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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, D.C. 20410-0500
Via: www.regulations.gov

RE: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Docket No. FR-6111-A-01

To Whom It May Concern:

Thank you for the opportunity to comment on the subject request. The National Affordable Housing Management Association (NAHMA) commends HUD's continued efforts to streamline rules and reduce regulatory burdens. NAHMA and its industry partners have developed and filed joint recommendations for HUD's review, including response to specific HUD questions. The joint comments are attached to this letter. Collectively, our recommendations aim to overhaul and improve HUD's Fair Housing Act's Disparate Impact Standard. The highlighted recommendations below are particularly important to Owner/Agents.

About NAHMA

NAHMA is the leading voice for affordable housing management, advocating on behalf of multifamily property managers and owners whose mission is to provide quality affordable housing. NAHMA supports legislative and regulatory policy that promotes the development and preservation of decent and safe affordable housing, is a vital resource for technical education and information and fosters strategic relations between government and industry. NAHMA's membership represents 75 percent of the affordable housing management industry, and includes its most distinguished multifamily owners and management companies.

Recommendations

1. **The Final Rule must incorporate a "robust causality requirement."**

   The Final Rule contains virtually no discussion of causation and certainly fails to incorporate the "robust causality" requirement enunciated in *Inclusive Communities*. The Final Rule should adopt the U.S. Supreme Court's pronouncement that statistical discrepancies alone are insufficient to make a prima facia case of disparate impact, and that plaintiffs must show a "robust causality" between the challenged policy and the disparate impact in order to make a claim.

2. **The Final Rule should be revised to explain that disparate impact-based challenges should be used "solely" to attack "artificial, arbitrary and unnecessary barriers" to housing opportunities.**

   HUD should clarify those practices that it considers to be artificial, arbitrary and posing of unnecessary barriers. Additionally, the need to demonstrate that that the challenged policy is an "arbitrary, artificial and unnecessary barrier" should lie with the complainant/plaintiff as the substantive equivalent of the "legally sufficient justification" requirement imposed on respondents/defendants. Essentially, it should be part of showing the "robust causality requirement" specified in *Inclusive Communities* – presumably if a complainant/plaintiff demonstrates a challenged policy or practice is an artificial, arbitrary and unnecessary barrier, it will have demonstrated the cause of the alleged disparity.

3. **HUD should adopt specific safe harbors as defenses against disparate impact claims.**

   A housing provider should not have to wait until a fair housing claim is asserted to determine that a policy or practice is lawful. HUD must provide concrete guidance to housing providers to assure them in advance that they will not be the target of a fair housing claim. Just as a revised disparate impact rule would properly put the burden on the plaintiff to establish each element of its claim, establishing safe harbors would allow a defendant to establish elements of its defense. The following are examples of safe harbors that would be useful in assisting owners in complying with the FHAct:

   - As the Notice suggests, compliance with otherwise legitimate local, state or federal law ought to protect a housing provider from a disparate impact claim.
   - Adopting policies consistent with rules approved by HUD for operators of "federally-assisted housing" (as defined in 24 CFR §5.100) should provide a safe harbor for housing providers.
   - Implementing eligibility or selection policies intended to enhance housing opportunities for specific protected classes or other housing-impaired persons should also insulate housing providers from disparate impact liability.
   - HUD should consider generally exempting written policies or practices that housing providers adopt that are facially neutral, helpful to the provider's operations, are reasonably calculated to achieve those goals, and that impose no greater burden on persons in protected classes than they impose on the population generally.

Thank you for the opportunity to provide recommendations. Please contact Juliana Bilowich, NAHMA Manager of Government Affairs, at jbilowich@nahma.org, with any questions.

