



Instructions for Filing Comments with HUD

NOTICE

HUD published a Proposed Rule on August 19, 2019, titled *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*.

DEADLINE

Comments are due by **October 18, 2019** 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.regulations.gov/docket?D=HUD-2019-0067>

FILING A COMMENT

It is important that HUD receive information from NMHC and NAA members identifying our industry's support for their proposed rule addressing uncertainty and inconsistency of the disparate impact standard. To help facilitate comments, NMHC and NAA have provided background information on the issue below. We 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 we believe the Proposed Rule properly revises HUD's doctrine 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* and the eventual Final Rule.
- We support HUD's Proposed Rule and believe it remedies the disconnect between the language and reasoning of the 2013 Rule and the *Inclusive Communities* decision. That inconsistency creates uncertainty for housing providers and maintains problematic legal conditions specifically rebuked by the Supreme Court. HUD's Proposed Rule recognizes that 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) Voice support for HUD's Proposed Rule and recognize that HUD's revisions avoid conflict with the Supreme Court *Inclusive Communities* decision. Highlight specific elements and additional suggested revisions that may include:

- We thank HUD for taking steps to address our industry's concerns with the current disparate impact rule and strongly support the Proposed Rule issued in August 2019.
- HUD's current regulation threatens housing providers with liability under the Fair Housing Act even when they take necessary steps to develop and operate their properties in a safe and successful manner. For example, the guidance issued by HUD's Office of General Counsel in 2016, which threatened housing providers with fair housing liability where certain criminal screening is used to identify individuals who pose a threat to the life, safety and peaceful enjoyment of other residents, demonstrates that the current rule needs to be overhauled.

- The Proposed Rule incorporates a number of “safeguards” intended to prevent such abusive use of disparate impact liability. Among other things, it requires persons asserting disparate impact claims to establish the elements of that claim, including demonstrating that (1) the challenged policy imposed an “arbitrary, artificial and unnecessary barrier” to housing, (2) a “robust causal link” exists between the challenged policy and the alleged disparate impact and (3) the alleged disparity caused by the challenged policy is “significant,” among other elements.
- These elements bring HUD’s disparate impact doctrine in line with the Supreme Court’s *Inclusive Communities* decision and should be maintained in HUD’s Final Rule.
- In addition, the Proposed Rule identifies a number of defenses that a housing provider can assert to defeat a disparate impact claim.
- Importantly, the Proposed Rule further echoes the *Inclusive Communities* decision by discouraging “abusive” disparate impact claims while preserving cases that are at the “heartland” of disparate impact liability – such as those involving exclusionary zoning practices that make it difficult to develop multifamily housing in many communities and result in reduced housing opportunities for those protected under the FHA.
- To maximize the benefit from revising its current rule and to reduce unnecessary litigation, HUD should also consider providing additional definitions, clarifications and examples of key terms.
- And HUD should also extend the defenses included in the Proposed Rule, including creating a safe harbor for owners that (1) adopt a written policy that (2) is not discriminatory on its face and (3) is reasonably calculated to achieve a legitimate property management objective.
- HUD’s Proposed Rule promotes our shared goal of preventing discrimination in housing while promoting the availability and affordability of housing nationwide. We encourage HUD to consider the additional revisions discussed here and expeditiously complete and issue the Final Rule on disparate impact.

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