Ballard Spahr LLP

300 East Lombard Street, 18th Floor
Baltimore, MD 21202-3268
TEL 410.528.5600
FAX 410.528.5650
www.ballardspahr.com

Michael W. Skojec
Tel: 410.528.5541
Fax: 410.528.5650
skojecm@ballardspahr.com

August 16, 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

Dear Sir or Madam:

We write to provide comments in response to HUD's advanced notice of proposed rulemaking ("ANPR") titled "Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" and dated June 20, 2018. These comments are submitted to the U.S. Department of Housing and Urban Development ("HUD") on behalf of two organizations which speak on behalf of the owners of tens of thousands of multifamily housing units across the United States, all of whom deal with fair housing and non-discrimination issues every day. The National Multifamily Housing Council ("NMHC") represents the principal officers of the multifamily housing industry's largest and most well-known and respected firms. The National Apartment Association ("NAA") is by far the largest national federation of state and local apartment associations with 170 state and local affiliates and more than 50,000 members. Together, NMHC and NAA are the "Commenters".

We strongly support HUD's efforts to review and revise the "Disparate Impact Rule" (defined as the final rule published in 2013 and the supplement published in 2016, the "DI Rule") to ensure compatibility with the United States Supreme Court decision in Texas Dept. of Housing and Comm. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) (the "Texas Decision"). The apartment industry supports the goals of the Fair Housing Act and is fully committed to creating communities that provide equal housing opportunity for all. However, there are numerous inconsistencies in the language and reasoning of the HUD DI rule and the Texas Decision - resulting in the establishment of two conflicting analytical frameworks for evaluating disparate impact liability. The Commenters urge HUD to resolve this tension and reissue a Rule and guidance that helps housing providers execute necessary and ordinary business practices without running afoul of fair housing requirements. HUD indicated that it was particularly interested in comments on six specific questions, which we respond to below.

GENERAL DISCUSSION

There is no requirement for evidence of intentional discrimination in a disparate impact claim; therefore, HUD and the courts should be reluctant to find liability without clear and compelling evidence of a substantial negative impact on protected class members by a defendant's specific policy, which impact is quantitatively and qualitatively different than its impact on other persons. It must be, without question, unrelated to any legitimate, nondiscriminatory goal of a defendant such that it is obviously artificial, arbitrary and unnecessary to legitimate governmental or business interests. The plaintiffs must carry the full burden of providing the evidence of such claims to establish a prima facie case when the claim is filed. Otherwise, the DI Rule should mandate that the claim fails and be dismissed.

The current DI Rule does not put the burden of the prima facie elements squarely on the plaintiffs. The DI Rule leaves open the question of whether plaintiffs may bring a disparate impact claim based just on a facially-neutral policy which has a minimal negative impact on a protected class without any consideration of the fact that the same policy has both positive and negative impacts on other groups. The impacts often flow from economic, educational, employment or other differences in the groups. The plaintiffs need to show that the policy affects the protected class members more harshly solely because of their participation in that class. The current DI Rule fails to require the plaintiffs to show that the defendant's policy is illegitimate, unnecessary and arbitrary but instead it forces the defendant to carry this burden as part of providing a "legally sufficient justification."

The DI Rule does not require that plaintiffs provide clear evidence that there is no direct relationship between the challenged policy and any legitimate governmental or business interest but rather puts this burden on the defendants in requiring the defendants to show a "necessary and manifest relationship" between the policy or practice and "one or more legitimate interests." It is patently bad public policy to allow plaintiffs the opportunity to regularly bring claims to challenge properly promulgated policies that are neutral on their face without putting a heavy burden on those plaintiffs right from the initiation of the claim or case. The current DI Rule is also, for the most part, inconsistent with the Texas Decision, which does place a much heavier burden on plaintiffs. As a result, the Commenters encourage HUD to rewrite the current DI Rule in a way that captures the better public policy goals and the Supreme Court's concerns.