Sincerely,

Kris Cook
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VIA E-MAIL (http://www.regulations.gov)

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Washington, DC 20410-0001

Re: Comments on Reconsideration of HUD's Implementation of Fair Housing Act's Disparate Impact Standard -- Advance Notice of Proposed Rulemaking
Docket No. FR-6111-A-01
RIN 2529-ZA01

Dear Sir or Madam:

On behalf of our clients, the National Leased Housing Association ("NLHA"), the Council for Affordable and Rural Housing ("CARH"), the Public Housing Authorities Directors Association ("PHADA"), the National Affordable Housing Management Association ("NAHMA"), the National Association of Housing and Redevelopment Officials "(NAHRO"), the National Apartment Association ("NAA"), and the National Multifamily Housing Council ("NMHC") (jointly, the "Housing Associations"), and their thousands of members – owners, managers, developers, and investors in the nation's multifamily housing industry – we provide this response to the Advance Notice of Proposed Rulemaking (the "Notice") published by the U.S. Department of Housing and Urban Development ("HUD") on June 20, 2018, requesting comments on its proposal to reconsider its final rule on disparate impact liability, 24 CFR § 100.500 (the "Final Rule"), in light of the decision of the U.S. Supreme Court in *Texas Dept. of Hous. and Community Affairs v. The Inclusive Communities Project, Inc.*, __ U.S. __, 135 S.Ct. 2507 (2015).

The Final Rule departs significantly from the standards set in *Inclusive Communities*, which dramatically restricts the scope of disparate impact liability in cases under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (the "FHAct"). Specifically, the Final Rule fails to adopt the safeguards that the Supreme Court imposed to prevent "abusive" disparate impact cases under the FHAct. 135 S.Ct. at 2524. As explained below, there are numerous inconsistencies between the Final Rule and the standards set by *Inclusive Communities*. HUD should overhaul

its Final Rule, including dispensing with its present burden-shifting approach and instead incorporating the safeguards identified by the Supreme Court as elements that the plaintiff or complainant must prove to establish a disparate impact claim and safe harbors and other express defenses to disparate impact claims. As Attachment A to these comments, the Housing Associations provide a suggested Framework for a reconceived disparate impact rule that identifies the elements of a disparate impact claim and affirmative defenses to it.

1. **Reconsideration of the Final Rule Is Required Following The *Inclusive Communities* Decision**

A. HUD's Final Rule Fails to Reflect a Workable Disparate Impact Standard.

In February 2013, HUD issued the Final Rule implementing its interpretation of disparate impact liability under the FHAct. Essentially, the Final Rule established a burden-shifting framework, in which each party (referred to here as the plaintiff or defendant) had to meet a specific burden of proof, at which point the burden would shift to the next party to carry its burden. Initially, the plaintiff is responsible for showing that a challenged policy or practice, even if not motivated by a discriminatory intent, caused or predictably will cause a "discriminatory effect," which is defined as a practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 CFR §§ 100.500(a), (c)(1) (2018)

The challenged practice may still be lawful if it is supported by a "legally sufficient justification," which exists where the challenged practice:

1. "Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" of the defendant and
2. "Those interests could not be served by another practice that has a less discriminatory effect."

§ 100.500(b)(1)(i)-(ii). Additionally, the Final Rule provided that the legally sufficient justification "must be supported by evidence and may not be hypothetical or speculative." § 100.500(b)(2).

Proof of a legally sufficient justification was divided between the parties. Thus, if the plaintiff shows a discriminatory effect, the burden shifts to the defendant to demonstrate that "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" of the defendant. §100.500(c)(2). If the defendant meets that burden, then the burden shifts to the plaintiff to show that those interests "could be served by another practice that has a less discriminatory effect." §100.500(c)(3).

Even before HUD adopted the Final Rule, it was apparent that there were many problems with HUD's approach to disparate impact liability. In comments submitted by several of the Housing Associations, they questioned the use of a burden-shifting model, arguing that as in

other areas of the law, the burden of proof should always rest with the party asserting the claim. They also questioned whether the disparate impact rule should incorporate standards for both the nature and extent of the alleged disparate impact, including whether the alleged impact should be qualitatively different on the protected class than on the general population. They also warned that requiring a defendant to show that the challenged policy "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and to impose hefty evidence requirements on that showing placed an almost insurmountable burden on the defendant. Instead, they argued that if the defendant was required to carry a burden, it should be sufficient to show that the challenged policy was rationally-related to a legitimate, nondiscriminatory interest of the defendant.

