NIXON PEABODY

NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

Harry J. Kelly
Partner
T 202-585-8712
hkelly@nixonpeabody.com

799 9th Street NW
Suite 500
Washington, DC 20001-4501
202-585-8000

VIA E-MAIL (http://www.regulations.gov)

Office of the General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001

Re: Comments on HUD's Implementation of the Fair Housing Act's Disparate Impact Standard – Proposed Rule
Docket No. FR-6111-P-02
RIN 2529-AA98

Dear Sir or Madam:

On behalf of our clients, the National Leased Housing Association ("NLHA"), the Council for Affordable and Rural Housing ("CARH"), the National Apartment Association ("NAA"), and the National Multifamily Housing Council ("NMHC") (jointly, the "Housing Associations"), and their thousands of members – owners, managers, developers, and investors in the nation's multifamily housing industry – we provide this response to the Proposed Rule (the "Proposed Rule") in "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," Docket No. FR-6111-P-02, published at 84 Fed. Reg. 42854 (the "Proposal").

The Housing Associations strongly commend the U.S. Department of Housing and Urban Development ("HUD") for its effort to revise its existing rule for disparate impact claims under the Fair Housing Act (the "Act"). 24 CFR § 100.500 (the "Current Rule"), to update it and incorporate important guidance from the U.S. Supreme Court's decision in *Tex. Dept. of Hous. & Comm. Affairs v. Inclusive Cmtys. Project, Inc.*, __ U.S. ___, 135 S. Ct. 2507 (2015).[1] The Proposed Rule will correct a number of errors and deficiencies in the Current Rule, helping to prevent "abusive" disparate impact cases while preserving the "heartland" of disparate impact liability to combat "arbitrary, artificial and unnecessary burdens" on housing opportunities. 135 S. Ct. at 2522. The changes will also promote the important goals of uniformity and predictability in disparate impact

[1] The Housing Associations previously submitted comments (the "2018 Comments") to the Advance Notice of Proposed Rulemaking issued by HUD on June 20, 2018. 83 Fed. Reg. 28560 (the "2018 Notice"), which requested public input on proposals to overhaul the Current Rule. Dkt. No. HUD-2018-0047-0310, tracking no. 1k2-94wj-kdgr.

outcomes. Although these comments strongly endorse the Proposed Rule, they also recommend some clarifications and additions to the Proposed Rule, to make it more effective and reduce unnecessary litigation, and respond to a series of questions raised by HUD in the Proposal, as explained in more detail below.

I. Background

In their 2018 Comments, the Housing Associations recognized that disparate impact can serve an important purpose in the "heartland" of cases it was meant to address – such as exclusionary zoning practices – but that the Current Rule needed extensive revision. They pointed out, among other things, that the Current Rule did not reflect many of the "safeguards" announced in the Supreme Court's *Inclusive Communities* decision. As a result, the Current Rule could lead to exactly the sort of "abusive" disparate impact claims that the Supreme Court warned against.

To correct the errors and deficiencies in the Current Rule, the 2018 Comments proposed a "Framework" for a revised disparate impact rule, that set out the elements of a disparate impact claim and made clear that at all times, the party asserting disparate impact claims had the burden to prove those claims. Among other things, the 2018 Comments also urged HUD to adopt safe harbors that would permit housing providers to adopt essential tenant selection and property management policies without fear of subsequent litigation and to identify specific defenses to disparate impact claims.

II. Comments on Proposed Rule

A. The Housing Associations Congratulate HUD On The Improvements Reflected in the Proposed Rule.

By adopting many of the components of the Framework proposed in the 2018 Comments, HUD's Proposed Rule marks a dramatic improvement over the Current Rule. Among other things, the Proposed Rule identifies a series of elements to a disparate impact claim under the Act that a disparate impact claimant must prove. This includes showing facts that the challenged practice is "arbitrary, artificial and unnecessary" to achieve a valid business or policy goal and establishing that a "robust causal link" exists between the challenged policy and the alleged discriminatory effect, and that the "alleged disparity caused by the policy or practice is significant," among other elements. *See* Proposed Rule, § 100.500(a).[2] The elements derive directly from the "safeguards" enunciated in the *Inclusive Communities* decision.

By adopting these changes, HUD will discourage the sort of "abusive" disparate impact cases that the Supreme Court warned against, including actions that do nothing more than "second-guess" otherwise legitimate decisions by government agencies and private entities. 135 S. Ct. at

---

[2] As explained below, some of the elements announced in the Proposed Rule should be clarified to avoid additional litigation that would jeopardize the gains in efficiency and predictability promoted by the Proposed Rule. As explained in Section C below, the Housing Associations recommend that HUD provide additional clarification for these elements and other components in the Proposed Rule.

2522, 2524. As the Supreme Court recognized, housing providers make critical decisions every day about property operations and management. In adopting the "safeguards" discussed in *Inclusive Communities*, the Supreme Court struck a balance between the legitimate needs of housing providers to manage their properties safely and successfully and the rights of persons in protected classes to challenge "arbitrary, artificial and unnecessary" practices that have a discriminatory effect.

