed the consistency between the Rule and the Supreme Court decision.

HUD’s Rule is consistent with the Court’s discussion about limitations on disparate impact liability. The Court’s majority recognized that disparate impact liability “has always been properly limited in key respects.”<sup>7</sup> The Court noted that constitutional issues may arise if disparate impact liability was “imposed based solely on a showing of a statistical disparity.”<sup>8</sup> The current HUD regulation (24 C.F.R. § 100.500) already recognizes that statistical disparity alone is insufficient to establish a prima facie case, and includes a causation requirement: “the charging party . . . has the burden of proving that a challenged practice *caused or predictably will cause* a discriminatory effect.”<sup>9</sup> The federal district court in *Property Casualty Insurers Association of America v. Carson* noted that the Supreme Court “did not indicate that HUD’s burden-shifting approach violates” the principle that disparate impact claims that rely on statistical disparity absent a showing of causation must fail.<sup>10</sup> Step 2 of the Rule’s burden-shifting framework already addresses another concern articulated by the Court: that defendants have “leeway to state and explain the valid interest served by their policies.”<sup>11</sup> Again, the HUD Rule already accounts for this limitation, by providing defendants the opportunity to prove that

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<sup>3</sup> Texas Dep’t of Hous. & Comm. Affairs v. Inclusive Comm. Project, 135 S. Ct. 2507, 2526 (2015).

<sup>4</sup> See, e.g., Property Casualty Insurers Association of America v. Carson, 2017 WL 2653069, at \*9 (N.D. Ill. June 20, 2017) (The Supreme Court in *Inclusive Communities* “did not identify any aspect of HUD’s burden-shifting approach that required correction.”).

<sup>5</sup> 42 U.S.C. § 3608(e)(5).

<sup>6</sup> See e.g., *Inclusive Communities*, 135 S. Ct. at 2523 (“As HUD itself recognized in its recent rulemaking, disparate-impact liability ‘does not mandate that affordable housing be located in neighborhoods with any particular characteristic.’”) (quoting 78 Fed. Reg. at 11,746).

<sup>7</sup> *Inclusive Communities*, 135 S. Ct. at 2522.

<sup>8</sup> *Id.*

<sup>9</sup> 24 C.F.R. § 100.500(c) (emphasis added). See also Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule, 78 Fed. Reg. at 11,469 (“Under this rule, the charging party or plaintiff has the burden of proving that a challenged practice *causes* a discriminatory effect.”) (emphasis added) (footnote omitted).

<sup>10</sup> 2017 WL 2653069, at \*8.

<sup>11</sup> *Inclusive Communities*, 135 S. Ct. at 2522.

the challenged practice is necessary to achieve one or more of the defendant's "substantial, legitimate, nondiscriminatory" interests.<sup>12</sup> Citing the HUD Rule preamble, *Inclusive Communities* observes that the step in the disparate impact analysis that affords defendants such leeway under the Fair Housing Act is "analogous to the business necessity standard under Title VII."<sup>13</sup> The *Inclusive Communities* majority opinion does not state that the Rule is problematic or requires reexamination.<sup>14</sup>

Post-*Inclusive Communities* courts simultaneously have relied upon both the Rule and *Inclusive Communities* as authorities for analyzing disparate impact claims, demonstrating there is no fundamental conflict between the two. The district court on remand in the *Inclusive Communities* case stated, "As a result of the Fifth Circuit's decision adopting the HUD regulations, and the Supreme Court's affirmance (without altering the burden-shifting approach), the following proof regimen now applies to ICP's disparate impact claim under the FHA"; the court proceeded to outline HUD's existing standard at 24 C.F.R. § 100.500.<sup>15</sup> The Second Circuit observed in *Mhany Management v. County of Nassau* that the Supreme Court in *Inclusive Communities* "implicitly adopted HUD's approach" regarding the third step of the burden-shifting analysis.<sup>16</sup> In *Property Casualty*, the court rejected the argument that the Rule is inconsistent with *Inclusive Communities* by stating that the Supreme Court "affirmed the Fifth Circuit's adoption of HUD's burden-shifting approach and held that disparate-impact claims are cognizable under the FHA."<sup>17</sup> *Property Casualty* also held, "[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 required correction."<sup>18</sup> Other opinions also have cited both *Inclusive Communities* and the Rule without identifying a conflict between the two authorities.<sup>19</sup>

