

## HUD Proposed Amendments to Disparate Impact FHA Regulation

By: *Daniel H Byrd, Jones Walker LLP*

On August 1, 2019, the US Department of Housing and Urban Development (HUD) issued a notice of proposed rulemaking seeking public comment on amendments to its “disparate impact” regulation under the Fair Housing Act (FHA). The Proposed Rule was published in the Federal Register on August 20, 2019, and comments are due by October 18, 2019.

The FHA prohibits discrimination in housing based on race, color, religion, sex, disability, familial status, or national origin. In 2013, HUD promulgated a rule setting forth the requirements for a disparate impact claim under the FHA (the “2013 Rule”). The 2013 Rule provided that liability may be established under the FHA when a challenged practice actually or predictably results in a disparate impact on a protected class

of persons — even if the practice was not motivated by a discriminatory intent — and established a burden-shifting framework for determining when a housing policy or practice with a discriminatory effect violates the FHA. Under the 2013 Rule, the plaintiff has the initial burden of showing that a practice has a disparate effect on a protected class, and then the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests. Even if the defendant satisfies such burden of proof, the plaintiff may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

In 2015, the Supreme Court decided *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities)*, which upheld the use of disparate impact analysis to establish liability under the FHA, without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain groups of individuals and the practice is not grounded in sound business considerations. The Court’s decision, however, held that a disparate impact claim cannot be sustained solely by evidence of a statistical disparity and imposed

a number of safeguards designed “to protect potential defendants against abusive disparate-impact claims.” The majority opinion emphasized, in particular, the plaintiff’s burden to establish a “robust” causal connection between the challenged practice and the alleged disparate impact on a protected class.



### WHAT YOU NEED TO KNOW

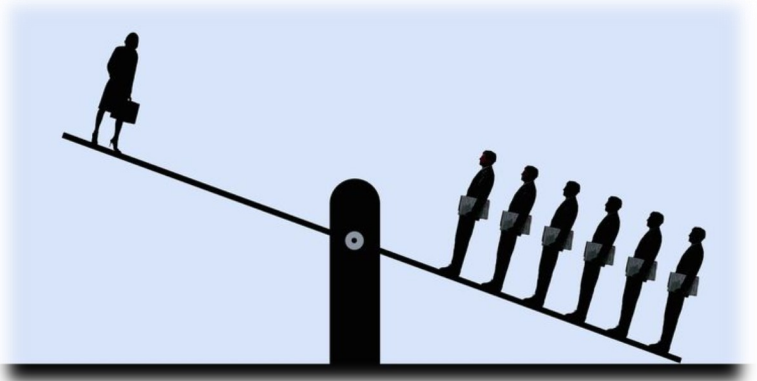


#### DISPARATE IMPACT:

employment practices may be considered discriminatory and illegal if they have a disproportionate “adverse impact” on members of a minority group.

## HUD Proposed Amendments to Disparate Impact FHA Regulation (Cont'd)

HUD has now issued the Proposed Rule expressly to conform the 2013 Rule to the *Inclusive Communities* decision; as stated in the preamble, the proposed amendments are “intended to bring HUD’s disparate impact rule into closer alignment with the analysis and guidance provided in *Inclusive Communities* as understood by HUD.”



The HUD press release accompanying the Proposed Rule adds: “The HUD proposed disparate impact rule provides a framework for establishing legal liability for facially neutral practices that have unintended discriminatory effects on classes of persons protected under the Fair Housing Act.”

To this end, HUD has proposed to replace the 2013 Rule’s disparate impact analytical structure with a revised burden-shifting framework under which a plaintiff raising a disparate impact claim would, initially, be required to plead that the policy or practice in question was “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective.” In accordance with this standard, the Proposed Rule requires a plaintiff to show that a specific, identifiable policy or practice caused the discriminatory effect and to allege five elements set forth in the Proposed Rule with respect to the specific policy or practice. If the plaintiff makes this *prima facie* case, the burden shifts to the defendant to rebut the disparate impact claim. The Proposed Rule identifies a number of defenses that may be used by defendants and, in particular, provides three methods by which a defendant could defeat a claim based on its use of an algorithmic model. The Proposed Rule’s revised burden-shifting framework is highly complex, and it will undoubtedly undergo further refinement before issuance of the final regulation.