The changes made by the Proposed Rule will help to implement the balance struck in *Inclusive Communities*. For example, it will reduce that fear that housing providers may face liability for applying neutral screening procedures before admitting new tenants. A residential lease is essentially a long term license to occupy a dwelling in exchange for compliance with the lease provisions, including timely payment of rent and respect for the right of peaceful enjoyment of the premises by other tenants. A housing provider must, therefore, adopt policies on matters such as a prospective tenant's credit and criminal history in order to determine whether the prospective tenant poses reasonable risks. No housing provider wants to deal with eviction proceedings if they can be avoided by applying neutral credit screening procedures in advance, and no housing provider wants to rent a unit to a person whose criminal background raises a bona fide concern about the safety and security of people and property at the premises.

An example of the burdens that HUD's Current Rule imposes on legitimate property management issues is the guidance (the "OGC Guidance") issued by HUD's Office of General Counsel ("OGC") in April 2016. Invoking the Current Rule, OGC warned that adopting crime screening policies could lead to disparate impact claims to the extent they tended to disqualify a disproportionate number of persons in protected classes. *See* OGC Guidance at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF. Among other things, the OGC Guidance suggested that in order to utilize crime screening data, it was necessary to perform an "individualized assessment of relevant mitigating information" to determine whether to admit a renter with an adverse criminal history. OGC Guidance at 7. According to OGC, this would require housing providers to assess other factors, such as the facts surrounding the criminal conduct, the age of the renter when the criminal conduct occurred, and evidence of rehabilitation activities, before making a screening decision. The requirement to perform an individualized assessment of mitigating factors imposes delay and expense on housing providers, and requires them to exercise psychological expertise outside the job description of most tenant selection personnel. Leaving aside these obvious burdens, the OGC Guidance had a chilling effect on housing providers' duty to meet a fundamental obligation to other tenants – to promote their physical safety and assure them of the right of peaceful enjoyment of their premises.

By requiring plaintiffs to prove basic elements of a disparate impact claim – such as that the challenged practice is "arbitrary, artificial and unnecessary" – the Proposed Rule makes it far less likely that housing providers who make bona fide efforts, such as performing crime screening to protect their tenants, their staff and their properties, will face "abusive" disparate

impact claims.[3] The Proposed Rule will help to strike the balance sought by the *Inclusive Communities* decision and properly focus on the "heartland" of disparate impact liability, as the Supreme Court intended.

B. HUD Should Consider Additional Safe Harbors and Defenses To Disparate Impact Claims.

In the Framework included in their 2018 Comments, the Housing Associations urged HUD to adopt additional safe harbors and defenses that would provide confidence to housing providers that reasonable property management practices would not subject them to disparate impact claims. The Housing Associations commend HUD for adopting several safe harbors and specific defenses for parties opposing disparate impact claims in the Proposed Rule. The Proposed Rule demonstrates that HUD made a serious effort to design safe harbors that protect legitimate decisions of government agencies and private firms, while preserving disparate impact liability in appropriate cases. Still, some additional modifications to the Proposed Rule would improve its equity and efficiency:

1. **Statistical Algorithms and Models.** Most notably, the Housing Associations applaud the proposal to permit public agencies and private firms to utilize mathematical algorithms to assess risk in appropriate cases. This is an extraordinarily helpful and prescient initiative. Statistical models are widely used in a variety of economic sectors to provide important insights into risk issues that experience and anecdotes simply cannot supply. Thanks to advances in information gathering and analysis, and developing technologies such as artificial intelligence, an enormous amount of information is available to assist government agencies and private firms to assess a variety of appropriate housing-related risks, such as credit, crime and casualty risks. The Proposed Rule recognizes that modeling risk issues is an essential task for agencies and businesses, that accurate risk assessments benefit everyone, and that agencies and businesses should be allowed to use the best available information and statistical modeling techniques to make accurate assessments of risk. HUD's Proposed Rule recognizes the important principle that neutral facts, processed through a neutral model, produce a nondiscriminatory outcome. The possibility that some individuals, even a number of individuals, may be adversely effected by a particular outcome should not provide grounds to reject the validity or utility of information that modern algorithms generate. Indeed, in most instances, statistical modeling techniques will ***reduce*** bias in housing decisions – algorithms that are factually accurate and properly designed and used will minimize the possibility of bias (conscious or unconscious) that otherwise might improperly tilt risk decisions. While the Housing Associations have some recommendations for improving the Proposed Rule's treatment of algorithms (*see* Section

---

[3] HUD should clarify that performing such "individualized assessments" of mitigating factors constitutes a "material burden" for purposes of proposed §100.500(d)(1)(ii) and (2)(iii), as discussed in more detail in Section C(1)(e), below. Indeed, HUD should take this opportunity to confirm that housing providers are never required to undertake such individualized assessments of mitigating factors to avoid disparate impact claims. *See* Section C(3) below.

