October 16, 2019

SUBMITTED VIA REGULATIONS.GOV

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

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

Dear Mr. Paul Compton,

We are grateful for the opportunity to offer comments in response to the above-docketed notice ("Notice") concerning proposed changes to the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development ("HUD"). We are a group of real estate trade associations that, together, represent hundreds of thousands of real estate professionals from throughout the United States. Our organizations have worked to advance fair housing rights and opportunities for both consumers and real estate professionals. As real estate trade associations, we know that open markets that are free from discrimination are vital for achieving a healthy, strong marketplace. Markets tainted by discrimination operate inefficiently and restrict business opportunities, stifling economic progress.

The Asian Real Estate Association of America (AREAA) is a nonprofit professional trade organization dedicated to promoting sustainable homeownership opportunities in Asian American communities.

The National Association of Hispanic Real Estate Professionals (NAHREP) is a membership organization made up of multicultural real estate professionals dedicated to increasing the rate of sustainable Hispanic homeownership and to serving the community at large.

The National Association of Real Estate Brokers (NAREB) is a membership organization of predominately African American real estate professionals. Founded in 1947, NAREB is the nation's oldest and one of the largest minority real estate trade associations.

We urge HUD to maintain the standard the agency adopted in its 2013 final rule ''Implementation of the Fair Housing Act's Discriminatory Effects Standard" for four reasons. First, a robust disparate impact standard is critical for driving marketplace innovations and helping to create a strong economic and business environment. Second, robust disparate impact claims remain necessary to achieve Congress's goals in the Fair Housing Act ("FHA"). Third, Congress implicitly adopted the approach of the existing rule, which reflects the long-standing

practice of HUD and the U.S. Courts of Appeals, and was endorsed by the U.S. Supreme Court in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2525-26 (2015) ("*Inclusive Communities*"). Fourth, the proposed rule violates the FHA, creates unjustified burdens on complainants, and creates untenable administrative procedures that depart from settled practice and arbitrarily increase the costs of implementing the Act.

The existing disparate impact rule serves the American public by providing an incentive for lenders, insurers and others to develop policies that appropriately identify risk and achieve business goals while not rejecting applicants or giving them less favorable terms based on stereotypes or illegal bias. The existing rule also helps spur the development of products and services that meet the needs of consumers and real estate professionals. Because disparate impact is crucial to the continued and strengthened access to fair credit and homeownership, we strongly oppose any changes to HUD's current Disparate Impact Rule. Communities of color were disproportionately impacted by the financial and foreclosure crises in large part because of a lack of effective enforcement of fair housing and fair lending laws. These communities have not fully recovered from the crisis, own homes that are disproportionately underwater, and are struggling to have equal access to housing and homeownership opportunities. In fact, the Black homeownership rate is continually declining and in a state of crisis. At 40.6%, the rate is lower than it was when the Fair Housing Act was passed 50 years ago. *See* James H. Carr, *2019 State of Housing in Black America,* National Association of Real Estate Brokers (2019). Now is not the time to weaken critical fair housing protections.

A Robust Disparate Impact Standard Drives Marketplace Innovations and Helps Create a Strong Economic and Business Environment

The consumers our members serve are fueling the U.S. housing market. In fact, the Hispanic market segment can be credited for dramatically reversing the trend of declining homeownership in the aftermath of the financial crisis. In 2015, this market segment became the "first ethnic demographic to show an increase to its post-recession homeownership rate." Since 2008, the Hispanic market has represented the largest share (62.7%) of net homeownership gains. *See* Marisa Calderon, *2018 State of Hispanic Homeownership Report,* National Association of Hispanic Real Estate Professionals (2018). The Asian American and Pacific Islander (AAPI) is the fastest growing demographic in the U.S. Certain segments of the AAPI market segment have among the highest rates of real estate purchase. *See State of Asia America,* Asian Real Estate Association of America (2019). Despite significant barriers, African-American women are the fastest-growing group of entrepreneurs representing the highest growth rate, from 2017 to 2018, than any other group. *See The 2018 State of Women-Owned Businesses Report,* American Express (2018). Significantly, a large portion of these businesses are started in people's homes and/or with home equity as the capital basis for the development of the business. This means that homeownership opportunities are an integral part of helping to build a strong economy.

