

Disparate Impact & Fair Housing Developments: New Administration Remedies & Guidance

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I. Introduction

This White Paper analyzes the divergence between the standards used by the Department of Housing and Urban Development (“HUD”) and the United States Supreme Court in assessing disparate impact liability under the Fair Housing Act (“FHA”). While disparate impact liability in housing discrimination has long been recognized by courts as a valid remedy at law, it was not until recently that HUD and the Supreme Court issued their own respective standards. In 2013, HUD issued regulations establishing a three-step burden-shifting standard for determining whether a housing provider is liable under disparate impact theory. This standard, generally viewed to be a lower threshold and more plaintiff friendly, contrasts with the standard advanced by the Supreme Court in 2015 in the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which sets a higher burden for plaintiffs.

The cases collected and analyzed in this White Paper reflect that nearly all courts have aligned with the Supreme Court’s standard and largely omitted reference to HUD’s regulations in determining whether disparate impact liability exists. This judicial treatment comes in spite of HUD’s attempts from 2015 through the end of the Obama Administration to expand disparate impact liability through guidance and regulations.

The disparate impact cases following *TDHCA* can be categorized as cases involving: tax credit allocation, project decision making, mortgage lending, zoning, preference policies, insurance, and screening policies. Analyzed fully in Part IV, the case law demonstrates that courts are strictly adhering to the Supreme Court’s instruction that disparate impact liability should be limited only to situations where there is a specific, facially neutral policy, causing an artificial barrier to fair housing, that has a discriminatory effect on a protected class where the adverse effect is caused by being a member of that protected class. Nearly all of the courts have dismissed the disparate impact claims, usually by finding that the plaintiff has not met the “robust causality requirement” linking the adverse effect to the protected class. Courts rarely mention the burden shifting framework advanced by HUD’s 2013 regulations, however, when courts do analyze disparate claims under the three part test, the outcome is plaintiff-friendly. The divergence largely lies in the regulations lacking a strong causation requirement at the initial stage, allowing plaintiffs simply to show a statistical disparity without having to show that the defendant is liable for creating and causing that disparity. But with the potential to reconcile the divergence, there is currently a case challenging whether HUD’s regulations unlawfully conflict with the Supreme Court’s holding in *TDHCA*.¹

The change of administrations halted HUD’s previous active issuance of guidance and regulations expanding its interpretation of disparate impact liability. Though the Trump Administration is still in its nascent stages, statements by the Administration, including by the Secretary of HUD, indicate that it may move its focus away from enforcement to other priorities. Although HUD has given no indications on whether it will rescind prior agency guidance, such a move would be relatively easy to complete. The process of rescinding prior regulations is more cumbersome, though

members of Congress have already proposed legislation that would strip funding for an Obama-era HUD regulation.

Looking forward, the new HUD Administration could take several steps to reverse the expansive and aggressive use of disparate impact liability of the Obama Administration. HUD could easily withdraw any of the informal guidance documents, such as those relating to criminal screening and limited English proficiency disparate impact liability. HUD could also begin the rulemaking process to formally rescind regulations, such as the 2013 disparate impact regulations. HUD might, however, simply wait for a reviewing court to take action against the 2013 regulations, given the very realistic possibility that a court could hold that the regulations unlawfully conflict with the *TDHCA* heightened standard and exceed the scope of the FHA.

II. Disparate Impact Overview

The FHA, among other things, prohibits discrimination in the sale, rental, and conditions of housing because of an individual's membership in one of the protected classes of race, color, religion, sex, familial status, national origin, or disability.² HUD is the primary federal agency tasked with enforcing the FHA.

A. Disparate Impact Generally

Individuals who feel they have been victims of housing discrimination can bring a lawsuit under two different theories of liability: discriminatory intent (also called disparate treatment) or under discriminatory effects (usually called disparate impact). Disparate treatment liability arises when the housing provider has a policy or practice that, on its face and in practice, discriminates against a protected class. For example, if a housing provider had a policy against leasing to applicants with Afghani national origin or of Asian race, such a policy would violate the FHA under disparate treatment liability.

Because many policies and practices today do not openly discriminate against protected classes in that way, disparate impact liability is used to attack policies that might initially seem neutral but actually have the underlying effect of discriminating against a protected class. Thus, under disparate impact liability, even if the housing provider did not intend to discriminate against a protected class, it could still be liable if the effect of the policy or practice does in fact disproportionately and adversely affect a protected class. For example, a seemingly neutral policy of not leasing to applicants with a prior criminal conviction could lead to disparate impact liability because of how that policy could adversely and disproportionately affect members of a protected class that generally have more arrests and convictions.

B. Origins of the Diverging Standards of Liability

Before discussing the diverging standards used by HUD and the Supreme Court, some context is necessary to discuss what precipitated the need for an authoritative standard on disparate impact liability. Although disparate impact liability is not included

in the text of the FHA, all of the Circuit Courts of Appeals to consider the issue since the 1980's recognized it as a valid theory of recovery under the FHA.³ Despite this agreement, different circuits utilized different standards of reviewing those claims.⁴ Most circuits initially agree that after a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to show that the challenged policy or practice serves a "legitimate interest."⁵ After that stage, the circuits applied varying standards and burdens. For example, the Second and Third Circuits required the *defendant* to prove that there is no less discriminatory way to achieve that stated interest.⁶ In contrast, the Eighth and Tenth Circuits required the *plaintiff* to prove that there are less discriminatory alternatives.⁷ Making matters more complicated, the Seventh Circuit used a different four-factor test instead of the burden shifting approach.⁸ The Fourth and Sixth Circuits applied a balancing test to public defendants but a burden-shifting test to private defendants.⁹

The incongruent standards applied to disparate impact cases made the issue ripe for authoritative guidance. Seeking to resolve the inconsistencies, HUD in 2011 issued a Notice of Proposed Rulemaking, where it advanced what would become the three-part burden shifting framework finalized in its 2013 regulations.¹⁰ Around the same time, the *TDHCA* case was proceeding to the Supreme Court on appeal, paving the way for the two different standards to be announced within two years of each other—exacerbating the confusion on this issue.

This White Paper analyzes the standard for judging the viability of a disparate impact claim, which has diverged recently into two strains as a result of the attempts by HUD and the Supreme Court to resolve the prior inconsistent treatment among the circuit courts.

C. 2013 HUD Regulations: The Lower Standard

The first strain, which is the minority approach under the case law, assesses a disparate impact claim using the standard articulated by HUD in its 2013 regulations. Under the HUD regulations, which comprise a three-part burden shifting framework, the complaining party must first demonstrate that the challenged practice caused or predictably will cause a discriminatory effect.¹¹ Then, the burden shifts to the housing provider to prove that the challenged practice is necessary to achieve one or more "substantial, legitimate, nondiscriminatory interests."¹² If satisfied, the burden shifts back to the complaining party to prove that the "substantial, legitimate, nondiscriminatory interest" could be accomplished through a practice that has a less discriminatory effect.¹³ A housing provider will be able to prevail if it can show that the substantial, legitimate, nondiscriminatory interest cannot be achieved through a practice that has any less discriminatory effect.¹⁴

D. 2015 Supreme Court Standard in *TDHCA*: The Higher Standard

In 2015, the Supreme Court affirmed disparate impact liability as a valid theory of recovery under the FHA and articulated a standard of its own.¹⁵ The Supreme Court's standard diverged from that of HUD's regulations by imposing a significantly

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higher burden on the aggrieved party. The Supreme Court did not reject HUD's three part burden shifting test, rather, it imposed higher standards that limit liability. The Court held that a claim would fail if the plaintiff could not "produce statistical evidence demonstrating a causal connection" between the policy and discriminatory effect.¹⁶ The Court termed this a "robust causality requirement," which would protect housing providers "from being held liable for racial disparities they did not create."¹⁷ Using stricter language than the "legitimate, nondiscriminatory interests" defense in the HUD regulations, the Court stated that a housing provider's policy would not cause disparate impact liability unless it constituted an "artificial, arbitrary, and unnecessary barrier" to fair housing.¹⁸

The Court did not want its acknowledgement of disparate impact liability to put housing providers in an impossible bind where they would be subject to liability no matter what action they chose; for example, whether they chose to rejuvenate an inner city or to promote low income housing in the suburbs. In support of this recognition, the Court reiterated that the FHA "does not decree a particular vision of urban development" and that "disparate impact liability 'does not mandate that affordable housing be located in neighborhoods with any particular characteristic.'"¹⁹ The Court expressed disfavor for expansively interpreting disparate impact liability, as that could stifle low-income housing development by private developers and housing authorities, thus undermining the purpose of the FHA.²⁰ Further limiting an expansive view of liability, the Court emphasized that there must be a policy or practice causing the disparity, cautioning that "a one-time decision may not be a policy at all."²¹

The limiting language and narrowing of liability that the Supreme Court emphasized in its opinion demonstrates that it did not intend for its recognition of disparate impact liability under the FHA to open the gates for plaintiffs to bring a flood of claims related to any minor negative impact on protected classes, or for judges to second-guess every policy, practice, or project development decision. The Court viewed its safeguards in protecting defendants as necessary for ensuring that disparate impact liability is used only for "removing artificial, arbitrary, and unnecessary barriers" to finding or having housing.²²

The HUD and Supreme Court standards diverge from each other, in that HUD asserts a more pro-plaintiff standard while the Court's opinion suggests a higher, more pro-defendant standard that properly limits disparate impact claims to egregious, arbitrary and negative situations. Courts addressing disparate impact claims since *TDHCA* have nearly all aligned with the Supreme Court's standard, as they should, in requiring the plaintiff to meet the robust causality requirement in advancing statistical support for the policy causing a discriminatory effort. Part VI analyzes these cases by category. Before that analysis, the ensuing section discusses HUD's aggressive efforts to expand disparate impact liability between the issuance of the *TDHCA* opinion and end of the Obama Administration.

