

September 6, 2019

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: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02

Dear Sir or Madam,

I write to you on behalf of the Fair Housing Center of Southeast & Mid Michigan to offer comments in response to the above-docketed notice ("Notice") about proposed changes to the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development (HUD). We strongly oppose any changes to HUD's current Disparate Impact Rule.

The mission of the Fair Housing Center is to end discrimination in housing and public accommodations and to promote accessible, integrated communities. Since 1992 we have investigated over 3,800 fair housing complaints, resolved over 100 reasonable accommodations, and opened up thousands of housing units from discrimination. Fair Housing Center-aided settlements total over \$2.1 million. We cover eight counties in southeast and mid-Michigan including Ingham, Jackson, Monroe, and Washtneaw. More than 1.4 million people depend on our services.

As a nation, we have a shared interest in ensuring that housing opportunities are available to every person, regardless of their race, color, religion, national origin, sex, disability and/or familial status. The Fair Housing Act prohibits intentional discriminatory acts *and* facially "neutral" policies that limit housing opportunities based on race, color, national origin, religion, sex, the presence of families with children, and people with disabilities. **Fully realizing the promises of the Fair Housing Act for every person in the United States is central to HUD's mission.**

The Fair Housing Center of Southeast & Mid Michigan shares this central mission and we write to urge you not to revise HUD's existing Disparate Impact standard. HUD's

proposed change would risk the department failing to meet its critical obligation to achieve the Fair Housing Act's "central purpose...to eradicate discriminatory practices within a sector of our Nation's economy."¹ HUD's current Disparate Impact Rule is a necessary tool in the ongoing effort to achieve open housing markets, free of discrimination, and to eliminate all forms of housing discrimination and illegal segregation.

- Complainant Aaronica Warren was sent an eviction notice after an ex-partner came to her house, assaulted her, and caused damage to the apartment she shared with her young son. She was sent an eviction notice for not being in control of her "guest." Without the disparate impact standard, the Fair Housing Center would not have been able to help Ms. Warren file suit against her landlord and she and her son would have lost their housing. The case only settled for a few thousand dollars, but the property owner changed their policy. When batterers know that they can "get her evicted" by bringing violence to her home it gives these perpetrators one more tool to control survivors. The Disparate Impact Rule is vital for victims of domestic violence.
- We have also worked with a number of families with two parents and three children that were turned away from very large two-bedroom apartments because the landlord had an overly-restrictive "two heartbeats per bedroom" policy. It is extremely difficult to find a three-bedroom apartment in our area. If the square footage of the unit meets the local health and safety guidelines for five people it should be open to these families. Without the Disparate Impact Rule more and more families will be shut out of safe, affordable housing.

In its current form, the Disparate Impact Rule has proven practical and effective. It is also comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). In fact, *Inclusive Communities* quoted HUD's existing rule at length without any suggestion that its opinion was in tension with that rule. The central premise of *Inclusive Communities* is that disparate impact claims are necessary to prohibit policies that may not be readily challenged under disparate treatment theories even though, particularly when overlaid on preexisting, long-standing disparities, they unnecessarily exclude minorities from housing. HUD's proposal, however, would prevent disparate impact from performing this function by effectively limiting its application to classic disparate treatment cases.

¹ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511 (2015), available at: <https://casetext.com/case/texas-dept-of-housing-and-community-affairs-v-inclusive-communities-project-inc>.

Accordingly, HUD's existing rule should not be revised. Instead, HUD must focus on real enforcement of the Rule to remove unnecessary barriers to housing choice throughout our housing markets.

HUD's Proposed Rule Would Destroy Disparate Impact Liability in the Housing Markets

HUD's Proposed Rule would make drastic changes to fundamentally weaken this long standing enforcement tool and would allow insurance companies, financial institutions, and other major corporations to engage in covert discriminatory practices with impunity. The Proposed Rule would destroy disparate impact liability and eliminate the incentives for major corporations to continue doing their part to eliminate discrimination. **Accordingly, the Proposed Rule is directly contradictory to the Fair Housing Act and its basic purposes.**

The Proposed Rule shifts the burden of proof and inserts inordinately high barriers that would make it virtually impossible to bring the bedrock and heartland housing discrimination cases that Justice Kennedy expressly stated should be brought using disparate impact.²

We find the proposals to be problematic for some of the following reasons:

- It is already very difficult to for victims of housing and lending discrimination to prevail in a claim under the Fair Housing Act. Without the Disparate Impact Rule it will be virtually impossible to succeed. Specifically, victims will be asked to read the Defendant's mind, try to guess which justifications they might use and preemptively counter them.
- A business practice that relies on statistics or algorithms and has some predictive value will almost always be immune from liability, such that credit scoring, pricing, marketing, or underwriting models would be exempt from the Fair Housing Act, even if it is clear that they result in the discriminatory denial of access to housing and home loans. It is widely known that algorithms based on past discriminatory behavior will perpetuate discriminatory behavior.
- In *Connecticut Fair Hous. Ctr. v. Corelogic*, a plaintiff with a disability was denied housing based on criminal history. The plaintiff's criminal record consisted of a single charge for retail theft in 2014, when he was 20 years old. The grade of the charge was "summary offense," which is below the level of a misdemeanor. The charge was ultimately withdrawn.

Ultimately, the Proposed Rule contains a host of changes that, in practice, amount to insurmountable obstacles to proving what should be clear claims of

² *Inclusive Communities*, 135 S. Ct. at 2522.

housing discrimination. These proposed changes would ultimately result in an inoperable disparate impact standard of liability. Moreover, the proposed changes dangerously move companies and housing providers away from the practice of seeking out less discriminatory alternatives to harmful policies and practices. People of color, women, families with children, and people with disabilities can not lose one more tool that helps to temper the power of corporations that favor profits over civil rights.

The Disparate Impact Rule is Critical to Ensuring Housing Is Free of Systemic Discrimination

The existing Disparate Impact Rule is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of widespread discrimination with rightful recourse.

In our eight-county service area in southeast and mid-Michigan, systemic discriminatory policies and practices limit housing opportunities and choices that the current Disparate Impact Rule can be useful in addressing.

Those include using police calls for domestic violence as a reason to evict; requiring women to go back to work after a pregnancy before a mortgage can be closed; denying housing to otherwise qualified families with children because of overly restrictive occupancy standards; local municipality barring the developer from accepting section 8 at a new housing community as a requirement for developing the land; landlords that require income from work only.

The discriminatory impact of these policies can and should be altered. The focus on less discriminatory alternatives encourages housing providers to adopt less restrictive practices while meeting their business needs, but the Proposed Rule would ultimately preserve discriminatory barriers to open housing markets by not allowing victims to get past the burden of establishing that a policy has a discriminatory impact.

Conclusion

Please keep in mind that HUD is the principal Federal agency responsible for programs concerned with the Nation's housing needs, fair housing opportunities, and improvement and development of the Nation's communities.

The Proposed Rule operates to destroy disparate impact liability. It is in direct contradiction to HUD's mission, decades of legal precedent, and the Supreme Court's recent decision in *Inclusive Communities*.

Before finalizing the current Disparate Impact Rule in 2013, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. In 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. HUD should not change the current Disparate Impact Rule.

Thank you for the opportunity to comment. Please contact Pamela A. Kisch at Fair Housing Center, P.O. Box 7825, Ann Arbor, MI 48107 regarding these comments.

Sincerely,

Pamela A. Kisch, Executive Director
Fair Housing Center of Southeast & Mid Michigan