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CITY BAR

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

**Re: Docket No. FR-6111-P-02; RIN 2529-AA98
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**

This comment is submitted in opposition to the Department of Housing and Urban Development's ("HUD") proposed changes to the Fair Housing Act's ("FHA") Disparate Impact Standard, Docket No. FR-6111-P-02, published in the Federal Register on August 19, 2019 (the "Proposed Rule"). We urge that the Proposed Rule be withdrawn in its entirety and that the 2013 final rule ("Disparate Impact Rule") remain in effect.

As an organization of 24,000 members, the New York City Bar Association's mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. In doing so, the City Bar uses its voice to address a broad range of policy issues, which includes civil rights, housing law, immigration and nationality law, social welfare law, disability law, and laws affecting children and families. The Disparate Impact Rule has proven critical to ensuring that the objective of the FHA—to eliminate all vestiges of discrimination in housing—is achieved. By effectively eliminating a charging party's ability to advance genuine claims of disparate impact, the Proposed Rule will allow de facto discrimination to flourish in our nation. Because of the breadth of harm encompassed by the changes in the Proposed Rule, the City Bar opposes the Proposed Rule in its entirety.

I. BACKGROUND

In its current form, the Disparate Impact Rule has been practical and effective. It also comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). In fact, *Inclusive Communities* quoted the Disparate Impact Rule at length without any suggestion that the Supreme Court's opinion in that case was in tension with the

current regulation. The central premise of *Inclusive Communities* is that disparate impact claims are necessary to eliminate policies that may not be readily challenged under disparate treatment theories even though the policies unnecessarily exclude protected persons from housing, exacerbating preexisting patterns of segregation in America. HUD's new proposal will severely limit disparate impact's application and will leave disparate treatment as the only viable option for a FHA claim.

In addition to ensuring housing opportunities, HUD's mission extends to the building of "inclusive and sustainable communities free from discrimination."¹ This mission to end housing discrimination was reinforced and codified into the FHA, which was passed three years after HUD's creation. Soon thereafter, the Nixon administration began using disparate impact as a method of ensuring equal housing opportunity. From then until now, every circuit court that has considered disparate impact has upheld it as a viable method for proving discrimination under the FHA. When HUD adopted its current Disparate Impact Rule in 2013, it did so on the basis of decades of existing jurisprudence. With its decision in *Inclusive Communities*, the Supreme Court recognized the consistency of HUD's approach.²

II. COMMENTS

The Proposed Rule sets forth a standard for a prima facie case of disparate impact that is at odds with the vast majority of federal caselaw, including *Inclusive Communities*, and strikes at the core purpose of the FHA to ensure "fair housing throughout the United States."³ The Proposed Rule increases the plaintiff's prima facie case burden through a series of standards that are ambiguous, undefined, or overly burdensome.

a. **The Proposed Changes Will Grossly Diminish the Chances of a Complaint Surviving the Pleadings Stage.**

i. ***Requirement that pleadings demonstrate that challenged policy is "arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective."***

HUD points to *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1112–14 (8th Cir. 2017) in support of its proposal to require, as an element of a prima facie case for disparate impact claims, that "the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective." However, no other federal circuit court (or the Supreme Court to which the 8th Circuit erroneously cites in *Ellis*) has ever looked to whether a policy is "arbitrary, artificial, and unnecessary" as an element of a plaintiff's prima facie burden.⁴ HUD's reliance on

¹ See *Mission*, HUD, <https://www.hud.gov/about/mission>. (All websites cited in this letter were last visited on October 15, 2019)

² *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2521 (2015).

³ 42 U.S.C. § 3601.

⁴ See, e.g., *Inclusive Communities*, 135 S. Ct. at 2522 (explaining purpose of disparate impact claims to be "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (originally using the phrase to explain the purpose of Title VII);

the Eighth Circuit’s reasoning undercuts, if not completely negates, the purpose of the FHA and is ill-founded in the law, including the Supreme Court precedent under *Inclusive Communities*.

