

DATE: February 12, 2021

President Biden's Executive Order – Housing Industry

Question presented: How does President Biden's Executive Order affect the housing industry?

SUMMARY: On January 26, 2021 President Biden issued a Memorandum for the Secretary of Housing and Urban Development (“HUD”) titled, “Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies.” The over-arching objective of President Biden’s Executive Order (“E.O.”) is to overcome the history of structural discrimination in housing by applying and enforcing Federal civil rights and fair housing laws and take steps necessary to redress racially discriminatory federal housing policies that have contributed to wealth inequality for generations.

A. HUD ordered to review the effect of previous rules

President Biden ordered HUD to take all necessary steps as soon as practicable to examine the effects of the August 7, 2020 Rule during President Trump’s Administration entitled, “*Preserving Community and Neighborhood Choice*.”¹ President Biden further directed HUD as soon as practicable to examine the effects of the September 24, 2020 Final Rule during President Trump’s Administration entitled “*HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*.” (September 2020 Final Rule)².

The Memorandum directs that after examining the effects of the September 2020 Rule³, HUD must take all necessary steps to implement the FHA’s requirements and administer its programs in a manner that affirmatively furthers fair housing under FHA, “including preventing practices with an unjustified discriminatory effect.”⁴ One of President Biden’s goals is to reinstate President Obama Administration’s 2015 Affirmatively Furthering Fair Housing (AFFH) regulation.

¹ The August 7, 2020 Rule is codified in 903 of Title 24 of the Code of Federal Regulations; parts 5, 91, 92, 570, 574, 576.

² The September 24, 2020 Rule is codified in 903 of Title 24 of the Code of Federal Regulations; part 100.

³ The September 2020 Rule did not become effective in October 2020 as original planned due to a stay by a Massachusetts federal district court in a preliminary injunction action.

⁴ The Fair Housing Act imposes on Federal departments and agencies the duty to “administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further” fair housing. *See* 42 U.S.C. 3608(d).

Specifically, the September 2020 Final Rule implemented a higher standard for plaintiffs seeking to prove disparate impact housing claims under the Fair Housing Act with new pleading standards, proof requirements, and new defenses to mirror the United States Supreme Court's ruling on the subject. HUD stated in the September 2020 Final Rule that the change establishes a uniform standard (in line with Supreme Court precedent) for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act and provided greater clarity of the law for individuals, litigants, regulators, and industry professionals. The September 2020 Final Rule stated its goal was to give power to advance fair housing nationwide to localities and state authorities. Under the September 2020 Final Rule, a grantee's certification that it has affirmatively furthered fair housing was deemed sufficient if it proposed to take any action above what is required by statute related to promoting any of the attributes of fair housing.

Disparate Impact Analysis

President Biden also ordered HUD to examine the effects of the September 2020 Final Rule, which amends HUD's previous disparate impact standard, as reflected in the United States Supreme Court ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). The issue in the *ICP* case was whether the Texas Dept. of Housing and Community Affairs (TDHCA), which administers the Low Income Housing Tax Credits within Texas, disproportionately granted tax credits to developments within minority neighborhoods and denied the credits to developments within Caucasian neighborhoods, and whether this practice led to a concentration of low-income housing in minority neighborhoods—thereby perpetuating segregation in violation of the FHA. In *ICP*, the United States Supreme Court found that recognizing disparate impact claims under the FHA is consistent with the FHA's central purpose: "to eradicate discriminatory practices within a sector of our Nation's economy." *Id.* at 2522; *see also Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 930 F.3d 660, 663 (5th Cir. 2019)(citation omitted).

In the *ICP* case, the Supreme Court stressed that to assert disparate impact claims, there needs to be a facially-neutral policy attributable to the defendant *and* a robust causation to prove that the policy is the cause of disparity within that housing context. If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a disparate impact claim.

Essentially, the September 2020 Final Rule adopted the same disparate impact analysis applied by the Supreme Court in the *ICP* case above. While the federal court opinion staying the implementation of the September 2020 Final Rule is making its way through the court system and may (or may not) result in a ruling as to its legality and applicability, the Biden Administration has asked HUD to closely examine the effects of the Final Rule, and we can assume the Biden Administration will work to maximize the Rule's impact if the assessment shows the Rule will affirmatively further fair housing practices under FHA.

Conclusion

Ultimately, it appears the E.O. will support the reinstatement of the disparate impact analysis that focuses on housing and mortgage lending practices that may have excluded and resulted in a disproportionate negative impact on people of color, immigrants, individuals with disabilities, and

LGBTQ+ individuals. It is not clear how the Biden Administration will address any identified negative effects of the September 2020 Rule because a federal court issued a stay on the rule.

