

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

October 18, 2019

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

To Whom It May Concern:

I am writing on behalf of the National Housing Conference (NHC) to offer comments concerning HUD's proposed changes to the implementation of the Fair Housing Act's disparate impact standard.

NHC has been defending the American Home since 1931. Our core belief is that everyone in America should have equal opportunity to live in a quality, affordable home in a thriving community. NHC convenes and collaborates with our diverse membership within broader housing and community development sectors to advance policy, research and communications initiatives to effect positive change at the federal, state and local levels. Politically diverse and nonpartisan, NHC is a 501(c)3 nonprofit organization.

The law of unintended consequences is never repealed. This principle has been explored through the centuries by Niccolò Machiavelli¹ (1469-1527), Johann Wolfgang von Goethe² (1749-1832) and others, as well as more contemporaneously in hearings before the US Senate Committee on Small Business addressing the loss of 19,000 boat building jobs to the 10% "luxury tax" in the Omnibus Budget Reconciliation Act of 1990³. In 1949, NHC was the primary author and proponent of the landmark American Housing Act (PL 81-171), which in the words of President Harry S. Truman and the bill itself, declared that a "decent standard of housing for all is one of the irreducible obligations of modern civilization." Instead, the legislation fell well short of its promise of 1 million new homes to address the affordable housing crisis of that time – a fraction of the shortage we face today.⁴ It also fueled a nationwide destruction of historically black neighborhoods, including the Paradise Valley business district in Detroit, Michigan, in the name of "slum clearance" and "urban renewal",

¹ "But the scanty wisdom of man, on entering into an affair which looks well at first, cannot discern the poison that is hidden in it, as I have said above of hectic fevers."

² "The power that always wants the good and always creates the evil."

³ Hearing to Examine the Impact of the 10 Percent Luxury Tax on Small Businesses: Hearing Before the Committee on Small Business, United States Senate, One Hundred Second Congress, First Session, September 17, 1991

⁴ National Multifamily Housing Council and National Apartment Association, "U.S. Apartment Demand – A Forward Look," May 2017

which many civil rights leaders of the day labeled “Negro removal.”⁵ The displacement that resulted sowed the seeds of urban unrest fifteen years later.

The often wide delta between intention and impact is the cornerstone of the concept of the disparate impact standard, which is a critical component of the Fair Housing Act of 1968. NHC, along with our allies at the National Urban League and the NAACP, was a committed advocate for this landmark piece of civil rights legislation. The concept of disparate impact, as outlined in the Fair Housing Act, has been upheld by 11 of the 13 U.S. Courts of Appeals decision, as well as by the Supreme Court.⁶ Yet HUD did not establish a clear standard on disparate impact until 2013. In proposing changes to this disparate impact rule, HUD explained it was attempting to “better reflect the Supreme Court’s 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*”⁷ But in the referenced Supreme Court case, the Court made explicit reference to HUD’s 2013 disparate impact rule, and in agreeing to hear the case at all, the Court implicitly backed the rule by declining to alter the disparate impact standard.⁸

In passing the Fair Housing Act, Congress aimed to eradicate discrimination in housing practices and ensure that everyone had equal access and due process. The proposed rule change would drastically increase the threshold for plaintiffs to bring housing discrimination claims under the Fair Housing Act. The legal arguments for this assertion are well-elucidated in the comment letters of many of NHC’s members including the National Fair Housing Alliance and the Center for Responsible Lending, whose views we endorse. We agree that HUD’s proposed rule would have a devastating impact on countless people, particularly low- and moderate-income individuals and all people of color, who continue to face discrimination in finding housing on the basis of their race, religion, gender, ability status and so much more.⁹

No single statistic better illustrates the inadequacy of a disparate intent standard in the modern mortgage finance system than the fact that housing in America remains more segregated today than it was when mortgage discrimination was legal. The black homeownership rate today has collapsed to a horrifying rate of 40.6 percent — lower than it was in 1967 when redlining was

⁵ Weber-Davis, Laura, “CuriosiD: How A 1900s Black Detroit Community Was Razed For A Freeway,” *WDET*, October 2015

⁶ *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U. S. (2015)

⁷ Docket No. FR-6111-P-02 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard

⁸ Western Center on Law & Poverty, National Housing Law Project, and Shrive Center on Poverty Law, “HUD’s Disparate Impact Rule: An Overview for Legal Advocates,” August 2019

⁹ Cheng, Ping; Lin, Zhenguoguo; and Liu, Yingchun, “Racial Discrepancy in Mortgage Interest Rates,” *The Journal of Real Estate Finance and Economics*, July 2015; Glantz, Aaron and Martinez, Emmanuel, “For people of color, banks are shutting the door to homeownership,” *Reveal News*, February 2018; Levy, Diane; Wissoker, Doug; Aranda, Claudia; Howell, Brent; Pittingolo, Rob; Sewell, Sarale; and Santos, Rob, “A Paired-Testing Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals,” Urban Institute, June 2017; Friedman, Samantha; Reynolds, Angela; Scovill, Susan; Brassier, Florence; Campbell, Ron; Ballou, McKenzie, “An Estimate Of Housing Discrimination Against Same-Sex Couples,” HUD Office of Policy Development and Research, June 2013; Aranda, Claudia, “Targeting Disability Discrimination: Findings and Reflections From the National Study on Housing Discrimination Against People Who Are Deaf and People Who Use Wheelchairs,” *Cityscape*, 2015

legal, and far below the 73.1 percent rate for non-Hispanic whites.¹⁰ This disparity drives a severe and destabilizing racial wealth gap between median white and black households of nearly 1000 percent.¹¹