There were other defects in the Final Rule as well. Most notably, the Final Rule did not establish any criterion to assess the causal connection between the challenged practice and the alleged impact. Under the Final Rule, the plaintiff carries its burden if it merely shows that the policy "actually or predictably results" in an impact, ignoring real world situations where multiple factors over many years may produce discriminatory effects. Moreover, while the defendant's showing of a "substantial, legitimate, nondiscriminatory interest" must be established by evidence and must not be speculative, there is no discussion of what sort of proof is required to establish the plaintiff's burden of showing the challenged policy "results" in a discriminatory impact. This is an important omission in any case, but particularly important when dealing with cases alleging that a particular practice "predictably will cause a discriminatory effect." § 100.500(c)(1). The Final Rule provides no guidance for establishing causation, especially in such speculative situations. The Final Rule also missed the mark by failing to incorporate specific safe harbors so that government agencies and private entities would know that, if they followed rules set out by HUD in developing their operating policies, they could avoid disparate impact claims. As a result of this omission, agencies and private firms are left to the least efficient and most expensive alternative – litigation – to determine whether their policies and practices satisfy HUD's disparate impact standards.

B. The U.S. Supreme Court Narrowly Construes Disparate Impact Liability Under the FHAct.

In its June 2015 decision in *Inclusive Communities*, the U.S. Supreme Court for the first time squarely addressed the existence of disparate impact liability under the FHAct. While the Supreme Court narrowly affirmed disparate impact liability under the FHAct, it focused much of its opinion in warning against "abusive" disparate impact litigation. 135 S.Ct. at 2524. It recognized that by attacking nonintentional forms of discrimination, disparate impact threatened to penalize otherwise justifiable exercises of governmental authority or private enterprise. Among its concerns were cases in which disparate impact was used as a way to "second guess" legitimate decisions of public agencies and private entities. Such applications interfere with "the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Id.* at 2518. Likewise, the court recognized that "[e]ntrepreneurs must be given latitude to consider market factors." *Id.* at 2523. In particular, the court warned that disparate impact liability should not be used to "second-guess" otherwise legitimate decisions by government agencies or private entities, nor should it result in placing a defendant in a "double-

bind" where any decision it makes may be subject to a claim of disparate impact discrimination. *Id.* at 2522-23. The court said that disparate impact should be focused on the "heartland" of cases involving "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification." *Id.* at 2521-22.

To thwart such "abusive" applications of disparate impact liability, the Court offered a number of "safeguards." *Id.* at 2523. Among other things, the court warned that a mere "statistical disparity" by itself was insufficient to establish a disparate impact claim. *Id.* Instead, the court directed that persons asserting disparate impact claims must satisfy a "robust causality requirement," and "produce statistical evidence demonstrating a causal connection" between the challenged policy and the claimed discriminatory effect. *Id.* The court warned that where a particular outcome is the result of multiple causes – such as historical patterns of discrimination – no one policy can result in a specific disparate impact, and in such cases, a disparate impact claim must be dismissed. *Id.* at 2523-24. Disparate impact liability should be used "solely" to attack "artificial, arbitrary, and unnecessary barriers" to housing opportunities, not simply to challenge existing practices or to impose alternative policy outcomes. *Id.* at 2522, 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In addition, the Court ruled that defendants should be allowed "to maintain a policy if they can prove it is necessary to achieve a valid interest." *Id.* at 2523.

The Supreme Court, however, acknowledged the Final Rule in *Inclusive Communities*, without specifically endorsing it or the specific burden-shifting framework it incorporated. *See id.* at 2514-15. In applying the safeguards imposed by *Inclusive Communities*, however, subsequent court decisions have illustrated that there are numerous inconsistencies between the disparate impact standards reflected in the Final Rule and in the *Inclusive Communities* decision.

