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Recent HUD Actions Regarding Disparate Impact

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Executive Summary

This White Paper analyzes several important recent developments in Department of Housing and Urban Development (HUD) rulemaking and issuance of guidance based on disparate impact liability under the Fair Housing Act (FHA). 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.[i] HUD is the primary federal agency tasked with enforcing the FHA.

Disparate impact liability under the FHA arises when a housing provider's policy or practice that seems neutral on its face actually results in discriminatory effects on a protected class. Even if the housing provider did not intend to discriminate, it can still be liable if the effect of the policy or practice results in a disproportionately adverse effect on a protected class. For example, as discussed in more detail below, a housing provider could be liable under disparate impact theory for enacting a seemingly neutral screening policy prohibiting applicants with a criminal conviction merely because of how such a policy could adversely impact groups from a particular race.

Although the Supreme Court only recognized disparate impact liability under the FHA as recently as 2015, HUD had promulgated a rule detailing its own view on proving disparate impact liability in 2013. The state of disparate impact liability for housing providers is currently in flux because of the tension between HUD's 2013 disparate impact rule and the Supreme Court's 2015 decision on disparate impact liability. While the common denominator remains that disparate impact liability can be the basis of a valid claim under the FHA, it is somewhat unclear whether the HUD rule properly includes how the Supreme Court narrowed liability to only the more clear and egregious cases. This tension will be resolved going forward as courts have the chance to rule on the issues discussed herein.

General Background

HUD Rule on Disparate Impact

On February 15, 2013, HUD issued a final rule promulgating the standard for disparate impact liability under the FHA.[2] HUD issued this rule at a time when eleven federal courts of appeal agreed that the FHA encompassed discriminatory effects (disparate impact) liability despite the statute not providing a standard for such liability. The Supreme Court, at this time, had not yet formally recognized disparate impact liability. Because of the lack of Supreme Court and statutory guidance, HUD suggested it issue the rule to create a uniform standard.

The rule formally established a three-part burden shifting test for determining when a housing practice has a discriminatory effect even without discriminatory intent. The regulation states that a practice has a discriminatory effect "where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[3]

First, the plaintiff must demonstrate that the challenged practice caused or predictably will cause a discriminatory effect.[4] Then, the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more "substantial, legitimate, nondiscriminatory interests."[5] If the defendant satisfies that burden, then, the plaintiff must prove that the substantial, legitimate, nondiscriminatory interest could be accomplished through a practice that has a less discriminatory effect.[6] The defendant 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.[7]

Although the Supreme Court soon after issued its own standard for proving disparate impact liability under the FHA, HUD usually cites to this rule as the standard in the HUD guidance and rules that are discussed herein.

Supreme Court Decision on Disparate Impact Liability

The Supreme Court formally recognized disparate impact liability as a cognizable claim under the FHA in its 2015 opinion *Texas Dept. of Housing v. Inclusive Communities Project (ICP)*.[8] The Court noted that, unlike a discriminatory intent case where the plaintiff has to establish that the defendant had a discriminatory motive, disparate impact cases involve a defendants' practice that has a disproportionately adverse effect on minorities.[9]

Under the standard announced by the Court in *ICP*, a plaintiff must prove discriminatory effects using statistical evidence to demonstrate that the practice causes a racial

disparity. There must be a strong causal connection between the housing provider's challenged practice and the discriminatory effect.[10] This "robust causality requirement," the Court said, "protects defendants from being held liable for racial disparities they did not create."[11] Despite recognizing disparate impact liability, the Court noted that the bar is relatively high for plaintiffs because "private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers" to fair housing.[12]

Legal commentators are in disagreement about how much the Supreme Court's holding in *ICP* limited disparate impact liability. Some of the HUD-issued guidance discussed herein, such as the criminal screening guidance and insurer non-exemptions, is currently the issue of federal court litigation as to whether it is consistent with the Supreme Court disparate impact standards as opposed to the HUD-issued rule on disparate impact liability.[13] The eventual decisions in these court cases will shed light on whether federal courts think that HUD exceeded its authority in what some view as HUD's recent over-zealous issuance of rules and guidance in the last days of a departing Administration.

