

HUD Reinstates 2013 “Discriminatory Effects” Rule

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Lowndes

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Late last week, the U.S. Department of Housing and Urban Development announced it issued a final rule entitled *Restoring HUD’s Discriminatory Effects Standard*. This new rule reinstates the 2013 discriminatory effects rule and rescinds the 2020 rule that was adopted under the Trump Administration but never became effective.

The new rule will become effective 30 days after publication in the Federal Register. However, regulated entities complying with the 2013 rule don’t need to make any changes to their practices since the 2020 rule never went into effect.

By way of background, the Fair Housing Act can be violated absent discriminatory intent if the practice or policy has a discriminatory effect, or disparate impact, on a protected class. In 2013, HUD issue a rule for determining whether a practice or policy has an unlawful disparate impact. The rule set forth three-step burden shifting approach for disparate impact claims:

- The party challenging the practice had the initial burden to prove that the practice caused or will cause a discriminatory effect.
- Once that burden is satisfied, the burden shifts to the party defending the practice to prove that the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.
- If that burden is satisfied, the burden shifts back to the challenging party to prove that such interest could be served by a practice that has a less discriminatory effect.

In 2015, the Supreme Court confirmed that the Fair Housing Act could be violated based upon a practice’s disparate impact on protected classes. The Supreme Court, however, interpreted the three criteria adopted by HUD to be more restrictive than lower courts previously found.

Allegedly to reflect the 2015 Supreme Court ruling, in late 2020, HUD issued a new rule relating to claims of “disparate impact” under the Fair Housing Act. The new rule placed more onerous pleading requirements on claims

of disparate impact. It also set forth certain “legitimate” objectives that outweigh any alleged disparate impact on protected classes, which included practical business, profit and policy considerations. Under the 2020 rule, basically any monetary reason could defeat a claim that a practice or policy had a disparate impact upon a protected class.

The 2020 rule never took effect due to a preliminary injunction being issued in the lawsuit *Massachusetts Fair Housing Center v. HUD* where the court found that the 2020 rule would likely be found to be arbitrary and capricious in violation of the Administrative Procedure Act.

In its announcement, HUD recognized that the 2013 rule “more effectively implements the Act’s broad remedial purpose of eliminating unnecessary discriminatory practices from the housing market.”

“Discrimination in housing continues today and individuals, including people of color and people with disabilities, continue to be denied equal access to rental housing and homeownership,” said HUD Secretary Marcia L. Fudge. “Today’s rule brings us one step closer to ensuring fair housing is a reality for all in this country.”