While some lenders continue to actively redline non-white neighborhoods, most are willing and able to make these loans. However, multiple market drivers like racial disparities in multi-generational wealth, existing housing values, disproportionate student debt burdens and the increased cost in originating and servicing mortgages create a disincentive for making loans under \$200,000. The disparate impact standard is essential to ensuring lenders look beyond the “invisible hand” of the market and actively seek out underserved markets to successfully close this growing gap. Most parents have had the experience of a child breaking a beloved and fragile family heirloom defending themselves with the assertion that they “didn’t mean it.” But that neither absolves their responsibility, nor that of their parents to “child-proof” their homes.

Similarly, HUD has an existential obligation to affirmatively further fair housing through its actions and policy. Yet the proposed rule all but renders the disparate impact standard moot by establishing a near-impossible standard for plaintiffs to make disparate impact claims. The rule would do away with the current burden-shifting test, which requires first that a plaintiff shows that a practice leads to a statistical disparity, second that a defendant shows the practice is necessary, and finally that the plaintiff shows that a less discriminatory practice could achieve the same ends. In place of this straightforward, three-part test, the new rule would establish a complicated, arbitrary five-part test, requiring plaintiffs to prove (i) that a policy is “arbitrary, artificial, and unnecessary,” (ii) that a “robust causal link” exists between the policy and the disparate impact, (iii) that it negatively affects members of a protected class, (iv) that the impact is significant, and (v) that the plaintiff’s injury is directly caused by the practice.

In addition to the elevation of this due process bar for plaintiffs, the new rule would also lower the bar for defendants by giving them three remarkably easy standards to meet to justify their policy: if the policy isn’t the cause of the harm, if the policy is being used as intended and is the product of a third party, and if the policy is shown by an expert to not cause harm. The second of these three standards is the most concerning, because it opens the door for discrimination through the use of algorithms created by third parties. These algorithms are already commonly used in many housing transactions, including decisions about credit risk, mortgage interest rates, and home values.¹² Excluding lenders and landlords from liability for algorithms from third parties would allow them to shop for algorithms without regard to their potential for discriminatory effects. As Lisa Rice of the National Fair Housing Alliance, and

¹⁰ U.S. Census Bureau, “Quarterly Residential Vacancies and Homeownership, Second Quarter 2019,” July 2019

¹¹ Dettling, Lisa J.; Hsu, Joanne W.; Jacobs, Lindsay; Moore, Kevin B.; and Thompson, Jeffrey P., “Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances,” Board of Governors of the Federal Reserve System, September 2017

¹² Dezember, Ryan and Podkul, Cezary, “OK, Computer: How Much Is My House Worth?” *Wall Street Journal*, November 2018; Vogel, Miriam, “Making equitable access to credit a reality in the age of algorithms,” *The Hill*, August 2019; Capps, Kriston, “How HUD Could Dismantle a Pillar of Civil Rights Law,” *CityLab*, August 2019; Greene, Solomon and Galvez, Martha, “How a Proposed Rule Would Make It Harder to Fight Housing Discrimination,” Urban Institute, August 2019

Douglas Merrill of ZestFinance have made clear:

“AI can provide access for communities that have been locked out of housing, credit, and other opportunities because of discriminatory barriers. AI models can also be unpredictable, and if used incorrectly they threaten to perpetuate bias and unconscious prejudices that have plagued these markets for decades; the very harms disparate impact was designed to counteract.

“The HUD proposal threatens to squash the requirement for fair and transparent AI, and endanger critical legal tools for fighting lending and other forms of discrimination. That would work against the millions of Americans of color who face structural and systemic barriers when they attempt to get mortgages and other loans.”¹³

When NHC first proposed the creation of a cabinet department dedicated to housing and urban development in 1955, it was our intention that the new agency be a bulwark against racial discrimination and the failure of markets to build millions of desperately needed affordable housing units. Today, 54 years after the creation of HUD, its mission of building “inclusive and sustainable communities free from discrimination” is more important than ever. The scourge of housing discrimination persists today just as it did in 1965 when Congress created HUD and in 1968 when it passed the Fair Housing Act. Making housing discrimination harder to prove will turn back the legal clock by 50 years, much as the clock has been turned back on the homeownership rate for all people of color. The disparate impact standard is one of the most important tools for reversing discrimination outlawed by the Fair Housing Act. It is imperative that it is not watered down.

Thank you for taking our comments into consideration. Please contact me at davidmworkin@nhc.org or (202)466-2121 x234 with any questions.

Sincerely,



David M. Dworkin
President & CEO

¹³ Rice, Lisa and Merrill, Douglas, “HUD’s new housing rule has an A.I. loophole that’s bad for America,” CNBC Markets, October 2019.