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<sup>12</sup>24 C.F.R. § 100.500(c)(2); see also *Property Casualty*, 2017 WL 2653069, at \*8 (noting second step of the HUD Rule's burden-shifting framework provides housing authorities and private developers "'leeway to state and explain the valid interest served by their policies,'" quoting *Inclusive Communities*, 135 S. Ct. at 2522).

<sup>13</sup>*Inclusive Communities*, 135 S. Ct. at 2522 (citing 78 Fed. Reg. at 11,740).

<sup>14</sup>See also *Property Casualty*, 2017 WL 2653069, at \*8 (also noting that the "Supreme Court did not indicate that HUD's burden-shifting regime violates ... principles [referenced in the opinion] about racial considerations.").

<sup>15</sup>2015 WL 5916220, at \*3 (N.D. Tex. Oct. 8, 2015).

<sup>16</sup>819 F.3d 581, 618 (2d Cir. 2016).

<sup>17</sup>2017 WL 2653069, at \*8.

<sup>18</sup>*Id.* at \*9 (emphasis added).

<sup>19</sup>*Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 510-13 (9th Cir. 2016) (citing both 24 C.F.R. § 100.500(c) and *Inclusive Communities* to support the court's reasoning); see also *Ave. 6E Invs., LLC v. City of Yuma*, 2018 WL 582314, at \*7 n.49 ("In its reply, the City argues that even if the regulations support Plaintiffs' position, the court must then reject HUD's interpretation of the FHA given the Supreme Court's inconsistent interpretation of disparate impact liability in *Inclusive Communities*. ... However, as noted above, the court concludes that *Inclusive Communities* does not in fact hold that disparate impact claims cannot be based on a city's individual zoning decision. Therefore, HUD's regulations are consistent with that opinion and entitled to deference."); *Burbank Apartments Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) ("[W]e will follow the burden-shifting framework laid out by HUD and adopted by the Supreme Court in *Inclusive Communities*."). Even a case that references a "more stringent pleading standard" under *Inclusive Communities* does not say that the HUD Rule is inconsistent with *Inclusive Communities*, and even goes on to cite § 100.500(c) in the opinion. *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F.Supp.3d 20, 22, 29 (D.D.C. 2017); see also *Burbank*, 48 N.E.3d at 411 (referencing a "rigorous examination on the merits at the pleading stage" being required by *Inclusive Communities*, and quoting the Supreme Court's reference to 24 C.F.R. § 100.500(c)(1) in the prior sentence, and also never stating the Rule is inconsistent with *Inclusive Communities*).

Accordingly, *Inclusive Communities* and subsequent case law both confirm that the Supreme Court opinion does not compel changes to the HUD Rule.

**B. The addition of safe harbors to the current Rule is contrary to Congressional intent and unnecessary.**

HUD should not add safe harbors or exemptions from disparate impact liability to the Rule. The creation of a safe harbor from Fair Housing Act liability within the Rule for specific industries, practices, or subsets of potential defendants would conflict with Congressional intent. The burden-shifting framework in the HUD Rule sufficiently addresses concerns that disparate impact liability will adversely affect legitimate, nondiscriminatory business or industry practices, or when a defendant's discretion is limited by another law.