III. HUD's Promulgation of Rules and Guidance Post-TDHCA Expansively Interprets Disparate Impact Liability

After the Supreme Court's decision in 2015, which most legal commentators agree narrowed disparate impact liability, and through the end of the Obama Administration's term, HUD actively advanced its disparate impact rule and promulgated rules and guidance that expansively interpreted disparate impact liability.²³ HUD took this active position in a variety of subject areas, despite the body of judicial decisions dismissing most similar claims. This activity took the form of issuing informal guidance or formal regulations, applying to private housing providers or public entities, or, in some cases, both.

Agencies issue guidance to explain their understanding of a statute, not to create substantive law. On the contrary, when an agency issues formal regulations as part of the notice and comment rulemaking process, the regulations do carry the force of law. Courts therefore do not have to accept conclusions reached in agency guidance, but are instead able to provide the guidance the proportionate amount of deference that the court feels it deserves, based on factors such as its legal persuasiveness, thoroughness, validity of its reasoning, and consistency with prior agency pronouncements.²⁴

A. HUD Actions Regarding Private Housing Providers

HUD took four formal and informal actions in 2016 broadening disparate impact liability as applied to private housing providers, on the topics of criminal screening, hostile environment harassment, limited English proficiency, and insurer liability.

In April 2016, HUD issued informal guidance subjecting criminal screening policies to disparate impact liability by applying the standard from its 2013 regulations. HUD admits that convicted criminals are not a protected class under the FHA, but explains that the disproportionate incarceration rate for African Americans and Hispanics provides support for the proposition that a screening policy based on criminal convictions can have a discriminatory racial effect.²⁵ Housing providers can still employ criminal screening policies so long as the policy's screening mechanisms are tailored to legitimate, nondiscriminatory justifications and do not categorically ban all applicants with a criminal conviction.²⁶ Despite issuing the Criminal Screening Guidance over one year after the *TDHCA* opinion, HUD does not reference any of the heightened standards that the Supreme Court seemed to impose on disparate impact determinations. Instead, HUD simply analyzed criminal screening policies exclusively using its own 2013 regulations.

In September 2016, HUD issued guidance employing disparate impact theory to expand FHA protections to persons with limited English proficiency ("LEP").²⁷ Although being a LEP individual is not a protected class under the FHA, HUD justified that LEP's close nexus with the protected class of national origin permits disparate impact recovery because nearly all LEP persons are themselves from, or have family from, non-English speaking countries.²⁸ The LEP Guidance, similar to the Criminal

Screening Guidance, makes only a passing reference to the Supreme Court opinion and instead advances using the three step standard from the HUD regulations.

HUD issued formal regulations that same month in September 2016 prohibiting “hostile environment harassment,” which demonstrate HUD’s attempt to broaden discrimination remedies for aggrieved individuals.²⁹ The regulations impose liability upon a housing provider when discrimination or hostile environment harassment occurs on its property, including when solely between two tenants, if the housing provider “knew or should have known of the discriminatory conduct and had the power to correct it.”³⁰

In October 2016, HUD released Supplemental Public Comments on the applicability of the insurance industry to the 2013 disparate impact regulations.³¹ During the notice-and-comment stage of the 2013 regulations, the insurance industry requested a categorical exemption from disparate impact claims because insurers could be liable under it for using certain risk factors in underwriting that might have an unintended yet discriminatory effect.³² After HUD denied the request and stated that the concerns could be resolved on a case-by-case basis, a federal judge mandated that HUD provide an explanation for its reasoning.³³ HUD responded that it could not precisely define the scope of any exemption without sacrificing the remedial nature of the FHA but reassured insurers that “practices that an insurer can prove are risk-based, and for which no less discriminatory alternative exists, will not give rise to discriminatory effects liability.”³⁴ By refraining from granting a categorical exemption to the insurance industry on disparate impact liability, HUD again revealed its desire to broaden the impact of disparate impact liability where possible. Currently, however, and as discussed in depth in Part IV.F, the insurance industry continues to litigate this issue in a way that could result in a court ruling that HUD’s regulations are unlawful under the FHA as exceeding the scope of disparate impact liability set forth by the Supreme Court in *TDHCA*.

B. HUD Actions Regarding Public Entities

HUD also actively promulgated guidance and regulations affecting public housing authorities in the waning months of the Obama Administration. These actions may not directly relate to disparate impact liability but nevertheless demonstrate HUD’s active role in expanding its authority and remedies at law for individuals who feel they have been victims of housing discrimination.

In September 2016, HUD issued formal regulations on gender identity to ensure that no transgender individual is discriminated against with respect to participation in programs funded through HUD Community Planning and Development (“CPD”).³⁵ The regulation imposes an obligation on CPDs to make nondiscriminatory accommodations to address privacy concerns for gender nonconforming individuals in bathroom and sleeping facilities.³⁶

In September 2016, HUD issued guidance on how “nuisance ordinances” can have a disparate impact on women.³⁷ On their face, nuisance ordinances allow a

landlord to evict a tenant if the tenant commits a certain number of “nuisances” in a specified time period.³⁸ Some ordinances define “nuisance” to include incidents of domestic violence, without distinguishing between whether the property involved belonged to a perpetrator or victim of domestic violence.³⁹ These ordinances thus can have a disparate impact on women, who comprise eighty percent of domestic violence victims and could be subject to eviction for reporting domestic violence too many times.⁴⁰

C. HUD Regulation on Affirmatively Furthering Fair Housing

In July 2015, just a month after the Supreme Court’s *TDHCA* decision, HUD began its flurry of activity that continued through the end of the Obama Administration by issuing a final rule on affirmatively furthering fair housing. The rule had the stated purpose of providing HUD program participants with an effective strategy to further the FHA’s goals of overcoming historic patterns of segregation, promoting fair housing choice, and fostering inclusive communities that are free from discrimination.⁴¹

The purpose of this regulation was to reinvent the means by which HUD achieves the FHA-mandated goal of administering its programs in a way that affirmatively furthers fair housing.⁴² Finding the existing decentralized system ineffective and over-reliant on individual jurisdictions to assess their impediments to fair housing, HUD, through its new regulations, imposed a centralized system that will provide program participants with more data with which to assess their strategic plans for discriminatory effects.⁴³ However, contrary to HUD’s regulation, Congress, in 2017, proposed legislation in both the House of Representatives and the Senate that would specifically nullify the 2015 Affirmatively Further Fair Housing rule.⁴⁴

IV. Post-TDHCA, Federal Courts Have Aligned With the Higher Supreme Court Standard Over the HUD Regulations

HUD and the Supreme Court have diverged on the standard on which to base disparate impact claims under the FHA. The Supreme Court, in its 2015 *TDHCA* opinion, expressed concerns about the effects and constitutionality of an overly broad view of disparate impact liability. For those and other reasons, it discussed the need for a “robust causality requirement” to ensure that housing providers are not being held liable for racial disparities that they did not create.⁴⁵ Yet since that opinion, as discussed in Part III above, HUD became more aggressive in taking actions that expanded disparate impact liability, and what is more, HUD justified these expansions by citing to its own standard from the 2013 regulations as opposed to the Supreme Court case.

The case law below demonstrates that federal courts have aligned largely with the Supreme Court’s standard, which imposes a higher standard that limits liability. Plaintiffs have brought disparate impact cases on topics including tax credit allocation, project placement decision making, mortgage lending, zoning and preferences, insurance, and screening policies. In nearly all of these cases, the housing provider has prevailed in getting the disparate impact claim dismissed because the plaintiff could not satisfy the heightened standard articulated by the Supreme Court. Interestingly, in one

of the seldom victories for a plaintiff, the court applied the HUD regulations as opposed to the standard of *TDHCA*, which illuminates how the lesser HUD standard is more plaintiff-friendly.⁴⁶

New cases and appeals continue to be filed under this theory, therefore this White Paper only analyzes significant disparate impact cases through the spring of 2017. Although nearly all courts seem to be following the Supreme Court standard, ultimately, and potentially through a pending insurance category case,⁴⁷ a court will have to reconcile the divergence and formally resolve which standard should govern these types of claim.

