Housing Land Advocates

October 18, 2019

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Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Docket Number: FR-6111-P-02, RIN 2529-AA98

To Whom It May Concern:

Housing Land Advocates (HLA) provides advocacy, education, technical assistance, and legal representation on land use matters affecting affordable housing. Our board of directors is comprised of land use planners, attorneys, lenders, researchers, students, and housing advocates with a demonstrated commitment to affordable housing. HLA can be reached by e-mail at info@housinglandadvocates.org and by mail:

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On behalf of the fair housing organizations and civil rights of those who will be negatively affected by this Proposed Rule, we are writing and submitting these comments for your consideration. HLA believes that HUD's proposal would make it nearly impossible for people to bring disparate impact claims. As the Supreme Court recognized in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* ("*Inclusive Communities*") the Fair Housing Act "was enacted to eradicate discriminatory practices within a sector of our Nation's economy."[1] HUD's proposal would allow discriminatory practices to continue unchecked as long as the business, housing provider, or government actor did not state an intent to discriminate. HLA supports and adopts comments submitted by the National Housing Law Project (NHLP) and other national organizations who strongly urge HUD to withdraw this Proposed Rule.

These comments are structured as follows: I. General comments; and II. Response to specific questions raised by HUD in the Notice.

[1] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2521.

I. GENERAL COMMENTS

A. HUD's Proposed Rule contradicts the central purpose of the Fair Housing Act.

In passing the Fair Housing Act ("FHA"), Congress sought to eradicate discriminatory housing practices in the strongest possible terms. Congress intended the Act to provide "a clear national policy against discrimination in housing."[2] The Supreme Court realized that intent in its 2015 decision in *Inclusive Communities*,[3] by confirming that disparate impact is a cognizable theory under the Act, and the theory is essential to realizing Congress' central goals.

The proposed rule claims that HUD maintains the standard of prohibiting discrimination and that the purpose of the rulemaking is to "bring HUD's disparate impact rule into closer alignment with the analysis and guidance provided in *Inclusive Communities*." However, this Proposed Rule does not reflect the Supreme Court's interpretation of disparate impact in that it articulates a definition that is not supported by the decision. The Proposed Rule, without a legal rationale, renders disparate impact an unusable theory by holding plaintiffs to an impossible pleading standard and allowing defendants to evade liability for discriminatory practices and policies.

The primary failure of the Proposed Rule is that it imposes a heightened burden on the plaintiff requiring the plaintiff establish a prima facie case twice and reducing the defendant's burden of proof in response. The Proposed Rule would effectively dismantle a pillar of civil rights that took centuries for this country to create, and that *Inclusive Communities* expressly found as failing to guard against improper discrimination and exclusion.[4]

1. The Proposed Rule disproportionately increases the burden on plaintiffs raising discrimination claims.

Without explanation or justification, the proposed five-step process fails to adhere to the three-part standard set forth in *Inclusive Communities* creating a burden of production/proof so as to make the vast majority of discrimination allegations impossible to prove.[5] *Inclusive Communities* requires that the plaintiff first make a prima facie case showing the policy it is challenging causes a disparate impact on a member of a protected class.[6] If the plaintiff is able to establish a prima facie case, by showing a disparate impact attributable to the defendant's policy, then the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.[7] If the defendant satisfies that burden, the plaintiff will only prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[8]

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[2] H.R. Rep. No. 100-711, p. 15 (1988).
[3] *Id*.
[4] *Id*.
[5] National Housing Law Project, www.fightingforhousingjustice.org. https://docs.wixstatic.com/ugd/e9d741_ebf2e817c33041c59f5f61314ab2cd5d.pdf
[6] *Inclusive Communities Project,* 135 S.Ct. at 2521.
[7] *Id*.
[8] *Id*.

The Proposed Rule goes far beyond the legal standard set out in *Inclusive Communities* by requiring the plaintiff to first make a prima facie case based on proving that the challenged policy is arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective, and provide evidence in the pleading stage to support that case.[9] The proposed regulation doubles down on the plaintiff by requiring proof by the plaintiff of a second prima facie case based on the defendant's response. This is in direct conflict with existing legal standards in *Inclusive Communities*. There is no legal basis for the proposed first or second prima facie case nor the qualitative nature of the burden. The proposed regulation's scheme is an unbalanced process biased in favor of the defendant.

2. The Proposed Rule provides new defenses that shift the burden from defendants to third-party algorithm vendors.

The Proposed Rule provides new defenses for defendants that have not been acknowledged or identified in prior case law. Under the proposed rule, banks and landlords may avoid or reduce their liability when, in the conduct of their business, they use algorithms created by third-party vendors for their screening process. The proposed rule creates a scenario where the defendant (the end user of the algorithm) is held harmless for the harm caused by the defendant's uncritical use of the algorithm. This proposed rule ignores long standing tort law which holds that an entity is responsible for harm it causes when it knew or should have known of the reasonable likelihood of the harm. The defendant is in the best position to evaluate the potential discriminatory impact of the algorithm prior to acquiring it or by defining criteria the third party, by contract, must comply with in designing the algorithm. This rule, without explanation, ignores current tort law and shields defendants from their responsibility to know and understand the impact of the algorithm used in the conduct of their business.