Because homeownership opportunities are so important for the consumers we serve, we have worked diligently to support fair housing. In fact, real estate developers and housing advocacy organizations have worked together as plaintiffs in fair housing cases in order to eliminate all forms of housing discrimination. *See, for example, Hallmark Developers, Inc. v. Fulton Cnty., 466 F.3d 1276, 1279-80* (11th Cir. 2006) (Private developer challenged city's discriminatory

zoning ordinance). *See, Greater New Orleans Fair Housing Action Center v. St. Bernard Parish* (Private developer and non-profit fair housing organization joined forces to combat discriminatory zoning ordinances, including a "blood relative ordinance" which prohibited landlords from renting to anyone other than someone who was a blood relative of a person already living in the parish. The developer and fair housing group challenged the ordinance using disparate impact.)

Discrimination distorts and limits access to markets harming both victims of discrimination, the communities in which they live and housing professionals attempting to serve them. Economists have analyzed the negative affects of bias in housing markets showing that discrimination works to restrict markets and make them operate less efficiently. *See* Gary Becker, *The Economics of Discrimination* (2d ed. 1971). *See* David Rusk, "*The Segregation Tax": The Cost of Racial Segregation to Black Homeowners*, The Brookings Institute (2001). See John Yinger, Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination 98-103, Russell Sage Foundation (1997). (Estimating that the annual cost of discrimination in the mid-1990s housing market to be $2.0 billion for African Americans and $1.2 billion for Hispanics.)

Even Alan Greenspan, former Chairman of the Federal Reserve, opined about the debilitating impact of housing discrimination to our economy:

"Discrimination is against the interests of business-yet business people too often practice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital."

- Alan Greenspan, Remarks before the Annual Conference of the National Community Reinvestment Coalition, Economic Challenges in the New Century (March 22, 2000)

Disparate Impact is Necessary to Achieve Congress' Goals Set Forth in the Fair Housing Act

Congress passed the Fair Housing Act on April 11, 1968, seven days after, and in direct response to, the assassination of Dr. Martin Luther King, Jr. Congress passed the law with the expressed intent to achieve "fair housing throughout the United States." 42 U.S.C. § 3601. The Supreme Court recognized this Congressional intent in June 2015 when it decided that disparate impact claims are cognizable under the Fair Housing Act. The Court acknowledged the Fair Housing Act has a "continuing role in moving the Nation toward a more integrated society," and is "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.'" *Inclusive Communities*, 135 S. Ct. at 2525-26 (quoting Kerner Commission Report at 1). Disparate impact claims are a key part of achieving this congressional goal. *Id*

Although overt discrimination happens less frequently today than it was when the FHA was passed, the nation remains deeply segregated by race. This racial segregation is the direct result

of federal policies implemented by Home Owners Loan Corporation, Federal Housing Administration, and other federal agencies that used race-based policies to deny housing opportunities to people of color, mandate racial segregation in the provision of housing and lending programs, require the promotion of racially restricted residential covenants, and otherwise obligated communities and agencies to segregated communities based on race.

To respond to excessively high foreclosure rates during the Great Depression, Congress took steps that transformed the home mortgage market, notably by providing federal guarantees for approved mortgages. *See* Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to White and Out of Reach for Blacks*, 115 Yale L.J. 186 (2005). These measures made secure homeownership available to millions more Americans and transformed it into an important vehicle for families to build wealth. *Id.* However, these new, safer and sustainable, low-cost mortgages were restricted to predominately White borrowers and communities. *Id.* The Federal Housing Administration explicitly encouraged racially restrictive covenants to promote residential segregation and protect neighborhood racial homogeneity. FHA even required racially restrictive covenants to obtain financing for the massive new housing developments built after World War II. Although the Supreme Court declared that enforcing such covenants would be unconstitutional in 1948, the government continued to encourage them, and did not ban guaranteeing loans on racially-restricted properties covenants until 1962. *See* Gregory Squires, The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act (2018). *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017). The covenants, moreover, remained on the books, discouraging sales in the suburbs for decades. Richard R. W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms (2013).