C. *Post-Inclusive Communities Judicial Decisions Illustrate Differences Between Supreme Court's Approach and The Final Rule*

Since 2015, judicial decisions wrestling with disparate impact claims under the FHAct have demonstrated that the Final Rule fails to incorporate the safeguards required by the *Inclusive Communities* decision. While they have not expressly rejected the Final Rule, these decisions demonstrate that key concepts adopted by the Supreme Court simply are ignored by the Final Rule. These cases show that in order to conform to the *Inclusive Communities* standards, the Final Rule must be drastically overhauled to reflect what the Supreme Court intended.

a) **Judicial decisions have strongly focused on the plaintiff's duty to demonstrate a "robust causality requirement."** Starting with the remand of the *Inclusive Communities* case to the district court in Texas, courts have repeatedly emphasized that to prevail, a plaintiff must establish a clear causal connection between the challenged policy or practice and the alleged resulting discriminatory impact. In *Inclusive Cmtys. Project, Inc. v Tex. Dept. of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562 at *20 (N.D. Tex. Aug. 26, 2016), the district court observed that the plaintiff "failed to point to a specific, facially neutral policy

that purportedly caused a racially disparate impact." In a decision dismissing a challenge to housing code enforcement practices that allegedly had a disparate impact on minority housing opportunities, the court similarly warned that "a plaintiff's complaint is insufficient if it does not point to a defendant's policy and purported disparity and allege facts that show a causal connection." *See also City of Miami v. Bank of Am. Corp.*, 171 F. Supp. 3d 1314, 1320 (S.D. Fla. 2016) (dismissing predatory lending claim that failed to satisfy robust causality requirement); *Metro. St. Louis Equal Hous. & Opportunity Council v. City of Maplewood*, No. 4:17-CV-886-RLW, 2017 U.S. Dist. LEXIS 202308, at *13 (E.D. Mo. Dec. 8, 2017) (plaintiff "failed to plead a causal connection" between challenged nuisance ordinance and "alleged discriminatory impact" on protected classes).

b) **Judicial decisions point out the need to demonstrate that challenged policies or practices must constitute "artificial, arbitrary and unnecessary barriers" to housing.** In addition to requiring a strong causation standard, other courts have stressed that disparate impact claims are different than other types of housing discrimination claims. Thus, just weeks after the Supreme Court's decision, the court in *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-cv-09007, 2015 U.S. Dist. LEXIS 93451, at *17 (C.D. Ca. July 17, 2015), said that disparate impact claims should "'solely' seek to remove policies that are 'artificial, arbitrary, and unnecessary barriers,'" as the Supreme Court insisted in *Inclusive Communities*. *See also Ellis v. City of Minneapolis*, 860 F.3d 1106, 1114 (8th Cir. 2017) ("Under *Inclusive Communities*, a plaintiff must, at the very least, point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."); *City of Miami*, 171 F. Supp. 3d at 1320 (listing evidence of "artificial, arbitrary, and unnecessary" policy as element of disparate impact claim).

c) **Courts have treated the *Inclusive Communities* safeguards as elements a plaintiff must prove to establish a disparate impact claim.** The Final Rule imposes a minimal burden on the claimant, requiring them to do no more than assert a challenged policy "results" in a disparate impact to carry its burden of making a prima facie claim. After *Inclusive Communities*, courts have taken a different approach, formalizing components of the *Inclusive Communities* safeguards into distinct elements that are necessary to assert a disparate impact claim. For example, addressing predatory lending claims, the court in *City of Miami* stated that the plaintiff must "(1) show statistically-imbalanced lending patterns which adversely impact a minority group, (2) identify a facially-neutral policy used by the Defendants, (3) allege that such policy was 'artificial, arbitrary and unnecessary,' and (4) provide factual allegations that meet the 'robust causality requirement.'" 171 F. Supp. 3d at 1320. Applying this four-part test, the court concluded that the plaintiff failed to meet the robust causality requirement. *See also Cobb Cnty. v. Bank of Am. Corp.*, 183 F. Supp. 3d 1332, 1346-47 (N.D. Ga. 2016) (applying the same four-part test and explaining that "claimants must demonstrate how the defendant's policy caused the racial imbalance, or else defendants might be held liable for racial disparities they did

not create."). On its face, the *City of Miami* decision demonstrates that the Final Rule fails to capture the requirements imposed by *Inclusive Communities*: nothing in the Final Rule incorporates either the "robust causality" or the "artificial, arbitrary or unnecessary" requirements imposed by the Supreme Court. More important, *City of Miami* shows that those safeguards are not merely stand-alone items on a checklist. Rather, *City of Miami* shows how those individual items can be synthesized into a series of elements that a plaintiff must satisfy in order to establish a valid disparate impact claim. This is not an issue of shifting a burden from one party to another. Rather, this lands disparate impact into the context of other forms of liability-creating legal theories, such as components of tort fraud and other tort claims, by placing the burden on the plaintiff in the first case to make out each of the discrete elements of a disparate impact claim.