Not addressed in the proposed regulation is the liability of the third parties for developing and/or promoting an algorithm used by defendants or the rights of a plaintiff harmed by the third-party's algorithm. There are serious questions whether such third parties could be held liable under the FHA where the end user, the defendant in a FHA claim, is the party who denied the plaintiff a housing opportunity or "otherwise denied housing" to the plaintiff.

From a factual standpoint, this rule may create an absolute shield for defendants and third party developers of algorithms. Currently, the plaintiff has no way of knowing or obtaining information concerning what data or algorithm a particular defendant/third party used to model credit risk when evaluating an application for housing, a loan or insurance. A plaintiff will not be able to determine, prior to filing litigation, the third-parties that are responsible, the algorithm used, and its impact. The Proposed Rule effectively shields third parties from any legal responsibility for the discriminatory impact of the use of its product. It fails to account for barriers to disclosure of such information due to legal defenses such as trade secrets, non-disclosure agreements or other hindering mechanisms.

Not addressed in the proposed regulation is the liability of the third parties for developing and/or promoting an algorithm used by defendants or the rights of a plaintiff harmed by the third-

[9] *Id*.

party's algorithm. The end result of the proposed rule is to condone discrimination in lending, banking and housing when a person is "otherwise denied housing" through the use of a third party algorithm. This is a direct violation of the purpose, spirit and intent of the FHA.

3. The Proposed Rule diminishes the civil rights of protected classes under the FHA.

The 2013 Disparate Impact Rule was a powerful and significant accomplishment in the fight for civil rights and equality in general, not just in fair housing practices. In *Inclusive Communities,* the Supreme Court acknowledged that "[r]ecognition 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."[10] By setting an impossibly high standard of proof for disparate impact liability, HUD seeks to foreclose use of disparate impact theory that works to counteract the toxic impacts of disguised prejudice in housing decisions. HUD's proposal will make it much more difficult to realize the goals of housing integration.

The FHA currently includes the following protected classes: race, color, religion, sex, national origin, disability, and familial status.[11] Listed below are brief analyses of how some protected and quasi-protected classes will be negatively affected by the Proposed Rule.

a. The Proposed Rule's effect on individuals with criminal records.

Persons with disabilities and persons of color are disproportionately impacted by the criminal justice system resulting in higher proportions of convictions for these protected classes compared to the general population. Any screening criteria that denies housing for a conviction will necessarily exclude more persons in these two protected classes than someone in the majority population. Such screening criteria can be used to disproportionately exclude persons with disabilities or persons of color in a way that violates the FHA. The proposed rule conflicts with the 2016 HUD Guidance which was issued to address this systemic issue.[12]

The 2016 HUD Guidance[13] was created after the *Inclusive Communities* decision, and it identifies a specific analysis applicable to criminal records checks. Historically, individuals with a criminal record have not been a separate protected class listed in the FHA (nor are they now), but the 2016 Guidance raised the possibility that such individuals who have been discriminated against could bring a disparate impact claim against the housing provider or lender. The 2016

[10] *Inclusive Communities*, 135 S.Ct. at 2522.
[11] Ron Leshnower (Mar. 2019), *How Does the FHA Protect Against Housing Discrimination?* Retrieved from https://www.thespruce.com/protected-classes-under-federal-law-156381
[12] Rebecca Vallas and Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records* (Washington: Center for American Progress, 2014). (referencing data collected by the U.S. Department of Justice) https://nicic.gov/one-strike-and-youre-out-how-we-can-eliminate-barriers-economic-security-and-mobility-people
[13] Application of FHA Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf.

Guidance adopted a three-part burden-shifting standard from *Griggs v. Duke Power Co.*,[14] similar to other discrimination challenges. The 2016 Guidance allows a defendant to raise a defense through proof that the defendants' policy not only furthers a substantial, legitimate, nondiscriminatory interest, but that the challenged policy actually achieves that interest as well. However, the Proposed Rule would undermine that guidance.

b. The Proposed Rule's effect on individuals and communities of color.

Similar problems arise when considering potential racial discriminatory effects under the Proposed Rule. Underwriting criteria such as length of credit history, or number of credit inquiries can discriminate against protected class households who are disproportionately concentrated within the lower-income categories (such as, persons of color, single female head of households, households with children, people with disabilities). For example, these algorithms cannot fairly perceive the lengths an individual may have gone through to climb out of poverty or the nuance of the individual's past. Even if that individual pulled through the challenging period and made every payment on time for a significant period, the combined inputs in an algorithm may only see a credit risk.

