CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

August 24, 2021

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
Washington, DC 20410

Re: Reinstatement of HUD's Discriminatory Effects Standard

Dear Sir or Madam:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the proposed rule ("Proposal") issued by the Department of Housing and Urban Development ("HUD") regarding its implementation of the disparate impact standard under the Fair Housing Act ("FHA").[1]

HUD's 2013 Discriminatory Effects Rule ("2013 Rule") sought to formalize the Department's position regarding a discriminatory effects standard under the FHA. In doing so, HUD created a three-part burden-shifting framework that requires a plaintiff to prove as part of a prima facie showing that a practice caused or will predictably cause a discriminatory effect. If the plaintiff makes this prima facie showing, the defendant bears the burden of proving that the challenged practice is necessary to achieve one or more "substantial, legitimate, nondiscriminatory interests."[2] If the defendant meets this burden, the plaintiff can still prevail by proving that the interest could be served by a practice that has a less discriminatory effect.

As we noted in a 2019 letter to HUD on its Proposed Rule to replace the 2013 Discriminatory Effects Standard, "Discrimination is illegal and immoral. The business community strongly supports effective anti-discrimination policies in the housing market, including under the FHA. Responsible companies work hard—and invest substantial resources in compliance systems—to ensure compliance with the law."[3] The business community still firmly holds these positions and has a strong desire to comply with the law and promote a housing market that is fair for all.

---

1 See Proposed Rule, Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021) ("Proposal").

2 Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (February 15, 2013).

3 Comments_HUD_Disparate-Impact_101819.pdf (centerforcapitalmarkets.com).

The Chamber appreciates the seriousness of eliminating discrimination, especially in light of the ongoing, important national conversation about racial inequality. The Chamber has put a spotlight on racial inequality and brought the business community together to propose solutions to bridge underlying racial divides that contribute to broader, systemic inequalities in our society.

We launched an Equality of Opportunity Initiative last year, and recently convened our second National Summit on Equality of Opportunity.[4] We believe that all Americans should have the opportunity to earn their success, rise on their merit, and live their own American Dream.

Our member companies also desire regulatory clarity regarding the permissibility of disparate impact claims under the FHA. HUD's 2020 Rule ("2020 Rule") was written after the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. ("Inclusive Communities")* and sought to provide clarity in light of that decision regarding disparate impact claims, including how they relate to homeowners insurance. Shortly after the 2020 Final Rule was issued, the United States District Court for the District of Massachusetts issued a preliminary injunction in *Massachusetts Fair Housing Center, et al. v. HUD* that delayed implementation of the rule. As such, the 2020 Rule has never been enforced. Reinstating the 2013 Rule when the 2020 Rule was proposed less than a year ago and while the outcome of legal challenges to that rule are still pending will only add to the confusion for companies seeking to comply with the law. The confusion is only enhanced in this case by the fact that the 2013 Rule predated—and thus could not take into account—the limitations on disparate impact liability under the FHA that the Supreme Court announced in *Inclusive Communities*. Any HUD Rule that seeks to provide guidance in this area must incorporate and comply with that decision.

In addition to concerns about their compliance obligations, companies are also fearful of unintentionally adopting quotas in the name of avoiding disparities. They fear disparate impact lawsuits and are concerned about reputational risk that may come even if the company prevails in court against a disparate impact claim. As a reaction to any regulation, companies could begin to scale back the development of innovative products and services for their customers and avoid undertaking projects that could benefit large numbers of people out of fear of having a disparate impact claim filed against them. As the Supreme Court recognized in *Inclusive Communities*, such outcomes "undermine[] [the] purpose [of the FHA] as well as the free-market system."[5]

Clarity surrounding disparate impact liability will help both companies and consumers, in addition to achieving the most important goal: compliance with the FHA. Companies also want to reduce regulatory uncertainty so they can make beneficial business decisions without fear of litigation and reputational risk.

In addition to seeking regulatory clarity regarding disparate impact claims, we also ask that HUD retain any provisions of the 2020 Rule that preserve state regulation of the business of insurance. Importantly, the 2020 Rule recognized the McCarran-Ferguson Act and clarified the primacy of state law.

---

[4] Equality of Opportunity Initiative | U.S. Chamber of Commerce (uschamber.com).

[5] *Inclusive Communities*, 135 S.Ct. at 2522.

Discussion

I. HUD should provide regulatory clarity in any final rule in light of *Inclusive Communities*.

Intentional discrimination—or disparate treatment—has always been illegal under the FHA. Prior to *Inclusive Communities*, however, there was significant uncertainty whether disparate impact claims, which do not require a showing of discriminatory motive or intent, were cognizable under the FHA.

