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Regulations Division  
Office of General Counsel  
United States Department of Housing  
and Urban Development  
451 7th Street, SW  
Room 10276  
Washington, DC 20410-0500

Via regulations.gov

**RE: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02 (August 18, 2019)**

HUD's proposed amendment of its interpretation of the disparate impact standard is arbitrary, unnecessary, and will subject millions of Americans to ongoing and future discrimination on the basis of their race, color, sex, religion, national origin, familial status, and disability. The proposed rule should be withdrawn.

Texas Appleseed (Appleseed) is a non-partisan, non-profit, 501(c)(3) organization and part of a national network of public interest law centers. Our mission is to promote justice for all Texans by leveraging the volunteered skills and resources of lawyers and other professionals to identify practical solutions that create systemic change on broad-based issues of social equity, including disaster recovery and fair housing. Our goal is to ensure that all families have the opportunity to live in safe, decent neighborhoods with equal access to educational and economic opportunity.

I. Introduction

The Fair Housing Act of 1968 (FHA) has a dual purpose. It does not merely prohibit discrimination, it seeks to remedy the effects of past and present discrimination and segregation to create "truly integrated and balanced living patterns."<sup>1</sup> The legislative history of the FHA and the context in which it was passed, including the assassination of Dr. Martin Luther

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<sup>1</sup> 114 CONG. REC. at 3422. (remarks of Senator Mondale) (1968)

King, Jr. and the release of the Kerner Commission Report, which concluded that “[o]ur nation is moving towards two societies, one black, one white – separate and unequal”, make clear that the purpose of the Fair Housing Act is explicitly integrative. For example, see 114 Cong.Rec. 2281 (1968) (statement of Sen. Brooke) (a purpose of Title VIII is to remedy the "weak intentions" that have led to the federal government's "sanctioning discrimination in housing throughout this Nation"); id. at 2526-28 (statement of Sen. Brooke) (reviewing history of federal fair housing efforts); id. at 9577 (statement of Rep. Cohelan) (decrying historical "neglect" of minorities); id. at 9595 (statement of Rep. Pepper) (lamenting government's slowness in establishing truly "equal" rights); 114 Cong.Rec. 2274 (statement of Sen. Mondale) (Title VIII is "an absolutely essential first step" toward reversing the trend toward "two separate Americas constantly at war with one another"); id. at 2524 (statement of Sen. Brooke) ("Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America's residential neighborhoods."); and *Kerner Commission, Report of the National Advisory Commission on Civil Disorders* (Washington: U.S. Government Printing Office, 1968).

The broad remedial and integrative purpose of the FHA has been affirmed repeatedly by the Supreme Court of the United States and numerous federal circuits as well. See, for example, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); and *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).<sup>2</sup> “[The Fair Housing Act] imposes ... an obligation to do more than simply refrain from discriminating ... This broader goal [of truly open housing] ... reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” *NAACP v. Sec’y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987) HUD is required by statute to affirmatively further fair housing. 42 U.S.C. §3608(d)

Disparate impact is a key tool for identifying and remedying discrimination, particularly systemic discrimination, and discrimination that occurs under facially neutral policies and practices. This proposed rule would limit the use of disparate impact liability to attack discrimination, contravening both *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* and HUD’s statutory obligation to refrain from discrimination and affirmatively further fair housing.

II. The notice does not contain evidence or reasoning that supports the proposed changes to the Disparate Impact Rule.

HUD claims that its proposed amendments “better reflect the Supreme Court’s 2015 ruling” in *TDHCA v. ICP*. In fact, HUD’s proposed amendments distort and contradict the holding in *TDHCA v. ICP*, which upheld a legal and regulatory standard in place for decades and affirmed the

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<sup>2</sup> We note that the plaintiffs in *Trafficante* were white tenants denied “the important benefits of inter-racial association”. Segregation and discrimination do not solely harm the persons at whom discriminatory animus is aimed.