Although, some advancements have been made in reducing levels of segregation, largely because of enforcement under the FHA, segregation is still a systemic challenge in the U.S. Indeed, neighborhood and school segregation has actually gotten worse since the 1980s. *See* Alvin Chang, *The data proves that school segregation is getting worse*, Vox.com (March 5, 2018).

By 1968, these policies had created deep-rooted patterns of segregation. Cities had lost generations of access to favorable home financing, resulting in housing deterioration and loss of their middle-class populations. African American families had lost generations of wealth-building because they were denied access to low-cost home loans and high-value suburban neighborhoods. *See* Lisa Rice, *Long Before Redlining: Racial Disparities in Homeownership Need Intentional Policies* and *After Redlining: Part 2*, Shelterforce.org (February 15, 2019 and February 21, 2019). At the same time, because homeownership had become such a powerful way to build wealth for white families, suburban municipalities had every incentive to create zoning rules that fenced out residents of color. As a result, despite a desperate lack of affordable housing, most residential land in the United States is restricted to single-family ownership, and municipalities regularly increase the minimum lot size for new housing.

With over 4 million instances of housing discrimination occurring each year, it is imperative that our nation retain every viable means of redressing both individual and systemic discrimination. Although officials generally refrain from expressing blatantly discriminatory purposes, they can achieve the same results by simply maintaining and expanding exclusionary land use rules and other policies that perpetuate segregation. As *Inclusive Communities* acknowledged, however, targeting "zoning laws and other housing restrictions that function unfairly to exclude minorities

from certain neighborhoods without any sufficient justification," fulfills the "central purpose of the FHA." *Inclusive Communities*, 135 S. Ct. at 2522. Disparate-impact liability is thus a "'crucial tool[] to combat the kinds of systemic discrimination that the FHA was intended to address.'" *Id*. at 2524 (quoting Brief for Massachusetts et al. as Amici Curiae 2). Sadly, the standard the agency proposes strips plaintiffs of this necessary, congressionally-intended tool by making disparate impact claims nearly impossible to bring.

The nation's long history of racially discriminatory housing and lending policies promulgated by the federal government coupled with discrimination in the private market created a dual credit market in which still today disservices LatinX, African American, Native Americans, and segments of Asian American consumers. These consumers are disproportionately credit invisible and access credit in the subprime or non-traditional credit market at much higher rates than their White counterparts. Squires (2018).

Discrimination in the housing market has also resulted in restricted opportunities for members of the LGBTQ community, single female headed households and persons with disabilities. Yet, it is precisely these consumers our organizations seek to serve. Restricted opportunities for these consumers directly limit the ability of our members to transact business and provide homeownership opportunities for those who want and deserve them.

The Supreme Court Implicitly Adopted the Existing Rule

The proposed rule is an unreasonable reversal of the current rule. That rule, adopted just six years ago after extensive notice and comment, reflected the consensus practice of HUD and Courts of Appeals throughout the nation developed over decades under the FHA. Congress implicitly ratified this approach in the 1988 amendments to the FHA. The U.S. Supreme Court recited and affirmed the current rule in *Inclusive Communities*, and several courts have relied on it since. There is no justification for the radical change in regulation that HUD is proposing.

In no way is the proposed rule necessary to "better reflect" the Supreme Court's decision in *Inclusive Communities. Cf.* 84 Fed. Reg. 42854 (stating reasons for proposal). *Inclusive Communities* repeatedly referenced and endorsed the current rule. The Court both recited the current rule's burden shifting framework, 135 S. Ct. at 2514-15, and referenced that framework in discussing the appropriate limitations on disparate impact liability. 135 S. Ct. at 2522 (citing 78 Fed. Reg. 11470); *see also* 135 S. Ct. at 2523 (quoting 78 Fed. Reg. 11476). As one court recently declared, "the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." *Property Casualty Insurers Association of America v. Carson*, 2017 WL 2653069, at *9 (N.D. Ill. June 20, 2017). Other courts have also described *Inclusive Communities* as "implicitly adopt[ing]" or "affirming" the approach of the current rule. *Mhany Management v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016); *Inclusive Communities Project v. Texas Dept. Housing & Comm. Aff.*, 2015 WL 5916220, at *3 (N.D. Tex. Oct. 8, 2015) (stating that the Supreme Court affirmed "without altering the burden-shifting approach" of the regulations).

