

January 26, 2018

The Honorable Ben Carson, M.D.
Secretary
U.S. Department of Housing and Urban Development
451 7th St., SW
Washington, DC 20141

Dear Mr. Secretary:

The undersigned civil rights, housing, and community development organizations write to express our strong and unwavering support for the U.S. Department of Housing and Urban Development's (HUD) rule entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("the Rule")¹ and to dispel inaccuracies about this Rule that have been presented to HUD in recent months. In November, a small group of Members of the House of Representatives wrote to you claiming that the Rule is inconsistent with the Supreme Court's decisions in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* and *Bank of America Corp., et al. v. City of Miami*. In October, the Department of the Treasury released a report in which it claimed that the Rule, as applied to certain insurance products, conflicts with state regulation of the insurance industry and recommended that HUD reconsider its use of the Rule in general and, in particular, with respect to the insurance market.

Since long before either the Rule or *Inclusive Communities*, the disparate impact doctrine was vital to addressing systemic discrimination in the housing and housing services market, including homeowners insurance markets. It is our hope that we can meet with you and your staff to discuss our concerns about the aforementioned arguments surrounding the Rule.

The Disparate Impact Rule Was Implicitly Adopted in the *Inclusive Communities* Decision

On November 15, 2017, a small group of Representatives wrote to you and incorrectly asserted that the Disparate Impact Rule is inconsistent with recent Supreme Court precedent. These Representatives called on you to revise the rule. In their letter, they state that the *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* decision² set parameters on disparate impact liability that are inconsistent with HUD's Disparate Impact rule. This position finds no support in *Inclusive Communities* itself and is in conflict with post-*Inclusive Communities* jurisprudence. Recently, the 2nd Circuit held in *Mhany Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* "[t]he Supreme Court] implicitly adopted HUD's approach."³ More recently, the Northern District of Illinois issued a decision that analyzed the relationship between the Rule and the Supreme Court decision and concluded that, "[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability

¹ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500).

² 135 S. Ct. 2507 (2015).

³ *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2nd Cir. 2016).

under the FHA and did not identify any aspect of HUD’s burden-shifting approach that requires correction.”⁴

The Supreme Court’s *Inclusive Communities* decision ratified the construction of the Fair Housing Act that underlies the Disparate Impact Rule. Indeed, after *Inclusive Communities*—which was not resolved based upon deference to the Disparate Impact Rule—it is now settled law that the Fair Housing Act itself provides for disparate impact liability, such that any inconsistent action by HUD would violate the Act.

The Disparate Impact Rule Requires More than Mere Statistical Evidence to Establish Liability

In their letter, the Representatives pointed to language in Justice Kennedy’s *Inclusive Communities* decision that is not found in the Disparate Impact Rule, including that liability cannot be “based solely on a showing of statistical disparity” and that there must be “robust causality” connecting a purported policy and the identified discriminatory impact. Though these precise terms may not appear in the Rule, the principles of disparate impact liability under the Fair Housing Act that are laid out in the Supreme Court’s decision are consistent with the Disparate Impact Rule on each point.

The Disparate Impact Rule, like the *Inclusive Communities* decision, does not provide for the finding of disparate impact liability based solely on statistical evidence. Rather, consistent with *Inclusive Communities*, it requires that a plaintiff identify a policy that causes a statistical disparity, and then provides that liability can only be established after further consideration of any business justification or public purpose of the policy at issue and an assessment of whether the policy is properly tailored to the identified justification. In response to a commenter concern that the Rule may “allow for lawsuits based only on statistical data...,” the Rule explicitly indicates that statistical analysis “does not end the inquiry,” but that under the Rule a housing provider or servicer then has “the opportunity to refute the existence of the alleged impact and establish a substantial, legitimate, nondiscriminatory interest for the challenged practice,” and that there is then an assessment of any less discriminatory alternative.⁵ The Northern District of Illinois decision, in analyzing this question, stated that while *Inclusive Communities* acknowledged that defendants must have an opportunity to explain the valid interest served by their policies, “[t]he Disparate Impact Rule does this in the second step of the burden-shifting scheme.”⁶ In line with Judge Kennedy’s decision, the Disparate Impact Rule outlines a standard of liability based on far more than mere statistical evidence.

The Disparate Impact Rule Requires a Robust Causal Connection between the Challenged Practice and Impact

The letter from the Representatives also demonstrates a misunderstanding of disparate impact cases and the standard of proof required under the Rule. The Disparate Impact Rule mandates a

⁴ *Prop. Cas. Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069 (N.D. Ill. June 20, 2017) at *8.

⁵ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11478.