HUD POST-ICP RULING

After the Supreme Court's 2015 ruling in *ICP* that most commentators viewed as narrowing disparate impact liability, HUD remained firm in progressively attempting to broaden the doctrine by using its own rule. HUD's activity has mainly taken the form of issuing informal guidance or promulgating formal regulations. 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.[14]

HUD Supplement Statement: Application of FHA's Discriminatory Effects Standard to Insurance

Although only indirectly affecting housing providers, HUD's issuance of supplemental public comments in October 2016 regarding the application of the FHA to the insurance industry is an example of HUD pushing back on any narrowing of disparate impact liability in the wake of the *ICP* opinion.[15]

In 2011, after HUD released the proposed rule on the three-stage burden shifting approach to disparate impact liability, several insurance trade associations submitted

comments to the proposed rule that criticized the application of disparate impact liability to insurers and requested a categorical exemption for all insurance underwriting practices.[16]

Claims against insurance companies for disparate impact in the sale or refusal to sell insurance for housing properties were regularly being made. When HUD issued the final rule in 2013, it denied the categorical exemption request and instead stated that HUD would adjudicate insurance company concerns on a case-by-case basis.[17] Under the rule, an insurer could face disparate impact liability for using certain risk factors in underwriting that had a discriminatory effect on protected classes. A federal court in 2014 later held that HUD acted arbitrarily and capriciously in failing to adequately explain why case-by-case adjudication was preferable to a categorical exemption.[18]

In response to the federal court mandate to better explain its reasoning, and in the aftermath of the *ICP* decision recognizing disparate impact claims under the FHA, HUD released the October 2016 supplemental statement. HUD's eight-page statement 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.[19] 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.[20]

In response to insurance association criticisms that disparate impact liability could threaten the actuarial standards underpinning the insurance market, HUD 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."[21]

Although this rule does not directly affect private housing providers, it does demonstrate HUD's recent efforts to expand disparate impact liability despite the *ICP* decision. The court challenges to these HUD efforts will continue.

HUD Guidance: Application of FHA Standards on Criminal Records

A second example of HUD's proactive efforts to increase the use of disparate impact and expand potential liability is in its recent criminal screening policy guidance, which applies to all housing providers.[22] The guidance imposes disparate impact liability for criminal screening policies that disproportionately affect a protected class absent a legitimate, nondiscriminatory reason.[23]

The guidance admits that the FHA does not contemplate a protected class for individuals with a criminal conviction.[24] HUD reiterates, however, that disparate impact liability exists anytime a policy has the effect of disproportionately burdening a particu-

lar race without justification.[25] HUD points to national statistics demonstrating African Americans and Hispanics are incarcerated at a rate disproportionate to their share of the general population.[26] HUD then concludes that criminal conviction screening policies consequently violate the FHA, because of their relation to race, if they lack a legally sufficient justification.[27]

HUD states that intentional discrimination liability can arise from criminal screening policies as well. Housing providers cannot intentionally treat two comparable applicants differently because of their race.[28] For example, it would violate the FHA to deny an African American solely based on a particular prior crime yet admit an Asian applicant guilty of that same exact crime.

HUD uses reasoning similar to its linking of incarceration to race to expand FHA protections to other types of individuals in its recent guidance. As will be further discussed below, HUD argues that disparate impact liability also protects persons with limited ability to speak English because of their close relationship to the protected class of national origin.

HUD also argues for disparate impact protections to victims of domestic violence because of their close relationship with the protected class of gender. With such an expansive interpretation of disparate impact liability, and the ease at which national data is available and breadth at which it is collected, it is easy to see how HUD, if it chose to, could continue to issue guidance expanding protections to more groups of people traditionally not protected by the FHA.

Although it remains to be seen how the criminal screening guidance will be enforced by the new Administration, if at all, it does not significantly alter the screening policies currently employed by many housing providers, provided that those policies already are proportionately tailored to weight certain types of convictions to meet legitimate safety and property interests in a non-arbitrary way.

HUD Final Rule on Affirmatively Furthering Fair Housing

On July 16, 2015, just a month after the Supreme Court's *ICP* decision, HUD finalized its new regulation on affirmatively furthering fair housing. HUD's stated purpose for enacting the regulation is to provide 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.[29] This rule does not apply to all housing providers, just those participating in certain HUD programs.