The current rule also already limits disparate impact liability in precisely the way *Inclusive Communities* dictated. When the Supreme Court stated that "an appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private

developers leeway to state and explain the valid interest served by their policies," it cited HUD's discussion of the valid defenses to a prima facie case. 135 S. Ct. at 2522 (citing 78 Fed. Reg. 11470). The agency's existing rule also explicitly places the burden on the charging party to prove that "a challenged practice caused or predictably will cause a discriminatory effect," 24 CFR § 100.500(c)(1), and that plaintiffs bear the burden of "identifying the specific practice that caused the alleged discriminatory effect." 78 Fed. Reg. 11469. The current rule thus already codifies the Supreme Court's warning that disparate impact liability should not be "imposed based solely on a showing of a statistical disparity." *Inclusive Communities* at 2522.

Inclusive Communities, moreover, emphatically endorsed use of the FHA in the way the current rule allows. The Court stated that suits targeting "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 2522. It emphasized the benefit of claims allowing "private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units." *Id.* It further praised the use of disparate-impact cases to "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Id.* Nothing in *Inclusive Communities* justifies abandoning the current rule in favor of the restrictive and untenable rule HUD proposes.

Reasoned justification is particularly necessary because the current rule reflects longstanding practice of the agency and the courts. *See Encino Motors*, 136 S. Ct. at 2137 ("This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law"). When HUD adopted the current rule, it was informed by its own decades-long practice and that of eleven U.S. Courts of Appeal.[1] All agreed that disparate impact claims were available under the FHA.[2] The three-step burden shifting approach codified in the current rule represented that of the majority of the courts as well as HUD itself. In creating this approach, moreover, HUD considered and rejected a standard more favorable to plaintiffs. That approach, adopted by one U.S. Court of Appeals and at times by HUD administrative law judges, would have placed the burden on the defendant at the third step to show that no less discriminatory alternative existed to achieve its objective. *See* Huntington Branch, 844 F.2d at 939; HUD v. Twinbrook Village Apts., 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001). Instead, the rule provides that once the defendant offers a legitimate non-discriminatory justification for the practice, the burden shifts back to the plaintiff or charging party to prove that no less discriminatory alternative exists. 24 CFR § 100.500(c)(3).

---

[1] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11462 (2013), citing Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 374-78 (6th Cir. 2007); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007); Hallmark Developers, Inc. v. Fulton County, Ga., 466 F.3d 1276, 1286 (11th Cir. 2006); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740-41 (8th Cir. 2005); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Jackson v. Okaloosa Cnty., Fla., 21 F.3d 1531, 1543 (11th Cir. 1994); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937-38 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curiam); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987-89 & n.3 (4th Cir. 1984); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290-91 (7th Cir. 1977); United States. v. City of Black Jack, 508 F.2d 1179, 1184-86 (8th Cir. 1974).

[2] *Id.*

Congress, moreover, has implicitly ratified the judicial interpretation codified in the rule. As *Inclusive Communities* noted, Congress amended the FHA in 1988 against the backdrop of eight circuit courts that had held the FHA created disparate impact claims. *Inclusive Communities,* 135 S. Ct. at 2520. The amended FHA "implicitly adopted" these courts' construction of the statute. *Id.* (quoting *Forest Grove School Dist. v. T.A.,* 557 U.S. 230, 244, n. 11 (2009)). In addition, in 1988 as in 1980, 1981, 1983, 1985, and 1987, Congress considered and rejected amendments that would have added a discriminatory intent requirement to the FHA. 78 Fed. Reg. 11467.

Congress has also already determined the necessary limits on disparate impact claims. The 1988 amendments clarified that the FHA did not prohibit real-estate appraisers from considering factors other than race, color, religion, national origin, sex, handicap, or familial status, 42 U.S.C. § 3605(c); that the FHA did not prohibit conduct against a person because they had been convicted of illegal manufacture or distribution of a controlled substance, 42 U.S.C. § 3607(b)(4); and that the FHA did not limit "the applicability of any reasonable ... restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). As *Inclusive Communities* recognized, these provisions, which are only relevant to disparate-impact claims, "signal that Congress ratified disparate-impact liability." 135 S. Ct. at 2521. These provisions also demonstrate that Congress knew how to limit disparate impact claims when contrary to the public interest, and that the current act reflects the balance Congress deemed necessary.