A. Tax Credit Allocation

Low income tax credit allocation was the genesis in *TDHCA* for disparate impact liability rising to national prominence, but plaintiffs have not encountered success bringing these claims. The Supreme Court remanded the seminal *TDHCA* case back to the district court, which had originally found disparate impact liability but now dismissed the claims, finding that the plaintiffs failed to identify a specific policy causing a discriminatory effect.⁴⁸ The reversal in outcomes shows how the Supreme Court changed the legal landscape. By complaining of the agency's exercise of discretion in making allocation decisions, as opposed to identifying a specific allocation policy, the district court was unable to evaluate any statistical effect of the policy to fashion an appropriate remedy.⁴⁹ The court indicated that the plaintiffs' failure to meet the Supreme Court's "robust causality requirement" demonstrated the difficulty in proving causality where multiple factors are involved in a decision.⁵⁰

Another case challenging the Department of the Treasury's program for allocation of low income tax credits came to the same result, with the court again finding that exercising discretion in the allocation of tax credits is not a specific policy that can give rise to disparate impact liability.⁵¹ The court emphasized the Supreme Court's instructions that disparate impact liability should be used to remove "artificial, arbitrary, and unnecessary barriers" in pointing out that the plaintiffs were actually seeking for the court to impose upon the Treasury a policy of affirmatively preventing racial segregation, rather than seeking to remove a policy causing such effect.⁵² The court also utilized the Supreme Court heightened standard in finding that the plaintiffs failed the causation requirement.⁵³

The tax credit allocation cases demonstrate the difficulties plaintiffs will encounter in attacking governmental decisions made not based on a specific policy but instead on the permitted exercise of discretion, as courts are now loathe to second-guess their reasonable judgment. These courts did not discuss the HUD burden-shifting framework and solely relied on the Supreme Court's standard in dismissing the disparate impact claims.

B. Project Decision Making

Tenants have attempted, largely unsuccessfully, to use disparate impact liability to attack decisions made by apartment building owners that change the nature or services of the building. For example, one court⁵⁴ dismissed a disparate impact action where African-Americans residents challenged the condemnation of their apartment complex by emphasizing the Supreme Court's language that a one-time decision is not necessarily a "policy or practice" and that compliance with safety codes is a legitimate governmental interest.⁵⁵ In another case,⁵⁶ the court dismissed a disparate impact action brought by residents after management discontinued acceptance of Section 8 vouchers (used by members of protected classes), because the plaintiffs failed to meet the rigorous pleading requirements of *TDHCA*, including the robust causality standard.⁵⁷

Only in one case did plaintiffs successfully overcome a motion to dismiss, and interestingly, the court there mistakenly emphasized adherence to the HUD regulations over that of the Supreme Court standard, which may explain that success.⁵⁸

Despite the one outlier, these cases are also demonstrative of how courts regard the Supreme Court's heightened standard as authoritative. The cases also demonstrate that one-time project related decisions (like condemnation or discontinuation of vouchers) might not even fall under the purview of disparate impact theory because they do not constitute a practice or policy.

C. Mortgage Lending

There have been three mortgage lending cases involving allegations that a bank's lending practices caused a disparate impact on protected classes through varying types of predatory lending. All of these claims failed because, primarily, the plaintiffs were unable to identify a specific facially neutral policy employed by the lenders that was the cause of the adverse impact. Interestingly, two of the courts interpreted *TDHCA* to impose a four-pronged test to determine whether a plaintiff has met the high prima facie burden. It does not appear that other courts have employed this four pronged test, but it accurately captures the key requirements of the Supreme Court.

One of the courts highlighted a theme from the tax credit allocation cases in that the plaintiffs were actually complaining that the bank *lacked* a policy of correcting disproportionate effects as opposed to complaining about a policy that caused disproportionate effects.⁵⁹ Another court attempted to clarify the conflation between disparate impact and discriminatory intent claims, by explaining that a policy of intentionally predatory lending to take advantage of minorities does not satisfy the disparate impact prerequisite of a policy that is "neutral on its face."⁶⁰ Instead, such a claim is actually one of discriminatory intent under the FHA. The third court to analyze this issue noted the same conflation, expressing concern about using disparate impact liability to hold a bank liable for disparities caused by other factors.⁶¹

These cases show that plaintiffs will not likely be able to successfully use disparate impact liability to attack banks for making lending decisions that adversely affect minorities or other protected classes. First, this is because if the bank were truly

engaging in predatory lending to target minorities, that would be an intentionally discriminatory policy, which is the opposite of a disparate impact claim. Second, the courts have noted the difficulty in proving higher default and foreclosure rates for minorities as being caused by the bank's lending practice without showing that this result was not caused by other factors.

D. Zoning and Ordinance Decisions

The zoning cases (and preferences cases, discussed next), more so than the other categories, serve as an example of the type of case the Supreme Court seemed to contemplate as within the bounds of the limitations it imposed on disparate impact liability. The Court specifically mentioned that liability would exist when zoning laws “function unfairly to exclude minorities from certain neighborhoods without any sufficient justification.”⁶² Municipalities must be diligent in crafting zoning policies that do not arbitrarily cause a disparate impact on protected classes.

Of the two zoning cases post-*TDHCA* involving disparate impact claims, the courts split on using the HUD regulations or the heightened Supreme Court standard. The Second Circuit analyzed the claim using the HUD regulations in finding that the city's zoning reclassification would perpetuate segregation by decreasing housing available to minorities.⁶³ The court remanded the case to the lower court to analyze the third prong (less discriminatory alternative) and surprisingly omitted reference to the *TDHCA* heightened standards. The other zoning case took the majority approach of analyzing the claim using the Supreme Court standard and easily determined that the city's construction ordinance was not causally connected to the complained of discriminatory effect.⁶⁴

E. Preferences Policies

When a city awards open units in a new affordable housing project, it sometimes uses a preferences policy whereby a certain percentage of available units are allocated for residents from a designated area. Although neutral on its face, a preferences policy that maintains the status quo in a district that is disproportionately segregated from surrounding areas is problematic and would likely survive a motion to dismiss. Even if the policy is well intentioned, like the San Francisco policy that sought to prevent low-income African Americans from being displaced by gentrification, it still must comply with FHA prohibitions against perpetuating segregation.⁶⁵ Like zoning ordinances, preferences policies are another example of what the Supreme Court likely contemplated in writing that the FHA's goal is to ensure that housing priorities “can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”⁶⁶

A prime example of the problems posed by preferences policies is the case where a city developed a lottery system to award affordable housing by giving preference to residents who already lived in the area surrounding the housing project.⁶⁷ The plaintiffs, however, demonstrated with statistics that the area was already disproportionately segregated, meaning that the preferences policy maintained the status quo of segregation, causing an obvious discriminatory effect.⁶⁸

F. Insurance

The insurance industry is now leading the litigation efforts to render the HUD regulations unlawful under the FHA for imposing a higher liability standard than the Supreme Court pronounced in *TDHCA*.

The insurance industry expressed initial concern with HUD's 2013 regulations because HUD did not exempt them from disparate impact liability as they had requested. This exemption was important to the industry because of the bind it would impose on the risk-based methods that underlie insurance rates. In order to avoid disparate impact claims, insurers would have to collect racial and other protected characteristic data to revise underwriting models, so to account for any statistical disparities the data sets revealed. At the same time, changing rates because of the disparate statistical effect they could have on a protected class would be blatant differential treatment based on membership in the protected class, which would violate the FHA.

For these reasons, the insurance industry sought an exemption so that it could continue using rates based on traditional risk-factors. HUD denied the exemption in its final 2013 regulations, ultimately stating that that it could handle these insurance issues by adjudicating them on a case-by-case basis because defining the scope of any categorical exemption would be “practically impossible.”⁶⁹

Pending in federal court currently is an insurance case that would resolve the divergence on which this paper is based: whether the 2013 HUD regulations unlawfully impose liability in excess of the Supreme Court's limitations in *TDHCA*.⁷⁰ The insurance industry attacked the first and third prongs of the HUD regulations as being unlawful under the FHA.

They first argue that HUD's regulations are unlawful under the FHA because the regulations permit a prima facie showing so long as a plaintiff demonstrates that “a challenged practice caused or predictably will cause a discriminatory effect.”⁷¹ In contrast, the Supreme Court in *TDHCA* stated that, to make a prima facie case, a plaintiff must meet the “robust causality standard” so to ensure that a defendant is not “held liable for racial disparities they did not create.”⁷² Thus, the plaintiffs argue, the HUD regulations allow a plaintiff to make a prima facie case by just showing a statistical disparity in a situation without showing that the defendant's policy actually caused that effect as required by the Supreme Court.

Second, they contend that the third prong allows plaintiffs to displace the valid objectives and policies of a housing provider. The HUD regulations, at the third stage, allow the plaintiff to show that there is a less discriminatory means of achieving the defendant's stated legitimate objective.⁷³ The Supreme Court, however, stated that disparate impact claims should not be used to “second-guess which of two reasonable approaches” a defendant should follow in achieving its objective.⁷⁴ The insurers argue that the HUD regulations do just that, by allowing them to propose alternative—and

potentially less effective—means of the defendant achieving its stated objective. The parties currently both have cross motions for summary judgment pending before the court.

G. Criminal Screening

The recent decisions of courts accepting that criminal screening policies can cause a disparate impact should make housing providers give due consideration to HUD's April 2016 Criminal Screening Guidance when drafting their policies.⁷⁵ Both courts to analyze the issue have denied the defendant's motion to dismiss, finding that, given the disproportionate conviction rate for protected classes, a criminal screening policy that broadly rejects an applicant with a criminal conviction is a policy that will cause a disparate impact.