The FHA, in addition to prohibiting discrimination in housing, imposes a requirement that HUD administer its programs in a manner that affirmatively furthers fair housing.[30] Before the new rule, HUD achieved this goal by requiring program participants (which includes states, local governments, and public housing agencies) to complete

an "analysis of impediments" that identified impediments to fair housing in their jurisdiction and make corresponding plans and actions to remedy those impediments.[31] However, HUD found that these reports were generally either not submitted to HUD, or when they were, they were not reviewed by HUD.[32] Participants lacked clear guidance from HUD on how to grapple with fair housing issues of race or disability in making grant decisions.[33]

HUD through its new rule therefore replaced the impediments analysis system with a standardized Assessment of Fair Housing (AFH) through which participants will identify and evaluate their fair housing issues and in turn reviewed by HUD.[34] HUD will provide more data on fair housing issues to participants so that they can better prioritize and set goals.[35]

Unlike before, HUD anticipates actually reviewing the strategic plans and assessments of program participants.[36] HUD will not set specific outcomes and it will continue to allow decision making to occur at the local and regional levels.[37] HUD's goal is that by increasing the tools and data with which program participants have to address fair housing issues, the participants will be empowered to foster diversity and overcome segregation in furtherance of the FHA's mission.[38]

Although this rule has little effect on private housing providers, it is another example of HUD's increasingly proactive role over the past year in expanding its authority to measure racial population and possible historic segregation in previously unseen ways. The new Administration and Congress will likely revisit these efforts soon. [39]

HUD'S MOST RECENT RULES AND GUIDANCE

Within the past year, and particularly since September 2016, HUD has become increasing active in issuing guidance and final rules relating to disparate impact liability under the FHA. This is the main subject and purpose of this White Paper. The following section outlines the notable developments and provide best practices recommended for avoiding liability under these recent enactments.

HUD Rule on Quid Pro Quo/Hostile Environment Harassment Liability

The following are the best practices recommended for avoiding liability under HUD's Rule prohibiting *quid pro quo* and hostile environment harassment:

- **Train staff** to understand and recognize quid pro quo and sexual environment harassment by both other staff or by residents and the appropriate process for addressing it

- **Develop a grievance mechanism** so that individuals who feel victimized by quid pro quo or hostile environment harassment can bring their complaint to management for proper resolution

On September 16, 2016, HUD issued a final rule that prohibits "*quid pro quo*" harassment and "hostile environment harassment" because of an individual's membership in a protected class.[40] The rule took effect on October 14, 2016. HUD's purpose in creating the rule was to establish consistent standards for housing providers to follow to ensure that their properties were free of unlawful conduct.

HUD additionally sought to provide clarity to victims so that they could better assess potential FHA claims. HUD additionally set forth standards for when housing providers could be held vicariously or directly liable for unlawful harassment or discrimination either by them or by third parties.

HUD justified the need for formal regulations on hostile environment harassment in the housing context because it found that courts often applied Title VII employment legal standards when reviewing harassment claims under the FHA, which although similar, contained differences in certain aspects.

The regulations define hostile environment harassment as "unwelcome conduct that is sufficiently severe or pervasive as to interfere with" the terms, conditions, or privileges of rental of a dwelling.[41] The rule creates a totality of the circumstances test for determining whether hostile environment harassment exists, which balances factors such as the severity, scope, frequency, duration, and location of the conduct, as well as the relationships between the persons involved.[42]

The victim need not demonstrate that psychological or physical harm to show that harassment occurred. Whether the harassment is "sufficiently severe or pervasive" as to create liability for the housing provider is judged based on the standard of a "reasonable person" in the victim's position.

The rule also prohibits "*quid pro quo*" harassment, which is Latin for "this for that." *Quid pro quo* harassment occurs when a person is subjected to an "unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to" the availability, terms, or conditions of rental of a dwelling."[43] Such *quid pro quo* harassment can come by e-mail, text messages, social media, taunting or teasing, or threatening statements. *Quid pro quo* harassment can occur even if the victim complies in the request.