THE SUPREME COURT DECISION

In the Texas Decision, the Supreme Court made several points about the analysis of a disparate impact case that necessitate revision of the DI Rule. The Supreme Court specified express safeguards to ensure that the disparate impact claims can only succeed where certain factors are evidenced by the claims. The Court held that a plaintiff must "produce statistical evidence demonstrating a causal connection" between the policy and the discriminatory impact.[1] The Court called this a "robust causality requirement," which would protect housing providers "from

[1] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

being held liable for racial disparities they did not create."[2] The Court did not intend to establish liability when an impact was caused by historic or other trends or when the impact was just incidental to a legitimate policy. If there are multiple causes of the negative impact, the robust causality requirement would mean the claim should fail. The Court expressly stated that there cannot be liability unless the challenged policy constituted an "artificial, arbitrary and unnecessary barrier" to housing.[3]

The Court expressly reiterated that the Fair Housing Act "does not decree a particular vision of urban development" and that "disparate impact liability 'does not mandate that affordable housing be located in neighborhoods with any particular characteristic.'"[4] The Court expressed disfavor for expansively interpreting disparate impact liability such that development of housing, particularly affordable housing, is undermined. The Court expressly said that "a one-time decision may not be a policy at all" that could be the basis of liability.[5] The Supreme Court said that "disparate impact liability has always been properly limited in key respects" because it needs to allow "practical business choices and profit-related decisions that sustain a vibrant and dynamic free enterprise system."[6]

COURT DECISIONS SINCE THE TEXAS DECISION

The major court decisions in disparate impact cases since the Texas Decision have, for the most part, effectively applied the Supreme Court's "safeguards" discussed in the preceding section and dismissed most cases soon after the initial filings. The few outliers that have generally allowed the cases to proceed have been in cases where the courts used the DI Rule without the "safeguards" analysis. The DI Rule, absent the Texas Decision's safeguards, creates a lower threshold standard for plaintiffs' claims and is thus inconsistent with the current law of the land as articulated by the Supreme Court. Here are some examples of the application of the Texas Decision.

In the most telling case, in the remand of the Texas case[7] and the companion case by Inclusive Communities against the U.S. Treasury[8], the federal judge who had previously found disparate impact liability decided instead that the claims should be dismissed under the Supreme Court's criteria. The court found that the plaintiff "failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact."[9] The judge emphasized that the claims were

---

[2] Id.
[3] Id. at 2524.
[4] Id. at 2523.
[5] Id.
[6] Id. at 2511-2512.
[7] Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562 (N.D. Tex. Aug. 26, 2016).
[8] Inclusive Cmtys. Project, Inc. v. United States Dep't of Treasury, Civil Action No. 3:14-CV-3013-D, 2016 U.S. Dist. LEXIS 150064 (N.D. Tex. Oct. 28, 2016).
[9] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, Civil Action No. 3:08-CV-0546 D, 2016 U.S. Dist. LEXIS 114562, at *20 (N.D. Tex. Aug. 26, 2016).

against the broad exercise of governmental discretion in tax credit decisions and not any specific policy that led to the decisions. In the Treasury case, the court focused on the lack of robust causality between any specific policy and an alleged negative impact because of claims that the Treasury had insufficient policies, not a specific arbitrary and unnecessary policy.[10]

In another case[11] addressing causality, plaintiffs alleged that an ordinance requiring landlords to pay a fee, obtain rental certification, and allow inspection of rental homes prior to renting was selectively enforced against minorities. In dismissing the suit, the Court noted that the plaintiff failed to demonstrate a causal connection because they did not allege "how the inability to rent its properties, specifically, would make a disparate impact on the availability of housing."[12] Another court, in attempts to clarify the pleading requirements for a disparate impact claim, adhered to the Texas decision standard finding that "a plaintiff's complaint is insufficient if it does not point to a defendant's policy and purported disparity and allege facts that show a causal connection."[13]

