HUD's Disparate Impact Rule: An Overview for Legal Advocates

On August 19, 2019, the Department of Housing and Urban Development (HUD) proposed a rule that would significantly change the way that the Fair Housing Act is enforced. If finalized, the rule would undermine an approach to fighting housing discrimination that has existed for decades.

An Attack on Fair Housing Enforcement

The proposed rule would limit use of the "**disparate impact**" theory of housing discrimination. Disparate impact occurs where a facially-neutral policy or practice has an adverse impact on a protected class, such as people of color, persons with disabilities, or families with children. Given that many housing providers no longer advertise their intent to exclude protected classes, disparate impact is a critical legal tool needed to expose housing discrimination that is often hidden. As the U.S. Supreme Court observed in 2015, "Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."

The Trump Administration's attack on disparate impact theory will make civil rights enforcement more difficult, allowing housing providers, cities, and mortgage lenders to perpetuate unequal access to safe, healthy, and affordable housing. The proposed rule assumes racism and discrimination are things of the past, and that all that we need to do now is passively denounce **overt** racism. That fantasy ignores the reality of discrimination in the United States today, particularly within the housing market.

In making this proposal, **HUD ignores a growing body of implicit bias research that says preferences against people of color are deeply ingrained in our society, and that deliberate intervention is necessary to prevent such bias from determining social outcomes.**

Implications of HUD's Proposed Rule

The proposed rule will render disparate impact a dead letter by imposing a nearly impossible standard of proof on plaintiffs while allowing defendants to escape liability with a minimal showing. While HUD states that many of the changes to its regulatory standard are intended to "better reflect the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, [135 S. Ct. 2507 (2015)]," it is apparent that the changes are **intended to significantly limit liability** for landlords, lenders, insurance companies, and others involved in the provision of housing. Furthermore, the Supreme Court, in its *Inclusive Communities* decision, referenced HUD's 2013 disparate impact regulation. In fact, in agreeing to hear *Inclusive Communities*, the Court had the opportunity to review the standard for proving disparate impact cases under the Fair Housing Act, but declined.[1]

The rule would require a "principal-agent relationship under common law for there to be vicarious liability" for housing discrimination. While this would superficially comply with the vicarious liability standard identified in *Meyer v. Holley*, 537 U.S. 280 (2003), the rule actually weakens the language of the regulation that extends vicarious liability "regardless of whether the person knew or should have known" of discriminatory conduct. Another way in which the rule limits liability is by allowing insurance companies to assert their practices comply with state law, and cannot be superseded by the Fair Housing Act.

The proposed rule **significantly increases the standard for a prima facie case at the pleading stage**, allowing defendants (e.g., housing providers, mortgage lenders) to seek dismissal if a plaintiff fails to sufficiently plead **five necessary elements**.

[1] 82 U.S.L.W. 3686 (U.S. Oct. 2, 2014) (No. 13-1371) (granting certiorari on first question only).

1. First, plaintiffs would have to be able to identify a specific practice or policy (before the benefit of discovery) and allege that it is "arbitrary, artificial, and unnecessary" to achieve a valid interest or legitimate objective including profit considerations.
2. Second, plaintiffs would have to demonstrate a "robust causal link" between the specified policy or practice and the disparate impact "that shows the specific practice is the direct cause of the discriminatory effect."
3. Third, plaintiffs would have to show that the policy negatively affects "members of a protected class" (race, color, religion, sex, familial status, disability, or national origin), and that the policy impacts them as a group, not just that the adversely impacted plaintiff is a member of a protected class.
4. Fourth, plaintiffs would have to indicate that the adverse impact is "significant," something more than a "negligible disparity."
5. Lastly, plaintiffs would have to sufficiently establish that the "complaining party's alleged injury" is directly caused by the particular practice in question.

Beyond changing the pleading standard, the proposed rule would **add three new defenses** to disparate impact discrimination based on the use of algorithms or risk models.

1. The first defense would enable defendants to indicate that the algorithm or model is not the actual cause of the disparate impact.
2. The second defense would allow the defendant to avoid liability by showing that a model or algorithm was created by a third party, and they are using it as intended. In significant part, this defense allows defendants to assert compliance with the industry standard and thereby avoid liability for disparity that exists throughout an industry.
3. The third and final new defense would allow the defendant to prove through qualified expert that the model is not the cause of the harmful disparity.

Buried within the proposed rule is the **removal of an important definition** of the "perpetuation of segregation" theory, which a theory that addresses *policies or practices that perpetuate segregated housing patterns*. This is inconsistent with *Inclusive Communities*[2] and a significant body of case law in which banks, governments, and other entities have been held liable for the racial segregation they preserve in communities nationwide.

This proposed rule even changes the damages available to victims of disparate impact discrimination. The rule **rejects punitive and exemplary damages** in administrative proceedings in favor of allowing equitable remedies concentrated on eliminating or reforming the discriminatory practice.

Overall, this proposed rule ignores the 50-plus year history of the disparate impact theory of discrimination in favor of an intent-based standard. It suggests that landlords, banks, insurance companies, and other powerful entities should not be responsible for the discriminatory housing practices they perpetuate, and ignores the fact that housing segregation in the United States remains ubiquitous, and access to housing unequal. **The underlying patterns, practices, and problems that created and continue to perpetuate segregated housing patterns have not been solved, especially for people of color – the proposed rule disregards that reality.**

What you need to know:

1. This is only a proposed rule. The final rule is not likely to go into effect for many months.
2. We need you to submit comments to HUD explaining why this rule would have a catastrophic impact on you, your family, friends, neighbors, tenants, and clients. The deadline to submit comments is **October 18, 2019.** Visit https://www.fightforhousingjustice.org/ for additional resources, including a comment portal that will allow you to submit your comment to HUD.

For more information, please contact:

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[2] 135 S. Ct. at 2522 (noting "the FHA aims to ensure that [housing authority] priorities can be achieved without arbitrarily creating discriminatory effects or *perpetuating segregation*") (emphasis added).