The most concerning aspect of the new regulations for housing providers is how the rule imposes liability on housing providers for the conduct of a third party. The rule creates three categories of direct liability for housing providers—liability for the housing provider's own conduct; liability for failing to take prompt corrective action relating to the conduct of its employees or agents; and liability for failing to take prompt corrective action for the conduct of a third party (such as another resident).[44] The ef-

fect of this third category is that a housing provider can be liable for one tenant's discriminatory conduct against another tenant if the housing provider "knew or should have known of the discriminatory conduct and had the power to correct it."[45] Whether a housing provider has the power to correct the discriminatory conduct of a third party depends on the extent of the housing providers control and legal responsibility over that person.[46] This becomes a question of the language in the lease agreement and property rules and the provisions of state and local law. The rule does not define what steps a housing provider must take in remedying the discriminatory conduct.

Although the breadth of potential liability under this regulation should concern housing providers, it appears that this provision has yet to be litigated to allow for guidance on how courts will assess the potential liability standards.

HUD Guidance: FHA Protections for Persons with Limited English Proficiency

The following are the best practices recommended for avoiding liability under HUD's guidance prohibiting potential discrimination against those with limited English proficiency ("LEP"):

- **Allow applicants to bring a translator** if they cannot fully understand the leasing documents
- **Do not automatically prohibit** or restrict applicants because they have a limited ability to read, write, speak, or understand English
- **Do not favor** LEP persons of one particular language over that of a different particular language
- **Do not refuse services** to residents who do not speak fluent English

On September 15, 2016, HUD released guidance stating that the FHA protects people with limited English proficiency ("LEP"). Under the guidance, housing providers can face liability for taking adverse actions against an LEP individual because of their limited ability to read, write, speak, or understand English.[47]

Although LEP is not a statutory protected class under the FHA, the guidance reasoned that LEP persons are nevertheless protected because of their close nexus with the protected class of national origin.[48] The guidance justified that nearly all LEP persons are LEP because they or their family are from non-English speaking countries. Twenty-five million people, or approximately nine percent of the U.S. population, are LEP.[49]

The guidance makes it unlawful to discriminate against LEP persons through either intentional discrimination or disparate impact discrimination. Types of prohibited intentional discrimination could include blanket bans on renting to persons who do not speak fluent English or prohibiting languages other than English from being spoken on the property.[50] It would likewise be intentionally discriminatory to treat different classes of LEP persons differently, by, for example, renting to people who speak a particular foreign language while refusing to rent to those that speak a different foreign language. Another example of suspect discriminatory treatment includes refusing to allow language assistance services if they are free or at low cost to the housing provider or the applicant.

The guidance distinguishes the needs of a housing provider from the needs of an employer, because in the employment law context, employers can defend an LEP discrimination claim by arguing that they have a legitimate need for employees to speak English to communicate internally, build a cohesive workforce, and assist customers.[51] Because the housing provider-tenant relationship is different from that of an employer-employee relationship, the guidance states that employment law defenses based on those types of "legitimate needs" will be inapplicable under the FHA.

The guidance also creates disparate impact liability for housing providers where there is a facially-neutral policy that has a discriminatory effect on LEP persons. The guidance states that disparate impact liability is assessed using the three-part burden shifting framework articulated in HUD's 2013 rule. The guidance explains that a policy can cause a disparate impact on LEP persons from multiple national origins; there is no requirement that the LEP persons must all be of the same national origin. As an example, a seemingly facially neutral policy of not allowing leasing documents to be translated could violate the FHA under the new guidance.

This agency guidance does not carry the force of law like formal rule regulations. Instead, courts are empowered to provide agency guidance with the proportionate amount of deference a situation merits, as deemed by the court, based on a variety of factors. Nevertheless, housing providers should take this new guidance seriously, as it may influence suits brought by plaintiffs or decided by courts. Blanket advertising requirements that all tenants must speak English or restrictions on the languages that residents may speak are heavily susceptible to FHA liability and should be avoided. Under the guidance, justifications for language-related restrictions should strictly relate to essential housing-related matters.

