

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

October 18, 2019

VIA ELECTRONIC SUBMISSION

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

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

To Whom It May Concern:

On behalf of Justice in Aging, we appreciate the opportunity to comment in response to the Department of Housing and Urban Development's (HUD) Implementation of the Fair Housing Act's Disparate Impact Standard, which was published in the Federal Register on August 19, 2019 (RIN 2529-AA98; HUD Docket No. FR-6111-P-02).

Justice in Aging is a national nonprofit legal advocacy organization that fights senior poverty through law. We are committed to ensuring access to social safety net programs on which older populations rely, such as Medicare, Medicaid, Social Security, Supplemental Security Income (SSI), as well as civil rights protections such as the Fair Housing Act. Our work focuses especially on older adult populations that have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency. We regularly work to highlight and address the needs of low-income older adults.

We strongly oppose this proposed interpretation of the disparate impact standard under the Fair Housing Act (FHA). The existing disparate impact rule efficiently and successfully serves American older adults and others as a tool for challenging the structural inequalities that persist in housing and financial markets. The proposed rule will, instead, create overwhelming obstacles for people who experience discrimination and seek to enforce their rights based on a disparate impact theory.

HUD's proposed rule contradicts Congressional intent behind the Fair Housing Act, and weakens HUD's ability to uphold the law

In passing the Fair Housing Act, Congress sought to eradicate discriminatory housing practices in the strongest possible terms. Congress intended the Act to provide "a clear national policy against discrimination in housing."¹ The Fair Housing Act prohibits intentional discriminatory

¹ H.R. Rep. No. 100-711, p. 15 (1988).

WASHINGTON

1444 Eye Street, NW, Suite 1100
Washington, DC 20005
202-289-6976

LOS ANGELES

3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
213-639-0930

OAKLAND

1330 Broadway, Suite 525
Oakland, CA 94612
510-663-1055

acts and facially neutral policies that limit housing opportunities based on race, color, national origin, religion, sex, the presence of families with children, and disability.

In 2013, HUD codified decades of federal court jurisprudence to establish uniform “burden-shifting” standards for determining when a housing practice with a discriminatory effect violates the law. In its current form, the disparate impact rule has proven practical and effective. In 2015, the Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*² established that housing decisions with a disparate impact are prohibited under the FHA. The Court further found that disparate impact liability “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classifications,”³ and in that way “may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”⁴

HUD’s proposed rule would impose a burdensome standard on individuals who have experienced discrimination

In addition to contradicting the central purpose of the FHA and dramatically weakening HUD’s own ability to uphold it, HUD’s proposal would shift to a burdensome and confusing balancing test with nine subparts that would act as a hurdle barring the way of individuals seeking to enforce the Fair Housing Act. The proposed rule is strongly biased against plaintiffs and would make it nearly impossible to establish disparate impact liability under the FHA. Ultimately, the proposed rule contains a host of changes that, in practice, amount to intractable hindrances to proving what should be clear claims of housing discrimination, resulting in an inoperable disparate impact standard of liability.

For example, people experiencing discrimination may be asked to essentially identify the justifications the defendant will raise and address them. A plaintiff may be required to prove by the preponderance of evidence that “a less discriminatory policy or practice would serve the interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.” The proposed rule not only sets a much higher bar for a person experiencing discrimination to meet, but one based on information that only the entity with the discriminatory policy may have.

The proposed changes include additional elements that are fundamentally inconsistent with nondiscrimination protections. For example, a model or methodology may be “standard in the industry” and facially neutral, and still serve to perpetuate discrimination in its outcome or application. A landlord who requires citizenship documentation from every occupant will have a disparate impact not only on immigrants, but also on women, seniors, people with disabilities, and people of color.⁵

² 135 S. Ct. 2507 (2015).

³ *Id.* at 2522.

⁴ *Id.*

⁵ Center on Budget and Policy Priorities, “Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance” (2019), at <http://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump-proposal-to-restrict-housing>.

The proposed rule miscalculates the balance of interests by weighting the process unfairly against individuals alleging discrimination, making it prohibitively difficult for people facing discrimination to access an appropriate and timely remedy, and dismantling a key tool for addressing systemic discrimination under the FHA. The proposed rule, if finalized as written, risks permitting covert discriminatory practices to proliferate without the appropriate and necessary enforcement tool of disparate impact liability, and would worsen senior poverty and homelessness.

