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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 Assistant Secretary Farías:

We adamantly oppose any changes to HUD's current Disparate Impact Standard (Current Rule). Disparate impact liability is essential to root out and "counteract unconscious prejudices and disguised animus" embedded in public and private policies that cause segregated housing patterns.[1] Justice Kennedy concludes in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. (ICP)* that the Fair Housing Act (FHA) and disparate impact liability has made our country more inclusive and diverse, and both must have a "continuing role in moving the Nation toward a more integrated society."[2] Despite this, HUD's Proposed Rule would make demonstrating disparate impact an almost insurmountable task by forcing plaintiffs to prove discriminatory intent and introducing several defenses to liability which neuter it further. These changes not only thwart the holding of *ICP*, they betray HUD's founding directive to affirmatively furthering fair housing and guide our country towards Dr. King's beloved community.

Texas Housers is a 501(c)(3) nonprofit that has worked with low-income Texans to achieve the American dream of living in a quality home in a quality neighborhood for over 30 years. Even in 2019, the biggest obstacle to achieving this mission is overcoming systemic public and private housing discrimination that excludes people of color from many of the benefits of American life while foisting many of its burdens upon them. We have long depended on your agency to be the cop on the beat to enforce the Fair Housing Act and stand up with those demanding equal treatment – we write these comments with urgency because we fear this Proposed Rule along with other recent agency actions marks your abandonment of this critical role.

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[1] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522 (2015).
[2] *Id.* at 2525-26.

Our comments are divided into three sections. Section I discusses how the Proposed Rule violates HUD's statutory duty to affirmatively further fair housing. Section II focuses on the conflict between the Proposed Rule and the holding of *ICP* and other precedents. Finally, Section III highlights our concerns with the safe-harbor from disparate impact liability for banking activity.

I. The Proposed Rule conflicts directly with HUD's statutory duty under the FHA to affirmatively further fair housing (AFFH) and foster integrated, inclusive communities because it no longer defines "discriminatory effect" as a practice that "creates, increases, reinforces, or perpetuates segregated housing patterns."

The FHA was enacted to combat private and public housing discrimination that led to segregated housing patterns throughout the country. As Justice Kennedy stresses in *ICP*, the FHA and disparate impact liability plays an "important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal."'[3] To accomplish the mission of integration, the FHA requires HUD and all "executive departments and agencies… including any Federal agency having regulatory or supervisory authority over financial institutions" to AFFH.[4] AFFH means taking "meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."[5]

As such, the Current Rule was drafted to ensure broad compliance with the FHA goal of eliminating segregation.[6] It creates a dual definition for "discriminatory effect" in 24 C.F.R. § 100.500(a), defining it as both a practice that: (1) "actually or predictably results in a disparate impact on a group of persons;" or (2) "*creates, increases, reinforces, or perpetuates segregated housing patterns* because of race, color, religion, sex, handicap, familial status, or national origin"(emphasis added).[7]

In the Proposed Rule, HUD has defied the FHA and long-held precedents by removing the definition of "discriminatory effect," along with any reference to practices causing segregated housing patterns as having a discriminatory effect within §100.500. HUD's justification for the action is flimsy and transparent. Although HUD claims that the definition is "unnecessary" because it "simply reiterated the elements of a disparate impact claim,"[8] this decision reads as just one more move in a broader effort to strike from the FHA its central obligations to AFFH and eliminate housing discrimination and segregation.

Secretary Carson has made it abundantly clear that he opposes efforts to dismantle the systemic discrimination that has resulted in housing and neighborhood inequity in the United States. In a 2015 Op-Ed for the *Washington Times*, then presidential-candidate Carson referred to the AFFH Rule and disparate impact liability as "mandated social-engineering schemes" and

[3] *Inclusive Communities Project*, 135 S.Ct. at 2526.
[4] 42 U.S.C. 3608(d)
[5] 24 C.F.R. § 5.150.
[6] See 78 FR 11459, 11469 (February 14, 2013).
[7] 24 C.F.R. § 100.500(a)
[8] 84 FR 42854, 42858 (August 19, 2019).

called past government integration efforts "failed socialist experiments."[9] He criticized the *ICP* decision because it would allow 'HUD to make a determination based on "disparate impact" rather than any specific intent to discriminate' (quotes in original).[10]