There are numerous examples of racial discrimination based on algorithms for housing, employment, even in the development of standardized tests. A recent study at the University of California, Berkley, found that Black and Latinx borrowers paid around 5.3 basis points more in interest with online mortgage applications when purchasing homes than similarly situated non-minority borrowers.[15] The Institute of Metropolitan Opportunity in Minneapolis shared a statistical pattern in a recent New York Times article, stating that "A black household that makes $167,000 is less likely to qualify for a prime loan than a white household that makes $40,000…What the banks say in these cases is, 'It's the credit histories, and our models explain the differences.' But you can't look at those models. They're proprietary."[16]

c. The Proposed Rule's effect on survivors of domestic violence, sexual assault, and other forms of gender-based violence.

Domestic violence is a primary cause of homelessness for women and children in the United States.[17] Over 90% of homeless women report having experienced domestic abuse or sexual violence in their lives, while over 50% of homeless women report that domestic violence

[14] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[15] Bartlett, R., Morse, A., Stanton, R. and Wallace, N. (2019). Consumer-Lending Discrimination in the FinTech Era. *UC Berkeley, Public Law and Legal Theory Research Paper*. [online] Available at: https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf [Accessed 3 Oct. 2019].
[16] Badger, E. (2019). *Who's to Blame When Algorithms Discriminate? A proposed rule from HUD would make it harder to hold people accountable for subtler forms of discrimination.* [online] New York Times. Available at: https://www.nytimes.com/2019/08/20/upshot/housing-discrimination-algorithms-hud.html [Accessed 3 Oct. 2019].
[17] *See* ACLU Women's Rights Project, *Domestic Violence and Homelessness* (2006), http://www.aclu.org/pdfs/dvhomelessness032106.pdf; *see also* U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities; A 25-City Survey* (Dec. 2014), https://www2.cortland.edu/dotAsset/655b9350-995e-4aae-acd3-298325093c34.pdf.

was the immediate cause of their homelessness.[18] Access to housing is absolutely critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.[19] Homelessness can also be a precursor to additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.[20]

HUD has repeatedly recognized housing discrimination against domestic violence survivors as a significant fair housing issue, as women account for over 80 percent of domestic violence survivors.[21] The harmful effects of housing instability are compounded for Native American women and women of color who face both increased barriers to housing and disproportionate rates of violence.[22] Housing discrimination against domestic violence survivors also implicates other protected classes. The rate of violence against women with disabilities, for example, is three times higher than the rate of violence against women without disabilities.[23] Additionally, LGBTQ+ individuals experience high rates of domestic violence, while 71% of survivors reported they were denied shelter because of barriers related to gender identity.[24]

Advocates for survivors of domestic violence, sexual assault, and other gender-based violence have relied on HUD's existing Disparate Impact Rule to protect survivors against unjust policies and practices that penalize survivors due to the abuse they have experienced. For example, domestic violence survivors sometimes face obstacles from property owners and housing providers when they request emergency transfer within housing units to escape their abusers. Advocates have relied on the existing Disparate Impact Rule to challenge the failure to grant emergency transfer requests under the FHA, often resulting in the adoption of new policies that ensure that survivors who are in danger may request emergency transfers.[25] HUD's Proposed

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[18] Monica McLaughlin & Debbie Fox, National Network to End Domestic Violence, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking* (2019), https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf.

[19] *See* Charlene K. Baker et al., *Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors,* 15 Aggression & Violent Behavior 430, 430-39 (2010), https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf.

[20] *Id.* at 431.

[21] *See, e.g.,* U.S. Dept of Hous. & Urban Dev., *Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act* (Feb. 9, 2011), https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF; see also U.S. Dept of Justice, Office of Justice Programs, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001* (Feb. 2003). https://www.bjs.gov/content/pub/pdf/ipv01.pdf

[22] *See* McLaughlin & Fox, *supra* note 2, at 1; *see also* Carolyn M. West & Kalimah Johnson, National Online Resource Ctr. on Violence Against Women, *Sexual Violence in the Lives of African American Women* (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf; Smith, S.G., et al., *National Intimate Partner and Sexual Violence Survey (NISVS); 2010-2012 state report* (Apr. 2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.

[23] ACLU, *Domestic Violence & Sexual Assault in the United States: A Human Rights Based Approach and Practice Guide* (Aug. 2014), https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv_sa_hr_guide_reduce.pdf.

[24] National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015* (2016), http://avp.org/wp-content/uplaods/2017/04/2015_ncavp_lgbtqipvreport.pdf.

[25] *See Blackwell v. H.A. Hous, LP,* Civil Action No. 05-cv-01225-LTB-CBS (D. Colo. 2005) (prohibiting discrimination against survivors of domestic violence and allowing them to request an emergency transfer when in imminent danger).

Rule will weaken this enforcement tool, thereby jeopardizing housing for survivors that need it the most.