2. Recommendations for Overhauling The Final Rule

Based on the foregoing, the Final Rule fails to reflect the concepts enunciated by the Supreme Court in *Inclusive Communities* and amplified in later judicial decisions. While the Housing Associations do not recommend an outright repeal of the Final Rule – which would only result in a further balkanization of disparate impact law – they believe it is essential to radically overhaul the Final Rule, to bring it into compliance with the concepts imbedded in *Inclusive Communities*. Housing Associations specifically urge HUD to undertake the following changes to the Final Rule:

a) **The Final Rule must incorporate a "robust causality requirement."** The Final Rule contains virtually no discussion of causation and certainly fails to incorporate the "robust causality requirement enunciated in *Inclusive Communities*, including showing that

i. A mere statistical showing of a disparity is insufficient to establish a prima facie disparate impact claim.

ii. The alleged disparity is the result of a specific challenged policy or practice. Mere predicted results (as opposed to actual results) are too speculative to satisfy the "robust causality" requirement.

iii. A disparate impact claim should be dismissed where the disparity results from multiple causes, for a defendant should not be "held liable for racial disparities they did not create." 135 S.Ct. at 2423. However, where a disparity results from multiple causes, a plaintiff may satisfy the causality requirement if it can demonstrate that a specific policy or practice worsened that disparity.

iv. The causation element is established at an early phase of a case. *Id.* (noting need for "prompt resolution of these cases.").

Moreover, the Final Rule focuses almost solely on demonstrating disparities as the basis for establishing a prima facie case and provides no guidance concerning causation. Thus,

while the Final Rule says a "practice has a discriminatory effect where it actually or predictably results in a disparate impact," the Final Rule does not explain what the complainant/plaintiff must do to demonstrate such a "result." The danger, as the Supreme Court warned, is that a fact-finder may substitute evidence of proof that a disparity *exists* for evidence that it was *caused* by the challenged policy. The Final Rule should be revised to reflect the need to demonstrate the "robust causality requirement" imposed by *Inclusive Communities*.

b) **The Final Rule's "Legally Sufficient Justification" Definition Invites Exactly the Sort of "Second-Guessing" the Supreme Court Condemned.** According to the Final Rule, if a complainant/plaintiff makes out a prima facie case, the burden shifts to the respondent/defendant to demonstrate a "legally sufficient justification" for the challenged policy or practice. The first component of this definition – demonstrating a "substantial, legitimate, nondiscriminatory interest" of the respondent/defendant (24 C.F.R. § 100.500(b)(1)(i) – is far stricter and more specific than what the Supreme Court adopted in *Inclusive Communities*. The Supreme Court required no such detailed showing to satisfy its "valid interest" requirement. On the contrary, the Final Rule directs a court to strictly scrutinize the goals and justifications offered by a defendant in support of its "valid interest." As written now, the Final Rule invites fact-finders to do exactly what the Supreme Court said they should not do – engage in second-guessing public and private decisions to test the validity of the conclusions those entities reached. This intrusive inquiry is inconsistent with the rule stated in *Inclusive Communities* and should be revised to comply with *Inclusive Communities*. If the challenged policy is rationally related to the housing provider's legitimate operations, is supported by relevant business experience, and is reasonably calculated to achieve those goals, it should be deemed sufficient to defeat a disparate impact claim.