In another decision[14], a court used the Texas Decision's safeguards and found that a City's decision to condemn and demolish an apartment building was a one-time decision which did not rise to the level of a full policy that can be challenged with disparate impact. Another decision[15] in a case against a major lender found that disparate impact claims should "'solely' seek to remove 'artificial, arbitrary and unnecessary barriers.'" The court said that asking the lender to adopt policies to better manage loans to minorities was not a valid basis for a disparate impact claim. In another lender case[16], the court used a four-prong framework to apply the Supreme Court's criteria to allegations that the lender targeted minority borrowers for predatory loans. The court said that a plaintiff must: "(1) show statistically-imbalanced lending patterns which adversely impact a minority group, (2) identify a facially-neutral policy used by the Defendants, (3) allege that such policy was "artificial, arbitrary and unnecessary," and (4) provide factual allegations that meet the "robust causality requirement" linking the challenged neutral policy to a specific adverse racial or ethnic disparity."[17] This court also found the plaintiff failed to meet the robust causality requirement. In a factually similar case applying the four-prong test, the court dismissed plaintiffs' complaint noting that "claimants must demonstrate how the defendant's policy caused the racial imbalance, or else defendants might be held liable for racial disparities they did not create."[18]

---

[10] Inclusive Cmtys. Project, Inc. v. United States Dep't of Treasury, Civil Action No. 3:14-CV-3013-D, 2016 U.S. Dist. LEXIS 150064, at *29 (N.D. Tex. Oct. 28, 2016).
[11] TBS Grp., LLC v. City of Zion, No. 16-cv-5855, 2017 U.S. Dist. LEXIS 8503 (N.D. Ill. Jan. 23, 2017).
[12] Id. at 7.
[13] Ellis v. City of Minneapolis, No. 14-cv-3045, 2016 U.S. Dist. LEXIS 40750, at *18 (D. Minn. Mar. 28, 2016).
[14] City of Joliet, Illinois v. New W., L.P., 825 F. 3d 827 (7th Cir. 2016).
[15] City of Los Angeles v. Wells Fargo & Co., No. 2:13-cv-09007, 2015 U.S. Dist. LEXIS 93451, at * 6 (C.D. Cal. July 17, 2015).
[16] City of Miami v. Bank of Am. Corp., 171 F. Supp. 3d 1314 (S.D. Fla. 2016).
[17] Id. at 1320.
[18] Cobb Cnty. v. Bank of Am. Corp., 183 F. Supp. 3d 1332, 1347 (N.D. Ga. 2016).

Conversely, as stated, courts using the DI Rule without the Texas Decision's higher standards and safeguards let the cases proceed - arguably contrary to the Texas Decision. In one decision[19], the court found that plaintiffs had met the burden of making a disparate impact claim by arguing that a zoning reclassification would reduce the supply of affordable housing and that would negatively impact minorities. Using only the DI Rule analysis, this court failed to consider robust causality and whether other factors also led to the impact. Another decision[20] mentioned that the Supreme Court had articulated "safeguards" but ignored them and applied the DI Rule to claims based on a new owner of an apartment project instituting new tenant criteria to tenants and applicants. This court found that the plaintiff met their prima facie case without considering whether the criteria were artificial, arbitrary and unnecessary barriers and/or legitimate business decisions. The stark difference in how courts decide disparate impact cases under the Supreme Court's criteria as opposed to the DI Rule is telling as to how the DI Rule fails to properly define the correct legal standards.

RESPONSES TO HUD'S QUESTIONS

1. Does the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

The burdens of proof in the DI Rule are not consistent with the Texas Decision as discussed above. The Supreme Court did not directly criticize a burden-shifting approach but also did not endorse burden shifting as necessary. At a minimum, the burdens should be rewritten for consistency with the Texas Decision. Presently, the DI Rule requires the following:

- The charging party/plaintiff (hereafter referred to as "plaintiff") must prove "that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR 100.500(c)(1). "Discriminatory effect" is defined as a practice that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of [protected status]." 24 CFR 100.500(a).

- The burden then shifts to the respondent/defendant (hereafter referred to as "defendant") to prove "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent." 24 CFR 100.500(c)(2).

- The burden then shifts back to the plaintiff to show that the respondent's legitimate, nondiscriminatory "interests supporting the challenged practice could

[19] Mhany Mgmt., Inc. v. Cty. of Nassu, 819 F. 3d 581 (2d Cir. 2016).
[20] Sams v. GA W. Gate, LLC, No. CV415-282, 2017 U.S. Dist. LEXIS 13168 (S.D. Ga. Jan. 30, 2017).

be served by another practice that has a less discriminatory effect." 24 CFR 100.500(c)(3).