Some landlords and housing providers may evict or threaten to evict domestic violence survivors based on "one-strike", "crime-free", polices or nuisance ordinances that effectively punish survivors for abuse they experienced in their homes.[26] The 2016 HUD Guidance drew from the 2013 Disparate Impact Rule to challenge the impact of harmful housing policies.[27] The existing Disparate Impact Rule is critical for protecting survivors from further victimization due to the loss of their home, and HLA believes that the new rule should incorporate these protective provisions.

d. The Proposed Rule will negatively effect families with children.

While nothing in the FHA makes discrimination on the basis of income illegal, many individuals and communities face barriers to earning adequate income just by being situated in a protected class. Access to safe and affordable housing options is critical to prevent homelessness for parents and children who may face additional barriers to housing due to unjust housing policies and practices. Disparate impact theory has been used to challenge housing policies such as occupancy requirements and amenity restrictions. Strict occupancy requirements, such as one person per bedroom, significantly limit housing opportunities for families with children and amenity restrictions overly restrict the use of facilities that are enjoyed by children, such as pools or courtyards, and these policies can be considered discriminatory under the FHA.[28]

HLA believes that laws in this country should support institutions that promote inclusive growth of a community, not those that limit members of protected classes to a permanent economic minority.

B. Suits targeting single land use decisions are the heartland of disparate impact liability under the FHA, and this Rule would exclude them.

In *Inclusive Communities*, the Supreme Court recognized that "suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."[29] HUD's proposal blatantly ignores the Supreme Court's guidance by proposing that most zoning decisions will not be actionable under disparate impact theory: "Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government's zoning decision or a developer's decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show

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[26] *See, generally, Warren v. Ypsilanti Hous. Auth.,* Case No. 4:02-cv-40034 (E.D. Mich. 2003) (defendant agreed to cease evicting survivors of domestic violence under its "one-strike policy").

[27] U.S. Dept of Housing & Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services* (2016).

[28] *See* 42 U.S.C. §§ 3601-19; *see also Hous. Opps. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Assoc.,* 510 F. Supp. 2d 1003 (S.D. Fla. 2007) (holding that residents had successfully stated a disparate impact claim because the restrictive occupancy rules had discouraging effects on families with more than two children).

[29] *See, e.g., Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18, 109 S.Ct. 276 (1988).

that the single decision is the equivalent of a policy or practice."[30] In support of this proposition, HUD cites an unpublished district court case currently on appeal,[31] and ignores Supreme Court and circuit court decisions holding that individual zoning decisions are a proper target for disparate impact liability.[32] HUD's proposal would improperly shield zoning and planning decisions from scrutiny under the FHA. As an organization focused on the impact of land use decisions on protected classes this is exactly the kind of blinders HLA seeks to remove. Instead, HUD is embracing the blinder approach to insulate local decision makers for disguised prejudice through piecemeal land use decision making.

C. Discouraging housing providers from collecting data will hamper enforcement of the FHA.

HUD's proposed section 100.5(d) states that "[n]othing in this part requires or encourages the collection of data" regarding protected classes. HUD provides no explanation for this provision, which appears to have no purpose other than to assist corporate entities in obscuring the discriminatory impacts of their practices. While data alone may not establish disparate impact liability, data is a critical tool in demonstrating the impact of housing-related practices on protected groups. This provision is another example of the way that HUD's proposal undermines the FHA and tries to use regulation to negate the Supreme Court's core holding in *Inclusive Communities*: that disparate impact claims are cognizable under the Act.

D. HUD's proposal regarding the use of algorithms does not reflect current research.

As HUD has recognized, algorithms can be used as a tool of housing discrimination.[33] Multiple studies have demonstrated that algorithms result in people of color being denied credit, employment, and housing at disproportionate rates.[34] A recent article published by the Penn State Press discussed various examples of racial discrimination based on algorithms ranging from schools' determination of kindergarten readiness to using eugenics in standardized test development and grading, to employers performing a perfunctory criminal background check which includes the input of racial data.[35]

HUD's Proposed Rule creates a vague standard with many undefined terms that will shield housing providers from disparate impact liability whenever they use an algorithm to make a housing decision. For example, HUD's proposed Section 100.500(c)(2)(ii) allows housing

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[30] *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98, 84 Fed. Reg. 42,854, 42,858.
[31] *Barrow v. Barrow* (D. Mass., July 5, 2017, No. CV 16-11493-FDS) 2017 WL 2872820, at *3.
[32] *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619.
[33] HUD v. Facebook, Charge of Discrimination, FHEO No. 01-18-0323-8 (Mar. 28, 2019)
[34] *When Algorithms Discriminate,* Claire Cain Miller, *New York Times* (July, 9, 2015) (Referencing multiple studies finding discriminatory impact of algorithms) Available at: https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html
[35] Williams, B., Brooks, C. and Shmargad, Y. (2019), *How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications*, (Journal of Information Policy, Penn State University Press) 8 (2018), pp.78-115. Available at: https://www.jstor.org/stable/10.5325/jinfopoli.8.2018.0078 (Accessed Oct 3,. 2019].

providers to defend a discriminatory impact claims where the algorithm employed meets "industry standards" even though the current industry standard has a discriminatory impact.[36]

