



Instructions for Filing Comments with HUD

NOTICE

HUD filed an Advance Notice of Proposed Rulemaking on June 20, 2018, titled *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*.

DEADLINE

Comments are due by August 20, 2018 and may be filed electronically using the Federal Register's Comment Filing System. Complete information about the comment period and on-line filing is available here:

<https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>

FILING A COMMENT

It is important that HUD receive information from NMHC/NAA members identifying our industry's concerns with uncertainty in the Fair Housing Act. To help facilitate comments, NMHC/NAA have provided background information on the issue below. NMHC/NAA have also outlined several key elements for inclusion in member comments. Of note, although HUD has identified several questions it is seeking answers to, it isn't necessary to answer every question or include information if it is unavailable, confidential or doesn't apply to you. Please contact Paula Cino with any questions at pcino@nmhc.org. Thank you for your support.

BACKGROUND

In February 2013, HUD issued the "Final Rule on the Implementation of the Fair Housing Act's Discriminatory Effects Standard" (Final Rule) formalizing the agency's interpretation of disparate impact liability under the Fair Housing Act (FHA). For apartment owners and managers, disparate impact means that seemingly neutral and common business practices – such as criminal background screening, credit screening and Section 8 voucher policies, among others – could trigger discrimination claims despite no intention of singling out a particular group for adverse treatment.

Subsequently, the U.S. Supreme Court issued a milestone decision on disparate impact liability in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (Inclusive Communities)* and established its own standard for disparate impact liability. While the opinion upheld the use of disparate impact liability under the FHA, the Court offered new analysis and limitations on the use of the theory. There are numerous inconsistencies in the language and reasoning of the final rule and the decision - resulting in the establishment of two conflicting analytical frameworks for evaluating



disparate impact liability. The tension between these two competing standards has resulted in confusion, uncertainty and litigation.

KEY DISCUSSION POINTS

1) Identify the Issue:

- HUD's 2013 Final Rule conflicts with the Supreme Court's 2015 *Inclusive Communities* decision, and should be revised to reflect the analysis of the Supreme Court and subsequent court rulings.
- Between 2013 and 2017, HUD issued a series of subsequent rules and guidance documents derived from the 2013 Final Rule that should also be reevaluated and reissued to ensure compatibility with the Supreme Court's *Inclusive Communities* decision.
- The disconnect between the language and reasoning of the Final Rule and the Inclusive Communities decision creates uncertainty for housing providers and maintains problematic legal conditions specifically rebuked by the Supreme Court. The *Inclusive Communities* Court was explicit in its reasoning that disparate impact liability should be "properly limited" and focused on rooting out "artificial barriers to housing."

2) Identify and Describe Your Company:

- Include information about your company, including your line of business (owner, manager, etc.) and details about your headquarters, areas of operation, size, etc.

3) Explain that HUD should revise its Final Rule to avoid conflict with the Supreme Court *Inclusive Communities* decision. Highlight specific conflicts and suggested revisions that may include:

- The Final Rule and *Inclusive Communities* significantly diverge in their analysis of a plaintiff's burden, and we strongly encourage HUD to adopt the Supreme Court's reasoning. Specifically:
 - The Final Rule fails to require plaintiffs to allege a *substantial negative* impact on a protected class, to identify a *specific* policy that causes that negative impact, and to demonstrate that defendant's policy is illegitimate, unnecessary and arbitrary as required in *Inclusive Communities*. Such allegations are necessary to avoid the litigation of unmeritorious claims.
 - Plaintiffs should carry the full burden of establishing a prima facie case for bringing a disparate impact claim under the requirements of *Inclusive Communities* in order to limit the ability of plaintiffs to regularly challenge properly promulgated policies that are neutral on their face. The current Final Rule's burden shifting framework is confusing and contrary to the Supreme Court Decision.

- The *Inclusive Communities*' "robust casualty requirement" necessitating a plaintiff's production of statistical evidence demonstrating a causal connection should be incorporated into a revised Final Rule in order to limit liability when an impact is caused by historic or other trends, or when the impact is merely incidental to a legitimate policy, in order to avoid holding defendants liable for disparities they did not create.
- Plaintiffs should be required to make a factual showing of how the disparate impact on the protected class is quantitatively and qualitatively different than other populations in order to avoid unnecessary liability and confusion associated with impacts that are caused by economic, education, employment or other differences.
- The majority of lower federal courts have already started applying the *Inclusive Communities* standard finding plaintiffs have failed to make a prima facie case for disparate impact.
- Safe harbor provisions, such as when another federal statute limits a defendant's discretion or requires adherence to state statutes, should be included in a revised Final Rule. Such safe harbors could also be drafted broader to include key areas of concern outside the application of laws with limited discretion (i.e. nuanced criminal screening policies).
- HUD's existing eligibility requirements should also qualify as safe harbors from disparate impact liability as those governmental policies furthering legitimate goals are, by definition, not artificial, arbitrary, and unnecessary barriers.
- The Supreme Court raised concerns regarding an expansive interpretation of disparate impact liability and the negative effects on affordable housing development and practical business decisions, which should be taken into consideration in any new rule.
- The Final Rule currently permits plaintiffs to bring predictable, rather than actual, impacts, which is inconsistent with *Inclusive Communities*. A lawsuit must be based on actual harm, not a conjectural impact.

4) If applicable, explain how your company has been impacted by uncertainty in fair housing standards, disparate impact claims, HUD's Final Rule or subsequent HUD guidance on disparate impact such as HUD criminal screening guidance.

To view NMHC/NAA's disparate impact comment letter draft, please click [here](#).