While the Supreme Court held in *Inclusive Communities* that disparate impact claims are cognizable under the FHA, it also made clear that such claims are subject to a series of significant limitations. As Justice Kennedy explained, "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[6] The "FHA is not an instrument to force housing authorities to reorder their priorities," but rather seeks "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[7] Moreover, under a "robust causality requirement," a "disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies that cause that disparity."[8] Without such "safeguards at the prima facie stage, disparate impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."[9]

While we disagreed with the Court's decision that disparate impact claims are cognizable under the FHA, it is now governing law. HUD should now focus on supporting responsible businesses in their efforts to comply with the law. Aligning HUD's rule with *Inclusive Communities* is critical to achieving regulatory clarity both for businesses who must comply with the law and consumers who are trying to understand whether they have a potential claim under the FHA. If consumers are unaware of the limitations on disparate impact liability, they may file frivolous lawsuits that bog down the courts and are harmful to businesses. It would be a mistake to revert to the 2013 Rule that was promulgated before the *Inclusive Communities* decision, and that HUD itself has acknowledged did not provide sufficient clarity about the standard used by courts for evaluating these claims. Doing so without adequately explaining HUD's reversal in position on the 2013 Rule would be a violation of the Administrative Procedure Act.

In our view, the 2020 Rule emphasized fidelity to the Supreme Court's decision in *Inclusive Communities*. We appreciated HUD's stated objective in that rule "to ensure consistency and uniformity, given the Supreme Court decision [in *Inclusive Communities*], and, thereby, provide clarity for the public."[10] As HUD noted at the time, it was important for its rule to "allow for a quicker, less costly method [for entities to understand] their burden and responsibility under

---

[6] Inclusive Communities, 135 S.Ct. at 2522.
[7] Id.
[8] Id. at 2523.
[9] Id.
[10] Proposal, 84 Fed. Reg. at 42861.

disparate impact law."[11] We agreed that "all parties, including small entities" would benefit from clarifications that were designed to "reconcil[e] HUD's existing regulatory framework for discriminatory effect claims with Inclusive Communities and subsequent case law."[12]

In our 2018 response to the ANPR on HUD's 2020 Rule, we particularly urged HUD to align its rule with the *Inclusive Communities* decision by implementing the "robust causality requirement" it emphasized. We believe that the 2020 Rule reflected the Court's emphasis on a "robust causality requirement." In our 2019 letter on HUD's Proposed Rule, we stated that "it is fundamentally unfair to hold companies accountable for disparities that they did not cause. Such an approach would significantly distort company behavior in a manner that hurts all consumers. Companies would be forced to pursue policies that avoid disparities—even absent any causal connection between the policy and any disparity—and thereby run the risk of effectively adopting a quota-based approach to financial services and depriving consumers of innovative and beneficial services."[13]

The Court recognized this in *Inclusive Communities*: "[d]isparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[14] A robust causality requirement is central to enabling companies to be able to make these decisions, which are critical to the success of the housing market and of the economy more broadly.

As part of a robust causality requirement, any plaintiff asserting a disparate impact claim should be required to identify the specific policy that caused the disparity at issue. As the Supreme Court explained, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[15] A one-off action is insufficient to establish disparate-impact liability. "For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all."[16] HUD recognized this important principle in the 2020 Rule.

In our view, HUD should withdraw the Proposal. *Inclusive Communities* is binding on all parties and no one benefits from a HUD rule that is inconsistent with the Supreme Court decision.

II. HUD should retain any provisions of the 2020 Rule that preserve state regulation of insurance providers.

[11] Id.
[12] Id.
[13] Comments_HUD_Disparate-Impact_101819.pdf (centerforcapitalmarkets.com).
[14] Inclusive Communities, 125 S.Ct. at 2518.
[15] Id. at 2523.
[16] Id.

Reverting to the 2013 Rule could have unintended consequences for the provision of insurance and credit. The 2013 Rule applied a disparate impact standard to homeowners insurance, which conflicts with federal law.

The McCarran-Ferguson Act states that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance."[17] Applying the Fair Housing Act to insurance law is inappropriate and contrary to Congressional intent. State laws should continue to regulate insurance and applying a disparate impact standard of legal liability would disrupt insurance markets. Furthermore, in our 2018 letter, responding to HUD's ANPR, we urged HUD to consider how applying a disparate impact standard would curtail the availability of insurance in certain markets, disrupt the ability of insurance providers to carry out actuarially sound underwriting, or more broadly affect markets.

The 2020 Rule recognized the McCarran-Ferguson Act and clarified the primacy of state law. It stated, "nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance."[18] Reverting to the 2013 Rule would infringe on the McCarran-Ferguson Act and create unnecessary confusion that could trigger a deluge of unnecessary lawsuits. The McCarran-Ferguson Act's "reverse preemption" doctrine provides that provisions of federal law in conflict with state insurance laws are preempted by state laws "unless such Act specifically relates to the business of insurance."[19] The FHA does not specifically relate to insurance; therefore, state insurance laws preempt the statute and any federal agency's interpretation of it through regulation.

We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman

[17] 15 U.S.C. § 1012(b).
[18] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60333 (September 24, 2020).
[19] 15 U.S.C. § 1012(b).