burden-shifting framework laid out in HUD's 2013 final disparate impact rule. Contrary to HUD's assertions, the Supreme Court did approve the three-step burden-shifting framework laid out in the 2013 rule.<sup>3</sup> The Court's concern was not that there weren't enough limits on disparate impact liability ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA." 135 S.Ct. 2507, 2522) it was ensuring that this tool is available to effectuate the FHA's "central purpose . . . to eradicate discriminatory practices within a sector of our nation's economy."<sup>4</sup>

Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.<sup>5</sup>

HUD's sole justification for these proposed amendments is conformity with the decision in *TDHCA v. ICP*, but the proposed amendments are not required by *TDHCA v. ICP*, and in fact contravene Supreme Court's decision. The proposed amendments are, therefore, arbitrary and capricious, and not in accordance with law.

A. The proposed rule places the entire evidentiary burden on the plaintiff.

The Supreme Court affirmed a well-established three-part approach to determining disparate liability in which the evidentiary burden shifts between the plaintiff and defendant. HUD's proposed amendments shift the entire burden to the plaintiff's prima facie case. The proposed rule would shift the burden of showing that the challenged policy is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective." (proposed §100.500) Essentially, the proposed rule would require plaintiffs to guess at what defendant considers a valid interest or legitimate objective and disprove at the first pleading stage. HUD provides no justification for this burden shift, and it is not required by *TDHCA v. ICP*.

In addition to shifting the entire burden of proof to the plaintiff, the proposed amendments dramatically lower the burden of proof for defendants. Instead of having to show that a policy or practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent" 24 CFR § 100.500(b)(1)(i), defendants will only have to show that the challenged policy or practice has any "valid interest or legitimate objective." (proposed §100.500(b)(1)) Nor will defendants have to prove that the asserted interest is valid or legitimate, or will plaintiffs have an opportunity to challenge the asserted interest as illegitimate. HUD provides no justification or explanation for shifting the burden of proof in this way, or for eliminating the requirement that the challenged practice be "necessary" and the non-discriminatory purpose be "substantial." HUD's position that members of protected classes

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<sup>3</sup> 135 S. Ct. at 2514-15.

<sup>4</sup> 135 S.Ct. 2507, 2521 (2015)

<sup>5</sup> 135 S.Ct. 2507, 2522.

can be subjected to harm - victims of domestic violence evicted for calling the police, homeowners denied insurance or subject to predatory lending for living in a historically-segregated lower-income neighborhood, families subjected to pollution that gives their children asthma because of discriminatory zoning - for reasons that are insubstantial and unproven and by policies that are not necessary to achieve any non-discriminatory purpose, flies in the face of HUD's responsibility to protect Americans from discrimination and dismantle segregation, particularly its obligation to affirmatively further fair housing under 42 U.S.C. §3608. The Court in no way gave institutions license to enact discriminatory policies as long as they are more profitable or cost less than a fairer, nondiscriminatory alternative, and the idea that Americans' civil and Constitutional rights are less important than a few extra dollars in profit is wrong. This change is arbitrary and capricious, and is not in accordance with law.

HUD would again increase the burden on the plaintiff in proposed § 100.500(d)(1)(ii). The current rule requires the plaintiff to show "that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." 24 CFR §100.500(c)(3). But the proposed rule requires the plaintiff to prove that "a less discriminatory policy or practice exists that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant." (proposed §100.500(d)(1)(ii)) This change is not required by *TDHCA v. ICP*, and in fact contradicts the Court's adoption of the established three-step evaluation. HUD's actions are arbitrary, capricious, and not in accordance with law.

Further, this change would substantially increase the costs to victims of discrimination who seek to bring these cases, and make it impossible for many of them to do so.

B. Other provisions of the proposed rule conflict with *TDHCA v. ICP*.

The proposed rule changes the definition of discriminatory effect in a way that is arbitrary, capricious, and not in accordance with law. The 2013 rule currently states "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or **creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.**" §100.500(a) (emphasis added) The proposed rule eliminates this language entirely.

