IMPACT FUND

2080 Addison Street, Suite 2, Berkeley, CA 94704-1693
Tel 510.845.3473 | Fax 510.845.3654 | impactfund@impactfund.org | www.impactfund.org

October 18, 2019

SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02

Dear General Counsel,

We write to you on behalf of the Impact Fund and Legal Aid at Work to offer comments in response to the above-docketed Notice concerning proposed changes to the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development ("HUD"). This comment addresses the overall proposed rule and specifically Questions 1-3 in Section III: Additional Questions for Public Comment of the Notice.

The Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund has served as class counsel in major civil rights cases challenging the disparate impact of discriminatory practices on behalf of underserved communities, including *Williams v. City of Antioch* (N.D. Cal.) (housing), *Dukes v. Wal-Mart Stores, Inc.* (U.S. Supreme Court) (employment), and *Ellis v. Costco Wholesale Corp.* (Ninth Circuit) (employment). The Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Legal Aid at Work (LAAW) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor, including cases challenging discriminatory practices with disparate impact. LAAW's interest in preserving the protections afforded by this country's antidiscrimination laws is longstanding.

We strongly oppose the proposed revision to HUD's current Disparate Impact Rule, codified at 24 C.F.R. part 100. The existing disparate impact rule is a necessary tool to achieve open, integrated housing markets and to eliminate all forms of housing discrimination and illegal segregation. It ensures robust enforcement of the Fair Housing Act and appropriately reflects federal courts' interpretations of disparate impact liability, including the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). The proposed revision eviscerates the Fair Housing Act's protections and enables insurance companies, financial institutions, private developers, landlords, and municipalities to engage in covert discriminatory practices, thereby undermining the purpose and intent of the Act.

The Proposed Rule Contravenes the Fair Housing's Act Broad and Inclusive Mandate

The Supreme Court has emphasized that the Fair Housing Act is "broad and inclusive."[1] The law forms part of our nation's statutory civil rights regime that is intended to strike all barriers that "operate invidiously to discriminate on the basis of racial or other impermissible classification[s]."[2] In enacting the Fair Housing Act, Congress affirmed the commitment of the United States to provide for fair housing across the country.[3] The law seeks to promote equal housing opportunities, foster community integration, and eliminate discrimination, which can rob entire communities of the wider social, professional, and economic benefits that fair and integrated living situations confer. Like other civil rights laws, the Fair Housing Act should be interpreted broadly to effectuate its remedial mandate to end discrimination.

In *Inclusive Communities*, the Supreme Court recognized the legacy of "open and covert racial discrimination" and the resulting social unrest that drove Congress to pass the Fair Housing Act in 1968.[4] "The [Act] . . . was enacted to eradicate discriminatory practices within a sector of our Nation's economy."[5] Congress did not pass the law in a vacuum. As the Court observed, two contemporaneous civil rights laws—Title VII of the 1964 Civil Rights Act and the 1967 Age Discrimination in Employment Act—use language that is "equivalent in function and purpose" to the Fair Housing Act and "serve[s] as catchall phrases looking to consequences, not intent."[6] The Court's interpretation of these laws instructed that "antidiscrimination laws must be

[1] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).
[2] *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (establishing disparate impact liability under Title VII of the Civil Rights Act)).
[3] 42 U.S.C. § 3601.
[4] *Inclusive Communities*, 135 S. Ct. at 2515-16 ("*De jure* residential segregation by race was declared unconstitutional almost a century ago . . . but its vestiges remain today, intertwined with the country's economic and social life") (internal citation omitted).
[5] *Id.* at 2521.
[6] *Id.* at 2519.

construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors."[7] That "logic" applied to the Fair Housing Act.[8]

Disparate impact theory, a cornerstone of anti-discrimination law for almost five decades, targets facially neutral policies or practices that adversely burden members of a protected group without legal justification. *Inclusive Communities* made clear that disparate impact liability is necessary to protect communities from policies and practices that appear neutral but foment the same types of community segregation that motivated Congress to enact the Fair Housing Act.[9] Disparate impact helps address development, zoning, lending, and other decisions that adversely affect underserved communities, especially communities of color. The Court recognized that disparate impact liability could "prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[10]

In establishing HUD, Congress declared that the purpose of the department would be to "provide for full and appropriate consideration, at the national level, of the needs and interests of the Nation's communities and of the people who live and work in them."[11] Robust enforcement of the Fair Housing Act to ensure community integration and eliminate discrimination is key to HUD's purpose.

