August 24, 2021

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 Seventh St. SW, Room 10276
Washington, D.C. 20410-0001

Via www.regulations.gov.

RE: Docket No. FR-6251-P-01
Notice of Proposed Rulemaking,
Reinstatement of HUD's Discriminatory Effects Standard

Dear Secretary Fudge:

The 38 undersigned civil rights, consumer, community, housing, legal services, and other public interest organizations submit these comments in response to the Department of Housing and Urban Development (HUD)'s proposed rule titled Reinstatement of HUD's Discriminatory Effects Standard ("Proposed Rule"). We write to express our strong support for HUD's Proposed Rule to recodify its previously promulgated "Implementation of the Fair Housing Act's Discriminatory Effects Standard" rule ("2013 Rule").

The Fair Housing Act (FHA) prohibits discrimination in housing and housing-related services on the basis of race, color, national origin, religion, sex, familial status, and disability. FHA protects people from discrimination when they are getting a mortgage, buying a home, or renting an apartment, and plays a critical role in supporting the development and maintenance of diverse, inclusive, neighborhoods and undoing the harms of segregation.

Disparate impact liability is essential to enforce the protections and promises of the Fair Housing Act because it is the tool used to eliminate seemingly neutral policies that wrongfully exclude people of color and other protected groups from housing opportunities. The 2013 Rule has proven practical and effective and aligns with the standard used for decades by courts and regulators, including HUD. It has fostered more inclusive lending and housing markets and lessened segregation by requiring housing providers and other companies to pursue less discriminatory alternatives to practices that have a discriminatory impact based on race or other protected classes that are not necessary to achieve any legitimate purpose. At the same time, disparate impact does not force any entity to modify practices that are necessary to accomplish

legitimate purposes. This clear standard is the same framework that courts have used for decades because it is straightforward, easy to apply and strikes the proper balance between competing interests.

Despite the proven effectiveness of the 2013 Rule and consistency with longstanding precedent, HUD issued a new rule in 2020 ("2020 Rule") that did not comport with existing case law and made drastic changes that would destroy disparate impact liability and allow housing providers, financial institutions, and other corporations to engage in discriminatory practices without consequence. Because the 2020 Rule so widely diverged from the record without justification, three separate lawsuits were filed to challenge it. A district court in Massachusetts ultimately issued a preliminary injunction to stop the 2020 Rule from going into effect, finding that the plaintiffs were likely to prevail on their claim that the finalization of the 2020 Rule was against the law, and this injunction remains in effect today.

We urge you to expeditiously implement the proposed rule to restore the 2013 Rule for the following reasons:

A. HUD's Proposed Rule - the restoration of the 2013 Rule - is supported by decades of case law, including the Supreme Court's *Inclusive Communities Project* (*ICP*) decision, while the 2020 Rule has no basis in law or fact and threatens to destroy disparate impact liability.

The 2013 Rule correctly codified decades of case law. In its 2020 Rule, HUD acknowledged that its 2013 Rule correctly codified disparate-impact doctrine as set forth in case law and long-standing HUD interpretations. During the formulation of the 2013 Rule, HUD considered and rejected many of the changes that the 2020 Rule made because HUD determined that they would be inconsistent with long-standing practice and explained its reasoning for such decisions. The 2020 Rule did not meaningfully disagree with any aspect of HUD's reasoning, interpretations, or positions in the 2013 Rule, yet made sweeping changes to the disparate impact standard without any attempt to explain any of the amendments as improved policy decisions to better align with the purpose of FHA, or as better interpretations of the law. It simply ignored HUD's prior justifications and, in many cases did not acknowledge that it was making changes at all. The hollow reasoning provided for the 2020 Rule was simply that the Supreme Court's ruling in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*[1] so dramatically changed the law to suddenly require such drastic changes, without providing any specific justifications for those deviations.

[1] 135 S. Ct. 2507 (2015).

In reality, the *ICP* decision did no such thing. Rather than changing the standard, the Supreme Court in *ICP* affirmed existing disparate-impact doctrine as laid out in the 2013 Rule, and repeatedly cited and discussed the 2013 Rule without suggesting that anything in that rule required adjustment. Nothing in *ICP* suggests that HUD's 2013 Rule failed to correctly state the law in any way, or that *ICP* intended to change that law in any way. Rather, *ICP* left the disparate-impact doctrine as it found it, and all the safeguards discussed in *ICP* were already in the 2013 Rule. *ICP* did no more than affirm HUD's position that disparate-impact claims are cognizable under the FHA. The idea that the drastic changes in the 2020 Rule were necessary to purportedly conform with *ICP* is fundamentally untrue, because there was no inconsistency that required conforming. There is simply no justification in the case law for the entire premise underlying the 2020 Rule—that the 2013 Rule somehow fails to properly restate the law of disparate-impact claims post-*ICP*. To the contrary, the 2013 Rule is a far more accurate and consistent restatement of the law that currently prevails in the courts than the 2020 Rule.

