October 18, 2019

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

Re: Docket No. HUD-2019-0067
FR-6111-P-02 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Assistant Secretary Farias:

The National Community Reinvestment Coalition (NCRC) is committed to ensuring equal housing opportunity under the Fair Housing Act. As such, NCRC encourages the U.S. Department of Housing and Urban Development (HUD) to continue its current implementation of the disparate impact standard, rather than enacting this newly proposed rule. The rule, as proposed, would effectively eliminate the use of disparate impact theory in fair housing cases, making it far more difficult for victims of housing discrimination to seek redress. It also creates defenses that serve no purpose except to protect housing providers that use technology that discriminates against their customers.

NCRC represents more than 600 community-based organizations throughout the United States. NCRC and its member organizations are devoted to the principle that race, ethnicity, and other protected characteristics should not dictate where people can live. Equal housing opportunity is essential to NCRC's goal of eliminating America's massive racial wealth gap, in which the average African-American has roughly 10% as much wealth as the average White American. The new HUD rule would greatly hamper these efforts to create a more just economy - an intent of the Fair Housing Act - as it would allow discriminatory policies to thrive.

Many of the most harmful policies used by housing providers are neutral on their face, but nonetheless have discriminatory effects on members of protected classes. For decades, disparate impact theory has been a vital tool used by fair housing advocates to fight these unjust policies. One of the most famous examples is the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which resulted in a landmark Supreme Court ruling that affirmed that disparate impact claims are fully encompassed by the terms of the Fair Housing Act.

In *Inclusive Communities*, the state of Texas was sued because it had continually allocated tax credits for affordable housing in neighborhoods that are predominantly African-American thereby preventing access to affordable housing in primarily white, suburban neighborhoods. The plaintiffs successfully showed that this allocation system caused a disproportionately adverse effect on people of color, and the system was ruled to be discriminatory. The U.S. Supreme Court upheld the ruling, and declared that disparate impact claims are viable under the Fair Housing Act.

It is essential that HUD continues to recognize the framework that was used – and validated by the Supreme Court – in *Inclusive Communities*. Fair housing agencies cannot uphold their obligations to enforce equal housing opportunity for all Americans if they, in effect, are unable to combat policies that have discriminatory effects. Unfortunately, HUD's proposed new rule imposes a large burden on plaintiffs in disparate impact cases under the Fair Housing Act, which creates barriers to enforcement that are contrary to the language and intent of the Fair Housing Act.

The new burden-shifting mechanism put forth by HUD is an unnecessary change that would prevent virtually all disparate impact claims from succeeding

HUD currently utilizes a three-part burden-shifting framework in disparate impact cases under the Fair Housing Act. Under this framework, a plaintiff must make a prima facie showing of disparate impact. If this is met, then the burden shifts to the defendant to prove that the challenged practice is necessary to achieve its interests. If this is met, then the plaintiff must prove that these interests could be served by another practice with a less discriminatory effect.

The Supreme Court reviewed HUD's burden-shifting framework approvingly in the *Inclusive Communities* decision. Despite this, HUD is now changing the framework to a more complicated five-part system, arguing that it will be "in closer alignment" with the *Inclusive Communities* decision – even though nothing in the Supreme Court decision suggests that changes to the framework are necessary.

This five-part framework will make it virtually impossible for any disparate impact claims under the Fair Housing Act to succeed. The first element requires a plaintiff to show that the challenged policy or proposal is "arbitrary, artificial, and unnecessary." This is a steep burden, as it requires that all three elements – arbitrary, artificial, *and* unnecessary – be met.

The second element is that the plaintiff must show a "robust causal link" between the policy or practice, and the disparate impact itself. HUD has included language stating that when a plaintiff relies on statistical data, they must provide a comparison showing that the policy is the actual cause of the disparity. Most racial disparities have a number of complex causes, and showing that a particular policy is *the* cause of a disparity is an extremely difficult task.