The agency's existing rule thus already limits disparate-impact claims in exactly the way the Supreme Court prescribed. It fulfills the Court's recognition that robust disparate impact litigation is necessary to implement the FHA, but that such litigation should not displace measures necessary to achieve valid housing objectives. It also conforms to longstanding judicial practice and the intent of Congress. The proposed abandonment of the agency's prior position, therefore, "results in a rule that cannot carry the force of law." *See Encino Motors,* 136 S. Ct. at 2137.

Inclusive Communities refers to and validates the existing regulation throughout the decision. The existing regulation explains that "a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff 'has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.' 24 CFR §100.500(C)(2). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability." The Supreme Court reiterated the point made by the existing rule, and in doing so conveyed its sanction of the existing rule, when it stated "In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "(r)acial imbalance…does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create."

The Proposed Rule Does Not Comport with the FHA and Would Cause Marketplace Disruptions

The existing rule, because it is based on decades of legal jurisprudence, has been adopted by the business community and incorporated in business practices. Our training and compliance

programs as well as business operations are keyed to the existing rule. We have invested an extensive amount of both capital and human resources into ensuring compliance with the disparate impact standard that has been in existence for the better part of four decades. Disrupting the current rule for a completely different standard and one that is not based on legal precedent will create regulatory and legal confusion for our organizations.

The proposed rule complicates and confuses the standards relied on by lower courts and endorsed by *Inclusive Communities*. In short, the proposed rule would make it effectively impossible for disparate impact claims to succeed. This is in direct conflict with the expressed intentions of the Supreme Court in *Inclusive Communities*. It plainly exceeds HUD's authority under the FHA.

The proposed rule discourages the collection of critical data needed to determine whether housing providers are complying with fair housing standards. This conflates with years of business training which supports and encourages businesses to keep important records and important data to help explain business decisions.

The proposed rule provides that "[p]unitive or exemplary damages shall not be available as a remedy," where the violation was caused by a third party whom the defendant had the power and responsibility to control. This directly contradicts the FHA, which provides that if a court finds that a discriminatory housing practice has occurred "the court may award to the plaintiff actual and punitive damages." 42 U.S.C. § 3613(c)(1). While punitive damages may be less common where the initial actor was a third party, HUD has no authority to usurp the intent of Congress by prohibiting punitive damages wholesale. If one of our members is harmed by an act of discrimination, we do not favor limiting the remedies that would be available to her/him to help ensure that their business remained viable.

The proposed rule also makes a dramatic change by removing references to the perpetuation of segregation. The current rule makes clear that actions that perpetuate segregation can be addressed by using the disparate impact tool. The proposed rule eliminates that language.

No explanation is provided for this change, which removes the perpetuation-of-segregation strand of jurisprudence out of the agency's interpretation of the act, and significantly narrows the basis for liability in all cases. The deletion of perpetuation claims is unjustified, particularly in light of the high rates of segregation continuing in the United States. This removal also violates the foundational understanding of the FHA endorsed in *Inclusive Communities.*

From the first appellate decision to uphold a disparate impact claim, courts have uniformly recognized that practices leading to the "perpetuation of segregation" violate the FHA. *See United States v. Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974). The Supreme Court itself affirmed that the Second Circuit properly found disparate impact when a town's practices "significantly perpetuated segregation in the Town." *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15 (1988) (quoting 844 F.2d 926, 938 (2d Cir. 1988)). The Supreme Court cited these opinions favorably in *Inclusive Communities*, and explicitly recognized "perpetuating segregation" as a basis for FHA liability. 135 S. Ct. at 2522. Deleting this language arbitrarily removes guidance long adopted by lower courts and endorsed in *Inclusive Communities.*

As the table below illustrated, the proposed rule also drastically increases the burden for establishing a prima facie case standard and sets up a scheme for pleading a disparate impact

claim that is not rooted in established law and is unnecessarily complicated. It also requires plaintiffs or charging parties to at once establish disparate impact and rebut the defendant or respondent's justification to make a prima facie case.

