August 19, 2021

Via Electronic Submission

Mr. Damon Smith  
General Counsel  
Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street, SW  
Room 10276  
Washington, DC 20410-0001  
www.regulations.gov

Re: Reinstatement of HUD’s Discriminatory Effects Standard,  
Docket No. FR–6251–P–01, RIN 2529–AB02

Dear Mr. Smith:

AARP, on behalf of our nearly 38 million members and all older Americans nationwide, writes to offer comments in response to the above-docketed notice (“Notice”) concerning the U.S. Department of Housing and Urban Development (HUD) reinstatement of its 2013 Discriminatory Effects Standard (2013 Rule). We support the reinstatement of the 2013 Rule because it will further the goals of fair and equal housing opportunity. In addition, we support HUD’s proposed action to rescind its 2020 Implementation of the Fair Housing Act’s Disparate Impact Standard (2020 Rule) that, among other faults, imposed pleading burdens that would bar meritorious disparate impact claims at the outset.

AARP helps people age 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole, including ensuring the availability of affordable, accessible, and appropriate housing. The ability of older adults to remain in their communities as they age can be improved through their continuing ability to challenge laws and policies that discriminate because of their effect. AARP has been deeply involved in supporting the right to bring disparate impact cases under the Fair Housing Act (“FHA”). AARP submitted comments to HUD’s 2013 Rule when it was first proposed and again to HUD’s 2020 Rule, which we strongly opposed. AARP has been actively involved in supporting and relying on the FHA’s discriminatory effects doctrine in the courts. We submitted an amicus brief on behalf of those asserting a disparate impact claim in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015), and AARP Foundation (AARP’s non-
profit, charitable arm) attorneys represented, among others, the residents in *Mt. Holly Gardens Citizens in Action, et al. v. Township of Mt. Holly,* cited by HUD in its 2013 and 2020 rulemakings. AARP’s Legal Counsel for the Elderly (LCE) program has also used the 2013 Rule to advocate on behalf of tenants to contest zoning plans that would have eliminated project-based rental assistance units, resulting in a disparate impact on families with children and African American residents.

Despite progress made to expand housing opportunities since the passage of the FHA in 1968, housing discrimination is still present across the country. Discriminatory housing policies often do not appear to target any particular group of people and may even appear to apply to everyone equally. However, in practice, certain policies unjustifiably harm some groups (e.g., people with disabilities, people of color) more than others. For decades, victims of this type of “hidden” discrimination have been able to challenge housing discrimination using disparate impact theory. In this context, disparate impact allows people to show that a housing policy negatively affects them because of their race, sex, national origin, disability, or other protected characteristic – even if the policy seems fair on the surface.

The 2013 Rule should be reinstated because it is practical and effective. It incorporates established judicial law decided prior to its promulgation and is consistent with the Supreme Court’s subsequent ruling in *Inclusive Communities.* In fact, as HUD points out in its preamble to reinstatement, the Supreme Court in *Inclusive Communities* cited the 2013 Rule with approval. The Supreme Court confirmed in *Inclusive Communities* that disparate impact claims under the FHA are available – and necessary – to address policies that cannot be readily challenged under disparate treatment theories when they unnecessarily exclude people from housing based on a protected class. To implement and enforce the FHA, HUD should reinstate the 2013 Rule.

**Disparate Impact is a Necessary Tool to Ensure Fair Housing for Older Adults**

While 76 percent of adults age 50 and over prefer to stay in their current homes as they age, almost all older adults will choose to age in their homes and communities if given a choice as opposed to an institutional facility. While age is not a protected class under the FHA, the specific discrimination that the aging population faces is often closely related

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2 86 Fed. Reg. 120, 33592 (June 25, 2021) *(Internal citations omitted)* In addition, multiple courts have since read Inclusive Communities as affirming or endorsing the 2013 Rule’s burden-shifting test. *Id.*

to the likelihood of their acquiring disabilities as they age⁴ and thus the need to address this underlying disability discrimination through challenges using disparate impact.

For example, AARP Foundation attorneys recently represented individual residents and a tenant association who challenged a private senior housing provider’s lease provision allowing the unilateral right to evict a resident that its board determined was no longer capable of living independently. The residents brought the denial of their housing claim as discriminatory under the FHA⁵ under both disparate treatment and disparate impact theories.⁶ The parties settled the case, without an admission of liability by the housing provider, but with revised policies and a revised lease excluding an independent living requirement.