HUD Guidance: Application of FHA Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence

This HUD guidance only applies to local governments that enact particular nuisance ordinances. However, the following is a best practice that housing providers can implement to mitigate any adverse impact of nuisance ordinances on tenants, and, more importantly, avoid potential hostile environment liability for themselves:

- **Properly document** instances of domestic violence reported by a victim to ensure accuracy of police and property records
- **Do not act** against a complaint of domestic violence **without accurate identification** of the perpetrator of the violence

On September 13, 2016, HUD issued guidance that imposes disparate impact liability to the enforcement of what are frequently referred to as "crime free housing ordinances" or "nuisance ordinances," primarily with respect to their impact on domestic violence victims.[52] A growing number of local governments are enacting nuisance ordinances, which label various types of conduct by a tenant a "nuisance" and require the landlord to abate the nuisance or else face penalties.[53]

Nuisances can include acts such as littering, disorderly or criminal conduct on the property, or, pertinent to this guidance, calling 9-1-1 an "excessive" amount of times within a prescribed period.[54] Many nuisance ordinances define "excessive" to be just a few calls.[55] Nuisance ordinances require housing providers to abate the nuisance, which can include evicting the tenant causing the nuisance, or else face penalties, which can include fines, losses of rental permits, condemnation of their property, or even incarceration.[56]

One effect of these ordinances is that a victim of domestic could face eviction for calling emergency services just a few times to report the domestic violence.[57] Some jurisdictions define domestic violence as a nuisance without regard to whether the tenant is a perpetrator or victim.[58] Other jurisdictions do formally exclude domestic violence victims from nuisance laws, but in practice, emergency service personnel do not properly log the call as one of domestic violence victim, making the adverse effect on the victim the same.[59] Because women comprise eighty percent of individuals subject to domestic violence, enforcing nuisance ordinances can have a disproportionately adverse effect on women as a protected class in violation of the FHA.

The guidance instructs local governments to review their nuisance ordinances for compliance with HUD's obligation to ensure that recipients of federal funds use them in a manner that affirmatively furthers fair housing policies.[60] Local governments could accomplish this affirmatively furthering fair housing goal by repealing nuisance ordinances that require or encourage eviction for the use of emergency services by domestic violence victims.

It is only local governments, and not housing providers, that can face liability for enacting and enforcing nuisance ordinances in a discriminatory manner. Housing providers can nevertheless play an important role in reducing the discriminatory effects of nuisance ordinances on domestic violence victims by properly bringing issues of

potential discrimination to enforcement officials when notified of these types of activities. As a matter of concern to private housing providers, providing the police with inaccurate information could cause hostile environment liability under the new HUD rule discussed above.

HUD Rule on Instituting Smoke Free Public Housing

This HUD rule only applies to HUD funded public housing programs and does not apply to private housing providers. Nevertheless, if a private housing provider wished to implement a smoke-free policy, the best recommended practices based on HUD's position are as follows:

- **Banning smoking indoors and within twenty-five feet of the building** is presumptively permissible
- **Reasonable accommodations** for disabled smokers **are not required** because smoking is not a fundamental right
- **Develop solutions** with disabled smokers such as moving them to the first floor or near an outdoor exit
- **Visit HUD's resource guide** for owners and management wishing to institute smoke free housing here[61]

On December 15, 2016, HUD issued its final rule prohibiting smoking in public housing.[62] The rule, which goes into effect February 3, 2017, requires each public housing agency (PHA) to implement a smoke free policy banning the use of prohibited tobacco products in all covered areas[63] of public housing by July 30, 2018.[64] Smoking outdoors is prohibited within twenty-five feet from the public housing building.[65] The rule applies to exclusively public housing projects, and it does not apply to tribal housing, mixed-finance developments, or PHA properties that have converted to project based rental assistance contracts under RAD.[66] Therefore, this rule does not affect private housing providers. It should provide guidance for implementing similar policies at private properties.

HUD's stated purpose for enacting the rule is to improve indoor air quality in public housing, improve the health of residents and visitors, reduce the adverse effects on residents and children of second hand smoke, reduce the risk of catastrophic fires from smoking, and lower overall maintenance costs related to smoke.[67]

The rule will affect over 700,000 units, 500,000 of which include units inhabited by elderly persons or non-elderly persons with disabilities.[68] HUD emphasizes that the rule does not require any individual to quit smoking, it just prohibits a person from smoking in the restricted areas and instead will make them go outdoors at least twenty-five feet away from the building to smoke.[69] PHAs have many enforcement mechanisms for noncompliance with the rule, which includes eviction.[70]

HUD addressed concerns raised by commenters regarding reasonable accommodation for disabled residents who smoke and may encounter difficulties complying with the indoor prohibitions.[71] Reasonable accommodations can only be granted where there is an identifiable relationship between the requested accommodation and the individual's disability.[72] HUD responded to these commentators concerns by pointing out that the act of smoking is not a disability under the ADA.[73] As such, there will be no reasonable accommodations that would allow a disabled person to smoke indoors in a restricted area.