HUD’s proposed rule would harm vulnerable populations and communities

The older population is growing at an unprecedented rate, and is also becoming more diverse. Although age is not a protected class under the Fair Housing Act, because older adults are members of other groups protected under the statute, seniors all over the country have relied on the FHA to ensure that they have equal access to housing that is affordable, appropriate, and accessible to them as they age and where they can have the services they need provided to them in their communities rather than in an institutional setting.

The vast majority of housing options for older persons are subject to the FHA, including all types of “independent living” units, all types of “assisted living” units, most nursing homes, and all types of residential units in age-restricted retirement communities. Other than hospitals and isolated cases involving hospices and nursing homes, all places where older persons are likely to be living must, therefore, comply with the non-discrimination requirements of the FHA.

This proposed rule would work directly against HUD’s mission to provide safe, accessible, and affordable housing for all by making it easier for housing providers to discriminate through policies and practices that appear “neutral,” but that disproportionately negatively impact low-income seniors who are people of color, immigrants, people with disabilities, LGBTQ individuals, and women.

For years, advocates have employed the existing disparate impact standard to challenge unjustified discrimination by landlords who are unwilling to rent to voucher holders, which disproportionately limits housing opportunities for people of color, people with disabilities, and low-income families. Over 10 percent of voucher recipients are seniors, providing approximately 600,000 older adults with the ability to afford decent housing where they can age in place.⁶

The existing disparate impact rule protects against unjust and overbroad tenant-screening policies that categorically deny housing based on certain factors – such as arrest records or prior eviction filings – and disproportionately harm people of color and other marginalized communities. Due to vast, systemic inequities in the criminal legal system – something that

⁶ Center on Budget and Policy Priorities, “Housing Choice Voucher Fact Sheets” (2017) at <https://www.cbpp.org/housing-choice-voucher-fact-sheets>.

HUD itself has previously recognized⁷ – housing policies that exclude persons with arrests or convictions can raise fair housing concerns, even if those policies appear facially neutral. As many as 100 million people in the United States have a criminal record, and a disproportionate number of people who interact with the criminal legal system are members of groups protected by the Fair Housing Act, such as people of color and people with disabilities.

The disparate impact rule has also been used to fight discrimination against immigrants for reasons related to their race, country of origin, ability to speak English, as well as ability to provide certain types of documentation. There are almost 5 million older immigrants in the United States, about 12 percent of the 40.4 million elderly in this country, and 12 percent of the 40 million immigrants.⁸

The prevalence of disability increases with age – over half of people over 65 have a disability. People with disabilities and their families already face a national shortage of accessible and affordable housing,⁹ particularly the lowest-income people with disabilities.¹⁰ People with disabilities often have few financial resources and remain among the country’s poorest, and far too frequently, encounter discrimination when seeking housing.¹¹ The lack of sufficient safe, accessible, affordable housing is a continuing and significant barrier to integrated community living, making it difficult for people with disabilities to move from segregated facilities into the community, and putting many people with disabilities at risk of unnecessary institutionalization or homelessness. It remains crucially important to work toward inclusive housing in the community for people with disabilities, and to protect the rights guaranteed under the FHA.

Discrimination against LGBTQ people in housing is a consistent and ubiquitous issue. Research conducted by HUD itself indicates that same-sex couples are treated less favorably than heterosexual couples in the online rental housing market.¹² In 2015, approximately one in four transgender people in the U.S. experienced some form of housing discrimination because of their gender identity.¹³ Of course, people living at the intersections of multiple marginalized identities, like LGBTQ people of color and LGBTQ people with disabilities, are even more

⁷ U.S. Dept. of Housing and Urban Development, “Application of Fair Housing Act standards to the use of criminal records by providers of housing and real estate-related transactions” (2016) at https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf.

⁸ Jeanne Batalova, “Senior Immigrants in the United States” (2012), at <http://www.migrationpolicy.org/article/senior-immigrants-united-states>.

