

# COMMENTS

## HUD'S 2016 LEGAL GUIDANCE: AN ADMINISTRATIVE DILEMMA

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### ABSTRACT

*Minority individuals are disproportionately charged and convicted of crimes in this country. Making matters worse is the fact that many housing providers use criminal history housing applications that disparately impact minority housing applicants. In 2016, after the U.S. Supreme Court held in 2015 that disparate impact liability was cognizable under the Fair Housing Act, the Department of Housing and Urban Development (HUD) issued legal guidance to address how disparate impact liability specifically applies in situations involving housing providers' use of criminal history in housing applications. While the legal guidance could, and should, have significantly impacted the housing market and formerly incarcerated individuals' ability to obtain fair housing, HUD's avoidance of notice-and-comment rulemaking when issuing its legal guidance creates an administrative dilemma that will diminish the legal guidance's impact. In light of this, I propose recommendations for HUD moving forward. HUD should either promulgate a proposed rule that is substantively similar to the 2016 legal guidance or, alternatively, promulgate a proposed rule that implements the ideas of the ban-the-box movement from the employment context into the housing context. In either situation, HUD should follow notice-and-comment rulemaking to promulgate the new rule.*

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## INTRODUCTION

Formerly incarcerated individuals are trying and failing to successfully reenter mainstream society largely because of housing providers' use of application policies that mandate criminal background checks.<sup>1</sup> Housing providers typically use public safety as a justification for these policies, arguing that such practices are necessary to protect the health and safety of the other renters and owners.<sup>2</sup> While public safety may be a legitimate concern, there

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1. See, e.g., Jesse Kropf, Note, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 75, 76–77 (2012) (describing how many public housing authorities bar applicants with criminal records regardless of the severity of the crime or length of time served); see generally Nicole Flatow, *The Prison Doors Open and You're Released. You Have No Money or Transportation. Now What?*, THINKPROGRESS (June 21, 2015), <https://thinkprogress.org/the-prison-doors-open-and-youre-released-you-have-no-money-or-transportation-now-what-442f6b067dfb> (providing examples of the struggles that many ex-convicts face when looking for housing immediately after release from prison).

2. See Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 4, 9 (2012); see also *Evans v. UDR, Inc.*, 644 F. Supp. 2d 675, 683 (E.D.N.C. 2009) (noting that the defendants' policy against renting to formerly incarcerated individuals is "based primarily on the concern that individuals with criminal histories are more likely than others to commit crimes on the property than those without such backgrounds," and that "the policy against renting to individuals with criminal histories is thus based on concerns for the safety of other residents of the apartment complex and their property").

is insufficient evidence that denying all housing applicants with a criminal history tends to increase public safety.<sup>3</sup> Moreover, because a disproportionate number of minorities are arrested and convicted,<sup>4</sup> criminal history housing policies disparately impact minority applicants in violation of the Fair Housing Act (FHA or Act).<sup>5</sup>

The FHA makes it unlawful to discriminate against people in the context of housing based on their race, color, religion, sex, familial status, or national origin.<sup>6</sup> Disparate impact liability—a theory of liability in which discrimination is proven without intent<sup>7</sup>—is not explicitly addressed in the Act. Despite recognition of its use under the FHA from nine of ten U.S. courts of appeals over the last forty years,<sup>8</sup> opponents continued to argue that the Supreme

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3. See Tran-Leung, *supra* note 2, at 6 (arguing that dismantling housing barriers for people with a criminal history will increase rather than decrease public safety); WASH. LAWYERS' COMM. FOR CIVIL RIGHTS & URBAN AFFAIRS, *THE COLLATERAL CONSEQUENCES OF ARRESTS AND CONVICTIONS UNDER D.C., MARYLAND, AND VIRGINIA LAW 2* (2014) [hereinafter WASH. LAWYERS' COMM.] (indicating that research shows housing and employment barriers increase the risk of recidivism, thereby actually reducing public safety while increasing the costs of the criminal justice system and social services).

4. FED. INTERAGENCY REENTRY COUNCIL, *A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE 6* (2016) [hereinafter FED. INTERAGENCY RECORD] ("African Americans and Latinos collectively represent 30 percent of the U.S. population, but make up more than half the prison population.").

5. See Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012).

6. *Id.* § 3604(b).

7. See Roger Clegg, *Silver Linings Playbook: "Disparate Impact" and the Fair Housing Act*, CATO SUP. CT. REV., 2014–2015, at 165, 166; Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 434 (2005).

8. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015) ("By [1988], all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims."); see also, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987) (noting that "the consensus is that a plaintiff need prove only discriminatory effect, and need not show that the decision complained of was made with discriminatory intent" when dealing with claims under the Fair Housing Act (FHA)); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that disparate impact liability is cognizable as a violation of the FHA because, *inter alia*, "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared."); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (noting that it is effect rather than motivation that is the "touchstone" of establishing a *prima facie* case of racial discrimination under the FHA because "clever men may easily conceal their motivations," and "we now firmly recognize that the arbitrary quality of thoughtlessness

Court should hold disparate impact liability incognizable under the Act.<sup>9</sup> Finally, in 2015, the Supreme Court sided with the U.S. courts of appeals and held that disparate impact liability was cognizable under the FHA.<sup>10</sup> This was an important win for both fair housing advocates and formerly incarcerated individuals because the Department of Housing and Urban Development (HUD) in 2016 decided to follow the Court's decision and issue legal guidance to apply disparate impact specifically to claims involving housing providers' use of criminal background checks.<sup>11</sup>

The Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project Inc.*<sup>12</sup> allows plaintiffs to sue housing providers when their policies and practices disparately impact one of the FHA's protected classes. HUD's legal guidance, titled "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," expands upon the Court's decision to allow for disparate impact liability under the FHA by extending liability to housing providers that have criminal history housing policies, which disparately impact minority applicants. Because minorities are disproportionately convicted of crimes, there is a disproportionate amount of minority housing applicants seeking housing upon release from prison.<sup>13</sup> Thus, while individuals with a criminal history are not a protected class under the FHA,<sup>14</sup> HUD's legal guidance attempts to protect them based on the rationale that housing providers are disparately impacting a group of people based on their race, which is a protected class.<sup>15</sup>

HUD's legal guidance, in theory, should serve as a substantial weapon for

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can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme").

9. 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, 561 (2014) (stating that those opposed to recognition of disparate impact liability have argued, intermittently, that the language of the FHA does not support application of the theory despite over forty years of jurisprudence saying otherwise).

10. See *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2525.

11. See DEP'T OF HOUS. & URBAN DEV., 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 1 (2016) [hereinafter HUD GUIDANCE].

12. 135 S. Ct. 2507 (2015).

13. *Id.* at 1–2.

