

June 14, 2017

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
Washington, D.C. 20410-0500

**Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under
Executive Order 13777
Docket ID No. FR-6030-N-01**

To whom it may concern,

We are writing on behalf of the members of the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) who represent the \$1.3 trillion apartment industry and its nearly 39 million residents. We applaud the Trump Administration's efforts to overhaul the federal regulatory landscape and reduce the burdens felt by American businesses of all types in complying with a profusion of unnecessarily costly and complex regulations. Additionally, we would like to extend our thanks to the leadership of the Department of Housing and Urban Development (HUD) in moving forward with this rulemaking and the establishment of a Regulatory Task Force. We believe that some regulations at HUD have strayed from their intended purpose and have made the development and operation of multifamily housing more challenging.

The multifamily sector is under increasing pressure to meet booming demand across the country. Experts believe this trend will continue, if not increase, due to a host of factors including demographic change and evolving consumer preferences. Our industry, and particularly apartment owners and developers, must balance a wide array of concerns regarding project viability, regulatory cost and compliance at all levels of government but in particular at HUD. While many regulatory hurdles and costs, such as impact fees, continual environmental reviews and antiquated zoning processes, are within the purview of state and local policymakers, there are a wide array of existing HUD regulations that contribute to making housing less economically feasible to develop and operate.

We believe that regulations must have demonstrable benefits that justify the cost of compliance and that federal agencies should be aware that broad-stroke regulations often have disproportionate effects on industries that serve as key drivers of our economy. Excessive regulation and compliance uncertainty result in costly mandates that divert resources from the production and operation of multifamily housing.

NMHC/NAA would like to highlight some of the specific HUD regulations that slow or prevent development of housing that is affordable, impose significant costs and business operational challenges, and decrease access to capital. The regulations outlined below, while well-intentioned in nature, have negatively impacted the development and management of multifamily housing at a time when our industry strives tirelessly to address the shortage of housing for American families. We urge the Regulatory Task Force to pursue reforms, provide needed clarity or rescind these regulations.

We appreciate the opportunity to share the multifamily housing industry's view on the importance of HUD regulatory reform. We look forward to working with HUD and the Regulatory Task Force towards our shared goal of building housing that is affordable to more Americans and spurring continued economic growth across the country. Please call upon us if we can serve as a resource to you in this regard.

Sincerely,



Douglas M. Bibby
President
National Multifamily Housing Council



Robert Pinnegar
President & CEO
National Apartment Association

Attachment (1)

cc: The Hon. Benjamin S. Carson, Sr., Secretary of Housing and Urban Development
The Hon. Mick Mulvaney, Director, Office of Management and Budget

NMHC/NAA Regulatory Department of Housing and Urban Development – Regulatory Relief Priorities

Federal Flood Risk Management - In response to President Obama’s Executive Order 13690, HUD has proposed a rule¹ to expand its floodplain management oversight to increase disaster preparedness and flood resiliency of federally funded buildings and projects. Under the proposal, multifamily builders would face new, costlier elevation requirements if funding is derived from a HUD grant program (HOME, CDBG) or when using Federal Housing Administration (FHA) mortgage insurance for new construction or substantial rehabilitation projects. This proposal would apply within the 100-year floodplain and in an unmapped, and therefore unknown, horizontally expanded FFRMS floodplain area. We believe this requirement for FHA multifamily projects exceeds the intent of E.O. 13690 by failing to limit expanded floodplain requirements only to “federally funded projects.” HUD does not originate loans or fund projects through the FHA Multifamily Program. Rather, it insures those loans through the FHA. As such, projects insured by these programs should not be required to meet the mandates of the FFRMS.