In stark contrast to the 2013 Rule, the 2020 Rule is inconsistent with case law and fails to further the purpose of the Fair Housing Act. It introduces uncertainty where none previously existed and would fundamentally weaken disparate impact liability by making it nearly impossible to successfully bring a disparate impact claim. Had the 2020 Rule gone into effect, it would have resulted in dismissal of otherwise meritorious disparate impact suits under existing law. By creating so many obstacles to challenge discriminatory practices, the 2020 Rule would destroy the disparate impact doctrine's effectiveness at requiring changes to policies with an unnecessary discriminatory impact in favor of less discriminatory alternatives. Instead, the 2020 Rule would provide cover to financial institutions and housing providers and allow them to engage in covert discriminatory practices with impunity.

First, the 2020 Rule places a drastically high burden on plaintiffs bringing a disparate impact claim, requiring them to plead facts demonstrating that a challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective."[2] Requiring a plaintiff to be able to plead that a challenged policy is "arbitrary," "artificial," *and* "unnecessary" imposes an unjustified, brand new substantive requirement. Such a requirement is contradictory to case law and places an insurmountable burden on a potential plaintiff in a disparate impact case. It would not be enough for a plaintiff to show that a policy with discriminatory effects is "unnecessary" and "arbitrary" if the policy is not also proven to be "artificial." Not only does it not make sense to make a plaintiff demonstrate that all three are true with regard to every challenged policy, but it essentially requires a plaintiff in a disparate impact case to show there was intentional discrimination, which is exactly the opposite of the holding in *ICP*.

[2] 2020 Rule, 85 Fed. Reg. at 60332

Moreover, the 2020 Rule would require the plaintiff to prove a negative—to plead facts showing that the defendant's policy has no legitimate purpose—even before the defendant is asked to articulate what its claimed legitimate purpose is. This would be a radical and unjustified change to the parties' respective burdens and the timing at which a plaintiff must be prepared to disprove potential justifications. Under the 2020 Rule, victims are asked to guess which justifications defendants might invoke and preemptively debunk them to begin a case. The burden is on the plaintiff to demonstrate the lack of an adequate justification before hearing the defendant's offered reasoning for the policy at issue, or the benefit of the discovery process. The most likely effect will be to prevent plaintiffs from bringing currently meritorious claims, thus shielding entities that maintain discriminatory policies from scrutiny. HUD should withdraw the 2020 Rule's new and unjustified requirement that plaintiffs plead facts showing that any challenged policy is "arbitrary," "artificial," and "unnecessary." Such a requirement has no basis in case law and would have the effect of blocking cases from the courts and eviscerating disparate impact liability.

Second, the 2020 rule requires plaintiffs to prove "a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class."[3] Not only must a policy or practice cause a disparate impact, but under the 2020 Rule, there must be a "robust causal link." This term is undefined in the 2020 Rule, introducing unnecessary uncertainty, but presumably requires plaintiffs to be able to plead and prove a link that goes beyond normal causation in some way. The 2020 Rule's "robust causal link" pleading requirement finds no support in *ICP*. The phrase "robust causal link" does not appear anywhere in the *ICP* decision. Most post-*ICP* circuit courts have recognized that the "robust causality requirement" articulated in ICP simply reflects the long-standing requirements codified in the 2013 Rule. No reasoning in the *ICP* decision supports requiring plaintiffs to go beyond showing normal causation and demonstrate a more "robust" causal link between the policy at issue and the resulting disparate impact, and the 2020 Rule failed to otherwise justify changes that would have such dramatic impact.

There was no basis for amending the 2013 Rule causation requirements that have always proven fully sufficient to vindicate ICP's concerns about defendants facing liability for disparities their policies did not create—including in that very case on remand. There is no basis for imposing a pleading requirement that does not appear in, and is inconsistent with, *ICP*. Moreover, it is indefensible to introduce an undefined phrase as a new pleading requirement that has no pre-existing meaning in the case law, which would make it dramatically more difficult for plaintiffs to challenge discriminatory policies. HUD should reinstate the 2013 Rule and rescind the 2020 Rule that adds the phrase "robust causal link," and the 2013 Rule causation standards for the pleading stage should be maintained.