The need for older people to prove they are “capable of independent living” continues to be a barrier to aging in place in the community. AARP will continue to challenge those barriers. The availability of disparate impact claims through the reinstatement of the 2013 Rule, and in particular the clear way it sets out the burdens of proof for each party, encourages housing providers to offer less discriminatory remedies and alternatives to litigation. Reinstating the 2013 Rule will also facilitate the ability to challenge rules and policies with a significant adverse disparate effect on all people with disabilities, rather than requiring each person with a disability to bring an individual action for a reasonable accommodation.⁷

Affordable housing, accessible housing features, reduction in isolation, and home and community based long-term services and supports are all critical elements that allow older adults to age in place in their homes and communities. When Congress amended the FHA to add disability as a protected class, Congress recognized that “a method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety, and land use in a manner which discriminated against people with disabilities.”⁸ In particular, the report called out zoning and land-use policies as often playing a role in preventing individuals with disabilities from full integration.⁹ It explained that the discrimination it intended to prohibit was the disparate effects that the neutral rules would have through their operation on people with

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⁶ Cason v. Rochester Housing Authority, 748 F.2d. 1002, 1004-5 (W.D.N.Y. 1990) (establishing that a housing provider policy that required applicants to elderly housing to demonstrate their “ability to live independently” violated the FHA under a disparate impact theory).
⁷ Of course a disparate effects challenge to a rule (whether successful or unsuccessful) would not bar an individual from bringing a reasonable accommodation or modification claim.
⁹ Id.
disabilities.\textsuperscript{10} Re-instanting the 2013 Rule will increase opportunities to age in the community because challenges may be made to zoning and land-use rules with adverse discriminatory effects before they can be adopted.\textsuperscript{11}

Older adults also face discrimination based on other protected classes to which they belong, such as race, national origin, and family status. One reason they may not be able to age in place in the home is that their neighborhood is sought for redevelopment. For example, AARP Foundation attorneys represented residents in the Mt. Holly Gardens neighborhood in New Jersey, in a challenge to the Township’s redevelopment plan that had a disparate impact on African American and Hispanic residents.\textsuperscript{12} None of the newly developed housing (nor any in the nearby neighboring area) would have been affordable to the existing residents. The Third Circuit held that the residents had established a \textit{prima facie} case showing disparate impact,\textsuperscript{13} that there was no dispute as to the Township’s legitimate interest in redevelopment,\textsuperscript{14} and that the residents had raised sufficient facts through their expert report to place in dispute whether there was a less discriminatory alternative.\textsuperscript{15} Prior to the Supreme Court hearing arguments on the Township’s Cert Petition, the parties entered into a comprehensive settlement that has now been fully implemented, providing redevelopment in the Mt. Holly Gardens neighborhood with affordable homes for plaintiffs integrated with market rate housing.\textsuperscript{16}

The Third Circuit decided \textit{Mt. Holly} prior to the 2013 Discriminatory Effects Rule. Had the 2013 Rule been in place, it is likely that under its clear guidance the litigation would have settled more quickly, saving years of hardship for the residents and money for the Township and its taxpayers.

\textbf{Reinstating the 2013 Rule is Consistent with the Central Purpose of the FHA and Inclusive Communities}

In \textit{Inclusive Communities} the Supreme Court confirmed disparate impact liability based on the FHA’s statutory language\textsuperscript{17} and its interpretation that Congress had ratified, accepted, and incorporated disparate impact principles in the 1988 amendments.\textsuperscript{18} The Court also

\textsuperscript{10} Id. at 23-24.
\textsuperscript{11} Examples include restrictions on occupancy such as advocacy by LCE described above, prohibitions on accessory dwelling units, and limitations on numbers of unrelated people who can live together.
\textsuperscript{12} \textit{Mt. Holly Citizens in Action}, 658 F 3d 375 (3d Cir 2011).
\textsuperscript{13} Id. at 382.
\textsuperscript{14} Id. at 385.
\textsuperscript{15} Id. at 386-87.
\textsuperscript{16} Residents who did not want to wait for replacement housing received a cash settlement. \textit{Mt. Holly Citizens in Action v. Twp. of Mt. Holly}, Case 1:08-cv-02584-NLH-JS Document 215-1 Filed 11/15/13 (Settlement agreement).
\textsuperscript{17} \textit{Inclusive Cmty. Project, Inc.}, at 534.
\textsuperscript{18} Id. at 536.
acknowledged that disparate impact is consistent with the FHA’s primary purpose of eradicating housing discrimination on a national basis.\textsuperscript{19}