⁶ *Id.*.

showing that is equivalent to “robust causality” in proving disparate impact. As stated in Judge Kennedy’s opinion in *Inclusive Communities*, the Rule states that “[a] housing practice has a discriminatory effect where it *actually* or *predictably* results in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns . . . because of [protected class status].”⁷ Consistent with the Supreme Court decision and the over forty years of disparate impact jurisprudence under the Fair Housing Act, the Disparate Impact Rule does not set forth a specific methodology for establishing effect because the appropriate manner or method in which a victim of discrimination may prove discriminatory effect may vary from case to case.⁸

The Disparate Impact Rule’s Burden of Proof is Consistent with the *Inclusive Communities* Decision

The Representatives’ letter also asserted that the *Inclusive Communities* decision and the Disparate Impact Rule are inconsistent in identifying which party bears the burden of proof for purposes of any finding of liability. This is simply untrue, as the Disparate Impact Rule and Supreme Court decision are consistent. Both provide that, to establish disparate impact liability, the plaintiff bears the initial burden to establish that a neutral policy has a discriminatory effect; the defendant must then show there is a legitimate business purpose; and finally, the plaintiff must establish there are less discriminatory means of achieving this purpose.⁹

The Disparate Impact Rule Deals with Different Issues than Those Addressed in the *Bank of America* Decision

The Representatives’ letter references a second Supreme Court decision, *Bank of America Corp., et al. v. City of Miami*,¹⁰ in its erroneous assertion that the Disparate Impact Rule is inconsistent with recent precedent. The recent *Bank of America* decision dealt with the very different questions of standing and proximate cause under the Fair Housing Act. The court there reaffirmed that cities have standing to sue under the FHA when challenged practices cause losses in tax revenue. It remanded the appellate court to articulate the proper standard for “proximate cause,” *i.e.*, whether the discriminatory conduct is sufficiently related to the city’s injury for it to claim harm under the Fair Housing Act.

These standing and proximate cause doctrines are distinct from those outlined in the Disparate Impact Rule. While both touch on issues of causation, the causation issues they address are different: the HUD rule requires a showing that a policy was the but-for cause of an identified disparity, while *Bank of America* finds that a private plaintiff suing under the Fair Housing Act also must show the challenged action proximately caused the alleged harm. Nothing in the *Bank of America* decision is inconsistent with the Rule. It is a mistake to conflate these distinct legal issues, as the Representatives’ letter does.

⁷ 24 C.F.R. §100.500(a) (italics added).

⁸ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. at 11468-69.

⁹ *Id.* at 11470; *Inclusive Cmty.*, 135 S. Ct. at 2522–23.

¹⁰ 137 S. Ct. 1296 (2017).

The Disparate Impact Rule's Application to Insurance Markets is Consistent with Federal and State Law

In October 2017, the Treasury Department issued a report that recommended HUD reconsider its use of the Disparate Impact Rule and specifically consider whether the rule, as applied, is consistent with the McCarran-Ferguson Act and state law.¹¹ These assertions echo arguments long raised by the insurance industry. However, there is broad agreement in the courts that the federal Fair Housing Act can be applied to discriminatory practices of homeowners insurers without running afoul of McCarran-Ferguson, including in every such case dealing with disparate impact liability since the 1988 amendments. In the more than twenty years since the Fair Housing Act was amended and HUD issued interpretive regulations, courts that have considered the issue have consistently held that the Fair Housing Act prohibits acts of discrimination by homeowners' insurers.¹²

Insurance companies routinely assert that the McCarran-Ferguson Act should be read to prevent the application of the federal Fair Housing Act and disparate impact liability to insurance. HUD has not categorically accepted or rejected that argument, but has taken an appropriately nuanced position on this that is consistent with the McCarran-Ferguson Act itself: "the case-by-case approach appropriately balances [insurance industry] concerns against HUD's obligation to give maximum force to the Act by taking into account the diversity of potential discriminatory effects claims, as well as the variety of insurer business practices and differing insurance laws of the states, as they currently exist or may exist in the future."¹³ Indeed, the McCarran-Ferguson Act requires an inquiry into whether a "specific state law" might be invalidated or impaired by application of a federal law like the Fair Housing Act, a determination that can only be made on a case-by-case basis. The cases we cite below all performed such an individualized review of state law, in the context of a challenge to a specific business practice, and found no McCarran-Ferguson impediment to enforcement in the circumstances presented.¹⁴ In addressing the

¹¹ U.S. Dept. of Treasury Report, "A Financial System That Creates Economic Opportunities: Asset Management and Insurance," available at: https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.

¹² See, e.g., *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994); *National Fair Hous. Alliance v. Prudential Ins. Co. of America*, 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110, 1117-1122 (W.D. Wash. 2004); *Ojo v. Farmers Group Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010).

¹³ Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule (Feb. 8, 2013) [78 Fed. Reg. 11459, 11475 (Feb. 15, 2013)]; See also e.g. *Nationwide*, 52 F.3d at 1360; *Nevels*, 359 F. Supp. 2d at 1119-20; *American Family*, 978 F.2d at 297-98, 300; *United Farm Bureau*, 24 F.3d at 1014 n.8; *Lindsey*, 34 F. Supp. 2d at 641-43; *United States v. Massachusetts Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996); *Strange*, 867 F. Supp. at 1214; *Ojo*, 600 F.3d at 1208.