The third element requires plaintiffs to allege that the challenged policy or practice has an adverse effect on members of a particular class. The fourth element requires a plaintiff to show that the disparity is significant. The fifth element is to show that the complaining party's alleged injury is directly caused by the policy or practice.

These elements are far more burdensome than the previous elements. They will serve only to prevent victims of discrimination from finding redress within the legal system. There is nothing in the *Inclusive Communities* decision mandating that the burden-shifting framework be changed.

In fact, jurisprudence since *Inclusive Communities* has been consistent with HUD's previous interpretation of disparate impact under the Fair Housing Act. For example, in 2016, the Second Circuit held in *Mhany Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* "[t]he Supreme Court] implicitly adopted HUD's approach."[1] In addition, the Northern District of Illinois issued a decision that analyzed the relationship between HUD's Rule and the Supreme Court decision and concluded that, "[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that requires correction."[2]

The new rule creates defenses specifically designed to protect businesses that use discriminatory algorithms

Corporations continue to use technology to discriminate against customers, often through the use of algorithms that exclude users by race or gender. HUD is aware of this, as it

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[1] 819 F.3d 581, 618 (2nd Cir. 2016).

[2] *Prop. Cas. Insurers Ass'n of Am. v. Carson,* 2017 WL 2653069 (N.D. Ill. June 20, 2017) at *8.

recently filed charges against Facebook for violating the Fair Housing Act through discriminatory use of its advertising platforms.

Yet HUD's new Rule has carved out exceptions for housing providers who use algorithms with discriminatory effects. The Rule provides safe harbors for defendants in fair housing cases who use algorithms that are produced, maintained or distributed by third parties. This provision sends a message to many housing providers that they bear no responsibility for their algorithms, even if the algorithms have an extremely discriminatory effect - so long as they allow an outside party to maintain them.

The Rule also protects housing providers that use algorithms that are predictive of credit risk or "similar valid objectives." If the providers can show that the material factors that their algorithms do not rely on factors that are "substitutes or close proxies for protected classes under the Fair Housing Act," then they will be given protection from discrimination lawsuits.

Unfortunately, even when factors are not substitutes or close proxies for protected classes, they can still have extremely discriminatory effects. Disparate impact theory itself is based on the notion that facially neutral factors can nonetheless produce discriminatory results. Many of the most harmful policies do not use any factors that are substitutes or close proxies for protected classes.

For example, many housing providers have held policies banning all applicants with criminal records of any kind, regardless of the type of criminal offense involved, or how much time has passed since the offense took place. Disparate impact litigation has helped to overturn many of these blanket bans on individuals with criminal records, because these policies have a disproportionately negative impact on African-Americans – even though they do not use any factors that are substitutes or close proxies for race.

Changing HUD's Disparate Impact Rule will lead to considerable confusion about how the theory will be applied

Prior to HUD's adoption of its Disparate Impact Rule, many circuit courts took different approaches on what constitutes a cognizable disparate impact claim. HUD's 2013 "Implementation of the Fair Housing Act's Discriminatory Effects Standard"[3] and the 2016 supplement[4] [collectively, "Disparate Impact Rule" or "the Rule"] established a clear standard for how disparate impact doctrine would be applied, and standardized the

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[3] 78 Fed. Reg. 11460.
[4] 81 Fed. Reg. 193 (Oct. 5, 2016).

burden-shifting framework for analyzing disparate impact claims under the Fair Housing Act.

The Disparate Impact Rule ensured that only one standard would be applied in all administrative hearings, and it added "no additional costs to housing providers and other engaged in housing transactions."[5] Its burden-shifting framework was subsequently adopted by many federal jurisdictions. In *Inclusive Communities*, the Supreme Court upheld the disparate impact standard, and reaffirmed forty years of law on disparate impact claims under the Fair Housing Act.

Clarifying the standard was essential, as it gave both housing providers and plaintiffs a clear framework for how disparate impact theory would be applied. This new Proposed Rule topples the current framework, and replaces it with a more complicated burden-shifting system.