Under the analysis of the Texas Decision, in order to make a prima facie case for disparate impact, the plaintiff carries a more significant initial burden to provide specific factual allegations of a *substantial negative* impact on a protected class; to identify a *specific* policy or practice of defendant that directly causes that negative impact; and to demonstrate that the defendant's policy is artificial, arbitrary and unnecessary to any legitimate governmental or business goal.

As such, if any burden shifting approach is to remain, the initial burden should be revised to require the plaintiff to demonstrate these factors in order to make a prima facie case of disparate impact. If the plaintiff meets this burden, then the defendant would have an opportunity to counter afterward. The third element would be plaintiff's burden in the first instance because a plaintiff cannot really show the policy is artificial, arbitrary and unnecessary unless the plaintiff considers whether there is some less discriminatory but equally effective alternative.

However, with all of the burdens of proof effectively becoming plaintiff's initial burden through the application of the Supreme Court's criteria, a burden-shifting framework seems unnecessary and confusing at best. The Commenters recommend that the burden-shifting approach be discarded in rewriting the DI Rule and the entire burden be put on the plaintiff as several of the federal courts have done. The Commenters also propose that, with either approach, the new rule make clear that the robust causality requirement expressly includes a factual showing of how the disparate impact on the protected class is quantitatively and qualitatively different than other populations.

2. Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary and unnecessary barriers result in disparate impact liability?

No. As explained above, the plaintiff must be required to make a substantial showing that the defendant's specific policy is artificial, arbitrary and unnecessary at the initiation of a lawsuit or claim. It should not be a question that plays out over the course of litigation with on-going real burdens placed on government agencies or businesses. That is not what the Supreme Court intended, as evidenced by most federal courts not allowing that. Again, the Commenters suggest that the burden-shifting framework is confusing and contrary to the Texas Decision.

3. Does the Disparate Impacts Rule's definition of "discriminatory effect" in 24 CFR 100.500(a) in conjunction with the burden of proof for stating a prima facie case in 24 CFR 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

The definition of "discriminatory effect" allows for any degree of negative impact to be the basis of a disparate impact claim. It should be revised to be consistent with the Supreme Court's

analysis in the Texas Decision. The impact should be substantial. The impact on the protected class should be quantitatively and qualitatively different than the impact on other groups of persons in order to avoid unnecessary liability and confusion associated with impacts that are actually caused by economic, educational, employment or other differences in the groups. There must be a showing that it impacted the class member more harshly because of their participation in the class. A discriminatory effect also needs to be more than just a simple impact; it should be an arbitrary barrier to protected class members which impacts them because of their class and/or reinforces or perpetuates segregated housing patterns. Also, the current DI Rule allows for predictable, rather than actual, impacts. This is inconsistent with the Texas Decision, and references to "predictably" impacting should be deleted. A lawsuit must be based on actual harm, not just potential or conjectural impact and harm.

The shifting burdens of proof in 24 CFR 100.500(c), as already discussed above, do not comport with the Texas Decision and do not avoid unmeritorious claims. In fact, they encourage unmeritorious claims by allowing plaintiffs to file and proceed with nothing but a showing of a simple negative impact on a protected group without showing the specific cause, whether there are historic or other causes unrelated to the defendant, what other groups are harmed and why, and why there is no legitimate reason for the policy which caused the impact.

4. Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under Inclusive Communities and other Supreme Court rulings?

Yes. The "robust causality requirement" articulated by the Supreme Court in the Texas Decision is a key piece of the standards that the Court set for what must be shown by a plaintiff at the start of a disparate impact claim. Subsequent cases have already started applying this requirement. However, the DI Rule should be revised for any avoidance of doubt. The Commenters strongly recommend that the requirement be set out in detail as a requirement of the new rule.

5. Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant's discretion or another federal statute requires adherence to state statutes)?

Yes. If the elements that a plaintiff must show, as are detailed by the Supreme Court in the Texas Decision and discussed above, are described clearly in the new rule, the defenses will also be evident. The new rule should expressly say that the defendant may rebut any of the allegations or showings of the plaintiff as grounds to dismiss. For example, the plaintiff alleges a specific policy has caused the negative impact and the defendant can show the policy is just a one-time decision or could not have that effect or is only one of several causes. The Commenters believe it is important to set out what the plaintiff must do in robust detail with expansive definitions but not to limit the defenses that logically flow from the requirements for plaintiffs.