The Proposed Rule's Burden-Shifting Standard Would Allow Discriminatory Conduct to Flourish

Adoption of the proposed rule would severely undermine the civil rights promises of the Fair Housing Act and roll back protections for our nation's most vulnerable communities. Should the proposed rule go into effect, plaintiffs would confront significant barriers to challenging disparate impact discrimination. Private corporations, insurance companies, financial institutions, and public entities would enjoy greater incentives to engage in pernicious discriminatory conduct. The proposal frustrates the purpose of the Fair Housing Act and renders meaningless much of the federal courts' robust interpretations of the law.

The current standard accurately reflects the disparate impact standard articulated by *Inclusive Communities* and other settled Supreme Court case law; the proposed rule does not. The current rule places the initial burden on the plaintiff to prove a prima facie case that "a

[7] *See id.* at 2518.
[8] *Id.*
[9] *See id.* at 2521-22 ("These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.").
[10] *Id.* at 2522.
[11] 42 U.S.C. § 3531.

challenged practice caused or predictably will cause a discriminatory effect."[12] Then, the burden shifts to the defendant to prove "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[13] If the defendant meets that burden, the plaintiff then has to prove that a less discriminatory alternative exists.[14]

By contrast, the proposed rule creates new hurdles for plaintiffs while easing the burden on defendants. It establishes a heightened pleading standard for plaintiffs, requiring them to allege five discrete elements in the prima facie case challenging a specific, identifiable policy.[15] The defendant may then rebut the presumption of discrimination by merely producing evidence showing that the challenged policy advances a valid nondiscriminatory interest.[16] The proposed rule explicitly permits defendants to justify a policy with a discriminatory effect by showing that they had limited discretion in implementing it or relied on algorithms or computer models that have been validated by a third-party.[17] To succeed, the plaintiff must prove that the defendant could have used a less discriminatory alternative that does not impose materially greater costs or burden on the defendant.[18]

The proposed rule creates new defenses for discriminatory behavior. It would exacerbate an already asymmetrical burden that favors defendants, who have greater resources to design simulated models and offer cost- or profit-driven rationales for otherwise discriminatory policies.

The Current Rule Accurately Reflects Decades of Case Law on Disparate Impact

The current disparate impact rule codifies the burden-shifting standard routinely used by courts. Nearly a half century ago in *Griggs v. Duke Power Company*, the Supreme Court first identified disparate impact liability and recognized that Title VII prohibited employment practices that were "neutral on their face, and even neutral in terms of intent," but that "operate[d] to freeze the status quo of prior discriminatory employment practices."[19] Subsequent courts have relied and elaborated on the *Griggs* burden-shifting standard when interpreting civil rights laws prohibiting discrimination.[20]

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[12] 24 C.F.R. § 100.500(c)(1) (2013).
[13] *Id.* § 100.500(c)(2).
[14] *Id.* § 100.500(c)(3).
[15] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,862-63 (Aug. 19, 2019) (to be codified at 24 C.F.R. § 100.500(b)).
[16] *Id.* at 42,863 (to be codified at 24 C.F.R. § 100.500(d)(1)(ii)).
[17] *Id.* at 42,862 (to be codified at 24 C.F.R. § 100.500(c)).
[18] *Id.* at 42,863 (to be codified at 24 C.F.R. § 100.500(d)(1)(ii)).
[19] 401 U.S. 424, 430 (1971).
[20] Under the prevailing Title VII standard, the plaintiff establishes a prima facie case of disparate impact; next, the defendant proves that the practice is consistent with business necessity, and then the plaintiff

Before the Supreme Court's decision in *Inclusive Communities*, many circuit courts had concluded that disparate impact claims were cognizable under the Fair Housing Act. Those courts incorporated law under Title VII, including *Griggs* and its progeny. In an early case, the Third Circuit considered Title VII jurisprudence in adopting a similar standard under the Fair Housing Act, requiring the plaintiff to show discriminatory effect to establish a prima facie case of disparate impact.[21] The Third Circuit also ruled that the defendant must show "a legitimate, bona fide interest" and "no alternative course of action . . . with less discriminatory impact."[22] Other circuits subsequently adopted similar analyses.[23] When HUD issued the current rule in 2013, it relied on these courts' interpretations of disparate impact under Title VII and other civil rights laws.[24] Altogether, the line of cases predating *Inclusive Communities* evinces a common, practical standard that allows plaintiffs to make their prima facie case and defendants to offer a legitimate justification based on business-related motives.