HUD's actions under Secretary Carson have mirrored his dim view of integration policies. Last year, HUD suspended a critical requirement of the 2015 AFFH Rule when it postponed jurisdiction's submission dates for the Assessment of Fair Housing until after October 31, 2020.[11] This rule was meant to strengthen HUD's ability to ensure that jurisdictions receiving federal housing dollars are complying with the AFFH obligation and by postponing its implementation, Secretary Carson ensured that state and local accountability would be harder to ascertain. HUD also issued an ANPR for changing the AFFH Rule claiming it is "overly prescriptive" and that efforts to make local jurisdictions "deconcentrate poverty" are "difficult to implement…without disrupting local decision making."[12] This explanation defies 50 years of precedent under the FHA. If a local jurisdiction has decided to pursue or leave in place illegal practices that perpetuate segregation, it is HUD's duty under the Fair Housing Act to disrupt them. From these words and actions, we can only conclude that the removal of the definition of "discriminatory effect" and the reference to "segregated housing patterns" is the next step in HUD's agenda to follow up on Secretary Carson's anti-integration philosophy. We call on Secretary Carson end his bid to limit disparate impact liability and instead stand up for every Americans' right to safe, affordable housing in a high-opportunity neighborhood free from racial segregation.

We ask HUD to restore the definition of "discriminatory effect" to the Rule. At a minimum, HUD must provide a complete explanation of why it is removing the definition of "discriminatory effect" in the Proposed Rule and directly address how it will continue to uphold the FHA mandate to eliminate segregation. This unjustified change to the Current Rule is arbitrary, contradicted by Supreme Court decisions including *ICP*, and defiant of Congressional intent. By removing the definition, HUD is putting a stop to plaintiffs' ability to challenge practices that create, increase, reinforce, or perpetuate segregated housing patterns. HUD's actions will encourage practices used by public and private actors to keep affordable, integrated housing out of many of the country's most well-resourced areas. It will doom the United States to racial and economic segregation for the foreseeable future.

II. The Proposed Rule directly conflicts with the holding of *ICP* because the elements of establishing a *prima facie* case: a) requires plaintiffs to essentially plead that the defendant intentionally discriminated and adopts overly stringent causation requirements; and b) provides a complete defense if a proposed non-discriminatory alternative policy might limit defendants' profit or cause them a "material burden".

[9]Ben S. Carson, *Experimenting with failed socialism again*, WASHINGTON TIMES, (July 23, 2015), https://m.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/.
[10] Id.
[11] 83 FR 683 (January 5, 2018).
[12] 83 FR 40713 (August 16, 2018).

The holding in *ICP* did not—in any way—require HUD to create the Proposed Rule. On the contrary, the Court supported the Current Rule's structure and burden-shifting framework, relying on the same logic to reach its holding that HUD used when it authored the Current Rule in 2013, and that every single Circuit Court in the country relied on prior to HUD issuing the Current Rule. [13] Like HUD, the Court analogized the disparate impact liability under the FHA to that found in Title VII.[14] The *ICP* decision did not criticize the Current Rule nor suggest that it must be clarified. HUD's contention that the *ICP* decision demanded this revision is wrong and misleading.

This becomes even clearer when considering the content of the revisions themselves. Several of the provisions of the Proposed Rule go beyond the holding or reasoning of *ICP* and will frustrate plaintiffs seeking to disrupt facially-neutral discriminatory practices. Most strikingly, the Proposed Rule incorporates discriminatory intent requirements, undermining the purpose of disparate impact liability, and adds complete defenses which render it nearly meaningless.

a. The 5-element test to establish a *prima facie* case of disparate impact liability is counter to the *ICP* holding and the AFFH requirements in the FHA.

First, the Proposed Rule replaces the Current Rule's three-part burden shifting framework with a five-element test that requires the plaintiff to essentially prove discriminatory intent of the defendant. The first element of this new test requires the plaintiff to "plead that the challenged policy of practice is *arbitrary, artificial, and unnecessary* to achieve a valid interest or legitimate objective."[15] This is a complete departure from *ICP* and other precedents, which only required a plaintiff to initially provide evidence that a practice "actually or predictably results in a disparate impact" on a protected class or, even more broadly, that a practice in some way "creates, increases, reinforces, or perpetuates" segregation.[16]

As the Court understood in *ICP*, the purpose of disparate impact liability is to make it possible for plaintiffs to "counteract unconscious prejudices and disguised animus" behind policies that are facially neutral and may serve a valid purpose but have an impermissible discriminatory effect.[17] The Proposed Rule requires plaintiffs to plead enough facts upfront to allege that a supposedly valid policy is actually a discriminatory pretense because it is "arbitrary, artificial, and unnecessary" to achieve a valid goal. By making this change, HUD is essentially replacing disparate impact theory with the pleading requirements for a disparate-treatment case because the new standard will force plaintiffs to investigate the underlying motives and intent behind the policy. Intent has always been and should continue to be irrelevant in disparate impact analysis.