¹⁴ In two cases the state-specific analysis resulted in some Fair Housing claims being incompatible or inconsistent with state law. *Saunders v. Farmers Ins. Exchange*, 537 F.3d 961 (8th Cir. 2008) (discriminatory pricing claims were incompatible with Missouri's administrative rate-setting regime); *Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421 (Tex. 2011) (discriminatory pricing claims were incompatible with Texas law, which permits racially disparate impacts). These decisions confirm that, on a case-by-case basis, the McCarran-Ferguson Act does indeed act to safeguard state insurance laws from incompatible Fair Housing Act claims.

McCarran-Ferguson preemption issue on interlocutory appeal, the Fifth Circuit specifically rejected the argument that disparate impact claims are particularly likely to impair state law, finding “no. . . convincing evidence that disparate impact suits will necessarily impair state insurance regulation.”¹⁵ Despite the industry’s repeated protestations otherwise, HUD’s position is consistent with the law.

The Disparate Impact Rule’s Application to Insurance Markets is Consistent with Sound Actuarial Practices

The Treasury Department report further recommends that HUD reconsider the application of the Disparate Impact Rule to insurance based on a need to assess whether such a rule would have a disruptive effect on the availability of homeowners insurance and whether the rule is reconcilable with actuarially sound principles. Courts have long considered and rejected these assertions.¹⁶ Consistent with this jurisprudence, the Disparate Impact Rule’s burden-shifting approach accommodates underwriting decisions that are based on any legitimate business purposes. As such, the rule is consistent with actuarially sound principles and only establishes liability for insurance policies and practices that are artificial, arbitrary, and unnecessary, i.e., that have the effect of discriminating on a protected basis without a business need to do so. Such practices are, by definition, not actuarially sound.

* * * *

The disparate impact standard, as detailed in HUD’s rule and most recently affirmed by the United States Supreme Court, is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of wide-spread discrimination with appropriate recourse. HUD would be violating its own enabling legislation, which requires it to affirmatively further fair housing, § 3608(d), should it give credence to the aforementioned arguments made by some Members of Congress and in a Department of the Treasury report. Relying on their inaccurate representations of landmark Supreme Court rulings would directly contradict HUD’s mission to fully and effectively enforce the Fair Housing Act and compromise the uniformity of a long-accepted legal standard.

The bottom line is that following these suggestions risks putting HUD in violation of the Administrative Procedure Act.¹⁷ As an initial matter, any action to reconsider the Disparate Impact Rule would have to proceed through notice and comment rulemaking procedures under the Administrative Procedure Act, which HUD used to enact the Rule in the first place.¹⁸ Prior to issuing the Disparate Impact Rule in 2013, HUD sought comments and considered concerns from stakeholders across the country, including from both housing industry and consumer interests. Additionally, HUD considered decades of federal court jurisprudence applying the Fair Housing Act in considering how to appropriately fashion a rule that provides a uniform standard. In addition to these procedural safeguards, the Administrative Procedure Act also requires HUD to avoid action that is arbitrary and capricious or otherwise not in accordance with law under

¹⁵ *Dehoyos v. Allstate Corp.*, 345 F.3d 290, 299 n.7 (5th Cir. 2003).

¹⁶ See, e.g. *Prudential*, 208 F. Supp. 2d at 60; *DeHoyos*, 345 F.3d at 297 n.5.

¹⁷ 5 U.S.C. § 701 - 706

¹⁸ 5 U.S.C. § 706(2)(D).

statutory mandate and judicial interpretation.¹⁹ After the *Inclusive Communities* decision functionally adopted the HUD rule,²⁰ HUD risks acting both arbitrarily and capriciously and contrary to law if it suddenly and without any reasoned basis changes a regulation that was developed in accordance with existing jurisprudence and was subsequently applied by the courts.²¹

We hope that you and your appropriate staff will heed our concerns and meet with us to discuss them in more detail. Should you have any questions, please reach out to Morgan Williams, General Counsel at the National Fair Housing Alliance, at MWilliams@nationalfairhousing.org or 202-898-1661.

Sincerely,

American Association of People with Disabilities
American Civil Liberties Union
Americans for Financial Reform
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Responsible Lending
Community Legal Services
Consumer Action
Disability Rights Education & Defense Fund
Fair Housing Center of Greater Boston
Housing and Economic Rights Advocates
Housing Choice Partners
Human Rights Campaign
Lawyers' Committee for Civil Rights Under Law
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Coalition for Asian Pacific American Community Development (CAPACD)
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low-income clients)
National Disability Rights Network

¹⁹ 5 U.S.C. § 706(2)(A).

²⁰ See, e.g., *Mhany Mgmt., Inc.*, 819 F.3d at 618.

²¹ See, e.g., *Open Communities Alliance, et al. v. Carson, et al.*, No. 1:17-cv-02192 (D.D.C. 2018) (order granting preliminary injunction).

National Fair Housing Alliance
National Housing Law Project
National LGBTQ Task Force
National Low Income Housing Coalition
NETWORK Lobby for Catholic Social Justice
Paralyzed Veterans of America
Poverty & Race Research Action Council
TASH
The Arc of the United States
The Leadership Conference on Civil and Human Rights
UnidosUS (formerly National Council of La Raza)