Inclusive Communities did not alter this analysis. The Supreme Court looked to Title VII in articulating the disparate impact standard under the Fair Housing Act, and it recognized that previous cases interpreting anti-discrimination laws, including *Griggs*, limited liability to ensure that defendants are able to make "practical business choices."[25] As the Court noted, "disparate-impact liability has always been properly limited in key respects."[26] Defendants in Fair Housing Act cases have "leeway to state and explain the valid interest served" in a step that is "analogous to the business necessity standard under Title VII."[27] The prevailing law on disparate impact that governs all statutory civil rights claims, including those under the Fair Housing Act, thus already contains appropriate limitations. The goal of disparate impact liability – "the removal of artificial, arbitrary, and unnecessary barriers" – is no different under the FHA than under other civil rights laws.[28]

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must prove that the employer refused to adopt an alternative practice "that has less disparate impact and serves the employer's legitimate needs." *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

[21] *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147-48 (3d Cir. 1977).

[22] *Id.* at 149.

[23] *See, e.g., Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty Metro Human Relations Comm'n*, 508 F.3d 366, 372 (6th Cir. 2007); *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 680 (D.C. Cir. 2006); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934-39 (2d Cir. 1988).

[24] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,466 (Feb. 15, 2013) ("[T]he federal courts have drawn the analogy between Title VII and the Fair Housing Act in interpreting the Act to prohibit actions that have an unjustified discriminatory effect, regardless of intent").

[25] *Inclusive Communities*, 135 S. Ct. at 2518.

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

[27] *Id.*

[28] *Id.* (quoting *Griggs*, 401 U.S. at 431).

Lower courts have effectively applied the burden-shifting standard from *Inclusive Communities* and other settled civil rights jurisprudence. For example, in *Mhany Management, Inc. v. County of Nassau*, the Second Circuit reaffirmed the standard and held that the Supreme Court implicitly adopted HUD's current framework.[29] Notably, the Second Circuit did *not* hold that *Inclusive Communities* had increased the burden for plaintiffs or added new defenses for defendants—such as, that a discriminatory policy may be justified by a computer algorithm or financial constraints.[30] Rather, the court ruled that *Inclusive Communities* and the current HUD rule appropriately gave the plaintiffs an opportunity to disprove the defendants' legitimate nondiscriminatory reasons for the policy, as per the typical disparate impact standard.[31]

Similarly, the Fourth Circuit in *Reyes v. Waples Mobile Home Park Limited Partnership* applied *Inclusive Communities* and noted the "adequate safeguards" embedded in the current disparate impact standard.[32] The court described the burden-shifting framework as requiring plaintiffs to prove a "robust causal connection" in their prima facie case and defendants to prove legitimate nondiscriminatory interests.[33] *Reyes* emphasized, however, that this causality requirement was not so strict as to obligate plaintiffs to show "any facially neutral rationale to be the primary *cause* for the disparate impact on the protected class."[34]

HUD's Proposed Rule Departs from Decades of Case Law

HUD's proposed rule incorrectly twists the language of *Inclusive Communities* and runs roughshod over settled law on disparate impact. In its Notice, HUD asserts that the disparate impact analysis must contain "adequate safeguards" to limit liability for defendants.[35] Existing law already contains these safeguards. Under the current standard, defendants—from employers under Title VII to housing developers and banks under the Fair Housing Act—have the opportunity to defend a challenged policy with a legitimate, nondiscriminatory reason that reflects a business- or profit-motivated decision.[36]

[29] 819 F.3d 581, 617-18 (2d Cir. 2016). The Second Circuit observed that the HUD regulation differed from its standard on the third step, as to whether the plaintiff or the defendant bore the burden of showing a less discriminatory alternative. *Id.* at 618-19. It ultimately found that, in any case, the plaintiffs established their prima facie case and defendants showed a legitimate, bona fide interest, and it remanded the case for consideration of the third step under HUD's current rule. *Id.* at 620.
[30] *See Mhany Mgmt*., 819 F.3d at 616-20
[31] *See id.* at 618-19.
[32] 903 F.3d 415, 424-25, 429 (4th Cir. 2018).
[33] *Id.* at 424.
[34] *Id.* at 430.
[35] *See* 84 Fed. Reg. at 42,855 (citing *Inclusive Communities*, 135 S. Ct. at 2524).
[36] 24 C.F.R. § 100.500(c)(2); *Inclusive Communities*, 135 S. Ct. at 2518; *see also Ricci*, 557 U.S. at 578.