1. Examples of how algorithms contribute to disparate impact on people of color.

The problem with unmonitored algorithms and credit reports is the neglect of past and present racial disparities in lending practice. According to Urban Institute, credit scores perpetuate racial disparities in wealth in financial security.[37] Among all the data collected by Urban Institute, credit score data reveal how racial disparities persist in cities.[38] The report states that 38 of the 60 cities have differences in median credit scores of 100 points or more between predominantly white and nonwhite areas.[39] Predominantly nonwhite areas in more than 50 of the 60 cities have below-prime median credit scores (660 or lower), and most of these are subprime (600 or lower).[40]

The reason for the disparate impact on people and communities of color is the imperfect credit system and it is rooted in the history of housing discrimination.[41] Historically, people of color have had limited access to affordable credit and have been victims of segregation. From the 1930s through the 1970s, discriminatory rating systems institutionalized by the Federal Housing Administration in collaboration with financial lenders labeled communities of color "high risk" and those neighborhoods were "redlined" on real estate maps.[42] Loans made to residents who lived in these communities, if made at all, were extremely expensive.[43] But more importantly, these polices created hurdles for the poor that reinforce segregation.[44]

The purpose of credit reporting and scoring is to be entirely objective. The true indication is the individual's ability to repay that credit. Studies found that the African American and Latino communities have disproportionately lower credit scores.[45] It is no surprise that the legitimacy of lending practice and credit reporting can be troubling due to the blatant discrimination practices from redlining, reverse redlining, and exclusion. Without accountability and a unified standard to check for disparate impact, this in turn can lead to the harm of other protected classes as well. Without a suspense mechanism, it triggers a slippery slope that allows

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[36] *See Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, LLC*, 369 F.Supp.3d 362, 374, 377-79 (D. Conn. 2019) (Tenant screening company may be held liable for discriminatory impact).
[37] Ratcliff and Brown (2017, November 20). *Credit scores perpetuate racial disparities, even in America's most prosperous cities.* Retrieved from https://www.urban.org/urban-wire/credit-scores-perpetuate-racial-disparities-even-americas-most-prosperous-cities.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] Rice and Swesnik (2012, June 6). *Discriminatory Effects of Credit Scoring.* Retrieved from https://nationalfairhousing.org/wp-content/uploads/2017/04/NFHA-credit-scoring-paper-for-Suffolk-NCLC-symposium-submitted-to-Suffolk-Law.pdf.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] National Consumer Law Center (2016, May). Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination. Retrieved from http://www.nclc.org.

lenders and even local governments to hide behind a veil while enabling questionable credit reporting and algorithms that perpetuate discrimination.

Algorithms function as gatekeepers for a broad range of industries, so it is imperative that disparate impact theory remains an effective tool for ensuring that algorithms do not operate to perpetuate historical patterns of discrimination. It is unclear why this special defense for algorithms is necessary, since the current framework in 24 C.F.R. 100.500(c)(2) allows a defendant to show that the use of the algorithm would be "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." The complexity of algorithms should not be used as an excuse to provide defendants that use algorithmic models in housing decisions with what amounts to a broad liability shield – even when those defendants are engaging in discriminatory housing practices.

II. RESPONSES TO SPECIFIC QUESTIONS RAISED BY HUD

A. How well do HUD's proposed changes to its disparate impact standard align with the decision and analysis in *Inclusive Communities* with respect to the proposed prima facie burden, including:

1. Each of the five elements in the new burden-shifting framework outlined in paragraph (b) of § 100.500.

This Proposed Rule would unjustifiably raises the burden for plaintiffs well-beyond the standard set by *Inclusive Communities,* holding that disparate claims need to be supported by more than a mere showing of statistical disparities.[46] *Inclusive Communities* requires a plaintiff to show that there is a "robust causality" between the evidence presented and the challenged practice in question. The Court did not want disparate impact claims to discourage entities from achieving legitimate objectives and policies unless these objectives and policies result in "artificial, arbitrary, and unnecessary barriers."[47]

The proposed regulation conflicts with the decision in that the new standards, without explanation, deviate from those stated in the Supreme Court Decision and propose standards that are a confusing mix of standing and burden of proof elements. For example, the proposed regulation increases the prima facie burden on plaintiffs and includes defenses not recognized in prior fair housing case law without an analysis based on the Supreme Court reasoning. In doing so, HUD has interpreted the FHA in an arbitrary and capricious manner. The analysis used in the proposed regulation deviates from the analysis in the decision without explanation and appears to be without a legal basis.

The following analysis highlights the five elements in the new burden-shifting framework outlined in paragraph (b) of § 100.500 and whether each conforms to the *Inclusive Communities* decision.

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[46] *Inclusive Communities*, 135 S.Ct. at 2521.
[47] *Id*.