This is a blatant and egregious deviation from the holding in *TDHCA v. ICP* and contradicts the Fair Housing Act. The Court in *ICP* held that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose" and pointed specifically to "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. . . . reside at the heartland of disparate-impact liability." 135 S. Ct. at 2521-22. The majority opinion cites the history of housing segregation, of the Kerner Commission, and of the assassination of Dr. Martin Luther King, Jr., and how the FHA's enactment was specifically related to remedying housing segregation. 135 S.Ct. 2507, 2515-2516 The opinion concludes by circling back to the FHA's central purpose of dismantling

residential segregation:

The FHA must play 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." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society. 135 S. Ct. 2507, 2525-2526. (citation omitted).

HUD's proposed amendment is arbitrary, capricious, and not in accordance with law or with the Supreme Court's decision in *TDHCA v. ICP*.

HUD seeks to further narrow disparate impact liability by announcing that "HUD will not bring a disparate impact claim alleging that a single event—such as a local government's zoning decision . . . —is the cause of the disparate impact unless plaintiff can show that the single decision is the equivalent of a policy or practice." 84 Fed. Reg. 42,858. This is ludicrous. There is an extensive and long-standing body of law holding that single decisions can be the basis of disparate impact liability. The Supreme Court in fact cites a number of these cases in *TDHCA v. ICP*, including *United States v. Black Jack*, 508 F.2d 1179 (1974); *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); and *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp 2d 563 (E.D.La.2009). It is unclear how many times HUD needs multifamily housing to be blocked based on the race of the potential residents, how many people must suffer asthma, lung disease, and cancer because environmentally hazardous uses were zoned into their neighborhood, or how many families must lose their homes because of targeted predatory lending before HUD will consider something a "policy or practice." Again, this proposed policy contradicts *TDHCA v. ICP* and the Fair Housing Act, is arbitrary and capricious, and not in accordance with law.

III. The proposed rule creates a new affirmative defense that effectively creates a "safe harbor" from disparate impact liability that is not provided by statute.

Section 100.500(c)(2) of the proposed rule creates a new affirmative defense, allowing defendants to avoid liability by showing that a challenged policy is based on a model, such as a risk assessment algorithm model. This affirmative defense effectively provides exception to disparate impact liability by making it virtually impossible to bring cases challenging pricing policies for housing related products, including homes, home loans, and home insurance. The proposed change, effectively, seeks to invalidate §3605 of the Fair Housing Act, which prohibits discrimination in residential real estate transactions. Not only does this proposed change contradict the statute, §3605(c) provides an actual exemption, "[n]othing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." The statute, in other words, specifically does not exempt anyone other than persons engaged in the business of furnishing appraisals of real property.

Nothing in *TDHCA v. ICP* even references this issue, and HUD provides no other reason for the

proposed change. The change is arbitrary and capricious, and not in accordance with law.

This proposed change also relies on demonstrably false assumptions about the nature of technology and artificial intelligence, that they are free of the biases held by human beings. However, technology continues to reproduce bias, racism, and discrimination, but in a way that obscures the discriminatory origins of these outputs. Algorithmic bias can be pre-existing, based on the biases (including implicit biases) of the system designer or programmer, technical, based on the technical limits of presenting the data, or emergent, new biases develop with the use of new technology.<sup>6</sup> Even when used with the intent of preventing bias, for example risk assessment tools for determining bail, these models can reproduce discriminatory results. For example, using address as a component of the risk assessment is a proxy for race, because of residential segregation. Facial recognition algorithms built in the United States are often better at identifying people with lighter skin, because the data sets used to train them contain more photographs of white people, and many of the engineers that build and quality test them do not have darker skin.<sup>7</sup>

Particularly relevant to proposed rule, credit score algorithms that take into account social networks are likely to produce biased results.