Disabled persons who smoke can work with their PHA to develop solutions such as moving to a first floor unit to more easily access outdoors areas, or designating smoking areas with an accessible walkway, cover, light, and seating.[74] These solutions, however, are not reasonable accommodations in the legal sense. While the rule was being proposed, HUD stated that nothing in the rule was to effect any requirements on the use of marijuana (medical or recreational) in federal-subsidized housing.[75]

In defense to criticism of the rule in the comments, HUD stressed that there is no "right" to smoke in a rental home.[76] HUD pointed out that although smoking tobacco is a legal act, it is only entitled to minimal protection under the Equal Protection Clause of the Constitution, meaning that federal regulations such as this one are permissible as long as they are "rationally related" to a "legitimate government interest."[77]

HUD lists several legitimate government interests for promulgating this rule, such as improving resident health and safety, reducing fires, maintaining sanitary conditions, and reducing non-smoker complaints.[78] Private owners and management companies can use these factors to formulate their own smoking policies.

HUD Rule on Equal Access to Housing for Gender Identity

This new HUD rule only applies to certain types of HUD-funded programs with respect to the placement of transgender and gender non-conforming persons at emergency shelters. It does not affect or impose any liability on private housing providers. Gender identity issues have become controversial and if a private housing provider chooses to implement any policy that is related to these, the best practice consistent with HUD's position is recommended as follows:

- **Gender identity,** as opposed to assigned birth sex, should govern which facilities an individual is permitted to use

On September 21, 2016, HUD issued a final rule titled "Equal access in accordance with the individual's gender identity in community planning and development programs."[79] The rule intends to ensure that no individual is discriminated against with respect to participation in programs funded through HUD Community Planning and Development (CPD).[80]

The rule builds on a 2012 rule that granted equal access to housing for HUD programs regardless of an individual's sexual orientation or gender identity.[81] Although the 2012 rule did address equal access based on gender identity, it did not address the placement of transgender and gender non-conforming persons[82] at covered temporary emergency shelters with shared sleeping or bathing facilities.[83] Because of privacy concerns for the other individuals in the shelters, HUD did not want to address that issue until completing further studies and reviews.

After conducting a review, HUD determined that the new 2016 rule was necessary to prevent transgender and gender nonconforming individuals from discrimination and harassment in attempting to access HUD-funded services. HUD's review found these types of individuals would not use shelter facilities designated for assigned birth sex and would instead choose to sleep on the street.[84]

HUD therefore issued the new rule, which states that CPD programs, including shelters, must place individuals in sleeping and bathroom facilities in accordance with that individual's gender identity.[85] The rule also imposes an obligation on CPD programs to make nondiscriminatory accommodations to address privacy concerns raised by other individuals.[86]

Unlike the FHA, this rule does not apply broadly to private housing providers, but rather only entities that fall under the regulation's definition of CPD programs, which are those that receive HUD funding through programs such as the Community Development Block Grant and Emergency Solutions Grants.[87] The rule does, however, further illustrate HUD's consistent efforts to broaden protections and liability.

ANALYSIS: HUD'S EXPANSION OF TRADITIONAL PROTECTED CLASSES TYPICALLY NOT BASED IN STATUTORY CHANGES

HUD's recent rulemaking and guidance illustrate the department's efforts to expand FHA protections to groups that are not defined in the statute as protected classes. For example, HUD links the criminal screening protections to race, the LEP protections to national origin, and the nuisance ordinance protections to gender. HUD justifies these expansions by citing to its 2013 rule on disparate impact liability, which allows HUD the requisite flexibility to do this because of the inherent nature of disparate impact liability involving facially neutral policies that in some way could have a discriminatory effect on different groups of people.

The speed at which HUD issued many of the rules and guidance discussed herein further demonstrates HUD's aggressive and expansive view of its role as it approached

the end of the Obama Administration. In September 2016 alone, HUD issued the Nuisance Ordinance guidance on September 13, the final hostile environment harassment rule on September 14, and the guidance on limited English proficiency on September 14. This rapid pace poses a problem for housing providers seeking to stay abreast of and comply with the many requirements.