The first element would require a plaintiff to plead that the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective. This element is one that does align with *Inclusive Communities* because it is part of the standard set forth in the ruling. However, HUD concedes that the first prong of its proposed prima facie standard may require an impossible showing.[48] The preamble states that "HUD recognizes that plaintiffs will not always know what legitimate objective the defendant will assert in response to the plaintiff's claim or how the policy advances that interest, and, in such cases, will not be able to plead specific facts showing why the policy or practice is arbitrary, artificial, and unnecessary.[49] How can a plaintiff plausibly allege the absence of a legitimate objective? Even if the plaintiff successfully makes this showing, the Proposed Rule allows the defendant to rebut the claim by "identifying" a valid interest – with no standard of proof.

The second element would require a plaintiff to allege a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class. This element does align with *Inclusive Communities* because it is part of the standard set forth in the ruling.

The third element would require a plaintiff to allege that the challenged policy or practice has an adverse effect on members of a protected class. This element aligns with proper standing requirements to bring a lawsuit as well as the standard in *Inclusive Communities*.

The fourth element would require a plaintiff to allege the disparity caused by the policy or practice is significant, and where a disparity exists but is not material, a plaintiff will not have stated a plausible disparate impact claim. This element is arbitrary and duplicative as the idea behind it is covered in the first element. Further, any lawsuit under the FHA already requires a plaintiff to plead they have been harmed by the defendant's decision in order to establish standing to bring the lawsuit. Additionally, HUD has not defined what "material" or "significant" means in this context HUD uses a blatantly discriminatory example of defendants "forced to resort to the use of racial quotas to ensure that no subset of its data appears to present a disparate impact." This element seems to be an attempt to disguise "material" or "significant" disparities as a means of creating yet another defense for defendants and another obstacle for plaintiffs.

The fifth element would require a plaintiff to allege that the complaining party's alleged injury is directly caused by the challenged policy or practice. The Proposed Rule states that this element seeks to codify the proximate cause requirement under the FHA that there be "some direct relation between the injury asserted and the injurious conduct alleged." However, this element is redundant because, again, the FHA already requires a showing of proximate cause, and would therefore already be part of establishing standing to bring a lawsuit.

[48] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 160 (Aug. 19, 2019).
[49] *Id*.

2. The three methods described in paragraph (c) of § 100.500 through which defendants may establish that plaintiffs have failed to allege a prima facie case.

The Proposed Rule carves out an unprecedented guidance for the automated decision-making systems that power the housing market and does so without any legal basis or justification. These are the algorithms used by lenders and landlords that deliver judgments on credit risk, home insurance, mortgage interest rates, and more. Under the new dispensation, lenders would not be responsible for the effects of an algorithm provided by a third party—a standard that will allow an industry backdoor to bias. These new defenses, not recognized in prior civil rights or torts law, are separate and apart from the disparate impact analysis in the Supreme Court holding. The proposed defenses—or proposed "safe harbor"—will effectively insulate a defendant from any liability when using an automated decision-making system.

First, defendants would be enabled to say that a model is not the cause of the harm because inputs used in the algorithmic model are not themselves "substitutes or close proxies" for protected classes. Additionally, the defendant could argue that the model is predictive of risk or some other valid objective. The use of artificial intelligence technology should help eliminate discrimination, but while an individual variable might not predict risk on its own, combinations of different variables could in fact be close proxies for protected classes, even if the original input variables are not.[50] Further, there are no nationwide standards nor any proposed nationwide standards for the use or development of these algorithms and virtually no transparency for prospective borrowers and/or renters. The Proposed Rule would make it nearly impossible for a plaintiff to respond to this type of defense when there is no way to know what data is on its own or combined with other inputs is predictive of credit risk.

The second defense provided in the Proposed Rule would allow defendants to show that a model or algorithm is being used as intended, and therefore is the responsibility of that third-party's computer system. It is unclear whether aggrieved parties can even get relief under the FHA by suing the third-party creator of the algorithm instead of the bank, landlord or other similarly situated defendant. The Proposed Rule does not discuss this concern nor indicate a position of how far liability would extent in the context of a third-party developer of an algorithm.

If HUD enacts the rule as-is there will be years of significant litigation in an attempt to clarify whether or not the proposed rule complies with the FHA and the Supreme Court's decision. Courts, addressing plaintiffs seeking relief from harm imposed by algorithms, must first decide whether an end user and/or the third-party algorithm creator can be held liable under the FHA for disparate impact discrimination before reaching the merits of a case. Liability under the FHA is analogous to that in tort law: liability extends to those who know or who should have known of the reasonable likelihood of the consequences of their decision-making process. Courts

[50] Prince, A. and Schwarcz, D. (2019). Proxy Discrimination in the Age of Artificial Intelligence and Big Data. *Iowa Law Review*, [online] (2020). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347959 [Accessed 3 Oct. 2019].

will be sympathetic to a plaintiff who argues a defendant failed to act reasonably by not ensuring the algorithm, in the usual conduct of its business, did not violate the FHA.