Housing providers, can, however, take some comfort in the fact that that the means by which the defendants applied a criminal screening policy in each of these cases was contrary to the Criminal Screening Guidance's recommendations. This fact indicates that compliance with the Guidance, for example, by imposing time limitations and categorizing specific types of objectionable crimes, probably would have led the courts to rule differently.

For example, in one case, a new management company imposed a policy that all current tenants and future applicants had to submit to a criminal screening check that looked back on their records ninety-nine years.⁷⁶ Such a policy would clearly violate the HUD Guidance as being overly broad in duration. In the second case, a defendant violated its own screening policy by denying an applicant for a conviction that was older than the policy's three year look back period.⁷⁷ This mistake shows how not following a policy can lead to disparate impact exposure.

Despite this recognition of the connection between criminal convictions and race, a court rejected the connection between legal status and race in a case where plaintiffs contended that a housing provider's screening policy requiring documentation of legal status caused a disparate impact on the race of Latinos.⁷⁸ The court held the *TDHCA* robust causality standard was not satisfied because the disparate effects of a policy targeting illegal aliens was incidental to, and not because of, being Latino.⁷⁹

These cases demonstrate that when analyzing criminal screening policies under disparate impact theory, courts appear to accept HUD's conclusion that racially disproportionate conviction rates justify allowing liability for unnecessarily broad screening policies.

V. Election Implications: Reversing HUD's Prior Actions

The change in Administration after the 2016 election opened up many questions surrounding the future of HUD activities and enforcement. The new administration and HUD Secretary have indicated that HUD will likely shift its priorities away from the activism in rules and guidance of the prior administration, although Congress declined to exercise its Congressional review powers to revoke any of HUD's rules issued at the end of the Obama Administration. Nevertheless, the new HUD administration can still repeal prior rules through the rulemaking process or withdraw prior guidance.

A. Priorities of the New Administration and HUD Secretary

Although it is still early in the new administration, new HUD Secretary Ben Carson has made several public comments that illuminate the more restrained role he foresees HUD having during his tenure.

In an op-ed prior to his assumption as Secretary of HUD, Ben Carson took a negative view of the Affirmatively Furthering Fair Housing rule (discussed in Part III.C.), writing that it is a government mandated “social-engineering” scheme that will only make fair housing matters worse.⁸⁰ This position indicates that now-Secretary Carson would support the current effort in Congress to pass legislation stripping the AFFH program of receiving any federal funds.⁸¹ In July 2017, he indicated that HUD will “reinterpret” but not reverse the AFFH rule.⁸²

In March 2017, the new Administration issued the America First blueprint detailing the President’s budget request for federal agencies.⁸³ The budget proposes a six billion dollar reduction in HUD funding for 2018.⁸⁴ That reduction includes eliminating the three billion dollar Community Development Block Grant program, which funds community development in the form of affordable housing, anti-poverty programs, and infrastructure development.

B. Congressional Review Act: Revoking Agency Rules

The Congressional Review Act (“CRA”) is a law that permits Congress to revoke an agency rule by simple majority vote with Presidential approval, if the rule was promulgated within sixty “legislative days”⁸⁵ of the close of the previous Congressional term, and the revocation occurs within sixty legislative days of the new term.⁸⁶ For this reason, it is most useful after an election where the same party assumes control of both Congress and the Presidency. Because the Republican Party assumed control of both the Presidency and Congress after the 2016 election, agency rules promulgated after June 13, 2016 (sixty legislative days before the end of the Obama Administration) could be revoked within sixty legislative days of the new Congressional term, by May 9, 2017.⁸⁷ Interestingly, none of the HUD regulations were revoked.⁸⁸

C. Repeal Process: Rules vs. Guidance

Without the ability to use the CRA to overturn HUD’s other actions, Congress and the new HUD administration must resort to the traditional methods of overturning prior agency action. Final regulations promulgated by HUD, because they carry the force of law, can only be overturned through the long and procedural notice-and-comment process. Agency guidance, however, which does not carry the force of law, can be immediately withdrawn by the new HUD secretary.

The different process for overturning rules versus rescinding guidance is due to the different process involved in their creation. Once an agency finalizes a rule, it becomes part of the code of federal regulations that carries the force of law. Regulations can be challenged in court, as seen in the insurance case where the insurers contend that

HUD exceeded the scope of its authority in issuing its 2013 disparate impact regulations. Absent judicial intervention, repealing an agency regulation must follow the arduous process required by the Administrative Procedures Act, which could take months or years. Just as a court reviews whether an agency was arbitrary or capricious in enacting a rule, a reviewing court would also review whether an agency acted in an arbitrary or capricious manner when repealing a rule.⁸⁹ Therefore, if the new HUD wants to rescind a previously enacted rule, it must “supply a reasoned analysis for the change” to survive judicial scrutiny.⁹⁰

As an example, the National Highway Traffic Safety Administration issued a final rule in 1977 phasing in mandatory passive restraints in cars beginning in 1982.⁹¹ After an election produced a change in political leadership, the new NHTSA issued a final rule that rescinded the passive restraint requirement from the 1977 rule.⁹² The Supreme Court struck the latter rule, holding that the NHTSA acted in an arbitrary and capricious manner in rescinding the rule because it did not provide sufficient evidence that the change “was the product of reasoned decisionmaking.”⁹³ This case demonstrates that the new HUD administration cannot simply rescind every rule from the prior administration without demonstrating a reasoned analysis to support that decision.⁹⁴

Agency guidance, like the criminal screening or LEP guidance, however, can be easily rescinded by the new HUD administration. Because agency guidance documents are not issued pursuant to the APA notice-and-comment rulemaking process, they do not carry the force of law and are not subject to any of the accompanying stringent repeal procedures.⁹⁵ Thus, in the same way that the President can revoke an executive order from a prior President, the President can likewise direct an agency Secretary to withdraw discretionary directives like guidance.

It is important to consider that even if the new HUD Secretary withdrew, for example, the criminal screening guidance, this withdrawal would not restrict plaintiffs from continuing to bring disparate impact liability actions against housing providers for their criminal screening policies. Plaintiffs and advocacy groups would still likely use the statistical data and arguments from the criminal screening guidance to argue that disparate impact liability applies to screening policies that are over-broad in their scope, duration, and crime type.

VI. Predictions

Going forward, a number of actions could be taken by HUD, the courts, and Congress that affect disparate impact liability and the divergence between the HUD regulations and Supreme Court standard.

Beginning with the most drastic change, a court could hold that the HUD regulations unlawfully exceed the limitations on disparate impact liability imposed by the Supreme Court in *TDHCA*. Considering the divergence in standards discussed throughout this White Paper, not only would this action be the most drastic, but also perhaps the most likely of the predictions discussed herein. The *American Insurance*

Association v. HUD case in the U.S. District Court for the District of Columbia is positioned well for this resolution, with cross summary judgment motions currently pending before Judge Leon. In late 2014 prior to *TDHCA*, Judge Leon, in this case, issued a scathing criticism of HUD, holding that HUD exceeded its authority in issuing the 2013 regulations because the FHA does not recognize disparate impact liability at all.⁹⁶ He wrote that the regulations are “yet another example of an Administrative Agency trying desperately to write into law that which Congress never intended to sanction.”⁹⁷ Because of the change in HUD administrations, however, the case is currently stayed while the judge allows the new counsel for HUD to assemble its litigation team and strategy. If the court strikes the regulations as unlawful, the new HUD would likely let that holding stand and not appeal it, sealing the fate of the regulations.

In lieu of proceeding with the case, HUD could instead begin the process of rescinding the disparate impact regulations. This process, however, could take significant time and would be subject to judicial arbitrary and capricious review just like in the NHTSA example above. HUD could likewise begin to revoke other formal rules that the prior administration issued, such as the rule on hostile environment harassment or on affirmatively furthering fair housing.

HUD can also rescind prior guidance as discussed above. The criminal screening and LEP guidance issued by HUD in the twilight of the Obama Administration are potential targets, but the new HUD administration has not yet made comments taking a position on them. If it does not withdraw them, HUD could still choose not to enforce them, but, at the same time, advocacy groups and plaintiffs could still use them to support their claims. As demonstrated by the two criminal screening cases discussed herein, courts have shown a willingness to adopt the reasoning of the HUD guidance in supporting a decision to expand disparate impact liability regardless of whether HUD is enforcing the guidance in the case.

Lastly, Congress could take action revoking the actions of the prior HUD administration through legislation. For example, the House of Representatives recently introduced a bill in January 2017 that would nullify the affirmative furthering fair housing rule discussed in above and prohibit the use of federal funds to support the centralized database of racial disparities that the rule sought to create.⁹⁸ This action demonstrates how Congress can exercise its power over federal funds to curtail what it views as overreaches by an agency. Notwithstanding this proposed bill, state legislatures aligned with the vision of the prior HUD administration can take action to realize the intent of the HUD rule at the state level. For example, in response to the federal bill nullifying the HUD rule, the State of California has proposed legislation that would require cities and counties to implement a program that would affirmatively further fair housing.⁹⁹ This action suggest that even if HUD takes a step back from enforcement and regulation, some states will take initiative to fill that void.