Table 1

PRIMA FACIE CASE STANDARD FOR CURRENT RULE (§100.500 (C)) COMPARED TO PROPOSED RULE (24 C.F.R. §100)	
CURRENT RULE	**PROPOSED RULE**
1. The Plaintiff or Charging Party bears the burden of proving its prima facie case by showing that a policy or practice:	1. The Plaintiff or Charging Party bears the burden of proving a prima facie case by showing that a specific, identifiable policy or practice has a discriminatory effect by stating facts plausibly alleging each of the following elements:
A. Caused, causes or predictably will cause a discriminatory effect on a group of persons or a community on the basis of race, color, religion, sex, disability, familial status, or national origin.	A. That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law; B. That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class which shows the specific practice is the direct cause of the discriminatory effect; C. That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class; D. That the alleged disparity caused by the policy or practice is significant; and E. That there is a direct link between the disparate impact and the complaining party's alleged injury.

The current rule simply provides that "[t]he charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." As discussed above, this reflects the consensus approach of the courts.

The proposed 500(b), in contrast, provides that to establish a prima facie case, a claimant must establish--

> (1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

(3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct link between the disparate impact and the complaining party's alleged injury.

On multiple levels, this standard departs from the FHA and the guidance of the courts and will unnecessarily and unfairly complicate the burden on plaintiffs and the courts.

Moreover, Inclusive Communities did not require or mandate that a policy must be shown to be arbitrary, artificial, or unnecessary at the pleading stage and in order to establish a prima facie case. Indeed, Inclusive Communities references the requirement in the existing regulation when describing how plaintiffs should establish a prima facie case. The Supreme Court stated clearly stated that "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." The Court does not state that plaintiffs that cannot demonstrate that a policy is "arbitrary, artificial, and unnecessary" at the pleading stage will not meet the prima facie standard. Requiring plaintiffs to present facts to substantiate that a policy is "arbitrary, artificial, and unnecessary" at the pleading stage will undoubtedly nullify any ability to survive a disparate impact challenge beyond the pleading stage.

Equally troubling, the policy requires plaintiffs to establish themselves that there is no legitimate justification for the policy before the burden shifts to the defendant. Unlike the current rule, this standard departs from the decades-long practice of the courts and HUD, the procedure proscribed by Congress for Title VII claims, as well as from the burden-shifting approach implicitly endorsed by *Inclusive Communities.* It also requires plaintiffs to muster facts to propose and rebut the defendants' defenses as part of their prima facie case. This is an impossible and unfair standard and is outside HUD's authority under the FHA.

The proposed rule is designed to prohibit plaintiffs' ability to survive a disparate impact case beyond the pleading stage and this is clearly not the Supreme Court's intent.

The proposed regulation provides numerous and duplicative opportunities for a defendant or respondent to defend any claim that may survive the pleading stage. Essentially, the rule would permit defendants to continue discriminating if they can show that it would be a little more expensive or time-consuming or unpleasant or otherwise vaguely burdensome not to. This violates the FHA, which prohibits practices with a disparate effect unless necessary to achieve a valid interest. *See Inclusive Communities*, 135 S. Ct. at 2522 (describing the rebuttal of a showing of disparate impact as analogous to the Title VII "business necessity" defense).

The Algorithm Defense in HUD's Proposed Rule Contradicts Inclusive Communities

The proposed standard creates an effective safe harbor for almost any discrimination resulting from an algorithm. The standard would create immunity for such discrimination if it is based on inputs that are not "substitutes or close proxies" for protected classes, the algorithm is "produced,

maintained, or distributed by a recognized third party that determines industry standards," *or* that it "has been subjected to critical review and has been validated by an objective and unbiased neutral third party that has analyzed the challenged model and found that the model was empirically derived and is a demonstrably and statistically sound algorithm."