⁹ U.S. Dept. of Housing and Urban Development, “Worst Case Housing Needs 2017 Report to Congress” (2017) at <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

¹⁰ Technical Assistance Collaborative, Inc., et al, “Priced Out: The Housing Crisis for People with Disabilities” (2017) at <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

¹¹ National Fair Housing Alliance, “2018 Fair Housing Trends Report” 52 (2018) at <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf> (“As has been the case in past years, the majority of complaints [of housing discrimination] from 2017 involved housing discrimination against people with disabilities.”)

¹² U.S. Dept. of Housing and Urban Development, Office of Policy Development and Research, *An Estimate of Housing Discrimination against Same-Sex Couples: An Executive Summary*, 2013, 1, at https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_exec_summ_v2.pdf.

¹³ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, 2016, 13, <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

likely to face discrimination in access to housing, and to have an increased need to access public housing supports. Older LGBTQ individuals face these challenges as well. All continue to rely on the FHA's protections to ensure they are not discriminated against in housing.

HUD's proposal regarding the use of algorithms does not reflect current research

HUD's proposed rule would allow defendants to rely on third-party algorithms, burying the effects of discrimination even deeper and making it harder for plaintiffs to root out the causes. The Western Center on Law & Poverty notes that algorithms are routinely used for decisions that maintain existing disparities in the housing market, such as redlining.¹⁴ Algorithms function as gatekeepers for a broad range of industries; it is imperative that disparate impact theory remain an effective tool for ensuring they do not operate to perpetuate historical patterns of discrimination.

As HUD has recognized,¹⁵ algorithms can be used as a tool of housing discrimination. Multiple studies have demonstrated that algorithms result in people of color being denied credit, employment, and housing at disproportionate rates.¹⁶ Instead of tackling this difficult and complex issue, HUD's proposed rule creates a vague standard with many undefined terms that will shield housing providers from disparate impact liability whenever they use an algorithm to make a housing decision.

Furthermore, it is unclear why this special defense for algorithms is necessary, since the current framework in 24 C.F.R. 100.500(c)(2) allows a defendant to show that the use of the algorithm would be "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." The complexity of algorithms should not be used as an excuse to provide defendants that use algorithmic models in housing decisions with what amounts to a broad liability shield – even when those defendants are engaging in discriminatory housing practices.

Conclusion: We strongly oppose the proposed rule and urge HUD to withdraw it

The existing disparate impact rule is a critical tool in combatting discriminatory housing policies that appear neutral on their face but often have a devastating impact on seniors. The proposed rule will fundamentally weaken this longstanding enforcement tool to the detriment of low-income seniors, our community, and the nation. We strongly oppose any changes to HUD's current disparate impact rule, and the proposed rule should be withdrawn.

Discrimination in housing is already far too prevalent. Acts of blatant, overt discrimination, which could be challenged under a theory of intentional discrimination, happen relatively less frequently than other forms of discrimination, which are more suited for a disparate impact

¹⁴ Western Center on Poverty & Law, <https://wclp.org/the-trump-administration-is-threatening-the-right-to-fairhousing-were-fighting-back-and-you-can-too/> (last visited October 4, 2019).

¹⁵ HUD v. Facebook, Charge of Discrimination, FHEO No. 01-18-0323-8 (Mar. 28, 2019)

¹⁶ *When Algorithms Discriminate*, Claire Cain Miller, *New York Times* (July, 9, 2015)(Referencing multiple studies finding discriminatory impact of algorithms) Available at: <https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html>

claim. The proposed changes to the rule will only make it harder for impacted people to bring claims alleging disparate impact, guaranteeing that even more discrimination occurs. Businesses, governments, landlords, and other entities will be emboldened to act in unprincipled ways, regardless of the impact of their actions, knowing that any challenge will be even more difficult to bring than it has been in the past.

Degrading the disparate impact protections currently in place will cause harm to millions of people who already struggle to find housing. As the Administration is turning its attention to the increasing number of people experiencing homelessness in the U.S., we strongly urge HUD not to facilitate an uptick in housing instability by making the disparate impact rule less effective.

We have cited research demonstrating the harms of these proposals and we respectfully request that HUD review each of the sources cited and made available to the agency through active hyperlinks. We further request that the full text of each of the sources cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act.

Thank you for the opportunity to comment on these proposed regulations. If there are questions concerning this submission, please contact Tracey Gronniger, at tgronniger@justiceinaging.org.

Respectfully submitted,

Tracey Gronniger
Directing Attorney