The newly proposed burden-shifting system contains more steps than the current one (with five in the newly proposed framework, compared to three in the current framework). The language of the new Rule is also, at times, quite vague. This vague language is bound to create major confusion regarding what is necessary to meet the new burdens.

For example, what constitutes a "robust causal link" is unclear in the context of HUD's proposed rule that requires a showing that the challenged practice "is **the** direct cause of the discriminatory effect" (emphasis added)The use of such an ambiguous word as "robust" will leave victims of discrimination unsure of what they need to prove in order for their claims to succeed. The ambiguity of the phrase also leaves the door open to interpretations that would make it nearly impossible for a plaintiff to meet their burden. This contrasts with the Supreme Court's use of the word "robust" in *Inclusive Communities* when it stated that a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. The decision states that a robust causality requirement ensures that '[r]acial imbalance... does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."[6]

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[5] 78 Fed. Reg. 11460-61.

[6] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* 135 S. Ct. 2507 at 2523, 192 L. Ed. 2d 514(2015) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S. Ct. 2115 104 L. Ed 2d 733 (1989) superseded by statute on other grounds, 42 U. S. C. §2000e-2(k)).

There is a significant difference between, on the one hand, having to prove that a policy or practice is **the direct** cause of a discriminatory effect without reference in the proposed rule to the use of statistical evidence of a disparity, and on the other hand, offering statistical proof of a racial imbalance along with other evidence of a policy or practice that causes a disparity. HUD uses the ambiguous word "robust" from *Inclusive Communities* and cuts its connection to the cited authority and the use of statistics as an element of proof. The proposed rule changes the precedential context and thereby provides a roadmap to dismissal instead of to justice.

For example, when an apartment complex uses a policy that disproportionately excludes African-Americans, a disparate impact claim may follow. In that scenario, HUD could potentially interpret the "robust causal link" language to mean that the plaintiff must prove that the policy in question is the sole reason for the lack of African-American residents at the complex. There may be many different reasons for the racial composition of the complex, and requiring the plaintiff to show a singular impact would make the plaintiff's burden so difficult that a disparate impact claim would essentially be futile. The Supreme Court has recognized the evidentiary impact of a statistical disparity along with the identification of the discriminatory impact of a policy or practice.

Similarly, HUD's proposed rule states that one element of the newly developed five-step *prima facie* case is "that the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law." [7] HUD would require all three qualities ("arbitrary, artificial, and unnecessary") in connection with a defendant's attempts to achieve an otherwise proper interest or objective. Notably, the Supreme Court in *Inclusive Communities* used the phrase "arbitrary, artificial and unnecessary" in connection with removing barriers. The Court cited the 1971 ground breaking case of *Griggs v. Duke Power Co*. that established disparate impact precedent, where it was stated:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[8]

[7] Fair Housing Act; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (Aug 18, 2019).

[8] *Griggs v. Duke Power Company*, 401 U.S. 424 at 431, 91 s. Ct. 849, 28 L. Ed. 2d 158.

The new "arbitrary, artificial and unnecessary" standard proposed by HUD will prove confusing to plaintiffs and housing providers alike because it is devoid of the context cited as authority in *Inclusive Communities*. It is another example of HUD selecting language from *Inclusive Communities* and using it in a manner that is limiting to plaintiffs. Consistent standards are essential for all parties to HUD complaints. Replacing the familiar standards and burdens that have been used not only under the Fair Housing Act, but also pursuant to many civil rights laws will be burdensome to individuals and companies hoping to stay on the right side of the law. Moreover, using language to place greater burdens on those who live with discriminatory effects is inconsistent with the purposes of the Act. As the Supreme Court stated, "Recognition of disparate-impact claims is consistent with the FHA's central purpose,"[9] and HUD should not undermine that in the name of reflecting *Inclusive Communities,* as its efforts have missed the mark. The current Rule properly expresses the law.

