

October 18, 2019

David H. Enzel, Deputy Assistant Secretary for Enforcement Programs
Office of Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street SW, Room 5204
Washington, DC 20410

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard [Docket No. Docket No. FR-6111-P-02, RIN 2529-AA98]

Dear Assistant Secretary Enzel,

On behalf of the Asset Building Policy Network (ABPN),* we write to comment on the Department of Housing and Urban Development's proposed rule for implementing the Fair Housing Act's Disparate Impact Standard, as published in the Federal Register on Monday, August 19, 2019 (Docket No. Docket No. FR-6111-P-02, RIN 2529-AA98).

As a coalition of civil rights, community development and policy organizations, including a financial institution, that is committed to strengthen the household financial resiliency within communities of color through, among other activities, the coordination of savings and asset building policy and advocacy efforts at a national level, we are concerned with HUD's proposal for modifying the "disparate impact" theory outlined in the Fair Housing Act of 1968.

For more than 50 years, disparate impact has been key to challenging predatory and discriminatory actors in the housing market, providing members of federally protected classes—which includes, but is not limited to, racial and ethnic minorities and people with disabilities—with the legal tools to confront discrimination they allege to face in the housing market. While current practice already requires considerable resources by plaintiffs, the proposed changes would shift the entire burden of proof onto those claiming discrimination, requiring the plaintiff to meet a five-point evidentiary test prior to any meaningful discovery process. In doing so, HUD's burden-shifting approach within this rule would essentially guarantee that many credible allegations of discrimination will not move forward. Beyond placing the responsibility to prove discrimination onto those that have been discriminated, the proposal also offers defendants accused of discrimination three defenses to counter the allegations, including a proposal to claim that it could be too costly to avoid discriminating.

The changes HUD has put forward in this proposal not only run counter to the Supreme Court's affirmation in 2015 of the use of this important civil rights theory in its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, but also to the fact that discrimination is still very much with us. In fact, over the past two decades, researchers at the Urban Institute and others have found that people with disabilities and racial and ethnic minorities, among others, have faced significant discriminatory treatment when searching for housing.¹ For example, studies by the Urban Institute², as well as by Zillow,³ have shown that when compared to similar White home

* The comments and recommendations within this letter are reflective of the Asset Building Policy Network as a body and not necessarily the position of any individual member.

seekers, people of color are less likely to be told of and shown homes and apartments by real estate agents and rental providers.

Ultimately, if adopted, this rule will weaken the effectiveness of civil rights and fair housing laws and worsen racial and economic segregation in the United States. And given the financial insecurities that many members of federally protected classes already face—including high liquid asset poverty rates⁴ and low⁵-to-zero wealth⁶—it would also serve to exacerbate economic inequality and the racial wealth gap.

For the sake of ensuring that communities who have long faced discrimination, particularly communities of color, have the resources and the recourse necessary to confront this issue in the housing market, we ask HUD not to finalize the proposed rule and to instead continue forward with existing rules and regulations that govern the use and application of the disparate impact theory.

Sincerely,

The Asset Building Policy Network

¹ <https://www.urban.org/features/exposing-housing-discrimination>

² <https://www.urban.org/research/publication/housing-discrimination-against-racial-and-ethnic-minorities-2012-full-report>

³ <https://www.zillow.com/research/minority-mortgage-access-6127/>

⁴ <https://scorecard.prosperitynow.org/data-by-issue#finance/outcome/liquid-asset-poverty-rate>

⁵ <https://scorecard.prosperitynow.org/data-by-issue#finance/outcome/net-worth>

⁶ <https://scorecard.prosperitynow.org/data-by-issue#finance/outcome/households-with-zero-net-worth>