If left as proposed, and while well-intentioned, we believe that the additional elevation and flood-proofing requirements for multifamily properties using FHA mortgage insurance and /or HUD grant programs could make many projects infeasible, due to increased construction costs and the inability to offset these costs through higher rents. In either case, the draft rule would prevent delivery of much-needed units as we all try to address our nation’s affordable housing challenges. **HUD should withdraw the proposed rule and prevent its implementation.**

Fair Housing Act (FHA) Rules - During the Obama Administration, HUD actively expanded fair housing liability to address groups that are not statutorily protected classes under the FHA. To advance this goal, HUD heavily relied on the use of disparate impact theory, which provides legal recourse where practices or policies are employed without intentional discrimination, yet they have a disproportionate impact on a protected class such as race and sex. However, HUD issued a series of rules and guidance documents reinforcing an interpretation of disparate impact theory that conflicts with recent Supreme Court precedent and creates uncertainty for housing providers. **We, therefore, urge HUD to: 1) review and replace the Final Rule on disparate impact liability to ensure compatibility with recent Supreme Court analysis; and 2) reevaluate guidance stemming from the Final Rule and reissue guidance that helps housing providers execute necessary business practices without running afoul of fair housing requirements.**

Review and Replace HUD’s Final Rule on Disparate Impact Liability

In February 2013, HUD issued the “Final Rule on the Implementation of the Fair Housing Act’s Discriminatory Effects Standard” (Final Rule)² formalizing its interpretation of FHA liability related to disparate impact theory. Subsequently, the U.S. Supreme Court issued a milestone decision on disparate impact liability in Texas

¹ <https://www.federalregister.gov/documents/2016/10/28/2016-25521/floodplain-management-and-protection-of-wetlands-minimum-property-standards-for-flood-hazard>

² 24 CFR Sec. 100.500

Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc. (Inclusive Communities).³ There are numerous inconsistencies, however, in the language and reasoning of the 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.

Moreover, recent litigation outcomes suggest there's a meaningful distinction between the HUD Final Rule and the Inclusive Communities ruling. 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."⁴ The Court cautioned that without limitation disparate impact claims could result in "abusive" lawsuits that could be used to "displace valid governmental and private priorities."⁵

Subsequent courts employing the Supreme Court analysis have routinely limited the use of disparate impact theory. Most notably, when the lower court reconsidered the original Inclusive Communities claim on remand from the Supreme Court, the case was dismissed for failing to identify a causal relationship between any policy and the purported discriminatory effect. Other courts similarly rejected disparate impact liability in cases involving the allocation of low income housing tax credits,⁶ housing condemnation actions,⁷ mortgage lending,⁸ and zoning.⁹

Conversely, the HUD Rule permits a more expansive use of disparate impact and lacks the robust causality requirement advanced by the Supreme Court. Where courts have relied heavily on the HUD Final Rule framework instead of the Inclusive Communities criteria, plaintiffs' disparate impact claims have moved forward.¹⁰

Reevaluate and Reissue Disparate Impact Guidance

The Obama Administration built on its disparate impact standard to advance fair housing liability in numerous other areas including resident screening,¹¹ hostile

³ 135 S. Ct. 2507 (2015)

⁴ *Id.*

⁵ *Id.*

⁶ *Inclusive Communities Project, Inc. v. United States Dep't of Treasury*, No. 3:14-CV-3013-D, 2016 WL 6397643 (N.D. Tex. Oct. 28, 2016).

⁷ *City of Joliet, Illinois v. New W., L.P.*, 825 F.3d 827 (7th Cir. 2016).

⁸ *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-CV-09007-ODWRZX, 2015 WL 4398858, (C.D. Cal. July 17, 2015).

⁹ *Anthony v. City of Naples*, 2016 WL 7010949 (M.D. Fla. Dec. 1, 2016).

¹⁰ *Crossroads Residents Organized for Stable & Secure ResidencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, No. CV 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016). *See also* *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).

¹¹ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016, available at https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf (hereinafter, Criminal Screening Guidance).

environment harassment,¹² limited English proficiency,¹³ nuisance ordinances¹⁴ and insurer liability.¹⁵ However, HUD's action related to criminal history screening poses particular challenges for housing providers.

In April 2016, HUD issued guidance on the "Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," which focuses on expanding fair housing protections for those with criminal convictions and arrest.¹⁶ Safe and secure housing is a critical need for all Americans and the federal government has long-recognized the role criminal background screening plays in making informed residency decisions. Despite the fact that criminal screening helps achieve property safety and security goals, the guidance challenges a variety of prevailing criminal screening policies and raises numerous legal and operational questions for housing providers.

