COMMENTS TO PROPOSED DISPARATE IMPACT RULE REVISIONS BY H.U.D.--BEGIN COMMENTS THURSDAY, OCTOBER 17, 2019:

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Thursday, October 17, 2019

TO: The Department of Housing and Urban Development

via https://www.regulations.gov/.

Re: Your proposed revisions to the Disparate Impact Rule.

Docket No.: FR-6111-P-02.

RIN: 2529-AA98.

Your proposed revisions to the current Disparate Impact Rule are found at 84 F.R. 42854 -42863, with your Summary and your Supplementary Information.

These are the first of several comments on your proposed revisions.

Your proposed new § 100.500(b) is unreasonable and invalid. You propose to revise existing law on when a plaintiff alleging discrimination under the Fair Housing Act has made a prima facie case under a theory of discrimination by disparate impact. Your proposed revision is not based on facts and it is not based on the law established under the Fair Housing Act you say that you are implementing. You do not have the authority to make new law especially when it is contrary to existing statutes and FHA case law. The entire proposed new section 100.500(b) is found in 84 F.R. at 42862.

The current HUD regulation, § 100.500 as it has existed from long before your proposed revision of it, has been justly described as "similar to the framework the Supreme Court ultimately adopted in *Inclusive Communities*, and indeed, some courts believe the Supreme Court implicitly adopted the HUD framework altogether." *Reyes v. Waples Mobile Home Park Ltd. P'ship*,

903 F.3d 415, 424 n.4 (4th Cir. 2018), cert. denied, ___ U.S. ___, 139 S. Ct. 2026 (2019). You of course claim in your proposal not only to have followed the *Inclusive Communities* decision but to credit that decision as the genesis of your proposal. Without deciding whether the Court followed the HUD regulation, the following Comments will address your proposed revision of the regulation.

(1) Your proposed § 100.500(b)(1) is contrary to the law established under the Fair Housing Act. Further, you have not shown any reason to undo and restate rules and regulations that were enacted by HUD when HUD had access to the relevant law that you rely on in your proposed revisions. This is not an attempt on your part to align the HUD regulation on Disparate Treatment with subsequent case law. as you say. Rather, this is an attempt on your part to **re-align** and **rewrite** HUD's previous regulation on Disparate Treatment because you do not approve of it.

You do a couple of things throughout your proposed revisions that are worth noting at the beginning here. You rely throughout your proposal on the 2015 decision by the U.S. Supreme Court in the case of *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). The requirements you propose under paragraph (b)(1) of your rewritten section 100.500 are not imposed by the *Inclusive Communities* decision, but are instead contrary to it. This will be discussed below as well.

Another thing that you do throughout your proposal is take words and phrases from judicial opinions and propose them as new law here. Picking out words and phrases does not equal the law. It does not represent the law any more than reading case headnotes does. Certainly your proposed paragraph (b)(1) does not represent FHA law, but rather is contrary to established law. In this regard, it should not have to be pointed out, but I will point it out for the record here, that HUD simply lacks the

authority to invent the law let alone to disregard it. Further, any attempts by HUD to do so are unreasonable and invalid due to its lack of authority alone if for no other reason.

Your proposed revision is strikingly reminiscent of a recent federal appellate court's description of a lower court's erroneous view of causation in disparate impact claims brought under the Fair Housing Act. Like that district court, your view would erroneously "seem to require an *intent* to disparately impact a protected class in order to show robust causality, thereby collapsing the disparate-impact analysis into the disparate-treatment analysis. [Citation omitted.] This goes far beyond the 'robust causality' requirement the Supreme Court described." *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 430 (4th Cir. 2018), cert. denied, ___ U.S. ___, 139 S. Ct. 2026 (2019) (italics in original; emphasis by the Fourth Circuit Court of Appeals). Or to put the same thing another way, "determining whether a plaintiff made a prima facie case of disparate-impact liability requires courts [and HUD] to look at whether a protected class is disproportionately *affected* by a challenged policy.... The extra step of determining whether such a practice that has a disparate impact on a protected class is *justified* is properly contained" within the ***defendant's*** burden of persuasion. *See Reyes*, 903 F.3d at 424, 430 (italics in original; emphasis by the Fourth Circuit Court of Appeals).