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[13] See *Id.* at 2514-15 describing the burden shifting framework of the 24 CFR 100.500 and citing HUD's analysis in 78 FR 11470. The Court follows HUD's analogizing of disparate impact in the Title VII context to uphold disparate impact under the FHA.
[14] *Id.*
[15] 84 FR 42854, 42862 (August 19, 2019); See 24 C.F.R. 100.500(b)(1).
[16] 24 C.F.R. §100.500(a).
[17] *Inclusive Communities Project,* 135 S.Ct. at 2522 (2015).

Further, requiring the plaintiff to allege enough facts to prove this at the pleading stage will be even more difficult because the tools of Discovery, which require defendants to turn over private information, are not available. Low-income plaintiffs who cannot afford legal representation will find this burden nearly impossible to overcome.

The second element of the Proposed Rule's *prima facie* burden changes the causation requirements in a manner that is not necessitated by the *ICP* holding and will create a nearly insurmountable barrier to meeting the elements of a disparate impact claim. Although the Court emphasizes the need for a "robust causation" requirement,[18] nowhere does it say that the Current Rule does not live up to that standard. The effect of the Proposed Rule's requirement that the challenged practice be "*the* direct cause of the discriminatory effect" (emphasis added)[19] could limit defendants' liability when their actions contribute to, but may not be the sole cause of, the discriminatory effect. The systemic discrimination that has caused generations of families of color to be racially segregated into low-opportunity neighborhoods has multiple causes and culprits, some intentional and some not intentional, but having a discriminatory effect all the same. A guilty defendant should not be exempted from liability simply because there are additional culpable parties or causes that have furthered housing discrimination.

The third and fourth elements of a *prima facie* claim in the Proposed Rule require the plaintiff to show that the disparity caused by a defendant's action or policy "has had an adverse effect on members of a protected class" and that the disparity is "significant." These two elements are problematic for several reasons. To begin, the Proposed Rule is a notable departure from the Current Rule, which requires evidence that a practice has "actually or predictably" resulted in a disparate impact.[20] Requiring a plaintiff to prove that there has already been an adverse effect is reactionary and prevents plaintiffs from proactively challenging practices or actions that are already well-understood to disparately impact members of a protected class. For example, it is widely accepted knowledge that if a lending institution is relying solely on credit score to determine creditworthiness, that decision will have an adverse effect on black individuals. A plaintiff should not have to wait to be discriminated against if it can be proven that the practice will "predictably result" in disparately and negatively impacting a protected class.

Additionally, the fourth element, which requires a "significant" disparity is subjective, vague, and is purposefully aimed at making it harder for a plaintiff to bring a disparate impact claim. The classes of persons protected by the Equal Protection Clause have been subjected to *generations* of discriminatory housing policies that have resulted in widespread segregation in American communities. Any policy or practice that furthers this segregation and discrimination is by its very nature significant. HUD's purpose should be to protect and promote the rights of people who have been abused by discriminatory practices, intentional or not, and these proposed elements of a *prima facie* case impermissibly place all of the burden squarely on plaintiffs.

[18] 84 FR 42854, 42862 (August 19, 2019); See 24 C.F.R. 100.500(b)(2)
[19] Id.
[20] 24 C.F.R. §100.500(a).

Finally, the proposed proximate cause requirement that there be "a direct link" between the disparate impact and the alleged injuries[21] is inconsistent with the Court's test in *Bank of Am. Corp. v. City of Miami*,[22] the case cited by HUD as the rationale for inserting this requirement. Rather, the test in *Miami* states that the FHA requires only "*some direct relation* between the injury asserted and the injurious conduct alleged" (emphasis added).[23] There is an important distinction between "a direct link" and "some direct relation" because proving the former is likely a significantly greater hurdle for a plaintiff to overcome. If HUD is going to rely on the *Miami* decision, it's language should be consistent with the language in the decision and not implement a standard that is more challenging to meet.

b. The Proposed Rule provides an arbitrary and impermissible complete defense to disparate impact liability that is counter to Congressional intent and court precedent.