HUD's creation of exemptions from disparate impact liability "beyond those found in the Act" would, as stated in the Rule's preamble, "run contrary to Congressional intent."<sup>20</sup> The Fair Housing Act's text, as amended, includes exemptions from liability.<sup>21</sup> Congress actually "rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions" in the 1988 amendments to the Act, while opting to include three other exemptions from Fair Housing Act liability.<sup>22</sup> HUD previously (and correctly) rejected the idea of including safe harbors in the Rule because additional exemptions would contradict Congress' intent in light of existing exemptions in the Fair Housing Act's text and "the Act's important remedial purposes."<sup>23</sup> A subsequent HUD notice supplementing the agency's reasoning with respect to insurance elaborated that the agency's creation of safe harbors or exemptions for the insurance industry would allow "at least some discriminatory insurance practices that can be subject to disparate impact challenges" to go uncorrected, which would "undermine the efficacy of the Act and run counter to the Act's purpose and HUD's statutory responsibilities."<sup>24</sup>

Courts have also rejected requests for exemptions from disparate impact liability. The Sixth Circuit Court of Appeals previously declined to apply an exemption under the Fair Housing Act in a case where an owner had sought an exemption from disparate impact liability in instances of landlord withdrawal from the Section 8 Voucher program.<sup>25</sup> The Sixth Circuit stated that "[w]e cannot create categorical exemptions from [the Act] without a statutory basis. .

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<sup>20</sup>78 Fed. Reg. at 11,475 (citing *Graoch*). In HUD's supplemental response in light of the *Property Casualty* decision, HUD again rejected safe harbors for the insurance industry because granting such exemptions would "undermine the Act's broad remedial purpose and contravene HUD's own statutory obligation to affirmatively further fair housing." Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,012, 69,014 (Oct. 5, 2016).

<sup>21</sup> 78 Fed. Reg. at 11,466; *see also id.* at 11,477 ("HUD notes further that Congress created various exemptions from liability in the text of the Act, [] and that in light of this and the Act's important remedial purposes, additional exemptions would be contrary to Congressional intent.") (internal footnote omitted).

<sup>22</sup>*Inclusive Communities*, 135 S. Ct. at 2520.

<sup>23</sup> Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,477.

<sup>24</sup> Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. at 69,013.

<sup>25</sup> *Graoch Associations # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission*, 508 F.3d 366 (6th Cir. 2007).

. *Nothing in the text of the FHA* instructs us to create practice-specific exceptions.”<sup>26</sup> A state supreme court concluded post-*Inclusive Communities* that adoption of “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 ... Congress.”<sup>27</sup> In that case, the court refused to “shoehorn” additional exemptions into fair housing law.<sup>28</sup>

Safe harbors and additional exemptions also are unnecessary because the Rule already accounts for particular industry or business practices that serve legitimate, nondiscriminatory purposes—assuming a less discriminatory alternative is unavailable.<sup>29</sup> The HUD Notice asks whether instances such as “when another federal statute substantially limits a defendant’s discretion or another federal statute requires adherence to state statutes” should qualify as a safe harbor. However, under the Rule’s burden-shifting framework, another federal statute that limits a defendant’s discretion or requires adherence to state statutes could constitute a “substantial, legitimate, nondiscriminatory interest[] of the respondent or defendant.”<sup>30</sup> Accordingly, defendants would not require a safe harbor or exemption from disparate impact liability, as the Rule already accounts for such a scenario.

The addition of safe harbors or exemptions to the current framework would significantly interfere with an important fair housing objective identified by the Court in *Inclusive Communities*. The Supreme Court stated that the “[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”<sup>31</sup> The Fair Housing Act’s effectiveness in “counteract[ing] unconscious prejudices and disguised animus” through disparate impact theory will be diminished without the burden-shifting framework outlined in the HUD Rule applied uniformly across industries—specifically where a defendant is required to prove a substantial, legitimate, nondiscriminatory interest. Safe harbors that shield certain classes of potential defendants from disparate impact liability would undermine the discovery of disguised animus within those industries.<sup>32</sup>