14. See 42 U.S.C. § 3604(b) (2012).

15. See *id.*

HUD and individual plaintiffs to use against housing providers whose criminal history housing policies disparately impact minority applicants.<sup>16</sup> In practice, however, this is unlikely to be the case because of the way HUD issued its legal guidance.<sup>17</sup> When an agency decides to promulgate a new rule or regulation, the agency typically must conduct notice-and-comment rulemaking as described in the Administrative Procedure Act (APA).<sup>18</sup> Agencies are exempt from using notice-and-comment rulemaking when they issue “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice”—collectively referred to as nonlegislative rules.<sup>19</sup> If the agency’s document is a legislative rule, the rule must be promulgated using notice-and-comment rulemaking, or it will be invalid under the APA.<sup>20</sup>

HUD did not use notice-and-comment rulemaking when it issued its guidance. This likely means that HUD either considered the legal guidance to be a nonlegislative rule, thereby exempt from notice-and-comment rulemaking, or a legislative rule that it would try to enforce under the guise of a nonlegislative rule. In either case, HUD’s action has created an administrative

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16. See Hensleigh Crowell, Note, *A Home of One’s Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left Behind*, 95 TEX. L. REV. 1103, 1124, 1126 (2017) (“HUD’s guidance will likely impact ongoing and future litigation . . . . Much is still left to be resolved regarding HUD’s recommendations for public and private housing owners. But there is no doubt that the pronouncement’s impact on current and future litigation will be great.”).

17. See *infra* Part II.

18. 5 U.S.C. § 553 (2012). Formal rulemaking is another procedural device that agencies may use to promulgate rules. See 5 U.S.C. §§ 556–557. However, despite its availability, agencies have almost completely abandoned this type of rulemaking in recent decades. See, e.g., Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247, 253 (2014) (explaining the Supreme Court’s role in putting an end to agencies’ use of formal rulemaking).

19. 5 U.S.C. § 553(b)(i)(A); see *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (defining general statement of policy). The Administrative Procedure Act (APA) also exempts rules promulgated when the agency “for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued)” that conducting the notice-and-comment process would be “impracticable, unnecessary, or contrary to the public interest.” § 553(b)(i)(B). However, because the Department of Housing and Urban Development (HUD) did not write anything about being exempt due to the good cause exemption in its legal guidance, this exemption is not relevant for purposes of this Comment.

20. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) (“If a purported nonlegislative rule has operative characteristics that only a legislative rule can legitimately possess, courts will not hesitate to invalidate that rule on the ground that the agency did not use proper procedures to adopt it.”).

dilemma for the agency—one that will significantly diminish, if not completely eliminate, any possibility that the legal guidance will be useful in the fight against housing policies that disparately impact minority applicants with criminal backgrounds. If HUD contends that its legal guidance is a nonlegislative rule, it will both lack the legal authority and be unenforceable.<sup>21</sup> Alternatively, if HUD stays put, the best HUD can hope for is that a court will defer to its legal interpretation of the FHA. Nonlegislative rules almost exclusively receive *Skidmore* deference,<sup>22</sup> which is both unpredictable and the weakest form of judicial deference an agency-issued document can receive.<sup>23</sup> Therefore, if HUD wants to help eradicate criminal history housing applications that violate the FHA, the agency must seek alternative options to avoid outcomes contrary to its mission.

Part I of this Comment provides background and context underlying HUD's decision to issue legal guidance pertaining to housing providers' use of criminal history housing policies. This Part focuses on the issues formerly incarcerated individuals face when being released from jail and prison, as well as how the disparate impact theory of liability has developed under the FHA. Part II discusses HUD's legal guidance, with emphasis exclusively on the multi-pronged disparate impact test that must be used to determine if any particular housing provider's criminal history housing policy disparately impacts minority applicants in violation of the FHA. This Part also explains

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21. Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 531 (2014) ("The supposed largest advantage of informal rulemaking over nonlegislative rules is that, once promulgated, legislative rules have the force of law."); see Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 407 (2007) (noting that agencies cannot base an enforcement action solely on a party's noncompliance with the agencies' nonlegislative rules).

22. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that courts must weigh agencies' legal interpretations based on factors that give agencies' interpretations the "power to persuade"); see Russel L. Weaver, *The Undervalued Nonlegislative Rule*, 54 ADMIN. L. REV. 871, 872 (2002); Thomas J. Fraser, Note, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight Into the Procedural Inquiry*, 90 B.U. L. REV. 1303, 1325 (2010).

23. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("[*Skidmore*] has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other."); see also William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1342–43 (2001) ("Few have improved on Justice Jackson's formulation [in *Skidmore*], and other than noting that *Skidmore* deference is deemed 'weak' deference, . . . not much more can be added."); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 330 (2002) (describing how courts view *Skidmore* as a "hollow doctrine" that requires little weight).

how HUD's choice to promulgate its legal guidance without notice-and-comment rulemaking created the administrative dilemma.

Part III addresses the "ossification" of rulemaking and how it influenced HUD's decision to avoid notice-and-comment rulemaking. Finally, Part IV looks at HUD's options moving forward, and recommends that HUD promulgate either a legislative rule that would in substance be very similar to its legal guidance, or alternatively a rule that would incorporate ideas from the ban-the-box movement.

## I. RATIONALE AND CONTEXT FOR HUD'S LEGAL GUIDANCE

### A. *The Underlying Rationale*

The United States currently accounts for approximately 25% of the global incarcerated population despite only holding about 5% of the world's total population.<sup>24</sup> Because the number of people in jails and prisons is so high,<sup>25</sup> the number of people that will leave jail and prison each year and reenter communities is similarly high.<sup>26</sup> Despite their attempts to reenter mainstream society, many formerly incarcerated individuals are unsuccessful because they are repeatedly subjected to "collateral consequences."<sup>27</sup> Referred

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24. Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty? Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F.L. & SOC. CHANGE 1, 11 (2016).

25. See Second Chance Act of 2007, 42 U.S.C. § 17501(b)(1) (2012). In 2007, Congress found that over seven million people were incarcerated in 2002 alone and that nearly 650,000 people are released from Federal and State incarceration each year. *Id.* More recently, the Federal Interagency Reentry Council concluded that more than 600,000 individuals are released from state and federal prisons and that over eleven million people are released from local jails each year. FED. INTERAGENCY RECORD, *supra* note 4, at 3.

26. See FED. INTERAGENCY RECORD, *supra* note 4, at 3 ("Nearly everyone who goes to jail and approximately 95% of persons in state and federal prisons will eventually return home.").

