



September 10, 2020

GENERAL NEWS

HUD Issues Final Rule on Disparate Impact

The Department of Housing and Urban Development ([HUD](#)) has issued a [prepublication copy](#) of a final rule amending its interpretation of the [Fair Housing Act](#)'s disparate impact standard. The rule incorporates comments following the [proposed rule](#) issued in August 2019.

The rule amends HUD's [2013 final rule](#) on disparate impact, as well as the [2016 supplement](#) to HUD's responses to certain insurance industry comments made during the rulemaking. As you recall, HUD announced in May 2018 that it would seek public comments on whether the final rule is consistent with the 2015 U.S. Supreme Court ruling in [Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.](#) While [prominent organizations](#) have spoken out against the proposed rule, and multiple comments expressed concern that the final rule may not be compliant with supreme court rulings or fair housing protections more broadly, HUD feels that the clarifications provided in the final rule are sufficient.

As you recall, the 2013 disparate impact final rule provided a framework for establishing legal liability for facially neutral practices that have discriminatory effects on classes of persons protected under the Fair Housing Act. Generally speaking, what the new final rule does is create a higher bar for proving discriminatory outcomes by **expanding** available defenses and rebuttals to allegations of discriminatory effect. That is, a charging party must now "sufficiently plead facts" to support a variety of criteria set out under the rule and prove by the preponderance of evidence that these criteria are met. These include proving that:

- The challenged policy is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy, consideration, or requirement of law
- The challenged policy or practice has a disproportionately adverse effect on members of a protected class
- There is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect
- The alleged disparity caused by the policy or practice is significant

- There is a direct relation between the injury asserted and the injurious conduct alleged

The defendant may now also rebuff a charging party's assertion and produce evidence to the contrary, which the charging party must prove is not valid or "that a less discriminatory policy or practice exists that would serve the defendant's identified interest (or interests) in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant."

The rule also states that:

- Nothing in the rule requires or encourages the collection of data with respect to race, color, religion, sex, handicap, familial status, or national origin
- Nothing in the rule is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance

Further details, including HUD's response to public comments received from the proposed rule, can be found in the [prepublication copy](#).

PH PROGRAM NEWS

HUD Issues Notice on Use of Proceeds

Late yesterday HUD's Office of Public and Indian Housing ([PIH](#)) issued Notice [PIH 2020-23](#) to provide guidance to PHAs on the requirements for obtaining approval to use proceeds under Section 18 [disposition](#) or Section 22 [voluntary conversion](#). The notice contains:

- An overview of the process for obtaining HUD approval and expending proceeds, including a broad description of the review by the Special Applications Center ([SAC](#)) and internal PHA approvals and consultations
- A list of eligible uses for *gross* proceeds, which include relocation costs, and reasonable costs of disposition
- A list of eligible uses of *net* proceeds, which include modernization and development of public housing, costs related to project-based voucher ([PBV](#)) projects, operation of public housing, Rental Assistance Demonstration ([RAD](#)) conversions, commercial uses, increasing the supply, availability, and utilization of low-income housing, and other HUD-approved uses
- A list of ineligible uses, which includes development of units not assisted with Section 8 or Section 9 funding under the 1937 Act and proceeds already expended
- Issues concerning public housing closeout
- Recordkeeping and financial reporting requirements

HUD is welcoming public comments on the notice. Contact information to submit comments and request technical assistance, and further details on the topics listed above, can be found in the [notice](#).



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