C(2) below), they applaud HUD's willingness to create a safe harbor for use of sophisticated risk assessment techniques.

2. **Safe Harbor for Compliance with Applicable Law.** The Proposed Rule also creates a safe harbor where a defendant shows that its discretion is materially limited by applicable law or by a binding judicial or administrative order or requirement. *See* Proposed Rule, §100.500(c)(1). This is similar to a proposed safe harbor included in the Housing Association's Framework, where "the challenged policy or practice was required by, or reasonably calculated to comply with, an otherwise valid law or regulation of local, state or federal government." 2018 Comments, Framework at 2. The Proposed Rule is narrower, however, because the protection provided by §100.500(c)(1) only applies where the housing provider's "discretion is material limited" by some outside legal duty. A housing provider should know that it is also protected where it takes action that on its face is authorized by or intended to comply with applicable laws. This is not a speculative issue: In *Burbank Tenants Assn. v. Kargman*, the Massachusetts Supreme Judicial Court concluded that an owner was still subject to a potential disparate impact claim, even though it had complied with all applicable HUD requirements for not renewing its Section 8 contract. 48 N.E.3d 394, 408-11 (Mass. 2016) (ultimately rejecting disparate impact claim because plaintiffs failed to satisfy *Inclusive Communities'* "robust causality requirement").

   HUD therefore should clarify that housing providers who comply with otherwise valid Federal, state and local laws should not be subject to disparate impact claims, and should encourage them to take innovative action to meet their legal obligations, rather than narrowly restrict this safe harbor to those circumstances where the housing provider would have to provide its "discretion is materially limited" by outside legal issues. To do this, we recommend that proposed §100.500(c)(1) be revised as follows (new text in italics):

   > (1) The defendant shows that *(x) the challenged policy or practice is authorized by or is reasonably calculated to comply with, or (y)* its discretion is material limited by a third party such as through : . . .

3. **Additional Safe Harbors and Defenses.** HUD should also consider adopting additional safe harbors and defenses that were discussed in the Framework attached to the Housing Associations' 2018 Comments, including the following:

   a. The challenged practice would be lawful if it is consistent with any policy or practice that HUD has approved for the operation of federally-insured housing as defined in 24 C.F.R. § 5.100.

   b. The challenged policy or practice is related to determining tenant eligibility or selection, and is reasonably calculated to enhance housing opportunities for persons who are members of protected classes under the Act or state or local fair housing laws, members of the military or veterans, homeless persons, persons with AIDS/HIV, LGBTQ persons, or persons whose income is at or below the

maximum income allowed to qualify for Section 8 rental assistance or for a unit in a low income housing tax credit or HUD-insured property.

c. A written policy or practice adopted prior to any challenge and made available to prospective and current tenants that

   i. Identifies a goal of the policy or practice that is not facially discriminatory and that is beneficial to the defendant's housing operations;

   ii. Explains that the policy or practice is reasonably calculated to achieve the goal; and

   iii. Concludes that the policy or practice imposes no greater substantive burden on members of a protected class than it imposes on the population generally.

Again, the Housing Associations believe that the changes made by the Proposed Rule will allow housing providers to adopt policies with confidence that they will not face subsequent disparate impact scrutiny. The additional changes proposed here will provide further clarity and allow housing providers even greater certainty that the policies they adopt will comply with the Act's requirements.

C. Recommendations for Additional Clarifications and Improvements.

While the Housing Associations commend HUD for making much-needed changes to the Current Rule, HUD should consider some additional clarifications and improvements that would make the Proposed Rule more efficient, such as the following:

1. **HUD should clarify key terms in the Proposed Rule.** While HUD properly adopted a series of elements that a disparate impact claimant must prove, those elements contain key words and phrases that have not been defined. In the absence of definitions, those terms will have to be defined through litigation, a time-consuming and expensive process that undermines the goals of uniformity and efficiency reflected in the Proposed Rule. The Housing Associations urge HUD to provide additional definitions for the following terms:

   a. *"Arbitrary, artificial and unnecessary"* (Proposed Rules, sec. 100.500 (b)(1)): This term is derived from the *Inclusive Communities* decision and prior Supreme Court decisions involving disparate impact claims. In *Inclusive Communities*, the Supreme Court described as "arbitrary" zoning policies that barred the construction of multifamily housing. *See* 135 S. Ct. at 2522. Similarly, it explained that the Act "aims to ensure that [legitimate] priorities can be achieved without *arbitrarily* creating discriminatory effects or perpetuating segregation. Id. (emphasis added). HUD should define the phrase "*arbitrary, artificial and unnecessary*" as applying to a policy that is not reasonably calculated to achieve a legitimate goal within the sound discretion of the policy-maker and that

imposes an otherwise unexplained burden on housing opportunities for persons in protected classes. It should also provide examples of policies that are arbitrary, artificial and unnecessary (such as zoning rules that artificially restrict the ability to develop multifamily housing) and those that are not, such as otherwise valid statistical models and algorithms that are used to make legitimate risk assessments (such as those discussed in proposed §100.500(c)(2)).