The Fair Housing Act's protections are essential in the fight for equal access to housing and credit, and should not be weakened

For over 50 years, the Fair Housing Act has been a vital instrument for fighting discrimination, not only in the realms of housing sales and rentals, but also in housing financing. Weakening the power of disparate impact claims is severely damaging to ongoing efforts to prevent housing providers and lenders from widening the substantial gaps between races (and other protected classes) in access to housing and credit.

NCRC has used disparate impact theory to achieve victories in a wide array of Fair Housing Act cases. These include:

- NCRC v. SouthStar Funding LLC, stemming from NCRC's determination that SouthStar would not make mortgage loans for row homes in Baltimore. This case was resolved with a conciliation that changed SouthStar's discriminatory policy of refusing to offer loans for row homes.
- NCRC v. NovaStar Financial Inc. et. al. NCRC's investigation revealed NovaStar's underwriting guidelines relating to "properties located on Indian reservations" and a policy regarding "Properties for Adult Foster Care" were both violations of the Fair Housing Act by virtue of the disparate impact these policies had on borrowers in protected classes. As a result, these policies were changed.

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[9] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* 135 S. Ct. 2507 at 2511, 192 L. Ed. 2d 514(2015).

Conclusion

The protections of the Fair Housing Act are now more necessary than ever. HUD's newly proposed disparate impact rule is an effort to gut disparate impact theory altogether, disguised as an attempt to comply with Supreme Court precedent that is already being followed. Placing harsh limitations on the use of disparate impact theory will benefit housing providers that engage in discrimination, but it will provide no benefit at all to the victims of that discrimination. The proposed rule would upend decades of well-founded jurisprudence through its revised burden- shifting approach and causation standard.

The newly proposed rule also contains loopholes for businesses with algorithms that discriminate against people of color, and other protected groups. At a time when technological advances continually allow corporations to use data in complex new ways behind a veil of secrecy, it is imperative that tools like disparate impact theory remain in place to benefit consumers.

NCRC and our more than 600 member organizations appreciate the opportunity to share our views on this proposed rule. If you have any questions or need additional information regarding our comment, please do not hesitate to contact me or Gerron Levi, Director of Government Affairs at 202-464-2708.

Sincerely,

National Community Reinvestment Coalition
Affordable Homeownership Foundation, Inc.
ALABAMA NAACP
Association for Neighborhood and Housing Development
August Gray Real Estate
CAARMA Consumer Advocates Against Reverse Mortgage Abuse
California Reinvestment Coalition
California Coalition for Rural Housing
Chicago Community Loan Fund
Coastal Enterprises, Inc.
Communities United For Action
Community Service Network Inc
Consumer Action
Ellendale Community Civic Improvement Association Inc.
Fair Housing Action Center of Maryland
Fair Housing Center for Rights & Research
Fair Housing Council of Central California
Florida Housing Coalition

GROWTH by NCRC
Hamilton County Community Reinvestment Group
Hammond Human Relations Commission
Housing Options & Planning Enterprises
La Fuerza UNIDA, Inc.
Lewis Associates
Maryland Consumer Rights Coalition
Metropolitan Consortium of Community Developers
Metropolitan Milwaukee Fair Housing Council
Montgomery County Government, Office of Human Rights
MT Fair Housing
Mustard Seed Development Center
New Development Corp
New Jersey Citizen Action
NHS of Kansas City, Inc.
Northwest Indiana Reinvestment Alliance
Oregon Housing and Community Services
Portland Housing Center
Social Impact Policy Institute
Southern Dallas Progress CDC
Southern Mutual Help Association, Inc.& Southern Mutual Financial Services, Inc.
The HUB Community Development Corporation
The Resurrection Project
TN Human Rights Commission
Urban Coalition of Appraisal Professionals
Vennmedia:! Nonprofit Media Enterprise
Wayne Smith & Associates
Woodstock Institute