VII. Conclusion

Disparate impact liability has undergone a dynamic change in the past few years. Five years ago there was fractured case law about how to analyze liability, with some courts not even recognizing it. HUD then issued regulations to standardize the fractured case law, shortly followed by the Supreme Court's own pronouncement. The conflict between HUD and the Supreme Court's standard created a divergence between a lower and higher standard by which to judge disparate impact claims.

The courts since *TDHCA* have largely aligned with the Supreme Court's requirement that plaintiffs must demonstrate robust causality between the disparate impact and the challenged policy, staying true to the Court's cautionary advice to limit liability to only policies that are an "artificial, arbitrary, and unnecessary barrier" to fair housing. Although there are some outlier cases, the trend in the decisions has been favorable to housing providers getting a disparate impact claim dismissed at the pleadings stage.

HUD will likely be less aggressive in issuing rules and guidance going forward under the new Trump Administration. While HUD can easily withdraw any of its prior guidance, reversing the rules, including the disparate impact regulations at issue here, would require more of a drawn out process. The District of Columbia federal court overseeing the insurance case is of particular interest as a case that could potentially strike down the regulations entirely. If not that court, another future court or HUD itself will have to reconcile the divergence between the two standards and future Supreme Court decisions will probably then further shape the *TDHCA* principles.

References

- ¹ See Part IV.F., discussion of *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, Docket No. 1:13-cv-00966-RJL, United States District Court for the District of Columbia.
- ² 42 U.S.C. § 3604.
- ³ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (collecting cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits).
- ⁴ *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 281 (5th Cir. 2014) (“Our sister circuits have applied multiple different legal standards to similar claims under the FHA.”).
- ⁵ *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Gallagher v. Magner*, 619 F.3d 823, 833–34 (8th Cir. 2010); *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm'n*, 508 F.3d 366, 374 (6th Cir. 2007); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1254 (10th Cir. 1995); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988).
- ⁶ *Huntington Branch*, 844 F.2d at 936; *Mt. Holly Gardens*, 658 F.3d at 382.
- ⁷ *Gallagher*, 619 F.3d at 834; *Mountain Side Mobile Estates*, 56 F.3d at 1254.
- ⁸ *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290.
- ⁹ *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 n. 5 (4th Cir. 1984); *Graoch Assocs.*, 508 F.3d at 371, 372–74.
- ¹⁰ Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD, *Implementation of the Fair Housing Act's Discriminatory Effects Standard*, November 16, 2011, 76 Fed. Reg. 70,921, available at <https://www.federalregister.gov/documents/2011/11/16/2011-29515/implementation-of-the-fair-housing-acts-discriminatory-effects-standard>.
- ¹¹ 24 C.F.R. § 100.500(c)(1).
- ¹² *Id.* § 100.500(c)(2).
- ¹³ *Id.* § 100.500(c)(3).
- ¹⁴ *Id.* § 100.500(b).
- ¹⁵ *TDHCA*, 135 S. Ct. 2507.
- ¹⁶ *Id.* at 2523.
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 2524.
- ¹⁹ *Id.* at 2523 (citing 78 Fed. Reg. 11476).
- ²⁰ *Id.* at 2524.
- ²¹ *Id.* at 2523.
- ²² *Id.* at 2524.
- ²³ For a complete discussion of HUD's recent activity on disparate impact theory, see White Paper dated April 2017: Recent HUD Actions on Disparate Impact Theory
- ²⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. v. 134, 140 (1944)).
- ²⁵ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016, available at https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhandcr.pdf (hereinafter, “Criminal Screening Guidance”). For a complete discussion of Criminal Screening Policies and Disparate Impact Liability, see the NMHC/NAA White Paper titled Criminal Conviction Screening Policies Best Practices to Avoid Disparate Impact Liability dated May 2016.

²⁶ Criminal Screening Guidance, at 2-3.

²⁷ Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, September 15, 2016, at 1, available at <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf> (hereinafter “LEP Guidance”).

²⁸ LEP Guidance, at 1.

²⁹ 24 C.F.R. § 100.600.

³⁰ *Id.* § 100.700(a)(1)(iii).

³¹ Applicability of the Fair Housing Act’s Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,012 (October 5, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-05/pdf/2016-23858.pdf>.

³² *Id.* at 69,013.

³³ *Prop. Cas. Insurers Ass’n of Am. v. Donovan (PCIAA)*, 66 F. Supp. 3d 1018, 1049 (N.D. Ill. 2014).

³⁴ 81 Fed Reg. at 69,015.

³⁵ 24 C.F.R. § 5.106.

³⁶ *Id.*

³⁷ Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, September 13, 2016, at 1 & 8, available at <https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf> (hereinafter, “Nuisance Ordinance Guidance”).

³⁸ Nuisance Ordinance Guidance, at 2-3.

³⁹ *Id.*

⁴⁰ *Id.* at 4.

⁴¹ 24 C.F.R. § 5.150.

⁴² 42 U.S.C. § 3609(d).

⁴³ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272.

⁴⁴ *E.g.*, Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017).

⁴⁵ *TDHCA*, 135 S. Ct. at 2523.

⁴⁶ See Part IV.B., discussion of *Crossroads Residents Organized for Stable & Secure ResidencieS (CROSSRDS) v. MSP Crossroads Apartments LLC*, No. CV 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016).

⁴⁷ *Am. Ins. Ass’n v. United States Dep’t of Hous. & Urban Dev.*, Docket No. 1:13-cv-00966-RJL, United States District Court for the District of Columbia.

⁴⁸ *Inclusive Communities Project, Inc. v. Texas Dep’t of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016). The Supreme Court remanded its seminal 2015 case back to the district court to assess the plaintiff’s claims under its new disparate impact standard. There, the advocacy group Inclusive Communities Project (“ICP”) alleged the Texas Department of Housing and Community Affairs allocated low income housing tax credits to developments in a way that had a disparate impact on certain races. *Id.* at 1.

Upon remand, the court recited the Supreme Court’s “robust causality requirement” and indicated that demonstrating causation would be difficult in cases like this where multiple factors go into an allocation decision. *Id.* at 4 (citing *TDHCA*, 135 S. Ct. at 2523-24). The court took seriously the Supreme Court’s guidance that it should not simply second-guess one of two reasonable approaches that the TDHCA reached in exercising its discretionary allocation authority. *Id.* at 5 (citing *TDHCA*, 135 S. Ct. at 2523).

The court dismissed the disparate impact claim and stressed two reasons for the importance of identifying a specific policy or practice that causes the disparate impact. *Id.* at 6.

First, so that the court can evaluate whether that policy caused a statically significant disparity, and second, so that the court can fashion an appropriate remedy for the policy. *Id.* On the first point, the court dismissed the claim because ICP “failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact.” *Id.* A generalized policy of discretion will not lead to disparate impact liability. *Id.* The court also noted that because ICP complained “of the results of TDHCA’s exercise of discretion rather than of the existence of that discretion,” the claim was actually for disparate treatment rather than disparate impact. *Id.* at 7. This case is a prime example of a court agreeing and accepting that the Supreme Court’s standard is higher than that of the HUD regulations.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 4 (citing *TDHCA*, 135 S. Ct. at 2523-24).

⁵¹ *Inclusive Communities Project, Inc. v. United States Dep’t of Treasury*, No. 3:14-CV-3013-D, 2016 WL 6397643 (N.D. Tex. Oct. 28, 2016). Here, the Inclusive Communities Project (“ICP”) alleged that the Department of the Treasury (“Treasury”) allocated low income housing tax credits to state housing agencies in a way that caused a disparate impact and perpetuated racial segregation. *Id.* at 1. The court granted the Treasury’s motion to dismiss as it related to the disparate impact claims.

The court began its disparate impact analysis by reciting the applicable standard to be HUD’s burden-shifting approach, but as limited by the Supreme Court’s *TDHCA* prescriptions. *Id.* at 9. The court emphasized the Supreme Court’s “robust causality requirement” that “protects defendants from being held liable for racial disparities they did not create.” *Id.* (citing *TDHCA*, 135 S. Ct. at 2523).

The court strictly followed the Supreme Court’s instructions to examine disparate impact claims with care, so to ensure that governmental entities do not begin using numerical quotas. *Id.* at 11. The court explained that a simple showing of statistical disparity would not advance a prima facie case, because a plaintiff must identify an actual policy that causes that disparity. *Id.* ICP failed to identify a specific policy because the activity it complained of was that the Treasury’s tax credit allocation process lacked standards that would prevent racial segregation. *Id.* The absence of a policy cannot form the basis of a disparate impact claim because the intent of the FHA is to remove “artificial, arbitrary, and unnecessary barriers”—not to impose new policies on government actors. *Id.*

The court did not discuss the HUD burden shifting framework because the allegations could not survive the heightened standard imposed by the Supreme Court that require a plaintiff to point to a specific policy actually causing the racial disparity. This case highlights the difficulties for a plaintiff to prove a prima facie case against a governmental entity where federal, state, and local agencies are involved in the decision making process such that establishing causation will be very difficult. *Id.* at 12.

⁵² *Id.* at 11.