Not only is HUD's proposal superfluous, it would impose new barriers to plaintiffs that surpass the current standard. For example, the proposed rule requires that plaintiffs prove that the challenged policy is "arbitrary, artificial, and unnecessary."[37] While this language is imported from *Inclusive Communities* and *Griggs*, the cases do not refer to a test that disparate impact plaintiffs must satisfy when proving their prima facie case. [38] Plaintiffs must simply show that a specific or particular practice causes a disparate impact on the basis of a protected classification.[39] The imposition of these new conditions at the prima facie stage far exceeds the demands of civil rights laws, especially one as protective as the Fair Housing Act.

While raising the bar for plaintiffs, the proposed rule significantly lowers it for defendants. *Inclusive Communities* clarified that defendants bear the burden of proving that the discriminatory policy or practice is "necessary to achieve a valid interest."[40] The proposed rule would codify a number of additional defenses, including that the discriminatory effect was caused by models or risk-assessment algorithms.[41] It offers specific, concrete justifications for defendants to employ, such as showing that the model is produced by a "recognized third party that determines industry standards" or has been "validated by an objective and unbiased neutral third party."[42] Nowhere in *Inclusive Communities* did the Court suggest that algorithms could defeat a plaintiff's prima facie case, let alone provide a defense. Furthermore, the rule reduces a defendant's burden to one of production, flying in the face of the Court's repeated confirmations that defendants bear the burden of *proof* in disparate impact cases.[43]

Finally, requiring a plaintiff to show that their proposed less-discriminatory alternative would not impose materially greater costs on the defendant is an additional and unnecessary obstacle.[44] Plaintiffs have significantly limited access to defendants' business records and

[37] 84 Fed. Reg. at 42,862 (to be codified at 24 C.F.R. § 100.500(b)).
[38] *Inclusive Communities*, 135 S. Ct. at 2524 (quoting *Griggs*, 401 U.S. at 431)).
[39] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (establishing a prima facie case of disparate impact under Title VII if "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin"); *Ricci*, 557 U.S. at 579; *see also Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.").
[40] *Inclusive Communities*, 135 S. Ct. at 2523.
[41] 84 Fed. Reg. at 42,863 (to be codified at 24 C.F.R. § 100.500(c)(2)).
[42] *Id.*
[43] *Id.* (to be codified at 24 C.F.R. § 100.500(d)(1)(ii)); *see Inclusive Communities*, 135 S. Ct. at 2523 (declaring a defense for housing authorities and private developers ". . . if they can *prove* [a policy] is necessary to achieve a valid interest") (emphasis added); *Ricci*, 557 U.S. at 578 ("An employer may defend against liability by *demonstrating* that the practice is job related for the position in question and consistent with business necessity") (emphasis added; internal quotations omitted).
[44] *See* 84 Fed. Reg. at 42,863 (to be codified at 24 C.F.R. § 100.500(d)(1)(ii)).

financial decision-making processes, and they would be hard-pressed to present a valid analysis of a defendant's existing costs. Defendants are far better equipped to demonstrate their profit motives, which is why they currently have that opportunity when presenting their legitimate, nondiscriminatory interest in a challenged policy to the court.

The proposed burden-shifting standard upends decades of case law. By raising the bar for plaintiffs and lowering it for defendants, the proposed disparate impact standard would severely hinder a critical safeguard against housing discrimination.

Conclusion

Inclusive Communities affirmed the Fair Housing Act's "continuing role in moving the Nation toward a more integrated society."[45] The current disparate impact rule is the product of thoughtful analysis and decades of civil rights jurisprudence. Enacting the proposed rule would undermine the objective and spirit of the Act and further entrench residential segregation.

Thank you for the opportunity to comment. Please contact David Nahmias at dnahmias@impactfund.org or (510) 845-3473 ext. 301 regarding these comments.

Sincerely,

Jocelyn D. Larkin, Executive Director
David Nahmias, Law Fellow
Impact Fund

Joan Graff, President
Legal Aid at Work

[45] *Inclusive Communities*, 135 S. Ct. at 2525-26.