b. "*Robust causal link*" (Proposed Rule, §100.500(b)(2)): This phrase also derives from *Inclusive Communities*, which, among its proposed safeguards, called for a "[r]obust causality requirement." Id. at 2523. As the Supreme Court warned, "a disparate impact claim that relies on statistical disparity must fail if it cannot point to a defendant's policy or policies ***causing that disparity***." Id. at 2523 (emphasis added). Without such a causality requirement, government agencies and private firms would "almost inexorably" come to rely on improper racial quotas to avoid liability, which could raise "serious constitutional questions." Id. Determining causation in housing related matters is challenging, among other reasons, "because of the multiple factors that go into investment decisions about where to construct or renovate housing units." Id. at 2523-24. In other words, causation is not shown where a disparate impact is the effect of multiple causes, only one of which is the challenged practice. HUD should clarify the Proposed Rule to say that, to demonstrate a "robust causal link," a claimant must show that the challenged practice is both the "direct ***and sole*** cause of the discriminatory effect."

c. "*Significant*" disparity (Proposed Rule, §100.500(b)(4). The Proposed Rule would require a claimant to prove that "the alleged disparity caused by the policy or practice is significant," but it doesn't explain how "significance" should be measured. Indeed, one of the most persistent issues with disparate impact theory is determining how much of a disparity is sufficient to trigger liability. Because of the variety of ways in which a policy may affect housing opportunities, it is unlikely that a single numerical or percentage threshold for a "significant" impact can be established in advance. For example, what does it mean to say that an arbitrary zoning decision makes constructing a multifamily property twice as difficult as it would be without the rule? And even if it was possible to establish a threshold, what should the threshold be – is 5% more difficulty sufficient? Is 50% appropriate? Is 90% the right number? A strictly quantitative measure of significance is not likely to yield principled, consistent, and predictable results.

Instead of searching for a strict quantitative threshold, HUD should define a "*significant*" disparity in a functional way: A disparity is "significant" if it affects individual members of a protected class, in a qualitatively different manner than it affects individual members of the population at large. Suppose that a housing provider adopts a credit score requirement and that a higher percentage of minority applicants have substandard credit scores compared to nonminority applicants. If the evidence indicates that the housing provider rejects all

applicants, regardless of their minority/nonminority status, with the same substandard credit scores, the disparity would not be deemed to be significant. In other words, if the housing provider treats all persons with substandard credit scores similarly, regardless of their protected class status, the fact that more minorities may happen to be rejected would not constitute a "significant" disparity.

d. "*Valid interest*" (Proposed Rule, §§100.500(d)(1)(ii) and (2)(iii): Under the Current Rule, if a disparate impact claimant establishes a prima facie case, the burden shifts to the defendant to demonstrate, as part of showing a "legally sufficient justification," that "the challenged policy is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant. 24 CFR §100.500(c)(2). The Proposed Rule properly jettisons both the "legally sufficient justification" and "substantial, legitimate, nondiscriminatory" requirements. Both of these standards set multiple criteria that a defendant had to satisfy to support its policy, which opened the opportunity for litigation on multiple fronts. More important, these multifaceted standards made it extremely difficult for a well-intentioned housing provider to know whether – until it was forced to defend its policies in court – the policies satisfied the acid test set out in the Current Rule.

Instead, the Proposed Rule adopts the language from *Inclusive Communities*, explaining the burden that a disparate impact defendant must satisfy:

> An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the ***valid interest*** served by their policies.

135 S. Ct. at 2522 (noting incomplete analogies to "business necessity" test in employment discrimination cases) (emphasis added). In establishing that a housing owner only must show that the challenged policy satisfies a "valid interest," HUD properly moves its disparate impact rule away from the burdensome standard in the Current Rule now and towards harmony with *Inclusive Communities*. To complete the process, HUD should make clear that to prove a "valid interest," a housing provider is not required to demonstrate a "substantial, legitimate, nondiscrimination interest" in the challenged policy and instead is only required to show that the challenged policy (1) is reasonably calculated to achieve a generally recognized property management goal (including profitable operation of the property) and (2) does not on its face discriminate against a protected class.

e. "*Materially greater costs*" and "*material burden*" (Proposed Rule, §§100.500(d)(1)(ii) and (2)(iii): The Proposed Rule significantly overhauls the provisions in the Current Rule that, after the defendant meets the "substantial, legitimate, nondiscriminatory interest" test, shifts the burden back to the plaintiff

to show a "less discriminatory" alternative. §100.500(c)(3). The error in the Current Rule was brought into stark relief in *MHANY Mgmt. v. Cty. of Nassau*, No. 05-cv-2301, 2017 U.S. Dist. LEXIS 153214 at *20-26 (E.D.N.Y Sept. 19, 2017), where the district court concluded that a plaintiff satisfied this standard by demonstrating that a less discriminatory "alternative" existed, even though that "alternative" was not "equally effective" as the challenged policy. Wisely, the Proposed Rule makes clear that a less discriminatory alternative must be "equally effective" as the challenged policy, eliminating the possibility that a housing provider may be compelled to adopt policies that do not meet their reasonable operation and management needs.