⁵³ *Id.*

⁵⁴ *City of Joliet, Illinois v. New W., L.P.*, 825 F.3d 827 (7th Cir. 2016). Here, New West, the owner of an apartment building, contended that the City of Joliet’s decision to condemn and demolish its apartment building had a disparate impact on its tenants, who are ninety-five percent African American. *Id.* at 829. The court rejected the claim by citing to the disparate impact standards submitted by the Supreme Court in *TDHCA*. *Id.* at 830.

Primarily, the court emphasized that disparate impact claims look at the effects of policies, and not to one-time decisions. *Id.* at 830 (citing *TDHCA*, 135 S. Ct. at 2523). The court also echoed the Supreme Court’s sentiment that disparate impact claims must not prevent governmental entities from achieving legitimate objectives like compliance with health and safety codes, which caused the condemnation here. *Id.* at 830 (citing *TDHCA*, 135 S. Ct. at 2524). Thus, the condemnation did not have a disparate impact because it was a one-time

decision and was not part of a policy or practice to foreclose minority housing options in the city. *Id.*

This case is another example of a court dismissing a case using the Supreme Court's heightened standard and not mentioning the HUD regulations. The court echoed the Supreme Court's observation that "a one-time decision may not be a policy at all" and declared that a one-time specific decision *cannot* be a policy at all.

⁵⁵ *Id.* at 830 (citing *TDHCA*, 135 S. Ct. at 2523-24).

⁵⁶ *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107 (2016). In this case, the defendants, owners of an apartment building, chose not to renew its Section 8 housing voucher program with HUD, leading the plaintiffs, current and prospective tenants, to bring a disparate impact claim. *Id.* at 108. The plaintiffs argued that the decision would have a disproportionately adverse effect on members of protected classes. *Id.* at 109. The issue was whether a private building owner's decision not to renew a Section 8 contract, which was permitted by federal and state law, as well as by contract, could form the basis of a disparate impact claim. *Id.* The court dismissed the disparate impact claim under these facts, but did hold that such a disparate impact claim could exist if the plaintiffs met the required rigorous pleading requirements advanced by the Supreme Court in *TDHCA*. *Id.* at 110.

The court cited heavily to *TDHCA*, stressing that under the "robust causality requirement," the plaintiff must identify that the defendant's policy causes the statistical disparity and that the disparity is not caused "by factors other than the defendant's policy." *Id.* at 127 (citing *TDHCA*, 135 S. Ct. at 2514, 2523). With respect to current tenants, the claim failed because they failed to demonstrate any adverse effect given that they were offered an enhanced version of Section 8 vouchers in replacement. *Id.* at 129. The prospective tenants could not meet the "robust causality requirement" because their presence on the apartment building's wait list was too attenuated to demonstrate harm. *Id.*

The Massachusetts Supreme Court observed that *TDHCA* left "a number of questions unanswered" but it answered one of those questions by finding that the "robust causality requirement" implemented a higher burden for disparate impact claims under the FHA than exists for the same under Title VII, where plaintiffs are not required to plead a prima facie case to survive a motion to dismiss. *Id.* at 127 fn.29. The court noted that only under FHA claims must plaintiffs produce statistical data as evidence of discrimination at the pleadings stage. *Id.* Imposing this heightened requirement at the pleading stage satisfies the Supreme Court's instruction that disparate impact claims must be subject to adequate safeguards. *Id.*

⁵⁷ *Id.* at 110.

⁵⁸ *Crossroads Residents Organized for Stable & Secure Residency (CROSSRDS) v. MSP Crossroads Apartments LLC*, No. CV 16-233 ADM/KMM, 2016 WL 3661146 (D. Minn. July 5, 2016). Plaintiffs, former and current tenants of defendant's apartment complex, brought a disparate impact claim after the defendants purchased the apartment building from the prior owner and informed existing tenants that they would no longer accept housing vouchers and that they would be required to fill out new lease applications that included higher credit score and income qualifications as well as increased rent rates. *Id.* at 2-3. The plaintiffs claimed that these changes would cause a disparate impact on the various protected classes of tenants. *Id.* at 4.

The court denied the defendants motion to dismiss, finding that the plaintiffs sufficiently alleged that they will be able to demonstrate disparate impact through statistical analysis once they have a complete data set. *Id.* at 7. Departing from the other cases, the court specifically recited the three prongs of the HUD burden shifting framework before beginning its analysis. *Id.* at 6. The court then described the Supreme Court as incorporating "safeguards" into the HUD framework, including the "robust causality requirement." *Id.*

The court found that the plaintiffs made a prima facie showing of disparate impact for two reasons. First, because plaintiffs alleged that the defendant's new policies will reduce the

supply of affordable housing, which protected class members disproportionately rely upon. *Id.* at 6 (citing *Gallagher*, 619 F.3d at 835). Second, because the plaintiffs’ allegations infer that they will be able to show disparate impact through statistical analysis once they have a completed data set on residents affected by the defendant’s new policies. *Id.* at 7.

To make this finding, the court began with plaintiffs’ allegation that approximately 135 tenants of the 698 units used housing vouchers, and that “many if not most of these tenants belong to one or more protected classes.” *Id.* Then, the court accepts the plaintiffs’ allegations protected class members are overrepresented at the complex as compared to the surrounding area, that a high percentage of protected class members in the area are low income renters, and that the defendant’s new policies pose difficulties for low income renters. *Id.* The court found that these preliminary allegations were enough to surpass their initial burden of pleading a plausible claim, with the expectation that the plaintiff will submit a completed data set on the disparate impact at a later stage.

The court here differed in its analysis of the applicable disparate impact standard in several ways from the other courts analyzed in this White Paper. First, the court recited the three prongs of the HUD framework, which other courts sparsely acknowledge or wholly omit. The court seemed to downplay the significance of the Supreme Court *TDHCA* case by merely stating that the Supreme Court incorporated “safeguards” into the HUD standard. The court also cited many pre-*TDHCA* cases in its analysis of why the plaintiffs’ allegations satisfied their initial burden. These divergences from the other courts, coupled with the statistical data (albeit vague and bare) helps to explain why the defendants motion to dismiss was denied in this case.

⁵⁹ *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-CV-09007-ODWRZX, 2015 WL 4398858, (C.D. Cal. July 17, 2015). The City of Los Angeles alleged that Well Fargo engaged in discriminatory and predatory lending practices causing home foreclosures that had a disparate impact on minority borrowers. *Id.* at 1. In support, the city pointed to the disparate number of high cost loans the bank made to white versus minority borrowers. *Id.* at 3.

The court began its disparate impact analysis by citing to the HUD burden-shifting framework and then stating that the Supreme Court elaborated on limits to such claims. *Id.* at 5. The court reiterated the Supreme Court’s caution that disparate impact claims should “ ‘solely’ seek to remove ‘artificial, arbitrary, and unnecessary barriers.’ ” *Id.* at 6 (citing *TDHCA*, 135 S. Ct. at 2524). The court entered judgment for the bank because the city failed to identify a bank policy that created such barriers. *Id.* at 8. Instead, as courts have observed in other cases, the plaintiff actually complained of a *lack of policy*. *Id.* The city wanted the bank to implement a policy that would monitor racial lending data and correct any disproportionate issuances of loans. *Id.* at 8. Requesting the bank to implement such a policy would run afoul of the Supreme Court’s instruction that private actors should not “adopt racial quotas” because of the “serous constitutionality concerns” that would result from such action. *Id.* at 8 (citing *TDHCA*, 135 S. Ct. at 2523).

This case is another example of how courts will not allow plaintiffs to use disparate impact claims to impose new policies upon defendants. Instead, the court adhered to the Supreme Court’s guidance that the claims should be used to remove existing policies that are a barrier to fair housing. The case is currently on appeal in the Ninth Circuit.

⁶⁰ *City of Miami v. Bank of Am. Corp.*, 171 F. Supp. 3d 1314 (S.D. Fla. 2016). Here, the City of Miami sued Bank of America using disparate impact theory, alleging the bank engaged in discriminatory loan practices that targeted minority borrowers for predatory loans that carried more risk, steeper fees, and higher costs than those offered to similarly situated white customers. *Id.* at 1316. The court dismissed the disparate impact claims, but allowed the city to file an amended complaint to amend its allegations. *Id.* at 1321.

The court engaged in a unique analysis of *TDHCA*, interpreting it to impose a four pronged standard that a plaintiff must satisfy: “(1) show statistically-imbalanced lending patterns

which adversely impact a minority group; (2) identify a facially-neutral policy used by Defendants; (3) allege that such policy was “artificial, arbitrary, and unnecessary;” and (4) provide factual allegations that meet the “robust causality requirement” linking the challenged neutral policy to a specific adverse racial or ethnic disparity.” *Id.* at 1320 (citing *TDHCA*, 135 S. Ct. at 2522-24). The court found the plaintiffs failed to allege facts satisfying the latter three requirements.