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<sup>26</sup> *Id.* at 375 (emphasis added) (adding that “[a]bsent such instruction, we lack the authority to evaluate the pros and cons of allowing disparate-impact claims challenging a particular housing practice and to prohibit claims that we believe to be unwise as a matter of social policy.”). The court rejected the assertion that “disparate-impact claims should fail even if the plaintiff could prevail under the standard burden-shifting framework.” *Id.* HUD, in its supplemental notice regarding insurance, noted that “wholesale exemptions for all insurance practices or all insurance underwriting practices would necessarily be overbroad, allowing some practices with unjustified discriminatory effects to go uncorrected.” 81 Fed. Reg. at 69,015.

<sup>27</sup> *Burbank*, 48 N.E.3d at 409.

<sup>28</sup> *Id.*

<sup>29</sup> 24 C.F.R. § 100.500(c)(2), (3); *see also* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,475 (“Creating exemptions or safe harbors related to insurance is unnecessary because . . . insurance practices with a legally sufficient justification will not violate the Act.”).

<sup>30</sup> 24 C.F.R. § 100.500(c)(2).

<sup>31</sup> *Inclusive Communities*, 135 S. Ct. at 2522.

<sup>32</sup> *See also* Application of the Fair Housing Act’s Discriminatory Effects Standard to Insurance, 81 Fed. Reg. at 69,015 (“Wholesale exemptions also would invariably sweep within their scope potential intentional discrimination in the insurance market.”).

HUD rightly rejected the addition of safe harbors or exemptions to the Rule in favor of case-by-case determinations. Safe harbors, as they clearly conflict with Congressional intent, establish no objective limiting principle as to what sorts of industries or defendants are deemed “worthy” of a safe harbor, and which are not. Other industries and potential defendants, in turn, likely would seek to exempt themselves from disparate impact liability – despite not being covered by the specific exemptions outlined in the Fair Housing Act’s text. Similarly, providing safe harbors for certain practices or industries will also result in non-uniform standards across industries, which contravenes one of the Rule’s main objectives—namely, standardizing the discriminatory effects framework. HUD noted in the Rule preamble that: “with a clear, uniform standard, covered entities can conduct consistent self-testing and compliance reviews, document their substantial, legitimate nondiscriminatory interests, and resolve potential issues so as to prevent future litigation.”<sup>33</sup> Conversely, safe harbors and exemptions would establish a strong disincentive to select industries and defendants from reviewing their policies and practices for potentially discriminatory practices, making discriminatory conduct more likely.

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In conclusion, HUD therefore should refrain from making changes to the Rule. Thank you for your consideration of these comments. If you have questions about our comments, please contact Renee Williams of our staff, [rwilliams@nhlp.org](mailto:rwilliams@nhlp.org).

Sincerely,

/s/

Shamus Roller  
Executive Director, National Housing Law Project

Bay Area Legal Aid

California Rural Legal Assistance, Inc.

Central California Legal Services

Centro Legal de la Raza

Coalition on Homelessness and Housing in Ohio (COHHIO)

Community Legal Services of Philadelphia

Connecticut Legal Services, Inc.

Community Service Society

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<sup>33</sup> Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11,472.

Disability Rights Advocates  
Disability Rights California  
Disability Rights Oregon  
Housing Assistance Council  
Housing Justice Center  
Law Foundation of Silicon Valley  
Lawyers' Committee for Better Housing  
Legal Aid Foundation of Los Angeles  
Legal Aid Of Western Ohio  
Legal Aid Society of Southwest Ohio  
Legal Services of Greater Miami, Inc.  
Michigan State University College of Law, Housing Law Clinic  
North Carolina Justice Center  
The Public Interest Law Project  
Public Justice Center  
Public Law Center  
Regional Housing Legal Services  
Sargent Shriver National Center on Poverty Law  
South Carolina Appleseed Legal Justice Center  
Texas RioGrande Legal Aid  
Vermont Legal Aid, Inc.  
Western Center on Law & Poverty