In deciding \textit{Inclusive Communities}, the Supreme Court quoted from and cited HUD’s 2013 Rule with approval, specifically acknowledging its burden shifting structure.\textsuperscript{20} As HUD has pointed out in its preamble, multiple courts have read \textit{Inclusive Communities} as affirming the 2013 Rule’s burden-shifting test.\textsuperscript{21}

The 2013 Rule, and thus its reinstatement, properly reflects the limits developed by prior jurisprudence that constrain disparate effect doctrine within the parameters of statute and the Constitution and that the Supreme Court enumerated in \textit{Inclusive Communities}.\textsuperscript{22} The 2013 Rule framework requires the complainant to identify the policy or practices challenged, to establish the causal connection between the identified policy and adverse impact through evidence that is neither hypothetical nor speculative; and to assess any business justification defenses and offer in return less discriminatory alternatives. The 2013 Rule does not require consideration of race or quotas by businesses.

AARP particularly appreciates that the reinstatement of the 2013 Rule includes as part of disparate impact liability the concept of perpetuation of segregation. In \textit{Inclusive Communities}, the Supreme Court made clear that either creating discriminatory effects or perpetuating segregation could result in disparate impact liability,\textsuperscript{23} consistent with the FHA purpose to achieve “truly integrated and balanced living patterns.”\textsuperscript{24} When Congress passed the Fair Housing Amendments Act in 1988 to cover people with disabilities, it reaffirmed the importance of ending segregation.\textsuperscript{25} Cases challenging the perpetuation of segregation as invidious discrimination have a long legal precedent within FHA law.\textsuperscript{26} This issue is critical to the intractable problem of segregation by race around the nation.\textsuperscript{27} In addition, increasing the integration of people with disabilities of all ages in the community and ending the perpetuation of segregation of people with disabilities should be addressed with all the tools of the FHA.

In addition to encouraging private enforcement of the FHA where discrimination occurs through the adverse disparate effect of seemingly neutral policies and practices, HUD

\textsuperscript{19} Id at 537.
\textsuperscript{20} \textit{Inclusive Communities} 135 S.Ct. at 2515.
\textsuperscript{21} Fed. Reg. at 33592 (case citations at fn.35)
\textsuperscript{22} \textit{Inclusive Cmtys. Project, Inc.}, at 541-42.
\textsuperscript{23} Id.
\textsuperscript{26} See, e.g. \textit{Metropolitan Housing Development Corp. v. Village of Arlington Heights}, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that a zoning decision had the invidious effect of perpetuating segregation).
\textsuperscript{27} See e.g. Jenny Schuetz, Brookings Institute, Metro Areas Are Still Racially Segregated (Dec. 8 2017), \url{https://www.brookings.edu/blog/the-avenue/2017/12/08/metro-areas-are-still-racially-segregated/}.
should also robustly enforce the FHA where discrimination takes the form of adverse disparate impact under its Secretary Initiated complaint authority. In particular, HUD should use discriminatory effects enforcement to address persistent discriminatory policies in today’s markets, such as source of income restrictions, minimum credit score requirements, zoning restrictions that limit multifamily housing, and other policies that have an unjustified discriminatory impact on the basis of race, gender, national origin, and other protected classes. HUD’s 2013 Rule outlines meaningful standards that can provide algorithmic accountability and be used to evaluate technological developments in the market, including those that involve AI and machine learning.

**Conclusion**

HUD should reinstate the 2013 Rule because it is clear, workable, fair, and consistent with the law. Prior to promulgating the rule in 2013, HUD conducted an in-depth, thorough, and thoughtful review process. AARP submitted comments generally in favor of the rule at that time, while submitting comments in opposition to much of HUD’s 2020 Rule. HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments in 2016. The Supreme Court reaffirmed disparate impact liability in its recent decision in *Inclusive Communities*, citing the 2013 regulations without concern. We urge HUD to reinstate the 2013 Discriminatory Effects Rule as set out in the current rulemaking, consistent with the intent of Congress, HUD’s mission, and the Supreme Court’s recent decision.

AARP appreciates the opportunity to comment on the proposed rule, as it is vital to ensure successful aging in one’s home and community. If you have questions or need additional information, please contact Debra Alvarez in our Government Affairs Department at (202) 434-3814 or dalvarez@aarp.org.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs

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28 The 2020 Disparate Impact rule has been stayed by litigation and would be withdrawn and substituted by the reinstatement of the 2013 Rule