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HUD Proposes Reviving Discriminatory Effects Standard for FHA Claims

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On June 25, the latest edition of the *Federal Register* included a proposal from the Department of Housing and Urban Development (HUD or Department) to bring back the "Implementation of the Fair Housing Act's Discriminatory Effects Standard" rule (2013 Rule) under Title VIII of the Civil Rights Act of 1968, or Fair Housing Act (FHA). HUD believes the 2013 Rule "better states Fair Housing Act jurisprudence and is more consistent with the Fair Housing Act's remedial purposes." This move would eliminate "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (2020 Rule) introduced under the Trump administration that was enjoined before implementation.

The FHA prohibits discrimination in the sale, rental, or financing of dwellings and other housing-related activities because of race, color, religion, sex, disability, familial status, or national origin. The 2013 Rule, published in February 2013, was a move by HUD under President Obama to formally recognize the three-step burden-shifting approach that the Department and courts regularly used to adjudicate housing discrimination claims. Under the 2013 Rule, a housing discrimination claim would follow this framework:

1. The plaintiff or charging party first must show prima facie evidence that a challenged practice caused or predictably will cause a discriminatory effect;
2. If the plaintiff or charging party makes this prima facie showing, the burden shifts to the defendant or respondent to show that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant or respondent; and
3. If the defendant or respondent meets its burden in Step 2, the plaintiff or charging party may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

The 2013 Rule received support from the Supreme Court in the 2015 decision of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (576 U.S. 519 (2015)), confirming that the FHA does provide for discriminatory effects liability similar to that in other civil rights statutes and is consistent with FHA's "central purpose" of "eradicat[ing] discriminatory practices within a sector of our [n]ation's economy."

The 2020 Rule resulted from HUD's invitation for public comment on the 2013 Rule after a 2019 proposal to amend the interpretation of FHA's disparate impact standard, which garnered 45,000 comments largely opposing the 2019 proposal. Among the other components, the 2020 Rule removed the definition of "discriminatory effect" and added pleading requirements that made it more difficult to initiate and pursue a discrimination case.

In the June 25 *Federal Register*, HUD finds that certain changes in 2020 Rule are "unwarranted," citing three

lawsuits against HUD in federal courts after the 2020 Rule codification — one of which the district court ordered HUD to “preserve the status quo.” Some of those unwarranted changes include:

- Erasing “perpetuation of segregation” as a recognized type of discriminatory effect;
- Eliminating the prohibition of policies or practices that could “predictably result in a disparate impact on a group of persons;
- Limiting remedies in discriminatory effects cases;
- Creating “new and confusing” defenses at both the pleading and post-pleading stage; and
- Creating a new “outcome prediction” defense that, in practice, would exempt most insurance industry practices from liability.

The Department added that the 2013 Rule, in its experience, sets a “more appropriately balanced standard for pleading, proving, and defending a fair housing case alleging a policy or practice has a discriminatory effect.” Public comment for the new proposal will remain open until August 24.

This proposal adds to other strides taken in the first half of the year by HUD under President Biden. On June 10, HUD released its “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications” interim final rule. This was done in response to the Trump administration’s 2020 rescission of the FHA’s Affirmatively Furthering Fair Housing (AFFH) rule.

Implemented in 2015, the AFFH provided states, counties, localities, and public housing agencies with tools to assess the discriminatory systems directly affecting protected classes within that area. This was carried out as a commitment by those establishments that received HUD funding in good faith to continue to improve housing conditions in communities. In 2020, HUD criticized the rule as being “at odds with federalism principles and specific statutes protecting local control over housing policy” and was ultimately overruled by Trump in an executive order under the “Preserving Neighborhood and Community Choice” rule (PNCC). The current administration’s interim rule restores certain definitions and certifications from the 2015 AFFH rule and rescinds the PNCC. The interim final rule goes into effect July 31, 2021; however, HUD is accepting comments on the interim final rule for 30 days after publication and says they’ll act on those comments prior to the effective date of the rule.

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