27. See Claire W. Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 44, 48 (2015) (noting that scholars often define collateral consequences as the stigma and prejudice that "burdens and disadvantages former prisoners long after their incarceration spells are complete"); USER GUIDE & FREQUENTLY ASKED QUESTIONS, JUST. CTR., [https://niccc.csgjusticecenter.org/user\\_guide/#q01](https://niccc.csgjusticecenter.org/user_guide/#q01) (last visited Nov. 1, 2017) (defining "collateral consequences" as the "penalties, disabilities, or disadvantages imposed upon a person as a result of a criminal conviction, either automatically by operation of law or by authorized action of an administrative agency or court on a case by case basis"); see also Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) ("People convicted of crimes are not subject

to by some as the new “Civil Death,”<sup>28</sup> collateral consequences are devastating for many ex-convicts because they affect all aspects of life, ranging from family relations, to employment, to housing.<sup>29</sup>

As it stands today, the inability to secure housing is one of the most detrimental collateral consequences that formerly incarcerated individuals face.<sup>30</sup> Formerly incarcerated individuals seeking housing usually must satisfy a number of inquiries into matters of character, lifestyle, and personal history.<sup>31</sup> Many housing providers require analysis of whether an applicant has a criminal history before determining whether to sell or rent housing to that applicant,<sup>32</sup> and every state currently has a criminal records repository where

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to just one collateral consequence, or even a handful. Instead, hundreds and sometimes thousands of such consequences apply under federal and state constitutional provisions, statutes, administrative regulations, and ordinances.”).

28. Chin, *supra* note 27, at 1790; see Marie Gottschalk, *The Past, Present, and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUB. POL’Y 483, 489 (2011) (“For many former offenders, their time in purgatory never ends, even after they have served their prison sentence or successfully completed their parole or probation. Former felons . . . risk losing the right to vote and are subject to other acts of ‘civil death’ that push them further and further to the political, social and economic margins.”).

29. See JOCELYN FONTAINE & JENNIFER BIESS, URBAN INSTITUTE, HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 2 (2012) (stating that ex-convicts face a long list of challenges upon release “from locating appropriate and stable housing, obtaining gainful employment, reuniting with their families and children . . . to meeting their more basic, elemental needs for clothing, food, and identification”); see also Chin, *supra* note 27, at 1791 (explaining that subjection to collateral consequences involving the “actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities” is often a more severe and long-lasting effect of conviction than either imprisonment or punitive fines).

30. See Thomas P. LeBel, *Housing as the Tip of the Iceberg in Successfully Navigating Prisoner Reentry*, 16 CRIMINOLOGY & PUB. POL’Y 891, 892–94 (2017); see also Douglas N. Evans & Jeremy R. Porter, *Criminal History and Landlord Rental Decisions: A New York Quasi-Experimental Study*, 11 J. EXPERIMENTAL CRIMINOLOGY 21, 22 (2014) (“Stable housing is essential for successful offender reentry.”); Herbert et al., *supra* note 27, at 45 (noting that some researchers argue that securing housing is formerly incarcerated individuals’ “most pressing and immediate short-term need”).

31. See Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 320 (2011) (“Today’s residential landlords are able to choose their tenants much more selectively than in the past, and do so in the hopes of reducing the risk of leasing to a tenant who will default in rent, damage the premises, or be otherwise problematic.”).

32. See Michael G. Allen et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 155, 191 (2014) (noting that criminal background checks are increasingly widespread).



police, prosecutors, and courts will send arrest data, charges, and dispositions.<sup>33</sup> Housing providers are able to use these repositories and ask for assistance from tenant-screening companies to easily locate a prospective buyer or renter's criminal background history and any other information deemed relevant.<sup>34</sup> Formerly incarcerated individuals, therefore, have difficulties securing stable housing immediately after being released from jail or prison, which in turn hurts them, their families, and society as a whole.<sup>35</sup>

Despite this, housing providers typically justify their criminal history policies on the basis of public safety, arguing that they are protecting the safety and health of the residents already living in the community.<sup>36</sup> Public safety, however, should not be able to justify the use of criminal history application policies that in effect disparately impact minority applicants because providing stable housing for ex-convicts may in large part actually increase rather than decrease public safety.<sup>37</sup> Minorities make up approximately 30% of the

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33. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 180 (2008).

34. See Dunn & Grabchuk, *supra* note 31, at 320 (observing that in modern times, a rental applicant's complete residential history, credit report, criminal record, civil litigation background, and other information are available within hours or even minutes); see also David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 11 (noting that several companies have started to offer web-based operating systems that systematically apply a predetermined algorithm to all applications to identify risks).

35. See Kropf, *supra* note 1, at 79 ("Without stable housing, many people are unable to provide a safe home for themselves and their families. As parents suffer, so do their children, who are left homeless or put into foster care due to unnecessarily punitive [criminal history application] policies.").

36. See Tran-Leung, *supra* note 2, at 9. But see Crowell, *supra* note 16, at 1109–10 (identifying housing providers' fear of being held liable for crimes committed by tenants with criminal records as another justification for landlords' ban of ex-convicts); *Unlocking Discrimination*, EQUAL RIGHTS CTR., 3, 31, (2016) <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf> (finding that "bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record").

37. See Memorandum from President Barack Obama on Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals to Heads of Exec. Dep'ts & Agencies, 2016 DAILY COMP. PRES. DOC. 1 (Apr. 29, 2016) [hereinafter 2016 Memorandum] ("Policies that limit the opportunities for people with criminal records create barriers to employment, education, housing, health care, and civic participation. This lack of opportunity decreases public safety, increases costs to society, and tears at the fabric of our Nation's communities."); WASH. LAWYERS' COMM., *supra* note 3, at 2 (2014) ("Research shows that housing and employment barriers, for instance, specifically increase the risk of recidivism, thus reducing public safety while increasing the costs of the criminal justice system and social services.").

total U.S. population,<sup>38</sup> but the percentage of minorities being arrested and charged with crimes is disproportionately higher.<sup>39</sup> Because housing providers' public safety argument is weak—or at the very least not a sufficient justification for the use of criminal history application policies that disparately impact minority applicants—it should not be able to thwart disparate impact claims by itself.

In an effort to combat collateral consequences, President Barack Obama formally created the Federal Interagency Reentry Council to develop and advance innovative and comprehensive approaches to reentry.<sup>40</sup> The Council is co-chaired by the Attorney General and the Director of White House Domestic Policy Council, and it collaborates with the heads of approximately twenty other federal agencies.<sup>41</sup> Between 2011—when it was initially created—and 2016, the Council worked to help individuals reentering mainstream society “have a meaningful chance to rebuild their lives and reclaim their futures.”<sup>42</sup> Then, in 2016, with those goals in mind, the Office of Personnel Management (OPM) implemented a new final rule that brought in ideas from a relatively unknown movement known as “ban-the-box.”<sup>43</sup>

This new rule's purpose is to ensure that all job applicants with a criminal history have a fair shot at federal employment.<sup>44</sup> In crafting its rule, OPM intended to make clear that all people, including those who were formerly incarcerated, would have a fair opportunity to compete for federal employment.<sup>45</sup> OPM also acknowledged that, where criminal history-based disqualifications for employment have a disparate impact, the hiring agency will need to be prepared to demonstrate that its policy is sufficiently job-related

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38. See *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/> (last visited Nov. 1, 2017). In 2016, minorities made up only 29.9% of the total U.S. population, which as of July 1, 2016, was estimated at 323,127,513 million people. *Id.*

39. See Allen et al., *supra* note 32, at 191; see also Kropf, *supra* note 1, at 84 (“Though discrimination against criminal records is a formally ‘color-blind’ process, minorities particularly feel its effects because they are disproportionately targeted by the criminal justice system.”).