The change in Administrations further complicates the picture for housing providers because of uncertainty surrounding what the new Administration will enforce, radically change, or rescind regarding to HUD's latest actions. The Secretary of HUD could easily withdraw any guidance issued by HUD previously, such as the criminal screening or LEP guidance, without having to go through additional Congressional hurdles because guidance does not carry the force of law.

Formal rules, such as the rules on hostile environment harassment, gender identity, and smoke free public housing, cannot be rescinded by the Secretary alone, but instead could be overturned by way of the 1996 Congressional Review Act (CRA). The CRA allows the new Congress by majority to overturn any formal agency rule issued within sixty session days of the prior Administration's termination, which dates back to June 13, 2016.

HUD finalized all three of the aforementioned rules after that date, meaning they could each be overturned. Despite talk of using the CRA to overturn a handful of major regulations issued by the prior Administration, none of the HUD rules at issue is currently part of that conversation.

Even though much of the guidance issued by HUD has yet to be ratified by federal courts, and despite the fact that the new Administration may not aggressively enforce them or rescind them, housing providers should still be mindful of the best practices recommended for avoiding liability under the expanded theories of discrimination. This is because, even if not by HUD, advocacy groups and aggrieved residents can still bring lawsuits against housing providers and ground their arguments for liability in these HUD procurements, driving up settlement costs and the potential liability from litigation and HUD administrative claims.

As discussed above, there are already lawsuits challenging some of these positions taken by HUD. For example, the lawsuit challenging whether automatically excluding an applicant because of a criminal conviction violates the FHA and the lawsuit challenging whether HUD's rule on disparate impact liability can apply to the insurance industry. These lawsuits and others could result in federal courts totally striking down HUD's disparate impact rule or requiring HUD to accept the narrower Supreme Court interpretation in *ICP* and change the rule. Housing providers will need to follow developments closely and keep up with changing current requirements.

[i] 42 U.S.C. § 3604.
[2] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013), available at https://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf.
[3] 24 C.F.R. § 100.500(a).
[4] 24 C.F.R. § 100.500(c)(1).
[5] 24 C.F.R. § 100.500(c)(2).
[6] 24 C.F.R. § 100.500(c)(3).
[7] 24 C.F.R. § 100.500(b).
[8] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507, 2518 (2015).
[9] *ICP*, 135 S. Ct. at 2513.
[10] *Id*. at 2523.
[11] *Id*.
[12] *Id*. at 2522.
[13] In *The Fortune Society v. Sandcastle Towers Housing Development Fund*, the plaintiff, an advocacy group, alleged that the housing provider has a policy of "automatically excluding any person with a record of criminal conviction" that does not account for the nature or date of the conviction, nor any evidence of rehabilitation. This policy, the plaintiffs contend, violates the FHA under disparate impact theory as demonstrated by incarceration statistics in New York. If the allegations in the plaintiff's complaint are true, this case could be the first to test whether blanket exclusions based on criminal convictions do actually violate the FHA, as the recent HUD Guidance argues. If so, the court could additionally elaborate on the types of factors that housing providers should use in drafting criminal screening policies. *See* Complaint, Case No 1:14-cv-6410 at *2 (E.D.N.Y. 2014).
In *American Insurance Association v. HUD*, two insurance trade associations are challenging the application of disparate impact liability to the insurance industry in opposition to HUD's refusal to grant the industry a categorical exemption in its disparate impact rule. This case presents another opportunity for federal courts to push back against HUD's formulation of the disparate impact rule. Case No. 1:13-cv-00966-RJL (D.D.C.).
[14] *See United States v. Mead Corp*., 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co*., 323 U.S. v. 134, 140 (1944)).
[15] 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
[16] *Id*. at 69,013.
[17] *Id*.
[18] *Id*.; *Prop. Cas. Insurers Ass'n of Am. v. Donovan (PCIAA)*, 66 F. Supp. 3d 1018, 1049 (N.D. Ill. 2014).
[19] Applicability of the Fair Housing Act's Discriminatory Effects Standard to Insurance , 81 Fed. Reg. at 69,013.
[20] *Id*.
[21] *Id*. at 69,015.
[22] 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_ogcguidappfhastandcr.pdf (hereinafter, "Criminal Screening Guidance"). For more detail, see the NMHC/NAA White Paper titled Criminal Conviction Screening Policies Best Practices to Avoid Disparate Impact Liability from May 2016.
[23]Criminal Screening Guidance, at 2.
[24] *Id*. at 2.
[25] *Id*.
[26] *Id*. at 2-3.
[27] *Id*. at 2.
[28] *Id*. at 8.