Recognizing that those with criminal histories are not a protected class under the FHA, HUD relied on disparate impact theory to support their guidance. However, HUD largely structured its guidance around the 2013 Final Rule on disparate impact and cites to the 2015 Inclusive Communities decision without resolving or addressing the inconsistencies between the two disparate impact standards. Therefore, the guidance leaves unanswered questions about both the underlying legal theories involved and acceptable compliance strategies. **We encourage HUD to reconcile the guidance with current Supreme Court precedent an offer additional compliance guidance.**

Affirmatively Furthering Fair Housing Rule - As it is currently written, the Affirmatively Furthering Fair Housing proposal's broad mission to desegregate communities by combating exclusionary zoning and other practices deemed discriminatory could indirectly affect the multifamily industry. Specifically, the proposal could lead to delays in construction and permitting decisions. These types of disruptions may aggravate the housing market's already short supply of apartments, affecting affordability at a variety of income levels. **We encourage HUD to focus on promoting new development of rental housing, and avoid endorsing local policies with harmful unintended consequences for private sector developers and managers.**

Small Area Fair Market Rents (SAFMRs) - The Section 8 Housing Choice Voucher Program provides subsidized rents for qualifying low-income families. The program uses [HUD-determined Fair Market Rents](#) (FMRs) to establish maximum allowable rents the government will pay to a private apartment owner who rents to a voucher holder. The final rule

¹² Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 24 C.F.R. § 100.600.

¹³ Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, September 15, 2016, at 1, available at <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf> (hereinafter "LEP Guidance").

¹⁴ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, September 13, 2016, at 1 & 8, available at <https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>.

¹⁵ Applicability of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,012 (October 5, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-05/pdf/2016-23858.pdf>.

¹⁶ Criminal Screening Guidance.

implementing Small Area Fair Market Rents establishes rent rates by ZIP Code, which in many cases does not accurately reflect the rental market and disproportionately impacts low-income neighborhoods. **We request that HUD continue to analyze what the best geographical definition of a real estate market is, be it county or metropolitan area, to capture the most accurate rents possible.**

Energy Benchmarking - HUD issued a proposed regulation that would require every FHA multifamily loan borrower to track and submit energy benchmarking data through EPA's ENERGYSTAR Portfolio Manager. The proposed regulation would be an administrative burden for owners and drive up their servicing costs. In many cases, the information is not available, and owners could be restricted from borrowing from HUD if the data is not reported. **We request that HUD remove the mandatory reporting requirement of this proposed regulation.**

Reasonable Accommodation Requests for Emotional Support Animals - The Fair Housing Act permits persons with disabilities to request a reasonable accommodation for an emotional support animal from their rental housing provider. In some circumstances, federal guidance¹⁷ allows for a third party, including a wide range of individuals, to provide verification of the resident's disability and/or disability-related need for the animal. According to a joint statement by HUD and DOJ, "[a] doctor or other medical professional, a peer support group, a non-medical service agency, or a *reliable third party who is in a position to know about the individual's disability* [emphasis added] may...provide verification."

HUD should reevaluate its guidance on this issue as the broad definition of third party verifier allows for abuse. For example, some residents supply documentation in the form of a letter purchased online for a fee that reflects little or no contact with a health care provider and not as the result of an actual therapeutic relationship. **We encourage HUD to specify that an individual providing verification for the resident must have actual knowledge of the person's disability and have an established therapeutic relationship with the resident.**

Housing Opportunity Through Modernization Act of 2016 (HOTMA) – NMHC/NAA also want to highlight our support for efforts to streamline HUD's assisted housing portfolio and urge HUD to carry out the measures contained in the Housing Opportunity Through Modernization Act of 2016.¹⁸ On July 29, 2016 "[The Housing Opportunity through Modernization Act](#)," was signed into law, maximizing the impact of taxpayer dollars and eliminating inefficiencies in critical federal housing programs. Specifically, it streamlines the Section 8 Voucher Program's property inspection process by allowing immediate occupancy if the apartment home has been inspected within the past 24 months. The legislation also extended the contract term for project based vouchers from 15 to 20 years. **NMHC/NAA urge the Administration to implement regulatory provisions that will expedite streamlining measures to relieve administrative burdens and allow residents access to safe, decent and affordable housing.**

¹⁷ See Joint Statement of HUD and the Department of Justice (DOJ), *Reasonable Accommodations Under the Fair Housing Act* (2004) <https://www.hud.gov/offices/fheo/library/huddojstatement.pdf> and John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (2013) https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

¹⁸ Became Public Law No: 114-201