[3] 2020 Rule, 85 Fed. Reg. at 60332

Third, the 2020 Rule requires the defendant only to "produc[e] evidence" that its policy "*advances* a valid interest," rather than requiring it to *prove* that its policy is "*necessary* to achieve" that interest.[4] This component of the 2020 Rule is inconsistent with HUD's 2013 Rule, as well as with *ICP*'s requirement that "housing authorities and private developers be allowed to maintain a policy if they can *prove it is necessary* to achieve a valid interest."[5] The 2020 Rule lowers the bar for a defendant's legitimate business interest to maintain a discriminatory policy. Under the 2020 Rule, a defendant's only burden is to have some reason to think its policy "advances" some valid interest, and a "valid interest" in the 2020 Rule is broadly defined to include "a practical business, profit, policy consideration, *or* requirement of law"[6] and quietly removes the long-standing substantial business interest requirement without explanation.

If a defendant provides evidence of advancing a valid interest, HUD's 2020 Rule then requires the plaintiff to demonstrate that a less discriminatory alternative "*exists* that would serve the defendant's identified interest (or interests) *in an equally effective manner without imposing materially greater costs on, or creating other material burdens for*, the defendant."[7] The 2020 Rule thus would (1) require a challenged policy only to "advance" any valid interest rather than be "necessary" to achieve it; (2) define that valid interest to include "profit" as well as any "policy consideration," no matter how discriminatory, and eliminate the requirement that the interest be "substantial"; (3) excuse a defendant from having to *prove* even that reduced standard; (4) require a plaintiff to prove that an alternative, less discriminatory policy already "exists" somewhere, regardless of whether a defendant could feasibly implement it; (5) require the plaintiff to prove that this already existing alternative would be "equally effective" in serving the identified interest, not just good enough; and (6) require the plaintiff to show that adopting this already existing alternative would impose *no* material costs or burdens on the defendant, even if the defendant could readily bear those costs and burdens. Ultimately, even a policy with the most flagrantly discriminatory effects would pass legal muster so long as a less discriminatory alternative is even slightly more costly and burdensome, even if the alternative was still significantly profitable.

The 2013 Rule, and decades of case law, provided that once a plaintiff establishes that a policy has the necessary discriminatory effect, the defendant must establish that the policy is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests[.]"[8] Advancing a valid interest is insufficient; the policy must be necessary to achieve a substantial interest. The defendant must do so with "evidence"; its justification "may not be hypothetical or speculative."[9] For a defendant's interest to be "substantial," it must "be a core interest of the organization that

[4] *Id.* at 60332 (emphasis added)
[5] *ICP*, 135 S. Ct. at 2523 (emphasis added).
[6] 2020 Rule, 85 Fed. Reg. at 60332
[7] *Id.* at 60333 (emphasis added).
[8] 2013 Rule, 78 Fed. Reg. at 11482.
[9] *Id.*

has a direct relationship to the function of that organization."[10] If the defendant meets that burden, the plaintiff must show that those interests "could be served by another practice that has a less discriminatory effect."[11] As HUD explained in the 2013 Rule, these burdens are consistent with both well-established FHA case law and longstanding federal agency practice. Both HUD and financial regulators had applied the "business necessity" standard for many years, and this standard was chosen to maintain continuity for regulated entities.

The 2020 Rule puts impossibly high burdens on plaintiffs while dramatically lowering the requirements for what constitutes a defendant's legitimate interest that would make a policy permissible even after the impermissible disparate impact of a policy has been established, dramatically weakening the effectiveness of disparate impact doctrine and giving defendants the incentive not to seek out less discriminatory alternatives. By shifting much of the defendant's burden for proving such an interest to the plaintiff to *disprove*, the 2020 Rule would result in dismissal of what should be meritorious disparate impact claims under existing law and would insulate from scrutiny many policies that have an unjustified disparate impact. These changes are not consistent with, let alone required by, *ICP*. The 2020 Rule makes no attempt to explain them otherwise, and no such justification would be possible. HUD should restore the burdens of proof in the 2013 Rule to realign with precedent and practice and maintain meaningful disparate impact liability for policies causing discriminatory effects.

The 2020 Rule purported to justify its dramatic changes to the 2013 Rule as necessary to comply with *ICP*, but *ICP* did not change the prevailing law that the 2013 Rule codified, and thus the 2013 Rule required no such realignment. *ICP* itself and the overwhelming weight of post-*ICP* case law is aligned with HUD's 2013 Rule and inconsistent with HUD's 2020 Rule. Courts have continued to apply the 2013 Rule and pre-*ICP* doctrine. Far from requiring the extensive changes in the 2020 Rule, *ICP* approved the 2013 Rule as is. Therefore, the 2013 Rule is the framework consistent with precedent and practice and HUD should proceed to finalize the Proposed Rule to restore the 2013 Rule.