More important, the Proposed Rule requires that a less discriminatory alternative must not "impos[e] materially greater costs on, or creat[e] other material burdens for, the defendant." To avoid uncertainty and unnecessary litigation in the future, HUD should clarify what "materiality" means in these contexts. Specifically, HUD should clarify that a cost increase or a burden is "material" if it imposes a cost or burden that, but for the disparate impact claim, would not be incurred by a housing provider. For example, as discussed in more detail below, it would be a "material burden" to require a housing provider, who has already performed an individualized credit or crime screening analysis, to undertake an additional "individualized assessment" of possible mitigating factors before disqualifying a substandard applicant. In such a case, the owner clearly has a "valid interest" to assess credit- and crime-related risks before entering into a lease with an applicant. To the extent that the owner has obtained reliable information about a specific applicant that indicates the applicant poses a substandard risk, and uses the information as intended, no additional individualized assessment should be required. Any such individualized assessment should be deemed to pose a "material burden" on the housing provider, because it reflects a cost that, but for a threat of disparate impact liability, it would not have to incur. HUD should make clear that any such costs are "material burdens" that an owner should not be required to prove.[4]

2. **HUD should provide additional clarification about the use of algorithms and mathematical models**. As noted above, statistical algorithms and models can benefit everyone by allowing accurate assessment of risks encountered in the housing sector. There are some provisions of the Proposed Rule, however, that need to be clarified so

[4] Arguably, to the extent that the "equally effective manner," "materially greater costs," and "material burden" provisions of proposed §100.500(d)(2) impose burdens on the defendant, they go beyond what *Inclusive Communities* allows. In that case, the Supreme Court indicated that the only burden imposed on the defendant in a disparate impact case is to show a "valid interest." 135 S. Ct. at 2522, 2523. To the extent that §100.500(d)(2) suggests that the defendant also has a duty to show that a less discriminatory alternative is "equally effective," that it imposes no "materially greater costs," or that it raises no "material burden" on the defendant, it violates the *Inclusive Communities* holding. HUD should make clear that at all times, the burden is solely on the plaintiff to show a less discriminatory alternative exists, including proving that the alleged alternative is equally effective and imposes no material costs or burdens on the defendant. The defendant always has the ability to ***rebut*** any such showing, but it should not bear the burden of ***proving*** them itself.

that the full benefit of risk modeling is available to government agencies and private firms alike.

For example, proposed § 100.500(c)(2)(i) allows a defendant to rebut a disparate impact claim based on use of an algorithm, if it can show that the factors used in the model "do not rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act . . . ." The term "substitutes or close proxies for protected classes" is not defined and ultimately begs the question – if a factor is not somehow closely correlated with a protected class, how can it raise a disparate impact question in the first place? The question should never be whether there is a correlation between a statistical factor used in a model and a protected class. Rather, the question should be whether there is a statistically valid reason to use a specific factor in order to assess the specific risk involved. If there is, and if there happens to be a coincidence between that factor and members of a protected class, then the only question should be whether adverse decisions based on the statistical model somehow are applied differently to persons in the protect class than they are applied to persons who are not in that protected class. As noted above, if a model yields the same negative credit scores for two individuals, one in a protected class and one who is not, and both are rejected, it is hard to see how there is a disparate impact on the person in the protected class.[5]

Similarly, proposed section 100.500(c)(2)(ii) – which provides a defense for models "produced, maintained, or distributed by a recognized third party that determines industry standards" – should also be clarified. There are a large number of entities in the housing sector – including the Housing Associations themselves – that make important contributions to policy and operational issues. Indeed, one of the remarkable aspects of the housing industry is the diversity of perspectives that are reflected in housing policy in this country. Given this wide variety of perspectives, it is not clear which of these organizations, if any, would qualify as "a recognized third party that determines industry standards." HUD is wise to try to provide a defense for neutral algorithmic models that are widely used in the housing industry, but it needs to provide additional guidance to explain when such models should be allowed. If HUD chooses to retain language that looks at the reputation of the producer of the model, it need to provide additional information to explain how that status is determined. Instead, HUD may want to focus less on the industry reputation or leadership of the third party that produces the model, and more on the acceptance of the model itself across the industry (which could be demonstrated by the number of firms that use the model).

3. **HUD should clarify that having made a fact-based individualized decision on the basis of neutral criteria, a housing provider is not require to perform any further "individualized assessment."** Because it is in the process of overhauling its disparate impact regulations generally, HUD should take this opportunity to limit the scope of

[5] And of course, if the two individuals receive the same negative score, but the person in the protected class is rejected while the person not in the protected class is admitted, it is hard to see how that should be treated as a case of disparate impact instead of a case of intentional disparate treatment, subject to the rules applicable to such cases.

