



## Statement of the Vermont Advisory Committee Concerned by Proposed Rule by the Housing and Urban Development Department

Herein, the Vermont Advisory Committee (VSAC) respectfully informs the U.S. Commission on Civil Rights of its concern about the recent the Housing and Urban Development (HUD) proposed rule to amend the disparate impact standard.<sup>1</sup> On August 19, 2019, HUD posted notice it would revise the disparate impact rule, which would replace the current standard with a more complex burden shifting framework that would first require a plaintiff allege that the policy or practice has a systemic discriminatory effect and further identify five elements about the practice and its effects if the defendant successfully rebuts the plaintiff's prima facie claim. This would likely make it harder for people to bring forward discrimination complaints under the Fair Housing Act, thereby fundamentally reshaping federal fair housing enforcement.<sup>2</sup>

In September 2018, the VSAC issued its report on housing discrimination, "A Handshake and a Smile," which concluded discrimination in housing persists in Vermont against people who are members of protected classes; more disturbing is that "this discrimination is more subtle."<sup>3</sup> The VSAC found that there is a persistence of housing discrimination against individuals based on race and disability.<sup>4</sup> Similar to the VSAC report's findings, the Vermont Legal Aid released a report finding that housing providers gave preferential treatment to white renters of U.S. origin without children and without an apparent disability and that "housing providers generally disfavor[ed] African American renters, renters of foreign origin, renters with children, and renters with disabilities."<sup>5</sup>

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<sup>1</sup> HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (August 19, 2019).

<sup>2</sup> Daniel H. Burd. "HUD Issues Proposal to Conform 'Disparate Impact' Rule to Supreme Court's Inclusive Communities Decision". The National Law Review. <https://www.natlawreview.com/article/hud-issues-proposal-to-conform-disparate-impact-rule-to-supreme-court-s-inclusive> (retrieved October 10, 2019); Ben Lane. "HUD Proposes Change to Fair Housing Rules". Housing Wire. <https://www.housingwire.com/articles/49873-hud-proposes-changes-to-fair-housing-rules/>. (retrieved October 10, 2019).

<sup>3</sup> Vermont Advisory Committee to the U.S. Commission on Civil Rights. "Housing Discrimination in Vermont: a Handshake and a Smile." p. 1. <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf>. (hereafter cited as *Vermont Housing Discrimination Report*).

<sup>4</sup> *Vermont Housing Discrimination Report*, p. 13.

<sup>5</sup> Vermont Legal Aid, "Rental Discrimination Report: Housing Discrimination in Vermont Rental Markets," Housing Discrimination Law Project, May 2014, <http://hrc.vermont.gov/sites/hrc/files/publications/Rental-Discrimination-Report-2014.pdf> (hereafter cited as *Vermont Legal Aid, Rental Discrimination Report*).

The VSAC noted that not that long ago, the Federal Housing Administration openly encouraged discrimination to protect neighborhoods from the “infiltration of inharmonious racial groups.”<sup>6</sup> Essentially, the government created and then enforced segregation and this insidious housing discrimination persists in Vermont and the Nation. HUD needs to remove the hurdles to those seeking redress under the Fair Housing Act instead of making it significantly harder – if not impossible.

HUD’s proposed rule would fundamentally weaken longstanding enforcement options under the Fair Housing Act, by changing the burden shifting framework so that a plaintiff must satisfy the five element prima facie rather than the three element prima facie case by the previous rule promulgated in 2013.<sup>7</sup> Insurance companies, financial institutions, and other major corporations could engage in covert discriminatory practices with greater impunity than under previous standards due to the difficulties plaintiffs would likely experience in attempting to challenge these practices and meeting a higher burden of proof.<sup>8</sup> VSAC believes that the proposed rule would likely diminish disparate impact liability and could potentially decrease incentives for municipalities, large corporations, and others to remain vigilant and continue to do what is necessary to eliminate systemic housing discrimination in Vermont. Accordingly, the VSAC believes the proposed rule contravenes the Fair Housing Act and is a step backwards in the efforts to eliminate housing discrimination.

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*The U.S. Commission on Civil Rights, established by the Civil Rights Act of 1957, is the only independent, bipartisan agency charged with advising the President and Congress on civil rights and reporting annually on federal civil rights enforcement. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels. The Commission: in our 7<sup>th</sup> decade, a continuing legacy of influence in civil rights. For more information about the Commission and our Committees, please visit [www.usccr.gov](http://www.usccr.gov) and follow us on [Twitter](#) and [Facebook](#).*

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<sup>6</sup> Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 550 (2014) (quoting Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 341 (1988)). Congress created the Federal Housing Administration (FHA) in 1934. The FHA became a part of the Department of Housing and Urban Development's (HUD) Office of Housing in 1965.

<sup>7</sup> HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,857, 42,858 (August 19, 2019); Katy O’Donnell. “HUD to Propose More Hurdles to Prove Housing Discrimination”. Politico. <https://www.politico.com/story/2019/07/31/hud-prove-housing-discrimination-1629826>. (retrieved October 17, 2019).

<sup>8</sup> Kriston Capps. “How HUD Could Dismantle a Pillar of Civil Rights Law”. CityLab. <https://www.citylab.com/equity/2019/08/fair-housing-act-hud-disparate-impact-discrimination-lenders/595972/> (retrieved October 17, 2019); Sarah Brundage “Enterprise Strongly Opposes Proposed Revision to Final Disparate Impact Rule.” Enterprise. <https://www.enterprisecommunity.org/blog/enterprise-strongly-opposes-proposed-revision-to-disparate-impact-rule> (retrieved October 17, 2019).