

October 18, 2019

**SUBMITTED VIA REGULATIONS.GOV**

Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

**Re: Reconsideration of HUD's Implementation of the Fair Housing Act's  
Disparate Impact Standard, Docket No. FR-6111-P-02**

Dear Sir or Madam,

The 46 undersigned consumer, housing, civil rights, labor, and community organizations write to express our strong opposition to the proposed changes to the disparate impact standard (“Proposed Rule”) as interpreted by the U.S. Department of Housing and Urban Development (“HUD”). HUD’s existing disparate impact rule is a necessary tool to challenge the structural inequalities that persist in housing and lending today. It has been an effective mechanism for uncovering forms of discrimination which are covert or unintentional and must be preserved to maintain access to credit and homeownership for all communities. The existing rule should not be changed.

The Fair Housing Act protects people from discrimination when they are getting a mortgage, buying a home, or renting an apartment. It makes it illegal to refuse or limit housing opportunities based on a person’s race, color, national origin, religion, sex, disability, or familial status. Disparate impact is essential to enforce protections guaranteed by the Fair Housing Act because it provides a way to prohibit seemingly neutral policies that unnecessarily exclude people of color and other groups from housing. It has been widely effective in addressing discriminatory practices in mortgage lending, rental housing, and property insurance, thereby making housing more available to all.

Disparate impact has fostered the development of improved lending criteria that more accurately and objectively identify qualified borrowers, replacing subjective criteria that unnecessarily generate disparities. It has provided protection for home mortgage applicants when a bank charges unfair and excessive fees or rates to certain groups who seek loans, forcing people of color, women, or people with disabilities to take on risky or costly loans or not have access to financing. Disparate impact helps prevent homeowners insurance practices based on categorical exclusions that don’t correlate with actual risk.

In its current form, the Disparate Impact Rule has proven practical and effective. It comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). The central premise of *Inclusive Communities*, which quoted the Rule without any indication of disagreement, is that disparate impact claims are necessary to prohibit policies

that may not be readily challenged under disparate treatment theories even though, particularly when overlaid on preexisting, long-standing disparities, they unnecessarily exclude minorities from housing. HUD's proposal would effectively limit its application to classic disparate treatment cases, destroying the incentive for lenders and insurers to adopt smarter, more accurate policies.

### **HUD's Proposed Rule Would Destroy Disparate Impact Liability in the Housing Markets**

HUD's Proposed Rule would make drastic changes to fundamentally weaken this longstanding enforcement tool and would allow insurance companies, financial institutions, and other major corporations to engage in covert discriminatory practices with impunity. The Proposed Rule would destroy disparate impact liability and eliminate the incentive to examine disparities and their causes to identify better, fairer practices and policies that do not discriminate. The Proposed Rule is directly contradictory to the Fair Housing Act and its basic purposes.

The Proposed Rule includes deeply flawed changes that shift the burden of proof and inserts inordinately high barriers that would make it virtually impossible to bring the bedrock and heartland housing discrimination cases that Justice Kennedy expressly stated should be brought using disparate impact.<sup>1</sup>

We are particularly concerned about these elements of the proposed rule:

- The proposed rule places a drastically higher burden on victims of discrimination to prove a disparate impact claim under the Fair Housing Act, making it virtually impossible to succeed. Specifically, victims are asked to guess which justifications defendants might invoke and preemptively debunk them to proceed to the next step in a case.
- A company policy that produces a profit will be immune from challenge for its discriminatory impact under the Proposed Rule unless there is an alternative approach that produces just as much money, even if the business could use alternate business approaches that are less discriminatory while still being significantly profitable.
- The proposed rule provides special defenses for business practices that rely on statistics or algorithms, effectively immunizing covert discrimination by algorithm by allowing companies to hide behind the formulas. The use of algorithmic models that incorporate credit scoring, pricing, marketing, or underwriting would be exempt from the Fair Housing Act, even if it is clear that they result in the discriminatory denial of access to housing and home loans.
- Businesses will no longer be incentivized to collect important data that can reveal discrimination. This will mean that victims of discrimination will be unable to identify whether discrimination is happening behind their backs and lack the ability to challenge it if they do detect problems.

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<sup>1</sup> *Inclusive Communities*, 135 S. Ct. at 2522.

## **Backtracking on HUD's Disparate Impact Rule May Harm Efforts to Stop Discrimination in Other Consumer Financial Products**

Furthermore, the effect of a revision to the current Disparate Impact Rule could have negative ramifications that extend past mortgages and insurance to other industries. Attacks on civil protections in one sector may weaken civil protections in other sectors. High barriers to prove a discriminatory impact in the mortgage and insurance industry may act as precedent to support higher barriers in the auto financing industry and in other financial products.

### **Conclusion**

HUD's Proposed Rule undermines the Fair Housing Act's "central purpose . . . to eradicate discriminatory practices within a sector of our Nation's economy."<sup>2</sup> It is in direct contradiction to HUD's mission, decades of legal precedent and the Supreme Court's recent decision in *Inclusive Communities*. In essence, the Proposed Rule operates to destroy disparate impact liability.

Before finalizing the current Disparate Impact Rule in 2013, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. In 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. HUD's current Disparate Impact Rule is a necessary tool to achieve fairer standards in lending, rationally-based insurance pricing, and homeownership accessibility.

As organizations with a strong interest in ensuring access to sustainable homeownership and credit for all communities, we strongly urge HUD not to change the existing disparate impact rule.

Sincerely,

The Action Center on Race and the Economy  
Allied Progress  
Americans for Financial Reform Education Fund  
CADCOM  
California Reinvestment Coalition  
Center for Community Progress  
COASAP  
Connecticut Legal Services, Inc.  
Consumer Action  
Desert Habitat for Humanity, Inc.  
Empire Justice Center  
Housing and Economic Rights Advocate (HERA)

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<sup>2</sup> *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2511 (2015), available at: <https://casetext.com/case/texas-dept-of-housing-and-community-affairs-v-inclusive-communities-project-inc>.

Hood & Lay, LLC  
Housing Equality Law Project — HELP  
Human Rights Campaign  
Illinois People's Action  
Integrated Community Solutions, Inc.  
The Leadership Conference on Civil and Human Rights  
Legal Aid Chicago  
Legal Aid Society of Southwest Ohio, LLC  
Main Street Alliance  
Massachusetts Communities Action Network  
Metropolitan Interfaith Council on Affordable Housing  
Mile High Connects  
NAACP  
National Association for Latino Community Asset Builders  
National Center for Transgender Equality  
National Coalition for the Homeless  
National Community Stabilization Trust  
National Consumer Law Center (on behalf of its low-income clients)  
The National Council of Asian Pacific Americans (NCAPA)  
National Disability Rights Network  
National Employment Law Project  
National Partnership for Women & Families  
National Housing Resource Center  
National WIC Association  
Our Spring Lake Store, LLC  
Public Law Center  
The Resurrection Project  
Savannah-Chatham County Fair Housing Council, Inc.  
Savannah Chatham Council on Disability Issues  
Take on Wall Street  
Unidos US  
Vermont Legal Aid, Inc.  
Virginia Poverty Law Center  
Westside Housing Organization