



Housing Policy Council
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August 24, 2021

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th St, SW, Room 10276
Washington, DC 20410-0500

Re: Reinstatement of HUD's Discriminatory Effects Standard; HUD-2021-033; RIN 2529-AB02

To: Damon Smith, HUD General Counsel:

The Housing Policy Council (HPC)¹ appreciates the prompt action taken by the Secretary of the Department of Housing and Urban Development (HUD) to initiate rulemaking on the discriminatory effects standard under the Fair Housing Act (FHA) (Proposed Rule). This rulemaking presents an opportunity for HUD to clarify certain aspects of the discriminatory effects standard and to affirm the Supreme Court's position in the 2015 *Inclusive Communities* ruling.² HPC member companies have a direct interest in the proposal, as they are engaged in all aspects of housing finance and, similar to other housing market stakeholders, are eager to achieve a level of regulatory certainty regarding this standard. Further, HPC members are deeply concerned about racial inequality in America and have committed substantial resources to achieve racial equity and social justice.

The new Proposed Rule is based on promulgation of a prior rule that was published in the Federal Register, on February 15, 2013, (2013 Rule) and in place at the time of the Supreme Court ruling in *Inclusive Communities*. The formulation of the 2013 Rule is simple, and reinstatement of this rule would maintain a long-standing legal framework that is familiar to key stakeholders. That said, HPC recommends enhancement to the Final Rule, based upon *Inclusive Communities* and existing federal regulatory guidance.

¹ The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit www.housingpolicycouncil.org

² *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (hereinafter, *Inclusive Communities*).

The *Inclusive Communities* case expounds upon aspects of the regulation that could benefit from additional interpretive language, be it in the regulatory text itself, the preamble to the rule, or in some other form of regulatory guidance or official interpretation. Namely, HPC recommends that HUD consider enhancing the regulation’s descriptions of legitimate arguments that may be relied upon as well as factors that should be considered under Step Two and Step Three of the burden-shifting framework.³

To be clear, the three-part burden-shifting framework in the 2013 Rule (that would be reinstated under the Proposed Rule) requires the plaintiff to prove that the specific, facially-neutral policy or practice in question caused or could cause the claimed disparate and discriminatory effect (Step One), and then permits the defendant to demonstrate that the challenged practice is necessary to satisfy a valid business or policy interest (Step Two). Following these two steps, the plaintiff may counter by identifying an alternative practice that could achieve the defendant’s business or policy objective (Step Three), by a less-discriminatory means. The concepts outlined in the regulation are both intuitive and sensible on their face. Yet, the lack of explanatory descriptions for Step Two (the position of the defense) and Step Three (the claimant’s counter argument) leaves these critical aspects of the regulation vulnerable to misinterpretation, which could unnecessarily prolong the litigation process.

HPC Recommendation on Burden of Proof for Defense [100 CFR § 100.500(c)(2)]

HPC recommends HUD clarify the defendant’s burden of proof in Step Two by enhancing the description of a legitimate justification for a necessary and valid business interest (“the challenged business practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests . . .”).

The burden of proof for the defense in Step Two benefits from previous guidance, published in the 1994 *Interagency Policy Statement on Discrimination in Lending* (Policy Statement).⁴ This Policy Statement is still cited as guidance by signatories⁵ and other agencies for how disparate impact law should be applied by financial regulators. For example, the Policy Statement notes that, for a business or policy interest to be valid, the “justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification could include *cost and profitability*.”⁶ The Policy Statement makes additional points important to HPC lender members, including the relevance of certain factors in credit

³ 100 CFR §§ 100.500(c)(2) and (3).

⁴ 59 Fed. Reg. 18266 (Apr. 15, 1994).

⁵ Signing agencies include HUD; Office of Federal Housing Enterprise Oversight; Department of Justice; Office of the Comptroller of the Currency; Office of Thrift Supervision; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; Federal Housing Finance Board; Federal Trade Commission and the National Credit Union Administration.

⁶ 59 Fed. Reg. 18266, 18269 (emphasis added).

decisions.⁷ Reiterating some of these elements or referencing the Policy Statement in the preamble to the Final Rule would enhance understanding and lead to more consistent interpretation of the rule and the types of information that bolster the existing legal justification for the “substantial, legitimate, nondiscriminatory interests.”

The 2015 *Inclusive Communities* opinion aligns with the Policy Statement on these issues, citing Supreme Court precedent to support the observation that “liability must be limited so that 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.*”⁸ The Supreme Court is clear that the defense can justify the validity of the policy or business interest on the basis of commercially reasonable determinations, and HPC recommends that the final rule include language – whether in the regulatory text, the preamble to the rule, or other official guidance – to emphasize this important feature of the defense’s argument.

HPC Recommendation on Burden of Proof for Claimant – Alternative Practice [100 CFR § 100.500(c)(3)]

Regarding the burden of proof in Step Three, if a defendant satisfies the burden set in Step Two, then the plaintiff may still establish liability by proving that the defendant’s interest could be served by a policy that has a less discriminatory effect. HPC again recommends some enhancements to the proposed regulation, in the regulatory text or the preamble to the final regulation, such as: “*a policy that is less discriminatory should be able to be implemented at a reasonable cost, without undue burden on a defendant or otherwise adversely affecting the defendant’s non-discriminatory policies and valid interests.*”

This approach also comports with the *Inclusive Communities* ruling, which reaffirms that the claimant may identify an available alternative practice with a less disparate impact for consideration but asserts that the alternative must be evaluated within the context of the “practical business choices and profit-related decisions” cited above. In other words, clarification that the alternative must be economically viable, operationally feasible, and readily available to the defendant would reinforce the existing regulatory text with concepts advanced by the courts.

⁷ *Id.* at 18269-70 (“Lenders will not have to justify every requirement and practice every time that they face a compliance examination. The Agencies recognize the relevance to credit decisions of factors related to the adequacy of the borrower’s income to carry the loan, the likely continuation of that income, the adequacy of the collateral to secure the loan, the borrower’s past performance in paying obligations, the availability of funds to close, and the existence of adequate reserves. While lenders should think critically about whether widespread, familiar requirements and practices have an unjustifiable disparate impact, they should *look especially carefully at requirements that are more stringent than customary.* Lenders should also stay informed of developments in underwriting and portfolio performance evaluation so that they are well positioned to consider all options by which their business objectives can be achieved.”) (emphasis added).

⁸ 576 U.S. 519, 533.

Conclusion:

The rationale for HPC's recommended enhancements to the regulation is straightforward: additional clarity would reflect and reinforce the standing judicial opinion and prior HUD statements regarding the operation of the burden shifting concept. The disparate impact policy debate that has occurred over the last several years has created an atmosphere of ambiguity and doubt that has been challenging for all stakeholders, those who seek to pursue disparate impact claims and those who must defend against them. HPC believes the additional enhancements we are recommending to the 2013 framework, as repropoed in this 2021 rulemaking, could help address the outstanding uncertainties. Further, these simple changes support existing sections (c)(2) and (c)(3) with minimal or possibly no change to the regulatory text itself.

Thank you for your consideration in this important rulemaking process. If you have any questions, please contact Meg Burns, EVP, at (202) 589-1926.

Yours truly,

A handwritten signature in black ink that reads "Edward J. DeMarco". The signature is written in a cursive, slightly slanted style.

Edward J. DeMarco
President
Housing Policy Council