c) **The Final Rule should be revised to explain that disparate impact should be used "solely" to attack "artificial, arbitrary and unnecessary barriers" to housing opportunities.** Repeatedly, the majority in *Inclusive Communities* stressed that there was a "heartland" of disparate impact cases, that focuses on unfair zoning and other rules and practices that artificially erected obstacles for protected classes under the FHAct to locate housing. The Court said that disparate impact liability should be focused on rooting out such "artificial, arbitrary and unnecessary barriers." 135 S.Ct. at 2524. On the other hand, disparate impact liability should not apply to other cases where it amounts to no more than "second-guessing" appropriate policy judgments that should be entrusted to the discretion of public and private decision-makers. *Id.* at 2512. The need to demonstrate that that the challenged policy is an "arbitrary, artificial and unnecessary barrier" should lie with the complainant/plaintiff as the substantive equivalent of the "legally sufficient justification" requirement imposed on respondents/defendants. Essentially, it should be part of showing the "robust causality requirement" specified in *Inclusive Communities* – presumably if a complainant/plaintiff demonstrates a challenged policy or practice is an artificial, arbitrary and unnecessary barrier, it will have demonstrated the cause of the alleged disparity.

d) **HUD should reject a burden-shifting approach to disparate impact claims under the FHAct, and instead place the burden on the plaintiff to establish all of the elements of a disparate impact claim.** While the Supreme Court identified a list of safeguards needed to prevent "abusive" disparate impact claims, it also did not expressly endorse a burden-shifting approach to proving disparate impact claims. Rather than embrace a burden-shifting model, courts in *City of Miami* and *Cobb Cnty.* have attempted to synthesize the individual safeguards identified in *Inclusive Communities* into a more formal series of elements that the plaintiff is required to demonstrate to satisfy a disparate impact claim. While these decisions are focused on the unique issues raised by the allegations in those cases, HUD should follow the lead of these cases and, rather than a burden-shifting approach, squarely place on the plaintiff the burden of proving each element of a disparate impact claim. This would properly impose on the plaintiff the burden of making out a disparate impact claim. In the attached Framework for Reconceiving HUD's Disparate Impact Rule (the "Framework," Attachment A to these comments), the Housing Associations identify the specific elements that a plaintiff should be required to show to establish a disparate impact claim. A defendant, of course, would be able to defend by refuting the plaintiff's evidence on each element and would also be able to raise certain safe harbors as defenses to disparate impact claims, as discussed below.

e) **The Final Rule is Inconsistent with Other Elements of the Supreme Court's Decision in *Wards Cove*, and Should Be Revised To Reflect Those Considerations.** In *Property Cas. Insurers Assn. of Am. V. Donovan*, 66 F. Supp. 3d 1018 (N.D. Ill. 2014), the district court identified several components of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) that were inconsistent with the burden-shifting provisions of HUD's Final Rule. Specifically,

i. *Wards Cove* "requires the plaintiff to challenge a particular practice, whereas HUD has indicated that a plaintiff may be able 'to challenge the decision-making process as a whole'." 66 F.Supp.3d at 1052 (internal citations omitted; emphasis original).

ii. "*Wards Cove* requires the plaintiff to show that the challenged practice creates a 'significant' disparate impact, whereas HUD's framework does not require that the challenged practice is 'significant'." *Id.*

iii. "[U]nder the *Wards Cove* approach, the burden of proof always remains with the plaintiff, and only the burden of production shifts to the defendant. In HUD's framework, on the other hand, the defendant bears the burden of proof – not just the burden of production – in the second step." *Id.*

iv. "*Wards Cove* does not require the defendant's legitimate business interest to be 'essential' or 'indispensable' for it to pass muster in the second step, but HUD's framework requires the defendant to provide that its business interest was 'necessary.'" *Id.*

v. "[I]n *Wards Cove*, the Supreme Court held that any alternative practice the plaintiff offered in the third step must be 'equally effective,' as the challenged practice. HUD, on the other hand, has determined that an 'equally effective' standard is appropriate. *Id.*

The Supreme Court clearly endorsed *Wards Cove* when, for example, it addressed the need for a "robust causality requirement." 135 S.Ct. at 2523. Similarly, even if HUD discards the burden-shifting approach incorporated in the Final Rule, the *Wards Cove*-derived concepts identified by the *Property Casualty* court should be considered by HUD as it overhauls its disparate impact regulation.