"individualized assessments," such as consideration of mitigating information, in the context of disparate impact claims. Although, as explained below, the concept emerged in the context of other fair housing issues, individualized assessments have crept into disparate impact cases and guidance as a sort of uncodified element of the defendant's proof. That is, in addition to showing that it has a "valid interest" in a specific policy or practice, a housing provider must also show that before that policy is applied adversely against a member of a protected class, the provider has considered other possibly mitigating information about that individual. Nothing in disparate impact theory itself – and certainly nothing in *Inclusive Communities* – requires housing providers to bear an additional duty to consider individual mitigating information, at least where they have obtained reliable adverse individual information in the first place, such as a substandard credit score or crime screening report.

As noted earlier, the 2016 OGC Guidance on crime screening demonstrates how individualized assessments distort the process established by the Current Rule. According to the OGC Guidance, before rejecting a prospective renter based on adverse criminal history, a housing provider must consider other mitigating factors, such as the specific facts and circumstances of the subject criminal activity, the age of the renter at the time the criminal conduct occurred, and subsequent rehabilitation activities. *See* OGC Guidance at 7. Leaving aside the fact that some of this information may not be available to a housing provider under any circumstances, it is clear that acquiring this information will impose additional costs on a housing provider that it would not otherwise incur. Moreover, such an individualized assessment inevitably imposes delays which could result in loss of other prospective renters who decide to look elsewhere for housing. Further, even assuming all of the information required by HUD was obtainable, a meaningful "assessment" of this information requires a degree of psychological insight that most property management professionals do not possess. Finally, the OGC Guidance discusses individualized assessments in the context of demonstrating that a less discriminatory alternative exists. *See* OGC Guidance at 7. But even under the Current Rule, that burden belongs to the plaintiff, not the defendant. *See* §100.500(c)(3). HUD has never explained how under the OGC Guidance, a plaintiff's duty to demonstrate a less discriminatory alternative somehow metamorphoses into an additional element for the defendant to prove. HUD should make clear that individualized assessments of mitigating information are never part of the housing provider's burden under either the Current Rule or the Proposed Rule.[6]

---

[6] Outside of the disparate impact context, an "individualized assessment" requirement has also been imposed where, for example, a housing provider bases a decision to disqualify an applicant, evict a tenant, or take other adverse action on the basis of non-personalized stereotypes, such as situations invoking the so-called "direct threat" exception to a housing provider's duty to make reasonable accommodations. *See* 24 CFR §100.202(d)(establishing "direct threat" exception); *see also Boston Housing Authority v. Bridgewaters*, 898 N.E.2d 848, 855 (Mass. 2009) (a landlord could not utilize the "direct threat" exception to evict a tenant because of a diagnosis of Tourette disorder, even where the tenant had exhibited violence towards other tenants; before eviction, landlord was required to perform an individualized assessment to determine whether the individual's behavior could be stabilized by a reasonable accommodation); *see also* FHEO Notice-2013-01 at 4 (breed–specific bans on assistance animals not allowed; "determining that an assistance animal poses a

As a result of establishing specific elements of disparate impact claims and squarely placing the burden on the claimant to prove those elements, HUD moved aggressively to bring its disparate impact regulation into harmony with the rules announced by the Supreme Court in its *Inclusive Communities* decision. With the modifications and clarifications discussed elsewhere in these comments, the Proposed Rule should be adopted by HUD.

D. Responses to HUD's specific requests for comments

In addition to seeking comments on the Proposed Rule itself, the Proposal identified a number of additional matters for which HUD sought public input. *See* 884 Fed. Reg. at 42860-61. While several of those questions are addressed in the course of the preceding comments, the Housing Associations provide the follow responses to the questions posed in the body of the Proposal by HUD.

a) First, HUD asked whether, and under what circumstances, punitive or exemplary damages may be appropriate in disparate impact litigation in Federal court. 84 Fed. Reg. at 42857. The Housing Associations respond that punitive and exemplary damages should never be awarded in disparate impact cases because by definition, disparate impact claims involve unintentional acts. Defendants should not face punitive/exemplary damages in the absence of evidence of actual discriminatory intent.

b) HUD also asked for comments "regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule." 84 Fed. Reg. at 42861, The Housing Associations respond that the only alternative to the Proposed Rule – completely eliminating its disparate impact regulation – would not reduce burdens. A uniform, national disparate impact rule that correctly reflects the safeguards identified in the *Inclusive Communities* decision is preferable to allowing courts and other decision-makers to resolve remaining issues on a case-by-case basis, which is likely to result in balkanization of disparate impact jurisprudence.

c) HUD also requested comments on the potential burden or benefit the proposed regulations may have on potential claimants and the organizations that represent them, some of which are small businesses. Id. The Housing Associations respond that subject to the recommendations contained in these comments, the Proposed Rule strikes a reasonable balance between competing interests and helps to bring HUD's disparate impact rules into harmony with the *Inclusive Communities* holding.

