

#FightforHousing Justice: Disparate Impact Proposed Rule Office Hours

September 26, 2019



Today's Office Hours

- Brief Presentation on HUD's Proposed Disparate Impact Rule
- Overview of the #FightforHousingJustice campaign and available resources to advocates
- Attendees should use the Q&A boxes to ask questions
- Special thanks to **Scott Chang, Housing Rights Center,** and **Susan Silverstein, AARP Foundation** for joining us!

HUD's Current Disparate Impact Standard

- HUD Discriminatory Effects Regulation: Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. 100.500).
- Included within definition of “discriminatory effects” to include **disparate impact & perpetuation of segregation** theories. 24 C.F.R. 100.500(a).
- Three-part burden-shifting framework

- Step 1 (prima facie case): Plaintiff (charging party) has the burden of proving that a defendant's **practice has caused (or predictably will cause) a discriminatory effect.**
- Step 2: If plaintiff accomplishes step 1, defendant (respondent) has the burden of proving that the “**challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.**”
- Step 3: If defendant accomplishes step 3, plaintiff has the burden of proving that defendant could have served substantial, legitimate, nondiscriminatory interests with a **less discriminatory alternative.**

HUD's Proposed Rule (2019)

- Eliminates reference to perpetuation of segregation from proposed 24 C.F.R. 100.500(a)
- Requires “specific, identifiable” policy or practice
- States that HUD rule re: discriminatory effects does not supersede state regulation of insurance
- Vicarious liability standard – proposed rule removes language “regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice” from current 24 C.F.R. 100.7(b)

HUD's Proposed Rule (2019)

- Prima facie case (proposed 100.500(b)) now includes **5 required elements**:
 - Challenged policy/practice is “arbitrary, artificial, and unnecessary” to achieve a valid interest “such as a practical business, **profit**, policy consideration, or requirement of law.”
 - **Robust causal link** that shows “the specific practice is the **direct cause**” of the discriminatory effect
 - Disparity has an adverse effect on members of a protected class as a group
 - Disparity is significant
 - **Direct link** between disparate impact and the alleged injury

HUD's Proposed Rule (2019)

- Defendant can defeat prima facie showing by:
 - Showing discretion is materially limited by third party
 - Making one of several showings related to an **algorithm** used by defendant
 - Model inputs “do not **rely in any material part**” on proxies for protected classes and that the model is “predictive of credit risk or other **similar valid objective**” OR
 - Model is created by third party that determines “industry standards” and model is being used as intended OR
 - Model has been reviewed and validated by “unbiased neutral third party”
 - Plaintiff has not alleged sufficient facts

- If plaintiff manages to establish a prima facie case, then defendant can produce evidence “that the challenged policy or practice advances a **valid interest** (or interests)”
- Then, plaintiff must then prove that “that a less discriminatory policy or practice exists that would serve the defendant’s identified interest in **an equally effective manner** without imposing materially greater costs on, or creating other material burdens for, the defendant.”

In Sum...

- Plaintiffs would have a substantially higher burden to meet under the HUD proposal, along with more potential outs for defendants, including:
 - Language has been changed from requiring a defendant to show “substantial, legitimate, nondiscriminatory interests” to simply showing a valid interest(s).
 - Less discriminatory alternative has to serve defendant’s interests in equally effective manner
 - Algorithms

Some of the Big Picture Points to Consider

- Inclusive Communities project affirmed disparate impact liability under the FHA; this Rule would make it virtually impossible to successfully allege a disparate impact claim, and is thus fundamentally inconsistent with the core holding of ICP.
- ICP decision referenced the 2013 HUD Rule and made no mention of constitutional concerns with the Rule
- It is unclear why HUD's current burden shifting framework could not address concerns by insurance industry and entities that rely on algorithms.

Food for Thought...

- Try to use as much original content as possible
 - Include information about your work and/or experience with disparate impact theory
- Avoid sign-on letters, if possible
- Most important – that you submit comments expressing support for HUD's current rule and opposing changes to the rule

#FightForHousingJustice Campaign

- Website: www.fightforhousingjustice.org
- Resources
 - Fact sheets
 - Talking points and tips for general commenters
 - Commenting portal
 - General basic commenting template
 - Additional resources being added regularly



The Next Few Weeks

- Proposed rule is undergoing 60-day public comment period
 - Comments are due **October 18, 2019**
- Emphasis is getting in as many unique comments as possible!
- Save the Date → National **Day of Action** on **October 10th**
- Stay tuned for other updates; be sure to join our e-mail list on the fightforhousingjustice.org website

Office Hours – Open Q&A

- Type in your questions into one of the chat boxes
- We'll be reading and discussing your questions



Questions HUD Is Asking About

- Proposed rule's alignment with *Inclusive Communities Project*
- What impact did ICP decision have? And how does the current 2013 HUD Rule align with ICP?
- Proposed rule's impacts on economic burden to relevant parties, including citizen litigants
- How would HUD's decision not to change the current Rule affect the status quo?
- How would changes regarding insurance affect the number of disparate impact claims?
- Other data, information, or analysis public can provide

Questions HUD Is Asking About

- Should HUD provide definitions for specific terms?
- Whether/when punitive or exemplary damages are appropriate for litigation in federal court?
- Would it be consistent with ICP to provide a defense to housing authorities who can show that a policy being challenged “is a reasonable approach and in the housing authority’s sound discretion”
- The “nature, propriety, and use of algorithmic models” related to the proposed defenses
- Less burdensome alternatives to the proposed rule
- Burden or benefit of the proposed rule on potential claimants and organizations

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