40. FED. INTERAGENCY RECORD, *supra* note 4, at 1.

41. 2016 Memorandum, *supra* note 37.

42. FED. INTERAGENCY RECORD, *supra* note 4, at iii.

43. Recruitment, Selection, and Placement (General), 81 Fed. Reg. 86,555 (Dec. 1, 2016) (to be codified at 5 C.F.R. pts. 330, 731). The ban-the-box movement began in the 1990s when civil rights advocates began to help formerly incarcerated individuals obtain employment. Christina O’Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2804 (2015).

44. 81 Fed. Reg. at 86,555.

45. *Id.*

and consistent with business opportunity to defend itself from liability.<sup>46</sup> As such, the rule revises OPM's regulations regarding when in the hiring process the hiring agency may request information that is typically collected during a criminal background check.<sup>47</sup>

As of now, neither OPM nor any other agency has promulgated a new rule that would apply the ban-the-box movement's ideas to the housing context. Nevertheless, by issuing its legal guidance, HUD has taken a step in the right direction toward combatting another important collateral consequence: housing.

### *B. Development of Disparate Impact Liability in Housing*

The disparate impact theory of liability requires plaintiffs to prove that the defendant's practice is discriminatory in operation, regardless of intent.<sup>48</sup> The theory of liability provides plaintiffs with the ability to challenge policies or practices that result from "unconscious prejudices and disguised animus that escape easy classification."<sup>49</sup> In the housing context, specifically, plaintiffs may challenge housing providers' policies under the theory if they believe the policy, regardless of the housing providers' intent, causes a discriminatory effect.<sup>50</sup>

Those in favor of applying disparate impact liability in the housing context have historically argued that disparate impact liability is a "fundamental component" of the FHA's protection against housing discrimination.<sup>51</sup> They contend that disparate impact liability is a "critical tool" for eliminating housing policies that, whether intentionally or not, perpetuate existing structural inequalities between different ethnicities in our society.<sup>52</sup> Further, they argue

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46. *Id.* at 86,555–56.

47. *Id.*

48. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) ("In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale." (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009))).

49. *Id.* at 2522.

50. *Id.*

51. Steven Raphael, *Incarceration and Prisoner Reentry in the United States*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 192, 211 (2011).

52. See *id.*; see also Rigel C. Oliveri, *Beyond Disparate Impact: How the Fair Housing Movement Can Move On*, 54 WASHBURN L.J. 625, 625 (2015) (stating that the theory of liability is a vital tool for fair housing advocates because it permits them to "challenge institutional behaviors

that disparate impact liability furthers the FHA's goal of promoting integrated housing and preventing housing providers from implementing policies that disparately impact minorities. Disparate impact liability, in their view, permits plaintiffs with the opportunity to prove that housing providers are very subtly discriminating against minorities.<sup>53</sup> On the other hand, opponents of using disparate impact liability under the FHA argue that the theory requires courts to consider race, thereby leading to the "race-conscious thinking" that is exactly what the FHA supposedly seeks to eradicate.<sup>54</sup> They contend that the theory is too far-reaching and that housing providers will unfairly be held liable whenever even the slightest bit of proof indicates that their policy disparately impacts one of the FHA's protected classes.<sup>55</sup>

Despite criticism about the use of disparate impact liability under the FHA, almost all U.S. courts of appeals have held that it was cognizable under the Act.<sup>56</sup> This is in contrast to the Supreme Court, which prior to 2015 had never decided a case on the merits involving disparate impact liability under

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that harm minority groups and municipal practices that perpetuate long-standing segregated patterns, without having to go through the often impossible process of identifying a specific bad actor with explicitly discriminatory motives").

53. See Allen et al., *supra* note 32, at 182–83.

54. *Id.* at 156; see Schneider, *supra* note 9, at 575–76 (explaining opponents' belief that using disparate impact liability under the FHA requires housing providers to consider race in a way that the FHA expressly prohibits).

55. See Schneider, *supra* note 9, at 579.

56. *Id.* at 561 (noting that all eleven circuit courts of appeals to hear the question of whether disparate impact is cognizable under the FHA have answered affirmatively); accord Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act & the Equal Credit Opportunity Act*, 18 B.U. PUB. INT. L.J. 1, 31 n.228 (2008) (finding that "the lone holdout, the D.C. Circuit, has noted the other courts' general consensus and has implied its agreement").

the FHA.<sup>57</sup> In *Inclusive Communities Project, Inc.*,<sup>58</sup> the Court finally reviewed the merits of a disparate impact claim under the FHA and held disparate impact liability was cognizable under the Act.<sup>59</sup>

## II. HUD'S LEGAL GUIDANCE AND THE ADMINISTRATIVE DILEMMA

### A. What Does It Say?

In an effort to more formally eradicate criminal history housing practices that disparately impact minority applicants, HUD issued legal guidance interpreting how disparate impact liability under the FHA could be applied to criminal history housing policies.<sup>60</sup> This legal guidance applies the disparate impact three-pronged test analyzed in *Inclusive Communities Project, Inc.* to housing providers' use of criminal history housing policies.<sup>61</sup>

Although the legal guidance does not create the multi-pronged test for disparate impact liability,<sup>62</sup> it does address, for the first time, how each step of the test applies in the context of housing providers' criminal history policies. First, plaintiffs are required to prove that the housing provider's criminal history policy creates a discriminatory effect against a group of people based on their race.<sup>63</sup> To meet this burden, they must present evidence prov-

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57. Prior to 2015, the Supreme Court only answered whether disparate impact liability was cognizable in the employment context. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 436 (1971). However, the Court did come close on multiple occasions. For example, in 1988, the Court reviewed a disparate impact claim related to the FHA, but the Court ultimately did not reach the question of whether it was cognizable under the Act because the appellants conceded its applicability. See *Huntington v. Huntington Branch*, 488 U.S. 15, 18 (1988) (per curiam). The Court also granted certiorari to review whether disparate impact liability was cognizable under the FHA in 2012 and 2013 but both cases settled prior to the Court's review. See *Mt. Holly v. Mt. Holly Gardens Citizen in Action, Inc.*, 133 S. Ct. 2824 (2013) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Third Circuit), *cert. dismissed*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit), *cert. dismissed*, 132 S. Ct. 1306 (2012) (mem.).

58. 135 S. Ct. 2507.

59. *Id.* at 2525.

60. HUD GUIDANCE, *supra* note 11.

61. *Id.* at 2–7. The legal guidance also addresses intentional discrimination, but it is not relevant for purposes of this Comment. See *id.* at 8.

62. HUD previously introduced the three-step standard for disparate impact claims under the FHA in a 2013 regulation. See 24 C.F.R. § 100.500 (2016).