It is important to note, however, that the Proposed Rule would only apply to actions under the FHA and not to disparate impact claims under other fair lending laws, in particular under the Equal Credit Opportunity Act (ECOA). During the Obama administration, the Consumer Financial Protection Bureau (CFPB) and the Department of Justice used disparate impact analysis in bringing or threatening numerous ECOA actions against lenders, based solely on statistical lending patterns and despite the absence of supporting language in the statute. In 2018, the CFPB indicated that it was reexamining its use of disparate impact theory under the ECOA “in light of *Inclusive Communities* and the Congressional disapproval of a prior Bureau bulletin concerning indirect auto lender compliance with ECOA and its implementing regulations.” While it remains unclear whether the CFPB will formally adopt a revised disparate impact policy under the ECOA, it is possible that the CFPB will choose to follow the approach taken by HUD in the Proposed Rule.

## NAA/AAGW Response & What You Can Do



Last month, the U.S. Department of Housing and Urban Development (HUD) announced its proposal to overhaul its regulation governing so-called “disparate impact” liability under the Fair Housing Act (the Act). Disparate impact is a legal theory that holds housing providers and others liable if they adopt policies that, while neutral on their face, have a disproportionately harsh impact on classes of persons protected by the Act. As a result, providers can be held liable for a violation of the Act even if they had no intention to do so. For example, in guidance issued in 2016, HUD’s Office of General Counsel itself used disparate impact to impose severe restrictions on criminal screening because of concerns that crime screening may have a harsher impact on minorities protected by the Act.

In its *Inclusive Communities Project* decision in 2015, the U.S. Supreme Court confirmed that disparate impact liability exists under the Act, but imposed a series of “safeguards” to prevent “abusive” disparate impact cases. The Proposal goes a long way to incorporate some of the safeguards announced by the Supreme Court and to reduce the threat that disparate impact liability will be applied improperly.

The National Apartment Association will file comments, with other housing associations, that urge HUD to finalize the Proposal as it is a significant improvement over the previous rule. We anticipate, however, that HUD will receive many comments from other groups who oppose the changes made in the Proposal; already, 7,500 comments opposing the Proposal have already been filed with HUD. ***It is important to let HUD know that housing providers support the changes reflected in the Proposal.*** As a result, we encourage our affiliate (AAGW) and members to submit comments directly, to make sure HUD hears from people who make decisions about tenant selection and property management every day and to let HUD know that the Proposal will help them operate their properties in a safe and successful manner.

**It's our responsibility to tell HUD to finish the job and adopt the proposed rule on disparate impact, take action now by following the link below or copy and paste to your browser:**

<https://www.naahq.org/advocacy/action-center/advocacy-365?vvsrc=%2fCampaigns%2f68640%2fRespond%3fvvcgUT%3dssvpdDzNq3vS2u2cjaUTHA%26vvcgRD%3dB75ME22U8Wg6GtJ%26vvsbr%3d3KZUVII9EPCAScDNWQKp4w>

This grassroots effort is an opportunity for every member of the apartment industry to share their voice and tell the Federal government to reform regulations that fail to adequately address our nation's housing crisis, strengthen our economy and provide quality jobs. The time is now to make

## Apartment's Contribute \$3.4 Trillion to National Economy

New research commissioned by the National Apartment Association (NAA) and the National Multifamily Housing Council (NMHC) and conducted by Hoyt Advisory Services confirms what those in the apartment industry have long known: Apartments and their residents provide a monumental contribution to the economy on a national, state and local levels. The industry and its residents contribute more than \$3.4 trillion annually to the national economy, which breaks down to \$9.3 billion daily or, to put that into perspective, enough to buy six major league baseball franchises every day. In addition to the national data, the report provides a detailed breakout of the economic impact by state and in 50 metro areas.



To fully measure the impact of the entire industry, the research examined dollars and jobs supplied by four different – nationally and on an annual basis, resident spending contributes \$3.0 trillion; operations adds \$175.2 billion; new construction brings \$150.1 billion; and renovation and repair adds \$68.8 billion. Additionally, for the first time ever, this year's study also examined how the apartment industry and its residents contribute taxes to national, state and local economies. Tax payments associated with apartment operations, as well as tax payments by apartment residents, contributed \$408.9 billion to the national economy. These taxes support schools, improvements to local infrastructure and other critical services in communities across the country.

Importantly, lawmakers will not only have a hard time ignoring the undeniable value of these communities, but also their desirability. The demand for apartments continues to grow – nationally, we need to build 328,000 apartments each year at a variety of price points just to meet existing demand – and new apartment construction, alongside renovation and repair of existing stock, will continue to have a tremendous impact for years to come.



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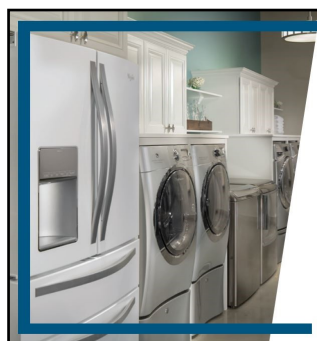
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