The court explained that the alleged unlawful policy was not facially neutral, as required under disparate impact claims, but was intentionally discriminatory under the city’s description. *Id.* at 1320. Moreover, the city did not meet the “robust causality requirement” because it did not plead any facts showing that the bank’s policies caused a statistical disparity. *Id.*

The court’s interpretation of *TDHCA* requiring satisfaction of the four prong test is unique among courts to discuss this issue. It is evidence of the confusion over how to reconcile the Supreme Court’s standards with the HUD regulations, and whether the Supreme Court replaced or just supplemented HUD’s standard. The court here, like many others, omitted any reference to HUD’s regulations and focused on the Supreme Court’s heightened standard.

After the court dismissed the disparate impact claim, the City filed an amended complaint, which the bank also moved to dismiss. The parties, however, then agreed to stay the case until related claims on appeal were adjudicated.

⁶¹ *Cobb Cty. v. Bank of Am. Corp.*, 183 F. Supp. 3d 1332 (N.D. Ga. 2016). Here, Cobb County alleged that Bank of America engaged in discriminatory lending practices targeted at minority borrowers through expensive loans with onerous terms that disparately impacted minorities and caused foreclosures. *Id.* at 1333-34. The city contends that the bank’s actions caused reduced minority homeownership and segregated neighborhoods. *Id.* at 1334.

The court dismissed the disparate impact claim and employed the same four-prong standard used by the court *City of Miami v. Bank of America*. *Id.* at 1346 (“(1) show statistically imbalanced lending patterns which adversely impact a minority group; (2) identify a “facially neutral” policy followed by the defendant during the same period of time; (3) show how that policy is artificial, arbitrary, and unnecessary; and (4) allege how that policy was a substantial cause of the adverse lending patterns.”). *Id.* (citing *TDHCA*, 135 S. Ct. at 2513). The court concluded that while the plaintiffs demonstrated statistical imbalances affecting minorities in high cost lending, they failed the latter three prongs of identifying a specific policy, alleging that the policy creates an artificial barrier, and alleging that the policy was the cause of the adverse impact. *Id.* at 1347. Similarly fatal as in other cases, the plaintiffs alleged intentional discrimination through targeting as opposed to a facially neutral policy that caused a disparate impact. The plaintiffs also did not allege how the bank’s lending practices caused the statistical imbalance in high cost loans for minorities as opposed to it being caused by other factors. *Id.*

Like the other courts to analyze the mortgage lending issue, this court expressed concern about holding the bank liable for disparities that it did not create. Omitting reference to the HUD regulations, the court analyzed the four factors it ascertained the Supreme Court to have set for disparate impact claims. This case is another example that courts will impose serious scrutiny on allegations at the pleadings stage and scrupulously adhere to the Supreme Court’s heightened standards.

⁶² *TDHCA*, 135 S. Ct. at 2522.

⁶³ *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016). In this case, residents alleged that a zoning reclassification by Garden City would have a disparate impact on minorities because it would eliminate the potential for affordable housing. *Id.* at 617. The Second Circuit took review of the district court’s decision, in which it denied the city’s motion to dismiss, because the district court improperly placed the burden on the defendant (as opposed to the plaintiff) on the third prong of the HUD burden-shifting test. The court remanded the case to the district court for the plaintiff to show that the city’s legitimate non-discriminatory interests

in the zoning reducing traffic and increasing townhouse construction could be served through a less discriminatory practice. *Id.*

The court stated that the plaintiffs had more than satisfied the first prong of proving a prima facie case because the zoning restriction on building multi-family housing would perpetuate segregation in the city by decreasing the already small availability of housing to minorities. *Id.* at 620. Notably, the court omitted any discussion of the heightened requirements imposed by the Supreme Court and instead focused on that HUD's 2013 regulations.

Although the district court, on remand, has yet to issue a decision as to whether the plaintiffs' disparate impact claim survives a motion to dismiss under the HUD framework, this case is a noteworthy outlier in not discussing the heightened and limited standards the Supreme Court advanced in its decision. Instead, the court exclusively relied on the HUD burden-shifting framework in analyzing the claim. It is most likely that, on remand, the district court will nevertheless align with the majority of courts and discuss the *TDHCA* limitations on disparate impact liability in its analysis.

⁶⁴ *Anthony v. City of Naples*, 2016 WL 7010949 (M.D. Fla. Dec. 1, 2016). Here, minority residents of the only minority community in the City of Naples alleged that a city ordinance authorizing the demolition of an unoccupied gas station would cause a disparate impact on minority residents. *Id.* at 2. They contended that because the city ordinance then authorized the construction of a 7-11 convenience store on the lot, the ordinance would have the effect of reducing property values, causing white purchasers to purchase the property at low cost and then in turn raise rents, financially pushing out the current minority residents. *Id.*

The court denied the plaintiffs' request for a preliminary injunction halting the implementation of the ordinance. *Id.* at 5. The court cited to *TDHCA* in that zoning laws and other housing restrictions only violate the FHA if they unfairly "exclude minorities from certain neighborhoods without any sufficient justification." *Id.* at 3 (citing *TDHCA*, 135 S. Ct. at 2521-22). Here, however, the plaintiffs failed to demonstrate any causal connection between the ordinance and the disparate impact on minorities. *Id.* The court explained that under the plaintiff's theory, every practice making it more difficult to obtain housing, no matter how minor, would violate the FHA. *Id.* The court was reluctant to extend disparate impact liability to such attenuated breadths, demonstrating that it took seriously the Supreme Court's instruction to examine disparate impact claims with care.

⁶⁵ The preferences policy that the federally subsidized Kennedy Apartments in San Francisco attempted to implement is an example of the dangers preference policies pose. In a well-intentioned move to help longtime residents combat rising rents, the city had originally proposed a preference policy for the complex allocating forty-percent of the subsidized units to residents living in the same district, or within a one-half mile of it. HUD objected to the city's policy because it would perpetuate segregation in the already disproportionately African-American district.

The city appealed to HUD to reconsider the objection and the two sides came to a mutually agreeable resolution where the pool of eligible residents for preferences was expanded beyond the initial zone to include low income individuals in neighboring districts. By expanding the zone outside the initial majority African-American district, the new policy ensures equal access to the preferences regardless of race.

This example could provide instructive to the parties in *Winfield*, whereby New York City could devise a preferences policy that captures enough districts to comprise a proportionate sample of the city's overall racial makeup so that no race is disproportionately given a preference. At the same time, it serves as a reminder that even well-intentioned policies seeking to assist low-income individuals being displaced by rising rents could run afoul of the FHA's equal access requirements.

⁶⁶ *TDHCA*, 135 S. Ct. at 2522.

⁶⁷ *Winfield v. City of N.Y.*, 2016 WL 6208564 (S.D.N.Y. Oct. 24, 2016). In this case, African-American residents of New York City alleged that the city operates its affordable housing program in a way that perpetuates segregation, disadvantages minorities, and causes a disparate impact. *Id.* at 1. Plaintiffs allege that the city's policy of giving preferences in affordable housing lotteries to residents who already live within that community district perpetuates the already disproportionate racial makeup of the city's districts. *Id.*

The court denied the city's motion to dismiss the disparate impact claim, finding that the plaintiffs' allegations made it plausible that, after discovery, they could prove the policy causes a disparate impact with complete statistical data. *Id.* at 6. The court cited to *TDHCA*'s pleading standard that a plaintiff only had to plead facts *or* produce statistical evidence at the pleading stage demonstrating a causal connection between the policy and discriminatory effect. *Id.* For these reasons, the plaintiffs' allegations that the preferences policy perpetuates segregation by maintaining the status quo in neighborhoods that already suffer from segregation withstood the motion to dismiss. *Id.* The case is now in the discovery phase to further examine the effect of the preferences policy.

The plaintiffs in this case survived a motion to dismiss because they alleged a case that aligned with the Supreme Court's explanation of how disparate impact liability should be used. The court aptly quoted *TDHCA* in that "the FHA aims to ensure that [housing provider] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." *Id.* at 6 (citing *TDHCA*, 135 S. Ct. at 2522). This case highlights the inherent dangers of preferences policies because of the effect they can have of freezing any existing racial disparities in the makeup of a district.

⁶⁸ *Id.* at 6.

⁶⁹ *Prop. Cas. Insurers Ass'n of Am. v. Donovan (PCIAA)*, 66 F. Supp. 3d 1018 (N.D. Ill. 2014). Here, the insurance association sued HUD after it issued the 2013 regulations. It argued that the lack of insurer-exemption would expose insurers to disparate impact claims for using certain risk factors in underwriting that had a discriminatory effect on protected classes.

The insurance association submitted these concerns to HUD during the notice-and-comment phase of the proposed rule. *Id.* at 1048. HUD issued a one-paragraph response in the final rule, stating that it would deal with the insurance issues by adjudicating them on a case-by-case basis as opposed to implementing a broader rule granting the exemption. *Id.* The court held that because HUD, in its response, provided no analysis balancing whether the benefits of a case-by-case approach outweighed the benefits of a categorical exemption, it acted in a manner that was arbitrary and capricious. *Id.* Therefore, the court ruled that HUD must issue supplemental comments explaining the reasoning for its decision not to grant the insurance exemption in the disparate impact regulations. *Id.* at 1049.