63. HUD GUIDANCE, *supra* note 11, at 3.

ing that the housing practice or policy “actually or predictably” causes a disparate impact.<sup>64</sup> Depending on the circumstances, they may use local, state, or national statistics to prove that a housing provider is causing a disparate impact.<sup>65</sup> However, plaintiffs *must* use local and state statistics rather than national statistics unless (1) local and state statistics are not “readily available,” or (2) no objective reason exists to believe that the local and state statistics differ from national statistics.<sup>66</sup> Ultimately, it is the court’s job to determine, on a case-by-case basis, whether the plaintiff’s evidence sufficiently shows that the housing provider’s policy is disparately impacting minority applicants.<sup>67</sup>

The second step shifts the burden from the plaintiff to the housing provider. Once the plaintiff sufficiently proves that the housing provider’s policy is disparately impacting minority applicants, the housing provider must be able to prove that its policy is necessary to achieve a “substantial, legitimate, non-discriminatory interest.”<sup>68</sup> While housing providers are likely to argue that public safety is a substantial, legitimate, non-discriminatory interest that satisfies this burden, HUD states that public safety is only a partial justification for a criminal history housing policy, and solely relying on a public safety argument will not be enough to satisfy their burden.<sup>69</sup>

Third, if the housing provider successfully convinces a court that the interest rationalizing the policy is sufficient, the burden shifts back to the plaintiff.<sup>70</sup> At this stage, the plaintiff needs to show that the housing provider could have implemented an alternative housing policy with a less discriminatory effect to serve the housing provider’s interest at stake.<sup>71</sup> As HUD notes, a sufficient alternative policy might be one in which the housing provider still

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64. *Id.*

65. *Id.* Plaintiffs may, but are not required to, present additional evidence to determine whether local and state statistics are consistent with national statistics. *Id.* at 4.

66. *Id.*

67. *Id.*

68. *Id.*; see Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,470 (Feb. 15, 2013) (codified in 24 C.F.R. pt. 100) (defining a “substantial” interest as “a core interest of the organization that has a direct relationship to the function of that organization,” and “legitimate” as “genuine and not false”).

69. See HUD GUIDANCE, *supra* note 11, at 4–5. Satisfying the second step of the analysis does not necessarily mean that the policy does not disparately impact minority applicants. Rather, it means that the court concluded that the housing provider’s interest was important enough that any discriminatory effect the policy may have was not enough to hold the housing provider liable under the FHA.

70. *Id.* at 7.

71. *Id.*

reviews an individual's criminal history. Under such circumstances, the housing provider is required to consider the circumstances surrounding the individual's criminal conduct, the age of the individual at the time of the criminal conduct, evidence of prior good tenant history before and after the conviction, and evidence that the individual is trying to rehabilitate him or herself.<sup>72</sup>

### *B. Why It Causes an Administrative Dilemma*

Plaintiffs who sue housing providers for using a criminal history policy that allegedly disparately impacts them based on their criminal record in violation of the FHA must satisfy the multi-pronged test articulated above. However, HUD's promulgation of its legal guidance without notice-and-comment rulemaking has created an administrative dilemma that will leave plaintiffs weary of relying on the legal guidance because of the uncertainty regarding the legal guidance's validity under the APA.

The APA grants all executive agencies the authority to implement rules.<sup>73</sup> Agencies may issue "formal" or "legislative" rules, but they must follow the APA's notice-and-comment procedures because such rules carry the force of law.<sup>74</sup> The notice-and-comment process has three steps. First, the agency is required to publish a notice of proposed rulemaking in the Federal Register.<sup>75</sup> Second, the agency must provide all interested parties the opportunity to submit comments on the proposed rulemaking.<sup>76</sup> Third, when issuing the final rule, the agency must consider and respond to all significant comments and include in the rule's text a general statement of its basis for implementing the rule and its purpose.<sup>77</sup>

Agencies, however, are exempt from notice-and-comment rulemaking when they issue nonlegislative rules.<sup>78</sup> These rules are nonbinding and unenforceable;<sup>79</sup> however, determining whether a specific agency document is

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72. *Id.*

73. See Administrative Procedure Act, 5 U.S.C. § 552 (2012). The Act defines "rule" very broadly as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." *Id.* § 551(4).

74. See *id.*; Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 7–8 (2003).

75. 5 U.S.C. § 553(b).

76. *Id.* § 553(c).

77. *Id.*

78. *Id.* § 553(b)–(c).

79. See Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695, 699 (2007)

a legislative or a nonlegislative rule can be extremely difficult and is, unsurprisingly, a major source of confusion in administrative law.<sup>80</sup> In fact, even in situations suggesting an easy decision—for example, when agencies explicitly state that the document is not meant to be binding—the coercive effect of the document may lead a court to determine the document is a legislative rule.<sup>81</sup>

Courts have tried to create a bright line test to distinguish between the two, but there continues to be no majority consensus.<sup>82</sup> For example, the Supreme Court has attempted to create a uniform rule by relying on the

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(noting that nonlegislative rules do not bind agencies or the public); Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 372 (2008). *But see* Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1318 (2001) (“Often, though, the practical effect of a guidance is just as automatically binding as the effect of a fully promulgated regulation.”); Fraser, *supra* note 22, at 1309 (“Although nonlegislative rules are, by definition, not binding on private parties, they can have the practical effect of binding.”).

80. Compare David Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) (describing the quest for a test to distinguish between legislative and nonlegislative rules as “maddeningly hard”), and Johnson, *supra* note 79, at 704 (noting that there is significant confusion among academic scholars regarding the creation of a bright line test distinguishing the two types of rules), with Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1321 (1992) (recognizing that while most legal scholars have had difficulty distinguishing between legislative and nonlegislative rules, the distinction between the two is actually easily comprehensible).

81. See Robert A. Anthony, “Well, You Want the Permit, Don’t You?” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 32 (1992) (explaining that agencies will often make use of nonlegislative rules that impose obligations or standards that as a practical matter are mandatory because they have the purpose or effect of imposing a practical binding effect, if not a legally binding one, upon the regulatees); Franklin, *supra* note 80, at 305 (stating that nonbinding rules often, in effect, “command compliance” and “thus have substantial practical effects on the public, regardless of whether they are framed as mere guidances”).

82. See Franklin, *supra* note 80, at 278 (asserting that courts currently do their best to distinguish which rules are legislative in nature and which are not by examining the text, structure, and history of the rule, its relationship to existing statutes and rules, and the manner in which it has been enforced, but have been unable to devise a uniform test); Funk, *supra* note 23, at 1324 (distinguishing between legislative and nonlegislative rules “has posed problems for the courts, and the Supreme Court has not provided a definitive answer to the question of how to identify an interpretive rule. As a result, the courts have not found agreement on one test for distinguishing between interpretive rules and legislative rules.”).



