

CITY OF SOMERVILLE, MASSACHUSETTS
FAIR HOUSING COMMISSION
Joseph A. Curtatone
Mayor

Staff

Bryant Gaspard

Commissioners

Claudia DeAndrade
Patrice Faulkner
Dennis Fischman
Rona Fischman
Natasha Sierra

October 18, 2019

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276,
Washington, DC 20410-0001
Submitted electronically via www.regulations.gov

RE: Docket No. FR-6111-P-02, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To whom it may concern:

I write on behalf of the City of Somerville, Massachusetts' Fair Housing Commission to submit comments on the U.S. Department of Housing and Urban Development's (HUD) proposed rule to amend HUD's interpretation of the Fair Housing Act's disparate impact standard. The ensuing comments focus on HUD's proposed changes to standard, burden shifting-framework, and defenses of algorithms.

HUD cites the Supreme court's 2015 decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. and previous public comments from its May 2017 Federal Register notice and advanced notice of public rule making from June 2018 as part of the basis to implement a new disparate impact standard. The stated purpose of the proposed rule and amendments is that they are to bring the Fair Housing Act's disparate impact standard into closer alignment with the analysis and guidance provided in Inclusive Communities. HUD's proposed rule changes the interpretation of the disparate impact standard under the Fair Housing Act and would require a plaintiff to establish, as a threshold matter, that a specific policy or practice caused a discriminatory effect.

The Somerville Fair Housing Commission disagrees with HUD's proposed rule for several reasons. One concern is the onerous and burdensome threshold required of plaintiffs to prove that a policy or practice has a discriminatory effect. Under the rule, plaintiffs would have to show additional evidence to bring forth a claim of disparate impact at the *prima facie* stage. Doing so will result in an increase in the cost to litigate a disparate impact case. The proposed rule would make it more difficult for plaintiffs to bring forth a cause of action of disparate impact that has a discriminatory effect, by effectively requiring potential plaintiffs to invest additional resources in order to litigate a case. Such a requirement is likely to result in a decrease of discriminatory cases being brought forth and a reduction of judicial enforcement of the Fair Housing Act. Such an effect would be a significant setback for fair housing advocates seeking to end discriminatory practices and.

The Commission likewise disagrees with the change in the “burden shifting framework” to prove a defendant’s policies and/or programs were discriminatory. The current rule places the burden of proof on defendants, who had to justify their policies when challenged. We believe this an appropriate implementation of the disparate impact standard; when a practice/policy has a discriminatory effect, whether it was intentional or not, it should be incumbent on the defendant to justify their policy. The proposed rule would shift the burden to the plaintiff to prove a practice/policy has a discriminatory effect by pleading facts that support five elements. Those elements substantially increase the threshold - and therefore the difficulty - for a plaintiff to support and successfully argue that a defendant’s practices and or policies had a discriminatory effect on a protected class:

HUD cites in its Federal Register Vol.84, No.160 that:

“plaintiffs must identify the particular policy or practice that causes the disparate impact. Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government’s zoning decision or a developer’s decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice.”

The proposed language above essentially acknowledges that the standard and elements proposed that the plaintiff would have to support will make it difficult to meet the revised standard. Somerville’s FHC believes such a burden-shifting framework should not be implemented, as it will make it more difficult for plaintiffs to prove a discriminatory case and weaken enforcement of the Fair Housing Act.

Finally, the Commission disagrees with HUD’s proposal to provide defendants who use algorithmic models to assess factors such as risk or credit worthiness with three types of defenses to prove their models achieve legitimate objectives. HUD, citing the Inclusive Communities case, admits that these defenses are intended to ensure that disparate impact liability is “limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.” The Commission believes that some algorithms are discriminatory even if the intent of the algorithm was not, and that providing extra “layers of defense” to those who use these models will in all likelihood allow more protected classes to be discriminated against.

The Somerville Fair Housing Commission does not support nor agree with HUD’s proposed rule to change the interpretation of the disparate impact standard in the Fair Housing Act. We believe the proposal will serve to legitimize discriminatory policies/practices, increase barriers to bring forth and successfully win discriminatory suits, and decidedly weaken the intention and goals of the Fair Housing Act. Somerville’s Fair Housing Commission strongly supports the intent and goals of the current disparate impact standard in the Fair Housing Act and is committed to addressing fair housing issues in community it serves. The intent and goals of the current disparate impact standard should not be altered or amended in a manner that would substantially diminish the possibility of discriminatory actions being raised and brought forth in a judicial proceeding to achieve positive change and address historical and systemic discriminatory practices and/or policies.

Respectfully submitted on behalf of the Somerville Fair Housing Commission.



Bryant Gaspard,
Program Specialist-Fair Housing/Operations, OSPCD

Cc: George Proakis, Executive Director, OSPCD
Michael Feloney, Housing Director, OSPCD