f) **HUD should adopt specific safe harbors as defenses against disparate impact claims.** A housing provider should not have to wait until a fair housing claim is asserted to determine that a policy or practice is lawful. HUD can provide concrete guidance to housing providers to assure them in advance that they will not be the target of a fair housing claim. Just as a revised disparate impact rule would properly put the burden on the plaintiff to establish each element of its claim, establishing safe harbors would allow a defendant to establish elements of its defense. The following are examples of safe harbors that would be useful in assisting owners in complying with the FHAct:

i. As the Notice suggests, compliance with otherwise legitimate local, state or federal law ought to protect a housing provider from a disparate impact claim.

ii. Adopting policies consistent with rules approved by HUD for operators of "federally-assisted housing" (as defined in 24 C.F.R. § 5.100) should provide a safe harbor for housing providers.

iii. Implementing eligibility or selection policies intended to enhance housing opportunities for specific protected classes or other housing-impaired persons should also insulate housing providers from disparate impact liability.

iv. HUD should consider generally exempting written policies or practices that housing providers adopt that are facially neutral, helpful to the provider's operations, are reasonably calculated to achieve those goals, and that impose no greater burden on persons in protected classes than they impose on the population generally.[1]

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[1] HUD's own efforts to apply the Final Rule to concrete situations faced by housing providers have demonstrated how unworkable it is. For example, in April 2016, HUD's Office of General Counsel ("OGC") issued guidance intended to apply disparate impact analysis to use of crime history data to screen tenants for housing. OGC, Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, (April 6, 2016) (available at https://www.hud.gov/sites/documents/hud_ogcguidappfhastandcr.pdf.) (the "Guidance"). Whatever its intended purpose, the Guidance left most readers perplexed as to whether housing providers could screen applicants on the basis of their criminal history, and if so, how to determine whether specific screening criteria

To assist HUD in the process of reconceiving the Final Rule in a manner that complies with *Inclusive Communities*, the Housing Associations have developed the Framework, which identifies how the safeguards enunciated in *Inclusive Communities* can be woven into a set of elements for establishing and defending against disparate impact claims, including the safe harbors mentioned above.

3. Responses to HUD Questions

The foregoing discussion explains why the Final Rule does not comply with the *Inclusive Communities* decision and suggests steps that HUD can take to reconceive its disparate impact rule. In its Notice, HUD asked for responses to specific questions relating to its reconsideration of the Final Rule. The Housing Associations present these responses to HUD's questions:

1. Does the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

   As explained above, HUD's current burden-shifting approach was not expressly endorsed by the Supreme Court in *Inclusive Communities* and fails to properly reflect the analysis that HUD and courts applying its disparate impact rule should adopt. Instead of the current format, HUD should adopt the concepts reflected in the Framework, to clarify that the plaintiff bears the burden of proving all aspects of its disparate impact claim and that the defendant only bears the burden of proving any applicable defenses.

2. Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability?

   As noted above, the Final Rule simply fails to address the Supreme Court's requirement that disparate impact only attack policies that are artificial, arbitrary and unnecessary. The Framework explains that, as part of the plaintiff's burden, it must show that the policy attacked is in fact an artificial, arbitrary or unnecessary barrier. This might be shown by evidence that there is a less discriminatory but equally effective alternative to the challenged policy – a burden which again should be on the plaintiff, not the defendant.

3. Does the Disparate Impacts Rule's definition of "discriminatory effect" in 24 C.F.R. § 100.500(a) in conjunction with the burden of proof for stating a prima facie case in 24 C.F.R. § 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

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complied with the FHAct. Rather than provide clarity and certainty, the Guidance only demonstrated that under the Final Rule, housing providers could be attacked for attempting to pursue policies intended to promote tenant security and safety.