Attorney General's 1947 interpretation of the APA.<sup>83</sup> The Attorney General's Manual identifies three distinct definitions for legislative rules, interpretive rules, and general statements of policy.<sup>84</sup> Legislative rules are documents issued pursuant to statutory authority and with the intention of implementing the relevant statute.<sup>85</sup> Interpretive rules are documents that advise the public about the agency's construction of the statutes and the rules that the relevant agency administers.<sup>86</sup> Finally, general statements of policy are documents that advise the public prospectively of the manner in which the relevant agency intends to exercise its discretionary power.<sup>87</sup>

Nevertheless, lower courts have largely chosen not to follow the Court's decision to use that manual, instead relying on a wide variety of factors. Among the list of factors employed include: whether the rule has a "legal effect;"<sup>88</sup> whether the substantive effect of the rule is sufficiently grave so as to require notice-and-comment rulemaking for the protection of the policies underlying the APA;<sup>89</sup> whether the rule establishes a "binding norm" or leaves the agency the freedom to exercise discretion in individual cases;<sup>90</sup> whether the agency is exercising its rulemaking power to clarify an existing

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83. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (noting that the Court has repeatedly given great weight to the Attorney General's 1947 manual interpreting the APA); see also, e.g., *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

84. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5, 30 n.3 (1973).

85. *Id.*

86. *Id.* More recently, the Supreme Court has stated that the "critical feature" of interpretive rules is that they are issued with the purpose of advising the public of the agency's construction of the statutes and rules which it administers. See *Perez v. Mortg. Bank Ass'n*, 135 S. Ct. 1199, 1204 (2015).

87. DEP'T OF JUSTICE, *supra* note 84, at 30 n.3.

88. See, e.g., *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) ("The most important factor in differentiating between binding and nonbinding actions is 'the actual legal effect (or lack thereof) of the agency action in question.'").

89. See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5–6 (D.C. Cir. 2011).

90. See *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009); *Prof'l & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596–97 (5th Cir. 1995); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983).

statute or regulation, or implementing new laws, rights, and duties upon regulatees;<sup>91</sup> and finally, whether the rule is binding as a practical matter.<sup>92</sup>

Because there is no uniform test to distinguish between legislative and nonlegislative rules, there is no sure way to anticipate how a reviewing court would rule on HUD's legal guidance. This creates uncertainty for an agency that, more than likely, thought that it would simply issue legal guidance and change the housing market for the better. What is more certain, however, is that when an agency like HUD issues a nonlegislative rule and then tries to enforce it, those adversely affected will do everything in their power to challenge the rule's validity on the basis that HUD cannot enforce rules issued without notice-and-comment rulemaking.<sup>93</sup>

HUD may argue that its rule is nonlegislative and therefore exempt from notice-and-comment rulemaking, but housing providers challenging the legal guidance are correct when they contend that HUD cannot enforce the legal guidance if the guidance is a nonlegislative rule.<sup>94</sup> Making matters worse from HUD's perspective is the fact that the rule will only receive *Skidmore* deference<sup>95</sup> if a reviewing court determines that it is a nonlegislative

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91. See *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) (quoting *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992)); *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994) (clarifying that while the substantial impact is relevant to a rule's classification as a legislative or interpretive rule, such an impact will not compel a finding that a rule is legislative); *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (asserting that "the central question is whether an agency is exercising its rulemaking power to clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act.").

92. See *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 (stating that nonlegislative rules will be considered binding as a practical matter if the rule has language that leads affected parties to reasonably believe that they will suffer consequences if they do not conform to it).

93. See *Franklin*, *supra* note 80, at 278 (explaining that the typical sequence of events is as follows: "a federal agency issues some sort of pronouncement . . . without using notice and comment; parties that believe they are adversely affected by the new pronouncement go to court, perhaps before it has even been enforced against anyone; the challengers argue that the pronouncement is in fact a legislative rule and is therefore procedurally invalid for failure to undergo notice and comment.").

94. See *Mendelson*, *supra* note 21, at 412 (asserting that agencies cannot base an enforcement action of their legal guidance solely on a regulated entity's noncompliance with the guidance because they are not legally binding).

95. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

rule.<sup>96</sup> *Skidmore* deference is the lowest and most unpredictable form of judicial deference a court can grant to an agency's interpretation of a rule.<sup>97</sup> Under *Skidmore*, courts use a sliding scale to determine whether the agency's interpretation has the "power to persuade" based on the thoroughness evident in the agency's consideration, the validity of the agency's reasoning, and the agency's consistency with earlier and later pronouncements.<sup>98</sup> Courts are free to grant varying levels of *Skidmore* deference based on the individual case.<sup>99</sup>

By issuing legal guidance without notice-and-comment rulemaking, HUD has created a situation that severely hinders its ability to help formerly incarcerated individuals and to eradicate housing providers' criminal history housing policies that cause a disparate impact. As such, formerly incarcerated individuals that viewed the legal guidance as a means for potential salvation against housing providers should be wary to rely on the legal guidance as it stands today.<sup>100</sup>

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96. See generally Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 8–11 (2007) (identifying several reasons why *Skidmore* is problematic).

97. See Funk, *supra* note 23, at 1342–43 ("Few have improved on Justice Jackson's formulation [of *Skidmore* deference], and other than noting that *Skidmore* deference is deemed 'weak' deference, compared to *Chevron's* 'strong' deference, not much more can be added."); Womack, *supra* note 23, at 330 (observing that many courts appear to view *Skidmore* as a hollow doctrine requiring little respect from courts).

98. See *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 304 (3d Cir. 2012) ("We, like many of our sister courts of appeals, have adopted *Mead's* conceptualization of the *Skidmore* framework as a 'sliding-scale' test in which the level of weight afforded to an interpretation varies depending on our analysis of the enumerated factors.").

99. See, e.g., *Lowe v. SEC*, 472 U.S. 181, 216 (1985) (White, J., concurring) (granting *Skidmore* deference depending on whether the agency's construction of the statute it is charged with enforcing is contemporaneous with the enactment of the statute); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 479–80 (6th Cir. 2015) (determining how much *Skidmore* deference to provide based on whether the agency interpreted the relevant statute consistently and has grounded its interpretation in the text of the statute using sound legal reasoning); *Sai Kwan Wong v. Doar*, 571 F.3d 247, 261 (2d Cir. 2009) (granting *Skidmore* deference based on whether the agency's interpretation was applicable to all cases rather than merely *ad hoc*).

100. See Weaver, *supra* note 22, at 879 (asserting that regulatees should be worried about agency-issued guidances because reviewing courts will not accept them if not in the proper format and because they will likely only receive *Skidmore* deference, thereby making it possible for the court to reject the agency's position and rely on its own interpretation instead).