Under the proposed rule, defendants would be allowed to call on a qualified expert to show that the alleged harm is not a model's fault. Courts are unlikely to substitute HUD's proposed rule for their own responsibility to determine legal and factual questions. A qualified expert cannot take place of the fact finder and does not replace the discovery process. HUD cannot mandate that the court accept an expert's testimony as conclusive fact.

B. What impact, using specific court cases as reference, did *Inclusive Communities* have on the number, type, and likelihood of success of disparate impact claims brought since the 2015 decision? How might this proposed rule further impact the number, type, and likelihood of success of disparate impact claims brought in the future?

Inclusive Communities indicated a willingness of the Supreme Court to embrace disparate impact theory as a distinguishable type of claim under the FHA and to adopt the standards set forth in HUD's 2013 regulation, while still setting limits in determining whether a disparate impact claim is meritorious. A few cases at the intersection of criminal history and disparate impact are *Fortune Society, Inc. v Sandcastle Towers Housing Development Fund Corp* (Eastern District of New York)[51] and *Alexander v. Edgewood Management Corp* (District Court for the District of Columbia).[52] The first case involves a defendant attacking the basic premise of disparate impact theory in its use of statistics, while the second case involves a defendant questioning the constitutionality of disparate impact theory.

The United States Justice Department filed a statement of interest in the *Fortune Society* case demonstrating its "commitment to removing discriminatory barriers that prevent formerly incarcerated individuals from restarting their lives. Women and men who served their time and paid their debt to society need a place to live, yet unlawful housing policies can too often prevent successful re-entry to their communities."[53] In *Alexander v. Edgewood*, the district judge stated that "in order to prevail in a discriminatory impact case under Title VII, plaintiffs, members of a discreet minority, are required to prove only that a given policy has a discriminatory impact on them as individuals."[54] This is a direct example of how some courts believe that plaintiffs should not have to prove an extensive and arbitrary set of elements such as those set forth in the Proposed Rule.

Another example is a case decided earlier this year, *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions*, where a federal judge held that a third-party screening company could be held liable for a criminal history screening tool that was relied upon by a landlord and led to discriminatory outcomes.[55] All of these cases show the courts' support of

[51] *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp*, 1:14-cv-6410 (E.D.N.Y).
[52] *Alexander v. Edgewood Management Corp*, 1:15-cv-01140-RCL (D.D.C.).
[53] *Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp*, 1:14-cv-6410 (E.D.N.Y).
[54] *Alexander v. Edgewood Management Corp*, 1:15-cv-01140-RCL (D.D.C.).
[55] *Connecticut Fair Housing Center et al., v. Corelogic Rental Property Solutions, LLC*, 3:18-cv-00705 (VLB).

both prohibition and prevention of discrimination in fair housing practices, as well as the constitutionality of the Disparate Impact theory.

Not addressed in the proposed regulation is the liability of the third parties for developing and/or promoting an algorithm used by defendants or the rights of a plaintiff harmed by the third-party's algorithm. There are serious questions whether such third parties could be held liable under the FHA where the end user, the defendant in a FHA claim, is the party who denied the plaintiff a housing opportunity or "otherwise denied housing" to the plaintiff.

HLA believes that the Proposed Rule will substantially obfuscate the parameters of a disparate impact claim, increase the number of legal disputes as a result of confusion as to the pleading and burden of proof requirements and, in general, lead to confusion as to how a defendant can conform to the requirement of the FHA.

C. How, specifically, did *Inclusive Communities,* and the cases brought since *Inclusive Communities*, expand upon, conflict, or align with HUD's 2013 final disparate impact rule and with this proposed rule?

Inclusive Communities conflicted with HUD's 2013 final disparate impact rule because it strayed from the framework set up in the rule itself and the Court created its own framework instead. HLA's specific analysis is discussed above in the General Comments.

D. How might the proposed rule increase or decrease costs and economic burden to relevant parties (*e.g.,* litigants, including private citizens, local governments, banks, lenders, insurance companies, or others in the housing industry) relative to the 2013 final disparate impact rule? How might the proposed rule increase or decrease costs and economic burden to relevant parties relative to *Inclusive Communities*?

1. Reducing the expense to defendants by discouraging litigation under the FHA is not in compliance with the goal and policies under the Act.

The Proposed Rule would essentially undo the 2013 final Disparate Impact Rule in its entirety, so the question becomes how the Proposed Rule would increase or decrease costs and economic burden to relevant parties relative to *Inclusive Communities.* However, HLA believes this question is merely fishing for positive responses from banks, landlords or other similarly situated defendants who welcome such a rule that is so heavily drafted in their favor. Prospective defendants would avoid defense costs to the detriment of plaintiffs who rightfully are seeking compensation for discrimination. The Proposed Rule will have a significant negative economic impact on protected class households in that they will incur greater costs when seeking housing, loans, and insurance because they cannot surmount the barriers created by this Proposed Rule. It is likely that this new Rule would more greatly affect prospective plaintiffs since they must shoulder the bulk of responsibility under the proposed new rule. Plaintiffs would incur increased costs such as attorneys' fees due to the complexity of litigation and the increased burden, and perpetuated negative credit history because of factors such as too many inquiries, etc.