---

direct threat . . . must be based on an individualized assessment . . . about the specific animal's actual conduct – not on mere speculation or fear" about the harm an animal may cause or that other animals have caused). In these cases, an "individualized assessment" is used to confirm that the housing provider is basing its decision on concrete information, rather than stereotypes and unsubstantiated fears. Those are different situations from cases where, for example, an owner has done its due diligence and confirmed that verified credit or criminal history information relating to a specific individual raises a bona fide risk concerning that individual. In such cases, where the housing provider has demonstrated its "valid interest" and based its decision on individualized information, no further "individualized assessment" should be required.

d) HUD also asked about the nature, propriety, and use of algorithmic models as related to the defenses in proposed §100.500(c)(2). Id. at 42860. The Housing Associations endorse the use of algorithms as risk assessment tools and commend HUD for creating a defense to disparate impact claims based on them. *See* Section C(2), above.

In addition to these requests, Section III of the Proposal includes requests for comments on a variety of questions. Id. at 42860. The Housing Associations provide the following responses to those 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.*

   Response 1: As explained above, the Proposed Rule aligns closely with the *Inclusive Communities* decision. We believe that the specific elements included in proposed §100.500(b) are urgently needed to clarify what a disparate impact claimant must prove to validate its claim and are essential to assure that HUD's disparate impact rule harmonizes with what *Inclusive Communities* requires. Likewise, the defenses and safe harbors reflected in proposed §100.500(c) are consistent with both the elements of a disparate impact claim identified in *Inclusive Communities* and the steps housing providers can take to show that the disparate impact claimant has not established those elements. Elsewhere in these comments, we suggest relatively minor changes and clarification what would bring the Proposed Rule into even closer harmony with *Inclusive Communities*.

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?*

   Response 2: While mindful of HUD's disparate impact rules, courts necessarily have treated *Inclusive Communities* as the most authoritative guidance on disparate impact liability under the Act. Courts have heeded the "safeguards" included identified in Inclusive Communities, and seem to be distinguishing those cases in the "heartland" of disparate impact, such as exclusionary zoning practices (*see MHANY Mgmt. v. Cty. of Nassau*, above), from cases dealing with exercises of reasonable business decisions. *See, e.g., Burbank Tenant Assn., above* (Mass. 2016)(holding that plaintiffs had failed to satisfy "robust causality requirement" of *Inclusive Communities*, where evidence did not indicate plaintiffs would actually suffer as a result of non-renewal of Section 8 lease).

Yet even in these cases – and in many others – courts have struggled with applying the safeguards identified in *Inclusive Communities* in a systematic manner. In some cases, the courts seem to cherry-pick some concepts from that case while ignoring others, to reach the outcome they want. One advantage to the Proposed Rule is that it attempts to codify the safeguards identified in *Inclusive Communities* into a set of elements that a disparate impact claimant must prove. This will encourage courts, other decision-makers, and litigants to address each element of a disparate impact claim thoroughly and consistently.

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?*

Response 3: The Current Rule attempted to establish a simplified framework for addressing disparate impact claims. Unfortunately, by minimizing issues such as causation and other safeguards, the Current Rule encouraged expansive applications of disparate impact unhinged from the "heartland" of disparate impact cases that, as the OGC Guidance demonstrated, undermined legitimate policy decisions by public and private entities and threatened "abusive" disparate impact claims. The clearest example of how the Current Rule required correction is the handling of the claims in the *Inclusive Communities* litigation, before and after the Supreme Court's decision. In its decision, rendered between the decision of the district court and the Supreme Court, the Fifth Circuit expressly adopted the Current Rule to affirm the district court's decision that the state agency's tax credit allocation policies had a disparate impact on minorities in violation of the Act. *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 282 (5th. Cir. 2014). After the Supreme Court's decision, the district court on remand reversed its original decision and found that there was no disparate impact-based liability, specifically finding that the plaintiffs had not established the "robust causality requirement" identified in *Inclusive Communities*. *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562 at *41 (N.D. Tex. 2016 Aug. 26, 2016). By incorporating the safeguards identified by the Supreme Court's decision in *Inclusive Communities* – subject to the improvements and clarification discussed elsewhere in these comments – the Proposed Rule will eliminate the errors in the Current Rule and direct future disparate impact cases towards the "heartland" the Supreme Court directed.