The notion of a protected class remains a fundamental legal concept, but as individuals increasingly face technologically mediated discrimination based on their positions within networks, it may be incomplete. In the most visible examples of networked discrimination, it is easy to see inequities along the lines of race and class because these are often proxies for networked position. As a result, we see outcomes that disproportionately affect already marginalized people.<sup>8</sup>

Given that many algorithms are proprietary, the likelihood that defendants will be able to provide the inputs for a particular model under proposed §100.500(c)(2)(i) is slim. Neither are defendants likely to be able to show that models have been evaluated by a neutral third party under proposed §100.500(c)(2)(iii) for the same reason. Defendants may not have the right to test or audit third party algorithms. Most defendants are likely to rely on §100.500(c)(2)(ii), which does not even demand any evaluation of whether the algorithm uses “factors that are substitutes or close proxies for protected classes under the Fair Housing Act.” As long as defendants can point to “recognized third party that determines industry standards” and show that “inputs are not determined by the defendant”, defendants can escape liability even if they know the model they are using discriminates on the basis of protected class status. The “industry standards” have long been discriminatory, from the HOLC redlining maps to algorithms that use close proxies for race.

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<sup>6</sup> <https://shahrestanilaw.com/types-of-algorithmic-bias/>;

<sup>7</sup> <https://www.pbs.org/wgbh/nova/article/ai-bias/>

<sup>8</sup> <http://www.danah.org/papers/2014/DataDiscrimination.pdf>, See, also 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](http://suffolklawreview.org/wp-content/uploads/2014/01/Rice-Swesnik_Lead.pdf).

IV. The proposed rule discourages data collection that is critical to uncovering discrimination.

The proposed rule discourages regulated entities from collecting data on “race, color, religion, sex, handicap, familial status, or national origin” and states that “[t]he absence of any such collection efforts shall not result in any adverse inference against a party.” (proposed §100.5(d)) Disparate impact, in particular, relies on being able to show discriminatory effect through statistics, and discriminatory effect is often an indicator of disparate treatment. Data is critical to evaluating compliance with federal civil rights laws.

Particularly in connection with the CFPB’s proposed regulatory change to exempt thousands of lending institutions from reporting Home Mortgage Disclosure Act (HMDA) data, HUD’s proposed amendment to the disparate impact rule looks like another attempt to allow financial institutions and other entities connected with housing to avoid liability for discrimination by concealing data from the government and the public.

HUD provides no reason for this change. It is arbitrary, capricious, and not in accordance with law.

*TDHCA v. ICP* is clear about the creation of a system that was intended to, and continues to, perpetuate segregation and deliberately disadvantage Americans based on their membership in protected classes. As Justice Kennedy states, “[d]e jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life.” 135 S.Ct. 2507, 2515. Segregation and concentrated disadvantage are not natural, they are the product of deliberate government policy decisions at the federal, state, and local level, and the replication of those decisions by private institutions.<sup>9</sup>

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<sup>9</sup> Examples of this include: racially explicit zoning; segregated public housing projects; FHA “redlining” of neighborhoods based on the race of the persons who lived there, creating “high-risk” that discouraged lending and investment in neighborhoods of color; affirmative action for white homebuyers such as the exclusion of Black veterans from GI Bill home loan programs (99% of these loans went to white veterans); FHA loans and other subsidies for suburban development conditioned on the exclusion of African-Americans; denial of equal public services, infrastructure, and facilities to segregated neighborhoods where people of color live; urban renewal programs that displaced and isolated African-American and other communities of color; zoning and land use decisions including exclusionary zoning that prohibits multifamily housing or group homes serving people with disabilities, siting of undesirable land uses and environmental hazards, restrictive covenants that function to exclude protected classes, etc.; lending discrimination such as steering persons of color into subprime loans when they are qualified for prime loans, discriminating against pregnant women, and targeting communities of color for predatory loan; steering by real estate agents; and gerrymandering school boundaries to ensure schools and neighborhoods remain white.

Given this history, claims that government actors and certain institutions “did not create” racial disparities are ahistorical, at best. These disparities were, in fact, created by those institutions; the involvement of current officials or employees is not the relevant issue. The goal of the FHA is to end policies and practices that perpetuate those disparities and redressing the harms the legacy of historical discrimination continue to cause. This is particularly true for government actors, who have an affirmative obligation under the FHA to remedy past discrimination and take affirmative steps to reduce segregation and create open communities with fair housing choice.