The proposal also would create unnecessarily high burdens on charging parties at the pleading stage. Under the Proposed Rule, plaintiffs will be forced to speculate about the defendant’s objectives at a time when they will have little or no information on which to premise such allegations. Organizational objectives are not commonly disclosed to the public, yet HUD seeks to require that the charging party attempt to blindly provide information that is typically substantiated only during the discovery phase of litigation. Because defendants control access to the facts necessary to meet this element, it is difficult to understand how HUD expects disparate impact cases to move forward under the Proposed Rule.

In its supplement, HUD addresses the difficulty plaintiffs will face in meeting this element during the pleading stage. Where plaintiffs lack specific facts, HUD suggests plaintiffs make a “plausible” showing concerning policy objectives.⁵ However, HUD overlooks the fact that this still requires plaintiffs to partake in blind conjecture. That is not what the law, as interpreted by the Supreme Court, requires.⁶

ii. “Robust Causal Link.”

Plaintiffs would also be required to prove a “robust causal link” between the challenged policy or practice and the impacted protected class.⁷ While HUD argues that the robust causal link requirement is derived from the *Inclusive Communities* decision, it fails to define what would meet this standard. Again, plaintiffs are being forced to engage in a guessing game that is unnecessarily stacked against them, undermining the FHA’s primary purpose.

b. The Proposal is Biased in Favor of Defendants.

The Proposed Rule also introduces sweeping and dangerous safe-harbor provisions for defendants that will invite and solidify discrimination in the housing market. Most notably, under the Proposed Rule, a defendant may avoid liability if it relies on certain forms of algorithmic decision-making, which researchers have repeatedly warned tend to be based on historical data reflective of human bias and discrimination, as well as human programming choices that can similarly introduce discriminatory biases.⁸ Indeed, a report by Data and Society observed that

Inclusive Communities Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 906 (5th Cir. 2019) (summarizing standards applied in other circuits following *Inclusive Communities*).

⁵ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

⁶ See generally *Inclusive Communities*, 135 S. Ct. 2507; see also *Duke Power Co.*, 401 U.S. at 431; *Lincoln Prop. Co.*, 920 F.3d at 906.

⁷ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,858 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100).

⁸ See, e.g., Maddalena Favaretto, Eva De Clercq & Bernice Simone Elger, *Big Data and Discrimination: Perils, promises and solutions*, 6 Journal of Big Data 12 (2019); Cathy O’Neil, WEAPONS OF MATH DESTRUCTION (Crown 2016).

“[w]hile law has always lagged behind technology, in this instance technology has become de facto law affecting the lives of millions—a context that demands lawmakers create policies for algorithmic accountability to ensure these powerful tools serve the public good.”⁹ Yet under the Proposed Rule, HUD would move in the opposite direction, making algorithmic decision-making in the housing context virtually exempt from legal review by the courts.

Remarkably, the safe-harbor defense for algorithmic decision-making ignores the possibility that a third party may have had discriminatory intent in formulating the algorithm, perhaps even at the housing provider’s behest or with the housing provider’s reckless disregard of the discrimination. Although such algorithmic outputs might be alleged to result from the application of neutral principles, as with redlining, that may not be the truth. The new proposal does not provide plaintiffs with the ability to analyze a model’s inputs or decision-making process to challenge the neutrality of the model. That fundamentally undermines the theory of disparate impact analysis under the FHA.

III. CONCLUSION

Our nation has a vested interest in ensuring that housing opportunities are available to every individual. The current proposal will effectively close disparate impact as a viable avenue to advance the cause of fair housing under the FHA. It is at odds with HUD’s mission, controlling legal precedent, and the best interests of the American public.

Respectfully submitted,

Committee on Civil Rights
Zoey Chenitz, Chair

⁹ Robyn Caplan, Joan Donovan, Lauren Hanson, & Jeanna Matthews, *Algorithmic Accountability: A Primer*, Data & Society, 25 (Apr. 18, 2018), https://datasociety.net/wp-content/uploads/2019/09/DandS_Algorithmic_Accountability.pdf.