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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR-6111-A-01]

RIN 2529-ZA01

**Reconsideration of HUD's Implementation of the
Fair Housing Act's Disparate Impact Standard**

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This advance notice of proposed rulemaking (ANPR) invites public comment on possible amendments to HUD's 2013 final rule implementing the Fair Housing Act's disparate impact standard, as well as the 2016 supplement to HUD's responses to certain insurance industry comments made during the rulemaking. HUD is reviewing the final rule and supplement to determine what changes, if any, are appropriate following the Supreme Court's 2015 ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., which held that disparate impact claims were cognizable under the Fair Housing Act and discussed standards for, and the constitutional limitations on, such claims. As HUD conducts its review, it is soliciting public comment on the disparate impact standard set forth in the final rule and supplement, the burden-shifting approach, the relevant definitions, the causation standard, and whether changes to these or other provisions of the rule would be appropriate. HUD is also issuing this ANPR in response to public comments submitted on its May 15, 2017, Federal Register document seeking input on ineffective regulations and an October 26, 2017, recommendation from the Department of the Treasury.

DATES: Comment Due Date: **[Insert date 60 days from date of publication in the Federal**

Register].

ADDRESSES: Interested persons are invited to submit comments to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0001. Communications should refer to the above docket number and title and should contain the information specified in the “Request for Comments” section. There are two methods for submitting public comments.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500. Due to security measures at all federal agencies, however, submission of comments by mail often results in delayed delivery. To ensure timely receipt of comments, HUD recommends that comments submitted by mail be submitted at least two weeks in advance of the public comment deadline.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> web site can be viewed by other commenters and interested members of the public. Commenters should follow instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the document.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Comments. All comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Krista Mills, Deputy Assistant Secretary, Office of Policy, Legislative Initiatives, and Outreach, Office Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW, Room 5246, Washington, D.C. 20410; telephone number 202-402-6577. Individuals with hearing or speech impediments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or Act)¹, prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. On February 15, 2013, HUD published a final rule, entitled “Implementation of the Fair Housing Act’s Discriminatory Effects Standard.”² The final rule codified HUD’s interpretation that the Fair Housing Act creates liability for practices with an unjustified discriminatory effect, even if

¹ 42 U.S.C. 3601-3619, 3631.

² 78 FR 11460.

those practices were not motivated by discriminatory intent³. Relying in part on case law under the Fair Housing Act and Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination), HUD's Disparate Impact Rule established a burden-shifting framework for analyzing claims of disparate impact under the Fair Housing Act.⁴ In 2016, HUD published a supplement to its responses to certain insurance industry comments made during the rulemaking.⁵ This ANPR uses the term "Disparate Impact Rule" to refer collectively to the 2013 final rule and 2016 supplement.

In 2015, in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,⁶ (Inclusive Communities), the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act. The Court's opinion referenced HUD's Disparate Impact Rule, but the Court did not extensively review the rule or rely on it for its holding. Rather, the Court undertook its own analysis of the Fair Housing Act and discussed the standards for, and constitutional limitations on, disparate impact claims. The Supreme Court's ruling in Inclusive Communities recognized the availability of disparate impact claims under the Fair Housing Act independent of HUD's Disparate Impact Rule. HUD is reviewing the Disparate Impact Rule to determine what changes, if any, may be necessary in light of the Inclusive Communities decision. As it conducts this review, HUD welcomes public comment on other amendments to the Disparate Impact Rule that may be necessary or helpful.

The request for comments contained in this ANPR is also consistent with HUD's efforts to carry out the Administration's regulatory reform efforts. On May 15, 2017, HUD published a

³ See 24 CFR §§ 100.5(b), 100.70(d)(5), 100.120(b), 100.130(b), and 100.500

⁴ See 24 CFR 100.500(c).

⁵ See "Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance," 81 FR 69012 (Oct. 5, 2016).

⁶ 135 S. Ct. 2507 (2015).

Federal Register document pursuant to Executive Orders 13771, “Reducing Regulation and Controlling Regulatory Costs,” and 13777, “Enforcing the Regulatory Reform Agenda,” inviting public comments to assist HUD in identifying existing regulations that may be outdated, ineffective, or excessively burdensome.⁷ In response, HUD received numerous comments asserting that the Disparate Impact Rule created uncertainty for commercial decisionmaking, as well as public policymaking, and that the rule is inconsistent with Inclusive Communities. On the other hand, HUD also received comments in support of the Disparate Impact Rule, asserting that it was cited in Inclusive Communities and is consistent with that decision. Additionally, in October 2017, the Secretary of the Treasury issued a report that explicitly recommended that HUD reconsider applications of the Disparate Impact Rule, especially in the context of the insurance industry.⁸

In light of Inclusive Communities, public comments submitted in response to HUD’s May 15, 2017, Federal Register document, and the recommendation from the Department of the Treasury, HUD is seeking public comment on whether the Disparate Impact Rule should be revised for any considerations of law or policy raised in those fora or that are otherwise appropriate.

II. This Advance Notice of Proposed Rulemaking

HUD seeks public comment on appropriate changes, if any, to the Disparate Impact Rule. While the following list is not exhaustive, HUD is particularly interested in comments on the following questions:

⁷ 82 FR 22344.

⁸ See U.S. Department of the Treasury Report: A Financial System That Creates Economic Opportunities, Asset Management and Insurance (Oct. 26, 2017), available at: https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf

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

II. Findings and Certifications

Environmental Impact

This ANPR is exclusively concerned with nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), it is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321-4347).

Regulatory Review – Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This ANPR was reviewed by OMB and determined to likely result in a “significant regulatory action,” as defined in section 3(f) of Executive Order 12866.

Dated: June 18, 2018.

Anna Maria Farías,
Assistant Secretary for Fair Housing and Equal
Opportunity.

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