

October 18, 2019

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SUBMITTED VIA REGULATIONS.GOV

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: Comments in Response to HUD's Implementation of the Fair Housing Act's
Disparate Impact Standard, HUD Docket No. FR-6111-P-02

Dear Sir or Madam,

We write to you on behalf of the Southern Poverty Law Center (SPLC) in response to the U.S. Department of Housing and Urban Development's (HUD) proposed rule revising the disparate impact standard; Docket No. FR-6111-P-02. The proposed rule will severely weaken fair housing enforcement and perpetuate racial inequality. We strongly urge you to uphold HUD's current interpretation of the disparate impact rule.

The SPLC is a non-profit legal organization based in Montgomery, Alabama, with additional offices across the Deep South in Florida, Georgia, Louisiana, and Mississippi. For over four decades SPLC has sought justice for and represented the needs of the most vulnerable members of our society. The SPLC is committed to ensuring that housing opportunities are made available to everyone, regardless of income, race, color, national origin, sex, religion, and disability. While engaging in social justice work in various states throughout the South, we witness firsthand the devastating effects that housing discrimination has on our society's most vulnerable members. We believe in eliminating discriminatory policies and practices, whether they be intentional or facially neutral. The disparate impact tool that is currently in place helps to ensure fair housing practices for those who suffer discrimination at disproportionately high rates, especially people of color and people with disabilities. If HUD's proposal is passed it will leave far too many families susceptible to housing discrimination, while creating loopholes that would shield banks and landlords from liability.

The federal Fair Housing Act of 1968 prohibits discrimination based on race, color, religion, national origin, sex, disability, and familial status. In 2013 HUD issued a final rule that enshrined decades of caselaw and provided if a practice has a "discriminatory effect," HUD or a private plaintiff can establish liability under the Fair Housing Act, even if there is no discriminatory intent.¹ The rule created a framework for disparate impact liability that opened the doorway for victims of

¹ 24 C.F.R. § 100.500 [78 FR 11 459 (Feb. 15, 2013)].

systemic housing discrimination to be justly compensated for harms they were caused, whether arising from denial of a rental property due to disability or denial of a housing loan based on race. The disparate impact rule is critical to ensure that the goals and objectives of the Fair Housing Act are achieved. Consistent with the standard set forth in the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, it prescribes a three-part burden-shifting framework to ensure cases are not frivolously brought.²

The National Fair Housing Alliance reports there were 28,843 complaints of housing discrimination reported in 2017 alone. At the top of the list were claims of disability (57%) and race (19%) discrimination.³ Many of those who have been discriminated against were able to find relief under the long-standing disparate impact standard.⁴

Some examples of complaints and lawsuits in the Southeast show the importance of the existing disparate impact framework. In the Eleventh Circuit case *Georgia State Conference of the NAACP v. City of LaGrange*,⁵ plaintiffs challenged policies that required LaGrange residents seeking access to municipal utility services to present state- or federally-issued photo identification and to satisfy all outstanding municipal debts to open utility accounts or maintain access without shut-offs. The plaintiffs argued that the policies disproportionately affected Black and Latinx residents of LaGrange. In *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, a local fair housing organization challenged a “blood relative” ordinance which restricted the rental of single-family residences to those related by blood to the owners of the property.⁶ The ordinance would disproportionately exclude people of color from renting because white individuals owned 93% of all owner-occupied housing. Under a settlement agreement, the parish paid \$32,500 in damages.⁷ And in *Greater New Orleans Fair Housing Center v. U.S. Department of Housing & Urban Development*, owners of homes in Black neighborhoods in New Orleans alleged that they received less compensation to rebuild after Katrina than those in white neighborhoods.⁸ HUD settled the case by distributing \$62 million to 1,300 homeowners in areas that suffered the most damage.⁹

Changes to this rule will make it much more difficult, if not impossible, for affected communities to challenge discriminatory housing practices. The proposed rule would substantially raise the burden of proof to make a prima facie showing of discrimination. It would require plaintiffs to conduct

² 135 S. Ct. 2507 (2015).

³ National Fair Housing Alliance, *Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report*, 60 (2018), https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

⁴ National Fair Housing Alliance, *Disparate Impact is Illegal Discrimination: A guide to understanding disparate impact under the Fair Housing Act*, 1 (2019), <https://nationalfairhousing.org/wp-content/uploads/2019/03/Disparate-Impact-Info-Pack-2019-Updated.pdf>.

⁵ No. 18-10053, 2019 WL 5076225 (11th Cir. Oct. 10, 2019).

⁶ 641 F. Supp. 2d 563 (E.D. La. 2009).

⁷ *Judge Oks accord in housing bias suit*, Times-Picayune (Feb. 29, 2008), <http://www.gnofairhousing.org/wp-content/uploads/2012/02/2-29-08-St.-Bernard-Settlement.pdf>.

⁸ 639 F.3d 1078 (D.C. Cir. 2011).

⁹ Settlement Agreement, *Greater New Orleans Fair Housing Center v. U.S. Department of Housing & Urban Development* (June 29, 2011), <https://www.clearinghouse.net/chDocs/public/FH-DC-0004-0016.pdf>.

rigorous data analysis to quantify the discriminatory effect and prove causation at the pleading stage, before data critical to these inquiries have been made available through the discovery process. Furthermore, the rule would protect landlords and lenders accused of discrimination through their use of computer models, such as algorithms that assign credit risk. It would incentivize housing providers to use third-party algorithms, which are often shielded by trade secret laws.

The unjust, problematic, and unlawful system that the Act was designed to dismantle will once again gain momentum if HUD's proposal is allowed. By tearing down the disparate impact standard, HUD signals an intent to allow sellers, landlords, and financial institutions to discriminate against vulnerable members of society, and in turn will make it more difficult for those impacted to prove wrongdoing has occurred. HUD's proposal will make it easier for banks, landlords, and sellers to get away with discrimination.

Thank you for the opportunity to comment on this issue. The SPLC believes that the proposed rule will destroy disparate impact liability. We believe that HUD should focus on ensuring that actors in the housing market comply with the Fair Housing Act and meet the standards that have been set by the disparate impact rule. The current rule strengthens our communities by allowing victims of systemic discrimination to seek recourse and challenge policies that limit their access to housing and related services. HUD should not change the current disparate impact rule.

Sincerely,

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