The proposed rule conflicts with HUD's own recent actions. In 2019, HUD filed a complaint against Facebook alleging that its algorithm, which permits targeting by zip code and other factors, resulted in housing discrimination. Ariana Tobin, *HUD Sues Facebook over Housing Discrimination and Says the Company's Algorithms have made the Problem Worse*, ProPublica, March 28, 2019. HUD announced it was investigating Twitter and Google's ad practices as part of the same probe. Tracy Jan & Elizabeth Dwoskin, *HUD is reviewing Twitter's and Google's Ad Practices as Part of Housing Discrimination Probe*, Washington Post, March 28, 2019.

As to the first proposed defense, because of the history and persistence of racial discrimination in society, many factors that are not "substitutes or close proxies" for race in fact discriminate against particular racial groups. *See* Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. Rev. 54 (2019). Arrest statistics, for example, reflect the continuing bias of the police as well as the larger police presence in areas where people of color often live. *See* Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L. J. 2218 (2019). Credit data often reflects one's neighborhood, restricted access to credit, family wealth, and previous discriminatory practices of loan officers, all of which are deeply affected by our history of discrimination. *See* Anupam Chander, *The Racist Algorithm*, 115 Mich. L. Rev. 1023 (2017); *cf.* Niall McCarthy, *Racial Wealth Inequality in the U.S. is Rampant*, Forbes, Sept. 14, 2017 (noting African American and Latino families have on average less than 5% of wealth of White families, and that the gap has widened since 1983). *See* Squires (2018).

Research has even shown that algorithmic-based loan pricing models can manifest discriminatory outcomes. In one study, researchers found that lenders charged African American and LatinX borrowers higher interest rates than their similarly situated White counterparts. Borrowers of color paid up to $500 billion annually in discriminatory surcharges as a result of algorithmic bias. *See* Adair Morse, *Consumer-Lending Discrimination in the Fintech Era*, Berkeley (2019) Shielding algorithms that use such proxies without showing they are the least discriminatory way to achieve valid interests immunizes the intentional discrimination that caused those disparities.

Similarly, as HUD's probes of Facebook, Google, and Twitter show, an algorithm may be created by a "recognized third party that determines industry standards" and still be discriminatory. Famously, picture identification software maintained by Google was prone to identify African American faces as those of animals, while Amazon's job recruiting program consistently rated women's applications lower than men's. Isobel Asher Hamilton, *Why It's Totally Unsurprising That Amazon's Recruitment AI Was Biased against Women*, Business Insider, October 13, 2018; James Vincent, *Google 'fixed' its racist algorithm by removing gorillas from its image-labeling tech*, The Verge, Jan. 12, 2018. Facial recognition systems, powered by Artificial Intelligence, systematically manifest racial and gender bias. One study found that 3 commercial classification algorithmic-based systems had an error rate of 34.7% for women with darker skin while having only an 0.8% error rate for males with light skin. *See* Joy Buolamwini, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, MIT, Proceedings of Machine Learning Research 81:1-15; Conference on Fairness, Accountability, and Transparency (2018). Algorithmic-based systems regularly

manifest discriminatory outcomes. We are at the dawn of using algorithms in new areas of business and government, and distribution by a well-reputed third party does not mean an algorithm does not discriminate.

Finally, it is not clear how the courts will identify an "objective and unbiased neutral third party" to approve of algorithms, particularly when many such algorithms are closely guarded by their makers and are protected as trade secrets. This kind of hidden-box safe harbor, at a time when third-party data analytics are becoming ubiquitous in housing, will inevitably shelter discriminatory practices Congress prohibited in the Fair Housing Act.

The Fair Housing Act, with its ambitious statement of purpose "to provide…for fair housing throughout the United States,"[3] represents our shared interest as a nation in ensuring that housing opportunities are available to every individual. Central to the effectiveness of the FHA in achieving Congress's stated goal is that the Act prohibits intentional discriminatory acts *and* facially "neutral" policies that limit housing opportunities based on race, color, national origin, religion, sex, the presence of families with children, and people with disabilities. Fully realizing the promises of the Fair Housing Act for every person in the United States is central to HUD's mission and therefore, HUD should abandon this proposed rule and keep intact the existing 2013 Implementation of the Fair Housing Act's Discriminatory Effects Standard.

Sincerely,

Asian Real Estate Association of America
National Association of Hispanic Real Estate Professionals
National Association of Real Estate Brokers

[3] 42 U.S.C. § 3601