### III. WHY HUD AVOIDED NOTICE-AND-COMMENT RULEMAKING

#### A. Ossification

The APA's notice-and-comment rulemaking represents a list of minimum essential rights and procedures due to the public.<sup>101</sup> The rulemaking process does a number of things to enhance public participation, including granting the public the ability to provide input to the agency, which then takes that information and promulgates rules based on accurate, rational ideas that it may not have considered otherwise.<sup>102</sup> Deliberation and reception of public comments, when creating important policies that will affect a major portion of the population, are both important and necessary to uphold the democratic principles that our country was founded upon.<sup>103</sup> In fact, avoiding notice-and-comment rulemaking in favor of promulgating nonlegislative rules compromises agencies' duty of care and obedience to the law because sound, rational policies that are consistent with both existing legal standards and societal norms typically require information from outside sources and a wide range of experts.<sup>104</sup>

HUD's decision to issue its legal guidance without notice-and-comment rulemaking is nevertheless unsurprising. The agency's decision continues what has become known as the "ossification" of rulemaking,<sup>105</sup> which has resulted from an increasing amount of post-APA requirements that agencies must follow before using notice-and-comment rulemaking.<sup>106</sup> Courts began

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101. H.R. REP. NO. 79-1980, at 250-51 (1946); see also Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 343-44 (2009) (explaining that individuals subject to administrative enforcement action or regulation are entitled to procedural protections under the APA and the U.S. Constitution's Due Process Clause, while individuals adversely affected by agency guidance often receive no procedural protections despite having the same interests).

102. See Mantel, *supra* note 101, at 345.

103. See Manning, *supra* note 20, at 904; Cass R. Sunstein, "Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking, 68 ADMIN. L. REV. 491, 500 (2016) ("Before committing themselves to one course of action or another, public officials should listen to the people they are privileged to serve, above all those whom they would affect.").

104. Mantel, *supra* note 101, at 390; Sunstein, *supra* note 103, at 499.

105. See Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483 (1997) (defining "ossification" as "inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules.").

106. See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) ("Throughout the late 1970s and early

in the 1960s to require agencies to promulgate rules based on information in the public record; courts also began to review the rationality of the resulting regulations.<sup>107</sup> These courts scrutinized agencies' reasoning using a "hard look" review in an attempt to make sure that agencies were carefully reviewing their decisions to promulgate new regulations.<sup>108</sup> Congress, with similar goals in mind, has also enacted several pieces of legislation that impact agencies' ability to issue regulations quickly and efficiently: the Paperwork Reduction Act of 1980,<sup>109</sup> the Regulatory Flexibility Act of 1980,<sup>110</sup> the Government in the Sunshine Act,<sup>111</sup> and the Contract with American Advancement Act.<sup>112</sup> Congress is also currently in the process of enacting further legislation that would cause even more of a burden on agencies seeking to promulgate new regulations.<sup>113</sup>

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1980s, however, the executive branch and, to a more limited extent, Congress added analytical requirements and review procedures, often at the behest of the regulated industries. These initiatives and the continuing scrutiny of reviewing courts under the hard look doctrine caused the rulemaking process to 'ossify' to a disturbing degree.").

107. See Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1072 (2000) (describing how these new court-imposed requirements created a "more dilatory, cumbersome, and legalistic system"); see also Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, 23 NAT. RESOURCES & ENV'T 13, 14 (2009) ("This doctrine, whether rightfully or so, arguably further encumbers the rulemaking process by influencing an agency's willingness to engage in a rulemaking process that might ultimately be remanded to have it done over.").

108. See generally Seidenfeld, *supra* note 105, at 490–99 (providing an in-depth explanation of the "hard look" doctrine of review and how from the agency's perspective it has become an "icy stare that freezes action").

109. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (amending 44 U.S.C. §§ 3501–3520) (creating the Office of Information & Regulatory Affairs (OIRA) and imposing several procedural requirements on agencies regarding collecting information from the public).

110. Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (amending 5 U.S.C. §§ 601–612) (requiring agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing how any proposed rule would affect small entities).

111. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (amending 5 U.S.C. § 552) (requiring, subject to ten listed exceptions, that every portion of every meeting be open to the public).

112. Contract with American Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (amending 5 U.S.C. §§ 801–808) (instructing agencies promulgating a regulation to submit a report to Congress and granting Congress the ability to reject the final implementation of the regulation).

113. See Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R.

Finally, the White House has released several presidential executive orders pertaining to agency regulation. In 1981, for example, President Ronald Reagan issued Executive Order 12,291, which required all agencies to adhere to five requirements when “promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation” and imposed several other procedural requirements upon agencies to make sure they followed those requirements.<sup>114</sup> He then issued Executive Order 12,498 in 1985 to create a regulatory planning process that requires each agency to submit to the Director of the Office of Management & Budget a statement of its regulatory policies, goals, and objectives for the year in question.<sup>115</sup>

In 1993, President William J. Clinton issued Executive Order 12,866. As a result, agencies became responsible for assessing all the costs and benefits of available regulatory alternatives, preparing a “Regulatory Plan” detailing the most important significant regulatory actions that the agency expected to issue during that fiscal year, and creating a program by which the agency will review its significant regulations to assess whether any of them should be modified or eliminated.<sup>116</sup> In 2011, President Barack Obama issued Executive Order 13,563, reaffirming the requirements in Executive Order 12,866 but also adding that agencies must “ensure the objectivity of any scientific and technological information and processes used to support the agency’s regulatory actions.”<sup>117</sup> Finally, in 2017, President Donald Trump issued Executive Order 13,771, which requires all new regulations to be offset financially through the elimination of at least two other regulations the agency previously implemented.<sup>118</sup>

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26, 115th Cong. (revising provisions related to congressional review of agency rulemaking); Independent Agency Regulatory Analysis Act of 2015, S. 1607, 114th Cong. (authorizing the President to require an independent regulatory agency to comply with regulatory analysis requirements that are currently only applicable to other federal agencies).

114. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,193–97 (Feb. 17, 1981).

115. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 4, 1985). The Office of Management & Budget’s responsibility for reviewing agency regulatory actions has increased significantly over time, starting with President Reagan’s executive orders. See, e.g., Lawrence Susskind & Gerard McMahon, *The Theory & Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 135–36 (1986).

116. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993). Former President George W. Bush administered Executive Order 13,422 in 2007 to amend Executive Order 12,866, but President Obama then repealed Order 13,422 in 2009. See Exec. Order No. 13,497, 74 Fed. Reg. 6113, 6113 (Jan. 30, 2009).

117. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

118. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

#### IV. HUD'S BEST OPTIONS MOVING FORWARD

When HUD issued its legal guidance, the agency took a step in the right direction toward helping formerly incarcerated individuals secure fair housing opportunities. However, as discussed in Part III, HUD's decision to avoid notice-and-comment rulemaking is not entirely surprising from an administrative standpoint. Over the past few decades, agencies have ossified from notice-and-comment rulemaking and largely have been in favor of implementing nonlegislative rules. In some circumstances, however, agencies do promulgate legislative rules using notice-and-comment rulemaking despite ossification and arguments that the notice-and-comment process has become increasingly long and "cumbersome" over the past few decades.<sup>119</sup> This is one circumstance in which HUD should have reversed the trend toward nonlegislative rules. By not doing so, HUD now faces an administrative dilemma that will diminish any impact the legal guidance might have had on the housing market.

