



August 20, 2018

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

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111A-01

To Whom It May Concern:

The National Council of State Housing Agencies (NCSHA) appreciates this opportunity to provide comments on HUD's 2013 final rule implementing the Fair Housing Act's discriminatory effects standard (Disparate Impact Rule) as HUD considers possible modifications to the Rule in light of the U.S. Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs vs. Inclusive Communities Project, Inc.* (Texas DHCA vs. ICP). NCSHA and our Housing Finance Agency (HFA) members are committed to providing quality affordable housing opportunities to low- and moderate-income households free from both disparate treatment and disparate impact forms of discrimination.

NCSHA represents the nation's state HFAs.¹ HFAs administer a wide range of affordable housing and community development programs, including the HOME Investment Partnerships program, the Housing Trust Fund, Section 8 rental assistance, the Emergency Solutions Grant, the Community Development Block Grant, and Housing Opportunities for Persons with AIDS. HFAs also administer down payment assistance, homebuyer education, loan servicing, state housing trust funds, and the Low Income Housing Tax Credit and issue tax-exempt private activity Housing Bonds to finance affordable housing for renters and home buyers.

NCSHA and HFAs welcome HUD's reexamination of the Disparate Impact Rule, which was implemented two years prior to the Supreme Court's decision in *Texas DHCA vs. ICP*. The Rule establishes a three-step burden-shifting framework for determining when a practice with a

¹ NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

discriminatory effect violates the Fair Housing Act. It is an important tool for addressing and stemming policies and practices that undermine fair housing opportunities.

While the Disparate Impact Rule is generally consistent with the Supreme Court's ruling in *Texas DHCA vs. ICP*, which finds disparate impact claims to be cognizable under the Fair Housing Act, NCSHA believes the language in the Supreme Court's majority opinion suggests HUD should revise the Disparate Impact Rule to further clarify both step one and step two of HUD's burden-shifting framework.

Clarify the Criteria for Establishing a Prima Facie Case in Step One of the Burden-Shifting Process

Under step one of the burden-shifting process, the plaintiff bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. The Supreme Court's majority opinion provides greater context to what criteria are necessary to establish a prima facie case than was available when HUD finalized the Disparate Impact Rule. Specifically, Justice Kennedy, in the majority opinion, states:

"A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important."

We recommend that HUD modify the Disparate Impact Rule to state that to be successful in establishing a prima facie case, plaintiffs must demonstrate a robust causality between the challenged policy or policies and the disparity.

Clarify the Criteria for a Legally Sufficient Justification of Policies in Step Two of the Burden-Shifting Process

If the plaintiff is able to establish a prima facie case, the second step in the burden-shifting process requires the challenged party to show a "legally sufficient justification" that its interest could not be served by another practice that has a less discriminatory effect. Again, we urge HUD to clarify step two of the burden-shifting framework to fully reflect the majority opinion in *Texas DHCA vs. ICP*, which suggests that reasonable approaches taken to make difficult allocation decisions in redeveloping communities are entitled to greater deference in determining a legally sufficient justification for the policy. Specifically, the majority opinion states:

"Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are artificial, arbitrary and unnecessary barriers..."

Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”

We recommend that HUD modify the Disparate Impact Rule to acknowledge that policies meet the legally sufficient justification so long as they are not artificial, arbitrary, and unnecessary barriers.

We believe further clarity regarding both the criteria for establishing a prima facie case in step one and the legally sufficient justification needed in step two of the burden-shifting framework to ensure consistency with the Supreme Court ruling would mitigate needless litigation. In the case of *Texas DHCA vs. ICP*, the Supreme Court balanced the importance of allowing plaintiffs to bring disparate impact claims under the Fair Housing Act with the legitimate policy objective of revitalizing distressed areas. The majority opinion states:

“Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing.”

Based on the criteria set forth in the opinion, on remand, the district court dismissed the claim against Texas DHCA.

NCSHA supports wholeheartedly the adoption of the Disparate Impact Rule by HUD. The use of discriminatory effects as a legal tool is of critical importance in achieving fair housing. NCSHA appreciates HUD’s interest in ensuring the Disparate Impact Rule is consistent with the Supreme Court ruling and HUD’s appreciation of the nuances in the majority opinion. We look forward to continuing our work with HUD to ensure low-income households’ access to affordable housing free from discrimination and in support of state policies that promote the values and requirements of the Fair Housing Act.

Sincerely,

A handwritten signature in black ink, appearing to read 'Garth Rieman', with a long horizontal flourish extending to the right.

Garth Rieman
Director, Housing Advocacy and Strategic Initiatives