The heart of the disparate impact standard under the Biden Administration will likely include the identification of targeting zoning, tax credit allocation, land use laws, and housing restrictions that function to unfairly exclude or disproportionately affect those in protected classes (race, color, religion, national origin, sex, disability, familial status) within certain neighborhoods and communities without sufficient justification. The disparate impact standard under the Biden Administration will also likely scrutinize arbitrary and discriminatory ordinances, unconscious prejudices that bar the construction of certain types of housing units.

B. Federal Agencies are directed to work with housing communities

The E.O. directs federal housing agencies to do the following:

1. Work with communities to end housing discrimination;
2. Work with communities to provide redress to those who have experienced housing discrimination;
3. Work with communities to eliminate racial bias and other forms of discrimination in all stages of home-buying;
4. Work with communities to eliminate racial bias and other forms of discrimination in all stages of renting;
5. Work with communities to lift barriers that restrict housing and neighborhood choice;
6. Work with communities promote diverse and inclusive communities;
7. Work with communities to ensure sufficient physically accessible housing; and
8. Work with communities to secure equal access to housing opportunity for all.

It appears there is no immediate action for housing communities to take at this moment except that they need to be aware that federal housing agencies will be actively working with them to accomplish the nine (9) objectives above—although the E.O. did not give HUD a deadline for its assessment. Nonetheless, below are some areas where the E.O. will likely impact the housing industry and where private and public property owners could be proactive:

- Establish additional fair housing projects that affirmatively further fair housing practices established under the Obama-Biden Administration.
 - Reinstate the AFFH policy that requires communities who receive federal funding to scrutinize their current patterns of integration and segregation, evaluate areas of poverty, and identify any discriminatory policies and practices, including disparities in equal access to housing.
 - Once the assessment is complete, communities are encouraged to set goals to improve their housing patterns.
- Public and private property owners should review facially-neutral policies that over the years have had disparate effects that limit housing access for historically marginalized people, including LGBTQ+ individuals.

- Remedy any long-term discrimination in housing against LGBTQ+ individuals who seek federal housing assistance.
- HUD expanding outreach to be actively inclusive to LGBTQ+ individuals.
- Outreach to LGBTQ youth centers to connect youths to HUD's services.
- Allow shelters receiving taxpayer dollars to assist transgender individuals.
- Focus on enhancements to the Equal Access regulations that prohibit discrimination in all HUD funded programs including rental assistance, emergency shelters, and FHA loan programs.
- Reinstate disparate impact analysis for establishing discrimination under the Equal Credit Opportunity Act ("ECOA") and Regulation B for issues relating to expanding credit access and discrimination in lending transactions.
- Establish legislation requiring that states receiving federal funding through the Community Development Block Grants or Surface Transportation Block Grants must implement inclusionary zoning and eliminate exclusionary zoning practices that may have kept people of color from certain housing communities—with the goal of integrating communities.
- Provide more real estate investment opportunities for underrepresented groups (people of color, disabled, LGBTQ+ etc.) to own properties and increase generational wealth.

Recommendation

To the extent possible, communities are encouraged to assess their housing policies and practices to ensure they are not discriminatory and ensure they are proactively in compliance with the objectives above in order to decrease the chances of close scrutiny or penalties from appropriate federal agencies. While there is not currently a federal law requiring that LGBTQ+ individuals be treated equally, the Biden Administration has made clear an intent to focus on that requirement. Interestingly, the best way for a new protected class to be created is through legislative action. Now that the Congress has a different make-up, new legislation may ultimately be imposed. Alternatively, courts will be left to interpret the Fair Housing Act while Executive Orders create additional requirements of varying standards for enforceability.

So, what is a landlord to do? At this time, the best advice is to review policies and explore how to ensure that LGBTQ+ individuals are not discriminated against. Accommodating such groups should not lead to additional liability but failing to do so may certainly lead to claims in the future as this area of the law evolves.

C. Other Related Housing Matters

On March 18, 2020, HUD authorized a 60-day moratorium (effective March 18, 2020) on all evictions of tenants living in properties secured with single-family mortgages insured by the FHA. The moratorium was extended through March 31, 2021.⁵

⁵ See HUD Mortgagee Letter 2021-03.

On March 18, 2020, the Federal Housing Finance Agency (FHFA) ordered a 60-day moratorium on all evictions of tenants living in single-family properties that have been acquired by Fannie Mae or Freddie Mac through foreclosure or deed-in-lieu of foreclosure transactions—the moratorium has since been extended until at least February 28, 2021.

The Centers of Disease Control and Prevention (CDC) and the Department of Health and Human Services (HHS) ordered a temporary ban on residential evictions through December 31, 2020—the moratorium has since been extended through March 31, 2021 by the CDC as requested by President Biden. The CDC and HHS federal moratorium:

- Applies to tenants who lost their employment during the pandemic and have no other good housing options;
- Allows evictions for reasons other than non-payment of rent; and
- Imposes criminal penalties on landlords that violate the ban.

In addition, to avoid eviction renter must present a signed copy of the Declaration in support of the CDC moratorium to their landlords.