(2) <u>Your proposed paragraph (b)(2) of your proposal to revise section 100.500 does not represent the law which has developed under the Fair Housing Act. Moreover, it would introduce ambiguity which would tend toward the denial of otherwise valid claims under the Act.</u>

Your proposed paragraph (b)(2) is another time when you clearly cherry-picked language from the case law, this time seemingly from the *Inclusive Communities* decision itself. Yet while the majority opinion used the phrase

"robust causal link" one time, *Inclusive Communities*, 135 S. Ct. at 2523, the Court's one-off use of that phrase was not an effort by the Court to re-define the law of proximate cause, as your proposed revision would do if it is implemented. Rather, the Court used that phrase as a shorthand way to describe the requirement that an FHA plaintiff relying on a theory of disparate impact to show discrimination must allege and prove causation. The Court did not attempt to define "robust causal link" in any way other than using it as a shorthand reference for the requirement in this context to prove causation.

(3) Your new, proposed § 100.500(b)(3) is again made unreasonable by your using an ambiguous, undefined phrase to require FHA plaintiffs to allege and prove "an adverse effect" if those plaintiffs are going to make a prima facie case of FHA violations under a disparate impact theory. This again is also contrary to law under the Fair Housing Act.

FHA law does not require proof of undefined "adverse effects." Other law may require and speak to such proofs, but not this one. The law under the Age Discrimination in Employment Act of 1967 or ADEA, for example, apparently does require proof that employment decisions "adversely affect" a person's employment status, but FHA law does not contain this requirement. You lack the authority to rewrite the statute you say that you are implementing. Only Congress has such authority; you do not.

You seem to want to introduce previously undefined concepts not addressed in the Fair Housing Act or in FHA case law, or in previous HUD rules and regulations. The use of undefined, previously unknown words and phrases in your proposed regulation greatly increases the risk of adverse decisions to FHA claimants, whether the increased risk is inadvertent or not.

(4) Your proposed new paragraph (b)(4) in your proposal to revise section 100.500 would impose a new requirement contrary to established law, and not found in the Fair Housing Act you say you are implementing, that a prima facie case of discrimination under a theory of disparate impact requires proof that the alleged disparity is "significant." To say again, that requirement is new. It is not imposed by the statute and it is contrary to settled law.

What the federal courts have required of disparate impact claims under the FHA is that the plaintiff show that the challenged practice have "a significantly disparate impact." This is not the same as your proposal to require proof of a "significant" disparity.

In addition, what you mean by "significant" is not clear from your proposed revisions. Once again, your proposals would introduce uncertainty and the attendant risk along with that uncertainty of legitimate claims being denied for no good reason.

(5) Your final new proposal to revise section 100.500 is to add a paragraph (b)(5) that would require something you call a "direct link" between impact and injury. Again, this new proposed requirement is not found in the Fair Housing Act and it is not found in the law surrounding the FHA. Rather, this new requirement you propose is another example of twisting words and phrases, like headnotes, in an attempt to re-write statutes and case law more to your liking. This is beyond your authority to do.

What has already been said above applies with equal force here as well: When courts have spoken of "direct" causal links, they were not trying to re-define the law of proximate cause, as your proposed revision would almost certainly do if it is implemented. Rather, the courts have sometimes

used that phrase as a shorthand way to describe the requirement that an FHA plaintiff relying on a theory of disparate impact must show discrimination by alleging and proving causation as a part of her prima facie case.

Thank you for your consideration of these Comments. As was noted from the beginning, more Comments will follow.

Sincerely Yours,

Dennis J. Wall