Notice-and-comment rulemaking provides several benefits. The process serves "important values,"<sup>120</sup> represents a much more deliberative, socially acceptable form of establishing the rule of law that the public can accept,<sup>121</sup> and provides interested parties who are adversely affected by the promulgated rule the opportunity to include their input in the agency's decisionmaking process.<sup>122</sup> The process also "improves the quality of agency decisionmaking by mobilizing the whole spectrum of interested parties to direct arguments, information, and criticism to the agency."<sup>123</sup> Further, as Congress stated when enacting the APA, notice-and-comment rulemaking is a "healthy process" that creates a system in which the public can force agencies to be more responsive to its needs and in which the public can check to make

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119. Franklin, *supra* note 80, at 283; Kalen, *supra* note 107, at 13; McKee, *supra* note 79, at 377; Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932 (2008) (finding that the procedural costs to rulemaking, from the agency's perspective, are not so high as to prohibit considerable rulemaking activity by agencies); *see supra* Part II. In fact, HUD has used notice-and-comment rulemaking to issue legislative rules related to fair housing very recently. *See, e.g.*, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100).

120. Anthony, *supra* note 80, at 1356 (noting that using notice-and-comment rulemaking provides for the "enrichment of the agency's information and enhancement of the rule's acceptability, flowing from the public's opportunity to present facts and views.").

121. Manning, *supra* note 20, at 904.

122. *Id.*

123. *Id.*

sure that agencies are not overstepping their boundaries.<sup>124</sup> HUD, therefore, would be remiss not to promulgate a rule substantively similar to its legal guidance through notice-and-comment rulemaking.<sup>125</sup>

Alternatively, HUD should consider following OPM's strategy and promulgate a new rule that implements ban-the-box ideas into federal housing.<sup>126</sup> Currently, twenty-nine states and more than 150 cities and counties throughout the United States have implemented a policy to eliminate questions (i.e., remove "the box") regarding an individual's history of criminal conviction from public employers' applications.<sup>127</sup> But despite the campaign's increasing success over the years,<sup>128</sup> the focus of the campaign has historically been exclusively on employment.<sup>129</sup>

Two major jurisdictions recently began to change and extend ban-the-box to the housing context. In San Francisco, the city and county adopted a policy because they recognized that ex-convicts are often "plagued by old or minor arrest or conviction records."<sup>130</sup> These records lead many ex-convicts to not even apply for housing because they know that checking the "box" indicating that they have a conviction will often automatically exclude them from consideration.<sup>131</sup> Thus, in an effort to alleviate recidivism and increase opportunities for stable housing, San Francisco implemented the policy that now makes it unlawful for housing providers to require disclosure of six factors related to criminal history.<sup>132</sup> Further, the policy also requires housing providers, when making the determination of whether to accept or deny a housing applicant, to conduct an individualized assessment that focuses on:

124. *See id.* at 907.

125. *See Johnson, supra* note 79, at 732 (noting that agencies suffer from a lack of public comments when circumventing the notice-and-comment process because the parties adversely affected may have provided the agency with useful information in determining the broader implications of its decision to create a regulation).

126. *See supra* notes 42–46 and accompanying text.

127. BETH AVERY & PHIL HERNANDEZ, NAT'L EMP'T LAW PROJECT, BAN THE BOX: FAIR CHANCE EMPLOYMENT GUIDE 1 (2017). For a complete list of cities, counties, and states that have adopted ban-the-box policies, see generally *id.*

128. *Id.* at 1; *see* Michael Pinard, *Criminal Records, Race, and Redemption*, 16 N.Y.U.J. LEGIS. & PUB. POL'Y 963, 984–86 (2013) (explaining how states and local organizations have in recent years increasingly implemented ban-the-box ideas to reduce employment-related obstacles for formerly incarcerated individuals).

129. *See AVERY & HERNANDEZ, supra* note 127, at 1 (noting that the ban-the-box campaign's initiatives since its inception have been designed to help job applicants).

130. S.F., CAL., POLICE CODE art. 49, § 4902 (2014).

131. *Id.*

132. *See id.* § 4906(a)(1)–(6).



(1) time that has elapsed since the conviction or unresolved arrest, (2) any evidence of inaccuracy in the background check, (3) evidence of rehabilitation, and (4) any other mitigating factors.<sup>133</sup>

Importantly, San Francisco's policy provides that housing providers may require applicants to disclose their past convictions once the provider has determined that the applicant is legally eligible to rent the housing unit *and* that the applicant is qualified to rent the housing unit based on the housing provider's criteria for assessing rental history and credit history.<sup>134</sup> Housing providers may also review a background check report once they have determined that the applicant is qualified to rent the housing unit based on their rental and credit history reports.<sup>135</sup>

More recently, Washington, D.C. implemented the Fair Criminal Screening for Housing Act of 2016 with the goal of assisting individuals who are reentering society by removing barriers to adequate and fair housing opportunities.<sup>136</sup> The policy prohibits housing providers from inquiring about or requiring applicants to disclose pending criminal accusations or criminal convictions before making a conditional offer.<sup>137</sup> The housing provider may only withdraw that conditional offer based on an applicant's criminal conviction if the withdrawal achieves a substantial, legitimate, nondiscriminatory interest.<sup>138</sup> The housing provider's determination must be made in consideration of several factors including, *inter alia*, the nature and severity of the criminal offense, the time elapsed since the crime was committed, the degree to which the applicant's crime would negatively impact the safety of the housing provider's other tenants or property, and whether the crime was committed on or was connected to property that the applicant previously rented or leased.<sup>139</sup>

While HUD's potential rule need not be identical to either of these two policies, they provide examples for HUD to examine before promulgating a new rule. Promulgating a rule that implements these ideas is a novel way for HUD to impact the housing market in the same way as it tried to do so when it issued its legal guidance in 2016.

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133. *Id.* § 4906(f).

134. *Id.* § 4906(c)(1)–(2) (emphasis added).

135. *Id.* § 4906(c)(2).

136. Fair Criminal Record Screening for Housing Act of 2016, 64 D.C. Reg. 1 (Feb. 24, 2017).

137. *Id.* at 2.

138. *Id.* at 3.

139. *Id.* at 3–4.

## CONCLUSION

HUD issued its legal guidance in 2016 with the intention of eradicating criminal history housing policies that disparately impact minority applicants. Instead, HUD's avoidance of notice-and-comment rulemaking has led the agency into an administrative dilemma, where it must either decide to argue that its legal guidance is a nonlegislative rule, and thereby nonbinding and unenforceable, or argue that its legal guidance is a legislative rule that is not in violation of the APA. Unfortunately, this means that HUD must pick between two unenviable options or else pursue alternative strategies. This Comment proposes the latter option. To avoid the administrative dilemma, and to ensure that formerly incarcerated individuals are equipped with the ability to secure fair housing opportunities, HUD must pursue promulgation of either a legislative rule implementing the disparate impact standard as it did in its legal guidance, or attempt to promulgate a new, innovative rule that encompasses the ideas of the ban-the-box movement. Only then will HUD significantly impact the status quo housing issues that run rampant throughout this country.