There are numerous defects with the definition of "discriminatory effect" used in the Final Rule that should be revised to conform to the *Inclusive Community* standards. For example, the plaintiff should be required to show that the alleged impact

(i) Is "substantial," meaning that it has a significant impact on housing opportunities for protected classes.
(ii) Affects protected classes in a manner that is not only quantitatively but also qualitatively different from the population at large. Again, numbers alone are not decisive. The policy must target protected classes in a way that affects them differently than other persons.
(iii) Is actual and provable. The current rule allows for challenges based on "predicted" impacts, but, as noted above, predicted impacts are inherently uncertain and speculative, and cannot possibly satisfy a "robust causality" standard. Claims relating to mere "predicted" impacts should not be allowed in disparate impact cases.

4. Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under *Inclusive Communities* and other Supreme Court rulings?

Yes. As explained above, the *Inclusive Communities* decision clearly imposed a "robust causality" requirement on parties asserting a disparate impact claim. The Framework explains how this requirement can be incorporated in a revised disparate impact rule.

5. Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant's discretion or another federal statute requires adherence to state statutes)?

Yes. As explained above, the revised disparate impact rule should include express defenses that a defendant can assert, including compliance with safe harbors that would allow a government agency or private entity to conform their operations to avoid liability in the first place. The Frameworks suggests several such safe harbors, including protecting a party who adopts written facially neutral tenant selection or admissions policies that promote the housing provider's bona fide interests (such as assisting other protected classes, minimizing lease defaults or promoting tenant security).

6. Are there revisions to the Disparate Impact Rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful?

The Housing Associations believe that the Final Rule is fundamentally at odds with the Supreme Court's decision in *Inclusive Communities*. The Supreme Court

and later decisions have pointed the way to reconceiving HUD's disparate rule to comply with the Supreme Court's intentions. Taking the action recommended here, including adopting a revised disparate impact rule consistent with the Framework, would promote the goals of improving clarity, reducing burdens, and making it easier for housing providers generally to develop policies that will promote HUD's fair housing goals and the rights of members of protected classes under the FHAct.

Conclusions

The Fair Housing Act is a critical component of the nation's housing policies, and in *Inclusive Communities*, the Supreme Court confirmed that disparate impact liability is a component of fair housing law. In reaching that conclusion, however, the Supreme Court made clear that when misapplied, disparate impact claims can undermine the very policies of providing affordable housing that the Fair Housing Act and federal housing policies are meant to promote. *Inclusive Communities*, 135 S.Ct. at 2524. Experience with the Final Rule, including a growing body of case law, indicates that it falls far short of the standards set in *Inclusive Communities*. HUD needs to reconceive its disparate impact rules to incorporate the safeguards that the Supreme Court has identified, and to prevent abusive disparate impact cases from frustrating its own goals and the legitimate interests of government agencies and private housing providers across the nation.

Very truly yours,

Harry J. Kelly

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ATTACHMENT A

Framework for Reconceiving HUD's Disparate Impact Rule

A. Elements of a Disparate Impact Claim

In order to establish a disparate impact claim, a plaintiff/complainant must establish the following elements:

1. The challenged policy or practice is the actual cause of the discriminatory effect alleged by the plaintiff.

    a. Where a discriminatory condition is caused by more than one factor, a disparate impact claim will not be allowed. However, where a disparity results from multiple causes, a plaintiff may satisfy the causality requirement if it can demonstrate that a specific policy or practice worsened that disparity.

    b. Predicted, as opposed to actual, disparate impacts are too remote and speculative to satisfy the required causality requirements for proving disparate impacts and will not be allowed.

2. The challenged policy or practice must have a significant discriminatory effect.

3. The challenged policy or practice constitutes an arbitrary, artificial and unnecessary barrier to housing opportunities for a protected class.

    a. Overturning the challenged policy or practice would not constitute second-guessing an otherwise valid decision of a governmental agency or private entity, or put the defendant in a double-bind where any choice would be found to have a disparate impact on someone.

4. The challenged policy or practice was not intended to achieve a valid interest of the defendant.

    a. A policy or practice is intended to achieve a valid interest of the defendant where:

        i. The goal of the policy is rationally-related to the defendant's legitimate operations

        ii. There is a non-speculative basis for the policy or practice, including relevant personal, agency or business experience.

        iii. The policy or practice is reasonably calculated to achieve the goal.

5. There was an equally effective but less discriminatory alternative available to the defendant.