Texas Housers fervently opposes §100.500(d)(2) of the Proposed Rule, which creates a complete defense to liability if a non-discriminatory alternative to the defendant's discriminatory policy is more costly or causes a "material burden" for the defendant. This policy is flatly contradicted by ICP's holding and the FHA. While the *ICP* Court analogizes Title VII disparate impact liability to that found under the FHA, it cautions against transferring Title VII's "business necessity" exception to the "fair housing framework" in whole cloth.[24] Rather, the Court's analysis regarding the "business necessity" exception is centered on protecting government, nonprofit, and for-profit housing developers from disparate impact liability if these entities choose one legitimate policy priority over another with the caveat that they "can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[25] **In no way did the Court give license to businesses to enact policies that discriminate as long as they are more profitable or cost less than a fairer, nondiscriminatory alternative.** It is notable that the phrase "material burden" is not used once in the *ICP* majority opinion. We suspect this phrase was conjured up to, among other reasons, free banks from the obligation of finding some other measure of creditworthiness than an algorithm-produced credit score, which disproportionately leads to the denial of loans to people of color.[26]

HUD's justification that revising the Disparate Impact Rule was necessitated by *ICP* does not hold up to scrutiny. The Proposed Rule goes far beyond *ICP*'s holding and is contradicted by years of precedent. **We request that HUD honor *ICP* and leave the Current Rule and its three-part burden shifting framework in place.**

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[21] 84 FR 42854, 42862 (August 19, 2019); See 24 C.F.R. 100.500(b)(5)
[22] *Bank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296 (2017).
[23] *Id.* at 1306.
[24] See *Id.* at 2522-23 explaining that "Title VII [business necessity] framework may not transfer exactly to the fair housing context…"
[25] *Id.* at 2522
[26] Jennifer Streaks, *Black families have 10 times less wealth than whites and the gap is widening – here's why*, CNBC, May 18. 2018. Available at: https://www.cnbc.com/2018/05/18/credit-inequality-contributes-to-the-racial-wealth-gap.html.

III. Texas Housers opposes the Proposed Rule's risk assessment algorithm provisions in §100.500(c)(2) because they will create a safe harbor from disparate impact liability for lenders relying on a risk assessment model even if the results create a discriminatory effect.

Section 100.500(c)(2) of the Proposed Rule creates a safe harbor from disparate impact liability for lending activity when the defendant depends on a risk assessment algorithmic model, such as a credit score, when: 1) the material factors that make up the model are not "substitutes or close proxies for protected classes" under the FHA; 2) the model is "created by a third party that determines industry standards;" or 3) the model has been reviewed by a third party who has found that the factors used aren't proxies for protected classes.[27]

Texas Housers opposes these changes. They will permit models causing a discriminatory effect as long as the plaintiff did not use factors that are "substitutes or close proxies for protected classes."[28] Like many of the changes discussed above, this change undermines the core purpose of disparate impact liability, and years of precedent, by inserting a discriminatory intent element into the analysis. As we already emphasized, intent is irrelevant in disparate impact analysis. The primary purpose of disparate impact liability is that it allows plaintiffs to challenge facially neutral policies that have discriminatory results. The use of credit scores and other such models has led to severe banking disparities in the communities of color with whom Texas Housers partners - multiple studies have shown that these models have discriminatory results and raise serious disparate impact concerns, yet the Proposed Rule would exempt them from scrutiny.[29] For example, one study has shown that despite some improvement through the use of algorithms, black and brown residents are "habitually charged…higher interest rates than white borrowers with similar credit profiles" and that this has cost people of color of more than **$765 million,** annually, in home ownership expenses.[30] This type of discriminatory impact on people of color undermines the goals of the Fair Housing Act. Any entity relying on these algorithms, regardless of whether it is accepted industry practice or created by a third-party, should be liable for a disparate impact to which their business has contributed.

The threat of disparate impact liability and laws such as the Community Revitalization Act have led to banks using less-discriminatory alternatives to assess creditworthiness, such as utility bill payment history. If the Proposed Rule is enacted, there will be no pressure on banks and other actors to make these compromises, especially in light of the complete defense to liability provided by §100.500(d)(5)(iii) if a plaintiff's proposed non-discriminatory alternative causes a material burden to the defendant. Therefore, we wholeheartedly oppose this change.

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[27] 84 FR 42854, 42862 (August 19, 2019).
[28] Id.
[29] Lisa Rise and Deidre Swesnick, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK UNIVERSITY LAW REVIEW, 935, 952 (2014). Available at: http://suffolklawreview.org/wp-content/uploads/2014/01/Rice-Swesnik_Lead.pdf.
[30] Aaron Glantz and Emmanuel Martinez, *Can Algorithms Be Racist? Trump's Housing Department Says No*, REVEAL, August 5, 2019. Available at https://www.revealnews.org/article/can-algorithms-be-racist-trumps-housing-department-says-no/

Conclusion

Thank you for your attention to these comments. We encourage you to contact us if you have questions or would like to discuss this issue or any other issues further. Our information is below.

Sincerely,

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