Since the *Inclusive Communities* decision, at least some courts have attempted to create their own set of disparate impact elements based on the principles discussed in that case. *See, e.g., City of Miami v. Bank of Am. Corp.*, 171 F. Supp. 3d 1314, 1319 (S.D. Fla. 2016) (adopting four-prong disparate impact standard); *Cobb Cty. v. Bank of Am. Corp.*, 183 F. Supp. 3d 1332, 1346 (N.D. Ga. 2016) (adopting most of *City of Miami* four-part standard). In both cases, the courts dismissed the disparate impact claims for failing to meet one or more of the prongs they established, including failing to show that challenged policy was "arbitrary, artificial and unnecessary" and

failing to meet a "robust" or "substantial" causality requirement. Perhaps the most significant aspect of these cases is that the courts created their own disparate impact tests, completely ignoring the Current Rule to adjudicate the plaintiffs' claims. That suggests that the courts recognized that the Current Rule does not reflect the safeguards identified in the *Inclusive Communities* decision. The cases also serve as a warning that unless HUD revises the Current Rule, courts will continue to experiment with different disparate impact standards derived from the *Inclusive Communities* decision, resulting in the same sort of balkanized rules that prevailed before the Current Rule was put in place. Adopting the Proposed Rule, with the modifications suggested here, will discourage further improvisation by courts and encourage the development of uniform national standards and outcomes in disparate impact cases, which were two of the principle goals in issuing a disparate impact regulation in the first place.

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?*

Response No. 4: Neither the *Inclusive Communities* decision or the Proposed Rule should be seen as placing a thumb on the scales of justice. The issue is not whether the *Inclusive Communities* decision or the Proposed Rule promote or restrict the likelihood of success of disparate impact claims. Rather, the question should be whether the Proposed Rule captures the spirit of the *Inclusive Communities* decision, which vindicated the use of disparate impact liability in fair housing cases, but identified a number of safeguards to prevent "abusive" disparate impact cases. In this respect, both the *Inclusive Communities* decision and the Proposed Rule strike a reasonable balance between enforcing fair housing rights without improperly "second-guessing" otherwise legitimate decisions by public and private entities.

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

Response No. 5: As discussed above, since the *Inclusive Communities* decision, the proper scope of disparate impact liability has remained in controversy. As the OGC Guidance on crime screening demonstrates, the failure to incorporate the safeguards identified by the Supreme Court leaves open the possibility of imposing liability on housing providers for pursuing policies that are reasonable efforts to achieve neutral and otherwise legitimate goals (in the case of crime screening, promoting the safety and security of housing). In general, courts have focused on whether the challenged practice imposes an "arbitrary, artificial and unnecessary" barrier to housing opportunities, and whether the plaintiff has demonstrated "robust causation" between the challenged policy and the alleged discriminatory impacts. Often, however, the courts and other decision-makers have struggled to work through the other

safeguards, sometimes giving emphasis to one safeguard or another, without approaching them as elements of a disparate impact claim in a systematic manner. If HUD chooses not to amend its disparate impact rule, courts and other decision-makers will not have the advantage of a framework to consider each of the elements of a disparate impact claim (and the applicable defenses) in an orderly and thorough manner that the Proposed Rule offers. As noted in Response 3 above, if the Current Rule is not revised, courts may decide that it does not accurately reflect the holding of the Supreme Court's *Inclusive Communities* decision, and will devise case-by-case solutions, which are likely to lead to increasingly divergent outcomes and frustrate the goals of uniformity and predictability that the Proposed Rule promotes.

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?*

Response No. 6: While we assume insurance interests are in the best position to comment on this question, the Housing Associations note that HUD's policies with respect to disparate impact should be focused primarily on whether or not they conform with the *Inclusive Communities* decision and other leading precedents

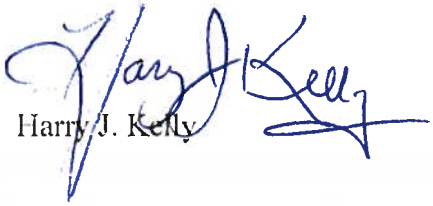
7. *Is there any other data, information, or analysis the public can provide to assist HUD in assessing the impact of the proposed regulation relative to the 2013 disparate impact final rule and the 2015 Supreme Court decision in Inclusive Communities?*

Response No. 7: We commend HUD for creating a defense for use of neutral algorithmic models that can be used to assess risks in a nondiscriminatory manner. *See* Section C(2), above. At the moment, HUD has not identified the criteria that can be used to confirm whether particular models can be relied upon to produce nondiscriminatory risk assessments. HUD should undertake additional analysis of models used in the housing industry to confirm whether these models yield useful, nondiscriminatory risk assessments or at a minimum attempt to establish neutral criteria the housing providers and third parties that develop such models can use to assess whether they meet the safe harbor requirements in advance.

Conclusion

The Housing Associations commend HUD for taking bold action to overhaul its Current Rule and to offer a Proposed Rule that reflects key aspects of the *Inclusive Communities* decision and the 2018 Comments. While they offer some additional suggestions for clarifications and improvements, the Housing Associations believe the Proposed Rule is properly focused on eliminating the defects in the Current Rule, incorporating the guidance provided by the *Inclusive Communities* decision, and crafting a uniform, national disparate impact rule that strikes a proper balance between the interests of all parties concerned.

Very truly yours,



Harry J. Kelly