DISCRIMINATORY EFFECTS FINAL RULE
FACT SHEET

- **Background**

  - The Fair Housing Act bars more than intentionally discriminatory conduct – it also bars policies that have an unjustified discriminatory effect based on race, national origin, disability, or other protected class.
  - As an example, a landlord's policy of excluding people who have any criminal record, including arrests, often will have a discriminatory effect based on race, national origin, and disability. A policy with a discriminatory effect is not always unlawful. It is unlawful if it is not necessary to achieve a substantial legitimate interest, such as tenant safety, or if it is not the least discriminatory way of achieving that interest.
  - The discriminatory effects doctrine is a powerful tool for addressing policies that cause systemic inequality in housing. It has been used to challenge criminal records policies; zoning requirements; lending and property insurance policies; and many more policies that unnecessarily exclude people of color and others from housing opportunities. It also is a critical tool for addressing unconscious and disguised prejudices that are not easily categorized as discriminatory intent. Having a robust discriminatory effects doctrine in place is critical to fair housing enforcement.
  - At the same time, the discriminatory effects doctrine does not require anyone to do anything that is unreasonable. Landlords, lenders, and others who are subject to the Fair Housing Act can comply with the Act by ensuring that their policies that are likely to have a discriminatory effect are actually necessary to achieve a substantial legitimate interest. They only are required to change these policies if there is an alternative policy that could be implemented that would still achieve the stated interest, or if the policy in place is not actually necessary to achieve a substantial, legitimate interest.
  - The U.S. Department of Housing and Urban Development's (HUD) 2013 discriminatory effects rule (2013 Rule) codified long-standing caselaw regarding the adjudication of Fair Housing Act cases under the discriminatory effects doctrine.
  - Under the 2013 Rule, the discriminatory effects analysis was straightforward: a policy that had a discriminatory effect on a protected class was unlawful if it was not necessary to achieve a substantial, legitimate, nondiscriminatory interest or if a less discriminatory alternative could also serve that interest.
  - In 2015, the Supreme Court in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project, Inc.* upheld the availability of disparate-impact claims under the Fair Housing Act. It cited the 2013 Rule with approval multiple times and did not suggest in any way that the 2013 Rule required modification.

- Nevertheless, the last administration promulgated a rule in September 2020 (2020 Rule), purportedly to implement the 2015 Supreme Court decision. In doing so, it added multiple new procedural requirements and defenses that collectively made it virtually impossible for a plaintiff to plead a disparate impact case to get it started, let alone ultimately win such a case. The effect was to allow businesses, governments, and housing providers to adopt and maintain unnecessary discriminatory policies and practices while escaping any threat of liability.
- Note that the 2020 Rule referred to the discriminatory effects standard in the 2013 Rule as the "disparate impact standard." The 2013 Rule made clear that "discriminatory effects" includes both "disparate impact"—when a policy is facially neutral, but affects people in protected classes differently—and "perpetuation of segregation," — when a policy creates, reinforces, or perpetuates segregated housing patterns but does not necessarily have a disparate impact; the 2020 Rule eliminated the definition of "discriminatory effects" and any reference to "perpetuation of segregation."
- The 2020 Rule was challenged in three separate lawsuits. On October 25, 2020 a U.S. District Court in the District of Massachusetts enjoined HUD's 2020 Rule, and it has never gone into effect. All three lawsuits challenging the 2020 Rule remain pending.
- The 2020 Rule, had it ever gone into effect, would have effectively eliminated HUD's and private plaintiffs' ability to bring and prove a discriminatory effects claim against insurance companies, lenders, housing providers, governments, and others whose policies affect the housing market. That, in turn, would have eliminated an important incentive for those entities to make their policies more equitable.
- Even before it promulgated the 2020 Rule, the last Administration refused to pursue discriminatory effects cases.
- The 2020 Rule, while technically not in effect, was published in the Federal Register and shows up as the current regulation. It has been causing confusion about HUD's position as to the standards HUD and private litigants must meet to pursue discriminatory effects claims.

- **The Notice of Proposed Rulemaking**

  - On June 25, 2021, HUD published in the Federal Register a notice of proposed rulemaking (NPRM) entitled "Reinstatement of HUD's Discriminatory Effects Standard" that proposed rescission of the 2020 Rule and proposed to restore the 2013 Rule.

- **This Final Rule**

    - On March 17, 2023, HUD published on its website and sent to the Federal Register a Final Rule to be published entitled "Reinstatement of HUD's Discriminatory Effects Standard" which takes two actions: rescinding the 2020 Rule and recodifying the 2013 Rule in its place.
    - This Final Rule will go into effect 30 days after it is published in the Federal Register.

- **Why HUD is Taking This Action**

    - HUD's goal is to enforce the Fair Housing Act's discriminatory effects doctrine in a manner that effectuates the Act's broad purposes and this administration's policy goal of a housing market free from both intentional discrimination and policies and practices that have unjustified discriminatory effects.
    - This action is a significant step in HUD's efforts to fully meet its statutory duties under the Fair Housing Act.
    - This action is consistent with existing jurisprudence, including the Supreme Court's decision in *Inclusive Communities*.
    - This action is also consistent with the President's Memorandum of January 26, 2021 on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies.
        - That memorandum directed HUD to examine the prior Administration's fair housing related rules and take all steps necessary to fully enforce the Fair Housing Act.
        - The memorandum also acknowledged that our nation remains deeply segregated by race, with people of color being denied equal housing opportunity because of illegal and artificial constraints. The memorandum acknowledges the large role the federal government had in creating these divisions and the federal government's current obligation to address them.
        - The memorandum stated that it is this Administration's policy "to eliminate racial bias and other forms of discrimination in all stages of home-buying and renting, to lift barriers that restrict housing and neighborhood choice, to promote diverse and inclusive communities, to ensure sufficient physically accessible housing, and to secure equal access to housing opportunity for all."
        - In particular, the White House directed HUD to examine the effects of the previous Administration's disparate impact rule.
    - Through the regulatory action announced today, HUD is clarifying the appropriate standard for analyzing discriminatory effects claims by both confirming that the 2013 Rule provided the proper framework and rescinding the 2020 Rule, which created a novel standard that would have made it nearly impossible to successfully plead or prove a disparate effects claim.