

CLPHA Member Call Regarding HUD's Disparate Impact Standard

Oct. 1, 3:00 PM ET

Detailed Agenda

I. General Overview

a. HUD Discriminatory Effects Standard Final Rule effective March 18, 2013

- Formalized “discriminatory effects” liability under Fair Housing Act and established three-part burden-shifting test.
- Tool for plaintiffs to challenge neutral policies or practices that nevertheless have a discriminatory effect on a protected class, e.g. zoning laws or permitting rules that prevent development of affordable housing.

b. Supreme Court decision in *Texas Department of Housing and Community Affairs vs. Inclusive Communities*, 135 S. Ct. 2507 (2015)

- Held that disparate-impact claims are cognizable under the Fair Housing Act, but cautioned that statistical disparities alone are insufficient to maintain a disparate impact claim.
- Held that a defendant can rebut a prima facie case by establishing that the policy in question was necessary to achieve a “valid interest” but that the plaintiff can still prevail by showing “that there is ‘an available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.’”
- Remanded the matter to the district court for further proceedings. Upon remand, the district court found that the plaintiff failed to meet its burden of identifying “a specific, facially neutral policy that purportedly caused a racially disparate impact” and found in favor of TDHCA.

c. HUD Advanced Notice of Proposed Rulemaking issued June 20, 2018

- Sought comments on possible amendments to the 2013 HUD Discriminatory Effects Standard Final Rule in light of *Inclusive Communities*.

d. HUD Proposed Rule issued August 19, 2019

- Proposes amendments to the 2013 HUD Discriminatory Effects Standard Final Rule “to better reflect [*Inclusive Communities*] and to provide clarification regarding the application of the standard to State laws governing the business of insurance.

II. HUD Proposed Rule in Detail

- a. Changes to burden-shifting test (see separate comparison document)

Proposed amendment to 24 C.F.R. § 100.500 requires that the plaintiff sufficiently plead:

- (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
- (2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;
- (3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;
- (4) That the alleged disparity caused by the policy or practice is significant; and
- (5) That there is a direct link between the disparate impact and the complaining party's alleged injury.

The proposed amendment further provides that if defendant demonstrates that the challenged policy or practice advances a "valid interest," plaintiff must then prove that a less discriminatory policy or practice exists that is "equally effective ... without imposing materially greater costs on, or creating other material burdens for, the defendant."

- b. Safe Harbors and Defenses

- i. Discretion "materially limited by a third party"
- ii. Material factors in challenged model not determined by defendant
- iii. Challenged model "produced, maintained, or distributed by a recognized third party that determines industry standards"
- iv. Challenged model is "subjected to critical review and has been validated by an objective and unbiased neutral third party"
- v. State law enacted "for the purpose of regulating the business of insurance" supersedes

- c. Comments are due on October 18, 2019.

III. Specific Questions for Membership Feedback

- a. Has your agency used the disparate impact standard as a tool to develop housing or otherwise maintain your portfolio, e.g. citing disparate impact to overturn a zoning board adverse decision?

b. Has your agency had to defend against disparate impact challenges?

c. HUD-specific questions:

1. How well do HUD's proposed changes to its disparate impact standard align with the decision and analysis in Inclusive Communities with respect to the proposed prima facie burden, including:

i. Each of the five elements in the new burden-shifting framework outlined in paragraph (b) of § 100.500.

ii. The three methods described in paragraph (c) of § 100.500 through which defendants may establish that plaintiffs have failed to allege a prima facie case.

2. What impact, using specific court cases as reference, did Inclusive Communities have on the number, type, and likelihood of success of disparate impact claims brought since the 2015 decision? How might this proposed rule further impact the number, type, and likelihood of success of disparate impact claims brought in the future?

3. How, specifically, did Inclusive Communities, and the cases brought since Inclusive Communities, expand upon, conflict, or align with HUD's 2013 final disparate impact rule and with this proposed rule?

4. How might the proposed rule increase or decrease costs and economic burden to relevant parties (e.g., litigants, including private citizens, local governments, banks, lenders, insurance companies, or others in the housing industry) relative to the 2013 final disparate impact rule? How might the proposed rule increase or decrease costs and economic burden to relevant parties relative to Inclusive Communities?

5. How might a decision not to amend HUD's 2013 final disparate impact rule affect the status quo since Inclusive Communities?

6. What impact, if any, does the addition of paragraph (e) of § 100.500 regarding the business of insurance have on the number and type of disparate impact claims? What impact, if any, does the proposed paragraph (e) have on costs (or savings) and economic burden of disparate impact claims?

7. Is there any other data, information, or analysis the public can provide to assist HUD in assessing the impact of the proposed regulation relative to the 2013 disparate impact final rule and the 2015 Supreme Court decision in Inclusive Communities?