However, including a list of safe harbors like the two described in the example would help to define the kinds of legitimate governmental and business interests that are already recognized in laws as contrary to the arbitrary nature of a disparate impact claim. Certainly, if a governmental

entity *requires* an owner engage in a certain policy or practice, that policy or practice should not be the basis for disparate impact liability for the owner. For example, sexual offenders subject to a lifetime state registration requirement cannot be admitted to most HUD-assisted housing; excluding households with such persons should then never be the basis for disparate impact liability in HUD-assisted housing. In fact, the many existing rules for eligibility for HUD-assisted housing should all be safe harbors from disparate impact liability. When HUD is already recognizing that certain persons should be barred from affordable housing or that certain populations are in great need for assisted housing, those legitimate goals and governmental policies are, by definition, not artificial, arbitrary and unnecessary barriers.

We also note that at least one court has asserted that a defendant can still be liable under the DI Rule even if they are following applicable laws: In *Burbank Apts. Tenant Association v. Kargman*, 48 N.E.3d 394, 407-411 (Mass. 2016), the Court noted that disparate impact can still occur when an owner follows all statutory, regulatory and contractual requirements. In *Kargman*, the Court was asked by the defendant to adopt a bright-line rule that, absent discriminatory intent, when an owner follows all statutory, regulatory and contractual requirements – which, in *Kargman*, permitted an owner to opt out of the Section 8 project-based program by requesting enhanced replacement Section 8 vouchers for tenants – cannot be found in violation of the DI Rule. The Court declined to adopt such a safe harbor.

We would also suggest that a safe harbor could be broader than simply applying to laws with limited discretion. Several years ago, HUD's Office of General Counsel issued guidance setting forth how plaintiffs can make disparate impact claims related to criminal background checks. That guidance could be turned into the basis for a safe harbor document, e.g., if owners have nuanced criminal screening policies that connect criminal convictions with the safety needs of a community and provide for denied applicants to present mitigating circumstances, that would constitute a safe harbor against disparate impact liability. It would be helpful for HUD to create certain types of safe harbors related to criminal screening and other key areas of concern, so that plaintiffs and defendants more clearly understand the framework under which such policies can be developed. In the employment discrimination context, properly implemented policies can be a defense to employer liability; we would suggest that could be the case under a revised DI Rule as well.

For the foregoing reasons, the Commenters support inclusion of a list of safe harbors in a revised DI Rule.

6. Are there revisions to the Disparate Impact Rule that could add to the clarity, reduce the uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful?

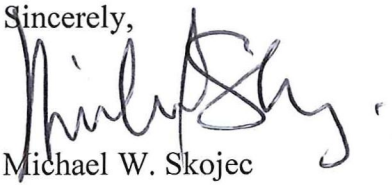
The Commenters would emphasize that re-writing the current DI Rule to be consistent with the Texas Decision is all important in meeting the goals described in this question. How it should be re-written is described above. The Commenters would also note that the prior DI Rule was used as the framework for analyzing matters of HUD policy which led to HUD Guidance on criminal

screening, protections for persons with limited English proficiency, and nuisance ordinances and Regulations on hostile environment harassment and transgender privacy. Without commenting on whether the direction and conclusions of any of those HUD statements are substantially or entirely correct, the Commenters recommend that they be rewritten and republished using an analysis derived from the Supreme Court criteria and consideration be given to including more specific safe harbor lists in those HUD statements which relate to the specific policy.

CONCLUSION

The Commenters commend HUD on its pursuit of reviewing this DI Rule matter as it has been of significant concern on many fronts for some time. We would offer to continue to assist HUD going forward with more information on details related to what is included in this letter and/ or comments related to any of the specific Guidance and Regulations mentioned above. Please contact me if you have any questions.

Sincerely,



Michael W. Skojec

cc: Cindy Chetti, NMHC
Paula Cino, NMHC
Greg Brown, NAA
Nicole Upano, NAA
John McDermott, Esquire, NAA