Pursuant to the court's order, in October 2016, HUD issued the supplemental comments discussed in Part III.A. HUD provided two overarching reasons for why it would not create the safe harbor exemptions sought by the insurance industry. First, it claimed it would be "practically impossible" to define the scope of the exemptions with sufficient precision given the diversity of potential discriminatory effects claims. Applicability of the Fair Housing Act's Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69,013 (October 5, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-05/pdf/2016-23858.pdf>. Second, HUD balanced that the exemptions sought would undermine the remedial purpose and effectiveness of the FHA in a way that outweighed any of the insurer concerns. *Id.* at 69,013. HUD, referring to the third step in its burden shifting framework, reassured insurance providers that "practices that an insurer can prove are risk-based, and for which no less discriminatory alternative exists, will not give rise to discriminatory effects liability." *Id.* at 69,015.

⁷⁰ After HUD issued its 2013 regulations that did not exempt the insurance industry from disparate impact liability, insurance associations sued HUD, contending that disparate impact

claims are not cognizable under the FHA. *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, 74 F. Supp. 3d 30, 31–32 (D.D.C. 2014), *vacated and remanded* (Sept. 23, 2015). The district court agreed and held that the FHA does not allow disparate impact claims. *Id.* at 47. While on appeal, the Supreme Court issued its *TDHCA* opinion authorizing such a claim, causing the appellate court to remand the case back to the district court, where it remains today. Presently, each side has filed for summary judgment but agreed to stay the proceedings while the new HUD administration decides on how it wishes to pursue the case.

⁷¹ 24 C.F.R. § 100.500(c)(1).

⁷² *TDHCA*, 135 S. Ct. at 2523.

⁷³ 24 C.F.R. § 100.500(c)(3).

⁷⁴ *TDHCA*, 135 S. Ct. at 2522.

⁷⁵ A thorough discussion of compliance with HUD's Criminal Screening Guidance can be found in the NAA/NMHC White Paper dated May 2016.

⁷⁶ *Sams v. Ga W. Gate, LLC*, 2017 WL 436281 (S.D. Ga. Jan. 30, 2017). In this case, current and former tenants sued the new apartment building owner, who had instituted a new criminal screening rule that barred any individual convicted of a felony or misdemeanor within the past ninety-nine years. *Id.* at 1. The owner made all existing tenants submit to a criminal screening check. *Id.* The plaintiffs alleged that this policy would have a disparate impact on African-Americans. *Id.* at 5.

The court denied the defendant's motion to dismiss the claim. *Id.* at 7. In doing so, it analyzed *TDHCA* and recited the "robust causality requirement" requiring that the plaintiffs "produce statistical evidence demonstrating a causal connection." *Id.* at 5 (citing *TDHCA*, 135 S. Ct. at 2523). Because African-Americans are twice as likely to have criminal convictions as Caucasians and represent a disproportionate share of the incarcerated population, the court found that the screening rule had an adverse disparate impact on African-American tenants. *Id.* at 5.

The court devoted few words to its ruling on the disparate impact claim, and, surprisingly, made no mention of the Criminal Screening Guidance HUD had issued nine months prior to this decision. This particular criminal screening policy would clearly violate that guidance, which expressly prohibited all-encompassing screening tests that were not limited by years or the type of crime. This screening policy serves as an example of the type that housing providers should avoid due to how it exposes them to disparate impact claims.

Although the court denied the defendants' motion to dismiss the disparate impact claim, it did grant the motion with respect to other claims. Thus, the plaintiffs were given leave to amend their complaint and the parties are still in the pleadings stage.

⁷⁷ *Alexander v. Edgewood Mgmt. Corp.*, 2016 WL 5957673 (D.D.C. July 25, 2016). Here, an African-American man, with a misdemeanor conviction from 2007 and felony convictions from 1991, alleged that the criminal screening policies at three different apartment buildings that rejected his application violated the FHA under disparate impact theory. *Id.* at 1-2. The defendant's criminal screening policies, however, stated that they would only look back three years for excluding applicants based on criminal history. *Id.* at 3.

The court denied the defendants' motion to dismiss, finding that the plaintiff sufficiently identified a facially neutral policy causing a disparate impact and produced statistics to support that claim. *Id.* The court stated that rejecting an applicant based on criminal history, given the racially disproportionate conviction rates in the district area, causes a disparate impact on the African-American class. *Id.* The court cited to the HUD Criminal Screening Guidance in support of its conclusion that the defendants' actions cause a disparate impact. *Id.* at 4.

The defendants here erred because they denied an applicant based on convictions that were outside their policy's three-year period. The HUD Criminal Screen Guidance allows criminal screening policies to exist, but cautions that they are tailored with year-limitations and crime type categories to avoid the discriminatory effects that a broad and open-ended screening

policy causes. This case demonstrates that courts are deferring to the legitimacy and reasoning of HUD’s Criminal Screening Guidance and are willing to expand disparate impact theory to the category of convicted criminals where it overlaps with designated protected classes.

⁷⁸ *De Reyes v. Waples Mobile Home Park Ltd. P’ship*, 205 F. Supp. 3d 782 (E.D. Va. 2016). In this case, current and former residents of a mobile home park sued the owner under disparate impact theory because of a new policy requiring all tenants to submit identification documentation in the form of a social security card, passport, or visa. *Id.* at 793. The tenants claimed this policy, enforced upon lease renewal, had a discriminatory effect on the basis of protected classes of race and national origin. *Id.* at 785. The plaintiffs argued that the policy, targeting illegal aliens, adversely affects them because illegal aliens are disproportionately Latino. *Id.* at 787.

The court dismissed the disparate impact claim, finding the case fell outside the scope and application of disparate impact liability under the Supreme Court’s cautionary instructions. *Id.* at 789. After a lengthy analysis, the court concluded that the policy targeting illegal aliens falls outside the scope of disparate impact liability, because, to find otherwise, would have the result of any policy targeting illegal aliens being subject to a claim because illegal aliens are disproportionately Latino. *Id.* To hold otherwise would eliminate the “robust causality requirement” requiring the plaintiffs to show that the policy disproportionately makes housing unavailable to Latinos *because of* their national origin. *Id.* at 794.

This case demonstrates that courts will carefully analyze whether a policy’s discriminatory effect on a group is *incidental to* or *because of* that group’s protected class. Here, the disparate effect of the policy targeting illegal aliens was incidental to the plaintiffs being Latino, simply because “Latinos have chosen in greater numbers than any other group to enter the United States illegally.” *Id.* at 793. This case is therefore another example of courts strictly adhering to the heightened requirements imposed by the Supreme Court in not allowing disparate impact liability to extend beyond its carefully drawn boundaries.

⁷⁹ *Id.* at 793.

⁸⁰ Ben Carson, *Experimenting with Failed Socialism Again*, THE WASHINGTON TIMES, July 23, 2015, available at <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish>.

⁸¹ Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017).

⁸² Jason Lawler and Al Weaver, *Ben Carson: HUD will ‘reinterpret’ Obama housing discrimination rule*, THE WASHINGTON EXAMINER (July 20, 2017), available at <http://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule/article/2629178>.

⁸³ America First: A Budget Blueprint to Make America Great Again, Office of Management and Budget, available at <https://www.gpo.gov/fdsys/pkg/BUDGET-2018-BLUEPRINT/pdf/BUDGET-2018-BLUEPRINT.pdf>.

⁸⁴ *Id.* at 25.

⁸⁵ A legislative day is a day in which Congress is in session, meaning that depending on Congress’s schedule, it can cover a period of many months.

⁸⁶ See 5 U.S.C. § 801, *et seq.*

⁸⁷ Senate Policy Committee, *Restoring the People’s Voice in Regulations*, March 7, 2017, available at <https://www.rpc.senate.gov/policy-papers/restoring-the-peoples-voice-in-regulations>.

⁸⁸ Congress, with the President’s approval, repealed thirteen regulations using the CRA.

⁸⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (holding that “the rescission or modification” of a rule is subject to the same “arbitrary, capricious, abuse of discretion” test as promulgation of a rule).

⁹⁰ *State Farm*, 463 U.S. at 42.

⁹¹ *Id.* at 37.

⁹² *Id.* at 38.

⁹³ *Id.* at 52.

⁹⁴ *Id.* at 43 (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

⁹⁵ *With the Stroke of a Pen: What Executive Branch Actions Can President-elect Trump “Undo” on Day One?*, CONGRESSIONAL RESEARCH SERVICE REPORT, November 22, 2016, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj4rKj-ydbTAhVHRCYKHeO8CpoQFggtMAE&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2Fstroke.pdf&usg=AFQjCNGeBpb49hkSs-nUULXPKFUiEXo-FQ&sig2=SfWLFn58l3wJ5yd0uV4NgA>.

⁹⁶ *Am. Ins. Ass'n v. United States Dep't of Hous. & Urban Dev.*, 74 F. Supp. 3d 30 (D.D.C. 2014), *vacated and remanded* (Sept. 23, 2015).

⁹⁷ *Id.* at 46.

⁹⁸ Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017) (“[N]o Federal funds may be used to design, build, maintain, utilize, or provide access to a Federal database of geospatial information on community racial disparities or disparities in access to affordable housing.”).

⁹⁹ California Assembly Bill No. 686, Housing Discrimination: Affirmatively Furthering Fair Housing, Feb. 15 2017, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB686.