



Aug. 20, 2018

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: Advance Notice of Proposed Rulemaking: Reconsideration of HUD's Implementation of the Fair Housing Act Disparate Impact Standard, Docket No. FR-6111-A-01, RIN 2529-ZA01

Dear Docket Clerk and General Counsel Compton,

On behalf of the Consortium for Citizens with Disabilities (CCD) Housing and Rights Task Forces, we submit the following comments in response to the above-captioned Advance Notice of Proposed Rulemaking. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. We respond below to questions 1-5 of the ANPRM.

The “disparate impact” rule promulgated by HUD is critically important for ensuring effective implementation of the Fair Housing Act, and was long overdue when it was promulgated in 2013, following decisions by eleven federal courts of appeals interpreting the Fair Housing Act to prohibit “disparate impact” discrimination and HUD’s own longstanding reading of the Act to prohibit such discrimination.

While the ANPRM solicits comment on whether HUD’s disparate impact rule is consistent with the Supreme Court’s decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, it is abundantly clear that the rule is consistent with the Supreme Court’s decision.

First, by its plain terms, HUD’s disparate impact rule is entirely consistent with the Supreme Court’s formulation. The rule requires that there be causality between the challenged action and the disparate impact, just as the Supreme Court did; there is nothing in HUD’s rule that is inconsistent with the Court’s “robust causality” requirement.

Second, it is simply absurd to think that the Supreme Court discussed HUD's disparate impact rule and its burden-shifting framework at length in the *Inclusive Communities* decision, believed that HUD's rule was inconsistent with its own formulation of the burden-shifting analysis, and yet made *no mention whatsoever* of its disagreement with HUD's rule.

Finally, courts have uniformly rejected arguments that the *Inclusive Communities* decision is inconsistent with HUD's disparate impact rule. *See, e.g., MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (“[Supreme Court] implicitly adopted HUD’s approach”); *Property Casualty Insurers Ass’n of Am. v. Carson*, 2017 WL 2653069 at \*8 (N.D. Ill. June 20, 2017) (“[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD’s burden-shifting approach that requires correction.”); *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 126–27 (Sup. Jud. Ct. 2016); *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Community Affairs*, 2015 WL 5916220 at \*3 (N.D. Tex. October 8, 2015, on remand) (noting that Supreme Court affirmed “Fifth Circuit’s decision adopting the HUD regulations”).

Given the consistency of HUD's disparate impact rule with the Supreme Court's disparate impact analysis, it is plain that HUD's rule clearly and appropriately “assign[s] burdens of production and burdens of persuasion,” that the rule is “sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability,” that it “strike[s] the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims,” and that it need not be amended to “clarify the causality standard for stating a prima facie case” or to add new “defenses or safe harbors to claims of disparate impact liability.” 83 Fed. Reg. 28560, 28561 (June 20, 2018).

The Supreme Court has set forth how to analyze disparate impact claims under the Fair Housing Act, consistent with HUD's disparate impact regulation. It would not only be inappropriate, but also invalid, for HUD to add additional requirements, defenses, or burdens that are not identified in the Supreme Court's analysis. Moreover, with respect to the application of other federal laws, there are well-established canons of statutory construction that have been used for many years to determine how to apply federal statutes with overlapping application, and HUD cannot override those rules by creating new safe harbors or defenses to disparate impact liability to account for the potential application of other federal laws. Decisionmakers should apply the ordinary rules of statutory construction rather than automatically subjugating Fair Housing Act rights to the application of other laws.

We urge HUD not to modify its disparate impact rule. The rule provides important protections for people with disabilities and others protected by the Fair Housing Act, and offers clarity and consistency for landlords and housing industry professionals. It is based on an extensive record, and consistent with the Supreme Court's analysis.

Thank you for the opportunity to comment.

Sincerely yours,

**CCD Rights Task Force Co-Chairs:**

Jennifer Mathis  
Bazelon Center for Mental Health Law

Mark Richert  
American Foundation for the Blind

Samantha Crane  
Autistic Self Advocacy Network

Heather Ansley  
Paralyzed Veterans of America

**CCD Housing Task Force Co-Chairs:**

TJ Sutcliffe  
The Arc of the United States

Andrew Sperling  
National Alliance on Mental Illness