The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

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SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development (HUD)
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 Sir or Madam,

I write on behalf of The Leadership Conference on Civil and Human Rights, a coalition representing more than 200 national civil and human rights advocacy organizations, to submit the following comments regarding above-docketed notice concerning proposed changes to rules governing the enforcement of the Fair Housing Act of 1968. We strongly oppose the proposed changes, and we urge HUD to rescind them.

This proposed rule would make it significantly harder for victims of discrimination to obtain relief, by eviscerating almost 50 years of congressional intent and federal courts' approval – most recently by the Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (2015) – of the "disparate impact" standard under the Fair Housing Act.

When the Fair Housing Act was enacted, one week after the assassination of Dr. Martin Luther King, Jr., Congress recognized that it was critical to prohibit all forms of discrimination – not only acts resulting from discriminatory intent, but also those resulting from policies and practices that appear neutral on their face but that have an unjustified discriminatory effect. Disparate impact litigation under this and other civil rights laws has allowed victims of discrimination to challenge obstacles that limit the availability of fair housing and credit for people based on characteristics such as race, color, national origin, religion, disability status, familial status, and gender. Such obstacles have included "one-child-per-bedroom" policies that force families with two or more children to pay higher rents for multibedroom apartments; "zero-tolerance" provisions in leases that allow the eviction of not just perpetrators, but also victims of offenses such as domestic violence; and mortgage lending practices that steered tens of thousands of minority borrowers into risky subprime mortgages even though they qualified for prime loans.

This Proposed Rule is Unnecessary

Finalized in 2013, the existing HUD rule on disparate impact analysis adequately and fairly serves the American public, by providing a mechanism to require housing and financial services providers to modify policies and practices that, regardless of intent, wrongly and unnecessarily make it harder for groups of covered individuals to pursue economic opportunities.

The 2013 rule is consistent with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). Indeed, while the Court in *Inclusive Communities* did not rely on the 2013 rule in its holding, the Court quoted HUD's existing rule at length, and never claimed or suggested that the rule was inconsistent with its holding. Similarly, as Sen. Chris Van Hollen (D-MD) pointed out in a Sept. 10 Senate Banking Committee hearing featuring Secretary Ben Carson, in 2017 the current administration defended the 2013 rule in a brief filed before the U.S. District Court for the Northern District of Illinois.

The key holding of *Inclusive Communities* was that disparate impact claims are cognizable under the Fair Housing Act, provided that "robust causality" is established between the practice in question and the discriminatory effect being alleged. As the Court itself noted in quoting 24 CFR 100.500, however, the 2013 HUD rule already requires that a plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." In neither its proposed rule, in the Sept. 10 Senate Banking Committee hearing, nor anywhere else has HUD satisfactorily explained how the causality requirement in the existing rule is inconsistent with *Inclusive Communities* or why it needs to be so drastically rewritten.

This Proposed Rule Would Drastically Undermine the Fight Against *Covert and Intentional* Discrimination

The proposed rule would replace the 2013 burden-shifting framework with a new five-point test that falls entirely on plaintiffs to satisfy – to a degree that is impossible prior to discovery – before a case can proceed to that discovery or beyond.

First, it 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." Second, a plaintiff would be required "to allege a *robust causal link* between the challenged policy or practice and a disparate impact on members of a protected class." Third, a plaintiff would be required "to allege that the challenged policy or practice has an adverse effect *on members of a protected class.*" Fourth, a plaintiff would be required "to allege that the disparity caused by the policy or practice is *significant.*" Finally, a plaintiff would be required "to allege that the *complaining party's alleged injury* is directly caused by the challenge policy or practice."

Taken together, and combined with sweeping exemptions, such as for practices that utilize algorithms – and language implying that even "profit" alone is an adequate defense – these standards would make it largely impossible for a plaintiff to establish and sustain a case against policies and practices that have a disparate impact. But by forcing the dismissal of cases before they can proceed to discovery, the new standards would also make it more difficult if not impossible to unearth evidence that a policy or practice is intentionally discriminatory.

Civil rights laws such as the Fair Housing Act have gone a long way in reducing overt, intentional discrimination against protected classes. That does not mean that such laws have eliminated discriminatory intent. Rather, such intent is now more likely to be concealed, and it is more likely that members of protected classes are unaware that they have ever been discriminated against. Statistical evidence of racial disparities may be the only indicator of impermissible racial discrimination that, unintentional or intentional, must be addressed. This proposed rule would make it much more difficult to do so, regardless of intent.

The Leadership Conference

This Proposed Rule Will Have Drastic Effects Going Well Beyond Housing Discrimination
As an organization that advocated for the passage of every civil rights law enacted since 1950, The Leadership Conference on Civil and Human Rights is well situated to understand the central role of housing to all other areas of life. The question of where an individual will live – or where other forces decide that an individual should live – has more impact on that individual than anything else in his or her life. It affects which schools a person's children will attend, and whether they are getting the tools they need to develop their potential. It affects whether that individual can get a decent-paying job, and whether the transportation infrastructure exists to get that individual to that job in a reasonable and sustainable fashion. It determines how much an individual will pay to cash a paycheck or to get a loan – and whether he or she can use that money to put healthy food on the table. It can affect how much of a voice an individual will have in local and even national affairs.

Where people live can affect whether they will be exposed to lead or smog or other toxins – even after other parts of the country have eliminated them – that still keep too many people from ever reaching their full potential. It also affects whether they will live in fear of violence, and whether they will face a two-tiered system of justice if they happen to find themselves accused of doing something wrong. And as we saw in the aftermath of the 2008 financial crisis, it has a drastic effect on the ability of Americans to build wealth and pass it along – or, as was the case for many families, to end in foreclosure and financial ruin.

As a result, when discrimination in the housing sphere occurs, regardless of intent, its impact can be widespread and devastating in many respects that are not directly related to housing. Making it harder to discover and address such discrimination – as this rule would do – would threaten to undermine the progress our nation has made in many other areas to promote equal justice and opportunity for all.

This Proposed Rule Will Ultimately Be Reversed, Creating More Regulatory Uncertainty
The current disparate impact rule, finalized in 2013, created a reasonable, workable standard that – as noted above – would survive judicial review. It does not presuppose or require any finding of bad intent – rather, it just requires housing and financial services providers to use the least discriminatory means possible to meet a legitimate business end.

If HUD arbitrarily and needlessly decides to upend the 2013 rule, and should this change somehow survive judicial review, there should be no doubt that it will again be gutted and reversed by a future administration that is more committed to seeing that our nation's civil rights laws are fully and properly enforced. What we do not know, however, is whether a future version of the disparate impact rule will be identical to the existing one. Instead of maintaining a workable middle ground as the 2013 rule does, then, implementing this proposed rule will instead lead to a regulatory back-and-forth that creates uncertainty, imposes additional burdens, and stifles innovation – ultimately harming the very industries that HUD appears to be trying to help with this drastic proposal.

For the above reasons, The Leadership Conference urges you to rescind this proposed rule. Thank you for your consideration of our views.

Sincerely,

Rob Randhava
Senior Counsel