CONSTITUTIONAL ACCOUNTABILITY CENTER

October 11, 2019

SUBMITTED VIA REGULATIONS.GOV

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

RE: Comments on HUD's implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02

The Constitutionality Accountability Center (CAC) is a non-profit law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all and to protect our judiciary from politics and special interests. Through our expert commentary, issue briefs, narratives, and testimony to Congress, we inform the public and America's elected leaders with comprehensive analysis of the most contentious topics in modern constitutional and federal law.

I write to you on behalf of CAC 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 encourage you to continue using HUD's current Disparate Impact Rule (Current Rule), which is a necessary tool in the ongoing effort to achieve open housing markets free from discrimination, and to ensure equal housing opportunities for all persons regardless of race. CAC strongly opposes the proposed changes to HUD's Current Rule and urges you to reconsider implementing the Notice's proposed rule (Proposed Rule).

Disparate impact liability, a longstanding part of the Fair Housing Act (Act), prohibits the use of arbitrary, harmful policies that, though facially neutral, have an unjustified discriminatory effect. It has played a critical role in protecting civil rights, advancing equal opportunity, and addressing the segregation that still persists in America. HUD's Current Rule interpreting the Act's disparate impact standard helps make housing accessible for women, LGBTQ+ people, people with disabilities, people of faith, communities of color, and families with children, ensuring that the Act's promise of equal housing opportunity is a reality for all people. It does this by requiring banks, landlords, and other housing providers to choose policies that apply fairly to all people. Some facially neutral policies can unfairly exclude certain groups of people or segregate particular communities in practice. Disparate impact

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liability requires the elimination of artificial barriers to equal opportunity for all. It allows us to identify and prevent harmful, inequitable, and unjustified policies, thereby ensuring that everyone can be treated fairly.

The text and history of the Fourteenth Amendment give Congress authority to enact laws that, like the Fair Housing Act, prohibit state action neutral in form, but discriminatory in operation, as a means of realizing the promise of equal opportunity contained in the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides broadly that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] To ensure that this guarantee is a reality, Section 5 of the Fourteenth Amendment provides that Congress shall have "the power to enforce, by appropriate legislation, the provisions of" the Amendment.[2] Consistent with this core guarantee of equality for all persons regardless of race, Congress has repeatedly used its express power to enforce the Fourteenth Amendment to prevent state and local governments from enacting laws and policies that result in an unjustified, disproportionate impact on people of color, recognizing that sometimes the simple prohibition of disparate treatment is insufficient to realize the Fourteenth Amendment's goal that all persons enjoy "equal protection of the laws."[3] Using a robust disparate impact standard brings us further along the arc of progress our Constitution's framers amended into our nation's founding document.

The Supreme Court has recognized that such prophylactic protections of equality of opportunity help enforce the Constitution's Equal Protection guarantee. The Fair Housing Act's embrace of disparate impact liability, the Court has said in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, "counteract[s] unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[4] And yet, the Notice in question purports to "better reflect the Supreme Court's 2015 ruling" just quoted.[5] Nothing could be further from the truth. The central premise of *Inclusive Communities* is that disparate impact claims are necessary to prohibit policies that may not be readily challenged under disparate treatment theories even though they unnecessarily exclude people of color from housing. HUD's proposal would effectively gut the Disparate Impact Rule; make it harder for plaintiffs to bring classic disparate impact cases; and destroy the incentive for lenders and insurers to adopt smarter, more accurate, less discriminatory policies.

HUD's Proposed Rule would be a step towards perpetuating inequality. First, the Proposed Rule will impose a drastically higher burden on victims of housing discrimination, making it virtually impossible for disparate impact claims to succeed. It would undercut the Supreme Court's recognition that disparate impact liability is critical to the Act's goal of ensuring equal housing opportunities to all regardless of race. Second, the Proposed Rule would immunize a discriminatory policy or practice if it is profitable and places the burden on aggrieved victims of discrimination to show that a company can make at least as much money without discriminating. Placing this burden on those who have suffered discrimination makes little sense when this information is in the hands of lenders and insurers. And third, the Proposed Rule creates special defenses for business practices that rely on statistics or algorithms—such as credit-scoring, marketing schemes, or pricing—which often have a disparate impact on marginalized

[1] U.S. Const. amend. XIV, §1.
[2] U.S. Const. amend. XIV, § 5.
[3] S*upra,* note 1.
[4] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2522 (2015).
[5] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R pt. 100).

communities. The Proposed Rule would allow financial institutions, insurance companies, and housing providers to engage in covert discriminatory practices by dramatically weakening disparate impact liability. This would effectively destroy a longstanding protection against housing discrimination, counteract the Supreme Court ruling the Proposed Rule claims to "better reflect," and pave the way for widespread harm to millions of people across the country while businesses pad their profit margins.[6]

There is no good reason for revising the existing rule, which reflects long settled principles of disparate impact liability long affirmed by the courts. Rather than trying to undermine the Fair Housing Act's protections, HUD must carry out its statutory role by vigorously enforcing the Act to remove discriminatory barriers to housing choice throughout the housing market. The Proposed Rule, on the other hand, would leave communities of color and other groups without critical protections from facially neutral policies that deny equal housing opportunities. HUD's Proposed Rule contravenes the very purpose of the Fair Housing Act by making it easier for companies to discriminate. The Constitutional Accountability Center strongly urges you to not go forward with the Proposed Rule. HUD should instead withdraw this Proposed Rule and fulfill its mission to "build inclusive and sustainable communities free from discrimination".[7]

Sincerely,

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[6] *Id*.
[7] *Mission*, U.S. Dep't of Housing & Urb. Dev., https://www.hud.gov/about/mission (last visited Oct. 9, 2019).