Disparate impact liability recognizes that individual animus is not necessarily the basis for the most serious harms inflicted by segregative and discriminatory practices; from the racial wealth gap to the reduced life expectancy caused by exposure to environmental hazards. Society’s interest is not in ferreting out individuals with “hate in their hearts”, it is in remedying harm and ensuring open inclusive communities where all Americans can thrive.

Similarly, complaints from the real estate, credit, property casualty insurers, and other industries about the economic burden of complying with civil rights requirements are contemptible, particularly in light of the vast sums of public money they receive. Lending institutions, for example, receive public subsidies and guarantees worth billions of dollars annually, from Federal Deposit Insurance Corporation (FDIC) depositor insurance to Freddie Mac and Fannie Mae secondary mortgage markets, and benefit disproportionately from the home mortgage interest tax deduction. The Emergency Economic Stabilization Act of 2008 alone provided \$700 billion in public funds to bail out banks, insurance companies, and hedge funds invested in mortgage-backed securities. Ensuring these institutions are not discriminating against the very people whose taxes fund those subsidies should be the absolute minimum that HUD and other government agencies require.

IV. The proposed rule is economically significant under Executive Order 12866 section 3(f)(1).

The proposed rule is economically significant under Executive Order 12866. It will “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”

Housing discrimination is expensive. 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.<sup>10</sup>

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<sup>10</sup> See: [https://courses.helsinki.fi/sites/default/files/course-material/4595613/Zliobaite2017\\_Article\\_MeasuringDiscriminationInAlgor.pdf](https://courses.helsinki.fi/sites/default/files/course-material/4595613/Zliobaite2017_Article_MeasuringDiscriminationInAlgor.pdf)



The documented history of housing discrimination and segregation prevented African-Americans, in particular, from accessing the housing market. Ongoing discrimination, including predatory mortgage and home equity lending, has reinforced and widened the racial wealth gap. For most families, their largest asset is a home. The racial wealth gap is largely a housing wealth gap. While the racial wealth gap has a serious negative impact on individual families, an August 2019 report by McKinsey and Company found that “the racial wealth gap also constrains the US economy as a whole. It is estimated that its dampening effect on consumption and investment will cost the US economy **between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.**”<sup>11</sup> (emphasis added) This proposed rule will have a negative material effect on the entire U.S. economy, by contributing to widening the racial wealth gap rather than closing it.

Despite a clear significant economic effect, the proposed regulation does not include the following required assessments:

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

The finding that the proposed rule complies with EO 12866 and EO 13563 is erroneous. HUD must withdraw the proposed rule and conduct the required regulatory analysis.

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<sup>11</sup> McKinsey & Company, *The Economic Impact of Closing the Racial Wealth Gap*, August 2019, Available: <https://www.mckinsey.com/industries/public-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>

- V. The proposed rule is part of a broader attack on disparate impact that impairs our ability to attack inequity and discrimination.

The proposed rule would gut disparate impact protections under the Fair Housing Act, but it is also part of a disturbing pattern of attacks on disparate impact in other areas including education, employment, health, environmental justice, transportation, and policing. While there are still cases of direct discrimination based on animus against a protected class, it will be difficult to challenge the systemic and structural inequities that have been deliberately created and perpetuated over hundreds of years without the tool of disparate impact liability. The reality of what discrimination looks like and the magnitude of the harms it causes require meaningful disparate impact enforcement.

Fixing these structural issues, from the racial wealth gap to disproportionate discipline of children of color and disabled children in schools, is critical to our continued economic and societal health. These issues implicate our most fundamental values and our Constitutional and civil rights. The proposed rule is unnecessary and arbitrary, and it puts HUD in the position of opposing the central goals and requirements of the Fair Housing Act, in violation of its own obligations under the FHA. HUD should withdraw the proposed rule.

Thank you for the opportunity to comment.

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