[29] 24 C.F.R. § 5.150.
[30] 42 U.S.C. § 3609(d).
[31] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015), available at https://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17032.pdf.
[32] *Id*.
[33] *Id*. at 42,275.
[34] *Id*. at 42,272.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 42,273.
[39] In January 2017, Congress introduced bills in both the House of Representatives and the Senate that would specifically nullify the 2015 Affirmatively Furthering Fair Housing rule. *E.g*., Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017).
[40] 24 C.F.R. § 100.600.
[41] 24 C.F.R. § 100.600(a)(2).
[42] 24 C.F.R. § 100.600(a)(2)(i)(A).
[43] 24 C.F.R. § 100.600(a)(1).
[44] 24 C.F.R. § 100.700(a)(1).
[45] 24 C.F.R. § 100.700(a)(1)(iii).
[46] 24 C.F.R. § 100.700(a)(1)(iii).
[47] 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").
[48] LEP Guidance, at 1.
[49] *Id*.
[50] *Id*. at 4.
[51] *Id*. at 5.
[52] 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, available at https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf (hereinafter, "Nuisance Ordinance Guidance").
[53] Nuisance Ordinance Guidance, at 2.
[54] *Id*. at 3.
[55] *Id*. at 3.
[56] *Id*. at 3.
[57] The guidance provides the following example: A woman in Pennsylvania who had been subjected to domestic violence was warned by police that if she called 9-1-1 one more time, she and her daughter would be evicted from the rental property pursuant to the local nuisance ordinance. When her abusive ex-boyfriend came over one night, she was too fearful to call emergency services and ended up being stabbed by him. She was airlifted to the hospital, and a few days after being released, she was served with eviction papers pursuant to the ordinance.
[58] Nuisance Ordinance Guidance, at 3.
[59] *Id*.
[60] *Id*. at 12.
[61] Smoke Free Housing: A Toolkit for Owners/Management Agents of Federally Assisted Public and Multi-Family Housing, U.S. Department of Housing and Urban Development, available at https://portal.hud.gov/hudportal/documents/huddoc?id=pdfowners.pdf.
[62] Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430 (Dec. 5, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-12-05/pdf/2016-28986.pdf.
[63] Restricted areas affected by the ban include, but are not limited to all public housing living units, interior areas, hallways, rental and administrative offices, community centers, day care centers, laundry centers and similar structures. 24 C.F.R. § 965.653(a).

[64] Instituting Smoke-Free Public Housing, 81 Fed. Reg. at 87,430; 24 C.F.R. § 965.653(a); 24 C.F.R. § 965.655(b).
[65] 24 C.F.R. § 965.653(a).
[66] Instituting Smoke-Free Public Housing, 81 Fed. Reg. at 87,438.
[67] *Id*. at 87,431.
[68] *Id*.
[69] *Id*. at 87,433.
[70] *Id*. at 87,434.
[71] *Id*. at 87,440.
[72] *Id*. at 87,441.
[73] *Id*.
[74] *Id*.
[75] Questions and Answers on HUD's Smoke Free Public Housing Proposed Rule at 4, available at https://portal.hud.gov/hudportal/documents/huddoc?id=finalsmokefreeqa.pdf.
[76] Instituting Smoke-Free Public Housing, 81 Fed. Reg. at 87,440.
[77] *Id*.
[78] *Id*.
[79] 24 C.F.R. § 5.106; Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs 81 Fed. Reg. 64,763 (Sept. 21, 2016), https://www.hudexchange.info/resources/documents/Equal-Access-Final-Rule-2016.pdf.
[80] 24 C.F.R. § 5.106.
[81] Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs 81 Fed. Reg. at 64,763.
[82] Gender nonconforming persons are persons who do not follow other people's ideas or stereotypes about how they should look or act based on their sex assigned at birth.
[83] Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs 81 Fed. Reg. at 64,764.
[84] *Id*.
[85] 24 C.F.R. 5.106(c)(1).
[86] 24 C.F.R. 5.106(c)(2).
[87] 24 C.F.R. 5.106(a).