E. How might a decision *not* to amend HUD's 2013 final disparate impact rule affect the status quo since *Inclusive Communities?*

A decision not to amend HUD's 2013 final disparate impact rule in light of the ruling in *Inclusive Communities* could have varying results. Therefore, HLA believes there are two options for desirable outcomes here. First, if this Proposed Rule is rejected, the defendant's use of an algorithmic model in a disparate impact case would be considered on a case-by-case basis, with careful attention paid to the particular facts at issue. This is how fairness could best be achieved. We do understand, however, that if this Proposed Rule is rejected outright, courts may simply continue to split on which standards to apply to which cases, involving a piecemeal version of the 2013 regulation and the Supreme Court standard. This is the preferable outcome as the Proposed Rule is an illegal and arbitrary interpretation of the statute at issue.

Second, if HUD refuses to leave things as-is, the parties will rely upon the current interpretation of disparate impact contained in *Inclusive Communities.*

F. What impact, if any, does the addition of paragraph (e) of § 100.500 regarding the business of insurance have on the number and type of disparate impact claims? What impact, if any, does the proposed paragraph (e) have on costs (or savings) and economic burden of disparate impact claims?

The Proposed Rule states that paragraph (e) "would provide that nothing in § 100.500 is intended to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." This language seeks to create the effect of a safe harbor for insurance, "in appropriate circumstances" by ensuring that parties are never placed in a "double bind of liability" where they could be subject to suit under disparate impact for actions required for good faith compliance with another law. The rule further states that this proposed paragraph "applies where the defendant can show that imposing disparate impact liability under the FHA would invalidate, impair, or supersede State insurance law." We do not believe that the addition of this paragraph will greatly affect, if at all, the number and type of disparate impact claims. We do not, however, agree with HUD that this is consistent with the "robust causality" requirement set forth in *Inclusive Communities,* because the intent in that case in creating that requirement was not to enhance protection of defendants' discriminatory effect in housing practices. We therefore believe this addition could be reworded so as not to provide a complete safe-harbor or similar effect to further shield defendants from liability or used as a method to satisfy the defendant's burden.

G. Is there any other data, information, or analysis the public can provide to assist HUD in assessing the impact of the proposed regulation relative to the 2013 disparate impact final rule and the 2015 Supreme Court decision in *Inclusive Communities*?

The following are some general recommendations to be taken in consideration with the foregoing statements.

1. HUD could rewrite this Proposed Rule to include nationwide standards for the use of algorithms used in screening practices by defendants.

HLA believes that HUD could rewrite this Proposed Rule to include nationwide standards for algorithm use in screening practices by landlords, banks and other similarly situated defendants. The Proposed Rule should make clear a primary user of an algorithm in the ordinary course of business is liable for the consequences of its use. The user of the algorithm is in the best position to determine the likely impact or outcome of its use and should therefore be the entity responsible under the FHA. Similarly, the primary user has the authority, by contract obligation, to ensure the creator of the algorithm or manufacture of the software utilizing the algorithm, to shift liability to the third-party vendor/creator, thereby ensuring, in the first instance, the products compliance with the FHA.

The proposed regulation should include standards of practice for those who use algorithms in the course of business and for those who create or market such algorithms. For example, one such standard would be to require producers and/or banks of an algorithm to run tests on the models they use to determine credit risk, with full transparency to prospective customers (banks, insurance agencies, management companies) and the public similar to energy standards. This allows end users of the algorithm to evaluate the product prior to purchasing it avoiding both liability and the cost of testing it themselves. If the end user (banks, insurance companies, management companies) were required to run these tests, it would incentivize vendors to design algorithms that do not result in a disparate impact upon protected classes. Under either scenario, end users would be more willing to pay for algorithms that are reliable and are in compliance with disparate impact standards.

2. HUD could clarify and include whether and how remedies against third-parties under this Rule and the FHA may be obtained.

HLA believes that HUD could clarify and include whether and how third-party vendors/algorithm developers can be assigned liability under this rule and the FHA. Guidance from product liability cases would be instructive given the third-party vendors/algorithm developers are creating and marketing a commercial product. Further, if those vendors/algorithm developers may be assigned liability, HUD should clarify and include whether and how plaintiffs can seek and receive a remedy for discrimination by those defendants.

3. HUD could include provisions on how the Proposed Rule will prevent discrimination and promote integration.

HLA believes HUD could respond specifically as to how exactly the Proposed Rule will further the prevention of discrimination and promote integration—twin purposes of the FHA—as the Proposed Rule merely states that it supports the prohibition of discrimination.

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Thank you for the opportunity to comment. We look forward to working with HUD to successfully implement a revised rule which reflects the policy against discrimination in fair housing practices.

Sincerely,

Jennifer Bragar
President, Housing Land Advocates