B. HUD's Proposed Rule - the 2013 Rule - provides a framework for evaluating technological developments, including the use of artificial intelligence and machine learning

There is an ever-increasing use of artificial intelligence (AI) and machine learning (ML)models in the housing market, which rely on significant amounts of data. Landlords, lenders and other businesses are using new and increasingly sophisticated models to automate credit and housing decisions. They use complex, opaque algorithmic models that are often proprietary and often closely guarded by the businesses that develop them. New technology is being adopted at a rapid

[10] 2013 Rule, 78 Fed. Reg. at 11470
[11] *Id.*

pace in a variety of systems related to lending to automate decisions that are consequential to consumers' ability to obtain and retain credit on non-discriminatory terms.

While leveraging new types of data and analytical techniques could potentially benefit consumers, serious concerns have arisen regarding the accuracy, relevance and predictability of the data sources used in these models and its potential to worsen existing disparities. The accuracy and predictability of AI and ML decision-making cannot be separated from the data that goes into the development of its models, and all such data and patterns cannot be separated from the context of systemic inequities in this country. Learning algorithms, processing large volumes of information, will likely pick up subtle but statistically significant patterns that correlate with race and other protected characteristics and replicate existing bias. The current proliferation of AI and ML use in the housing market exponentially increases the potential for far-reaching adverse impacts for borrowers of color and other protected groups by perpetuating, amplifying, and even accelerating existing discriminatory patterns.

Disparate impact doctrine is an essential tool to address such issues. Fortunately, as these models have proliferated, the disparate impact doctrine has motivated lenders and others to continually improve and refine dynamic decision models and policies to minimize unequal outcomes while maintaining accuracy. Disparate impact law has reduced disparities in ways more profound than the modification of individual policies; it has changed the ongoing processes by which many lenders and other entities create and maintain the models they use to make loans or otherwise decide who gets to participate in the housing market.

These advances would not have happened if the longstanding disparate impact doctrine was not in place to provide an incentive structure by requiring lenders and others to revisit policies that have discriminatory effects and modify those that are unnecessary to achieve legitimate ends. Knowing they risk liability from both private litigants and federal regulators, many of the major players that shape the availability and terms of housing have adopted compliance systems to make their policies fairer. Disparate impact created and continues to maintain that structure. The standards articulated in the 2013 Rule provide a framework to evaluate new uses of AI and ML decision-making to prevent unintended discriminatory effects. Applying disparate impact to AI and ML provides a vehicle for public and regulatory scrutiny to keep companies accountable and prevent harm, and encourages regular examination of the data used, the algorithmic model and calculations, and analyses of any discriminatory effects to avoid disparate impact liability.

C. Strong disparate impact standards and robust oversight and enforcement of that standard is necessary both to prevent discriminatory effects and create a more equitable and thriving housing market

The strong and clear disparate impact standards articulated in the 2013 Rule encourage housing market participants to reexamine assumptions and to think creatively about better solutions that lead to less discriminatory effects. In doing so, they can unleash considerable entrepreneurship. Responsible businesses have come to recognize that incorporating disparate impact law into their operations is good for business because it helps them to find more qualified customers in all communities without regard to race, color, or national origin. Institutions frequently have found that alternatives cost them little, if any, profits and may help them find new customers and be more precise about the lines they draw so as not to exclude people unnecessarily. Some lenders have developed their own lending standards– customized to reflect their unique customer bases – that more accurately and objectively separate qualified from unqualified borrowers, while other banks have discovered that these less discriminatory criteria also do a better job at identifying real risk. This is the promise that disparate impact offers—causing lenders to critically and continuously evaluate their policies to ensure they are as inclusive as possible while growing their customer base and meeting legitimate business objectives. The result of enacting the Proposed Rule is a more vibrant, inclusive housing market that is good for business, good for consumers, and good for the entire economy because it allows families, companies, and neighborhoods to thrive.

Oversight and enforcement are necessary to maximize the effectiveness of the Proposed Rule in both rooting out discrimination and laying the foundation for a more equitable and vibrant housing market in the United States. Through the Proposed Rule, HUD will be better positioned to challenge systemic discrimination in the sales, rental, lending, and insurance spaces, including discrimination arising from emerging technology and data-driven practices. HUD should leverage the reinstituted rule to take more enforcement actions, with the goal of putting a stop to practices that make housing opportunities less available, less equitable, and more expensive. HUD should work with the Department of Justice and other federal agencies to challenge some of the most systemically harmful practices in housing that are known to have an unjustified and discriminatory impact on protected classes, such as the discriminatory use of credit scores, source of income discrimination for Housing Choice Voucher households and other families who rely on housing subsidies, and exclusionary zoning policies. Addressing these types of discriminatory policies through oversight and enforcement will make space for the development of better, more equitable alternatives and allow the credit markets to become more accessible to those who had been traditionally shut out of affordable credit and housing opportunities.

For the reasons outlined above, we urge HUD to finalize the Proposed Rule to rescind the 2020 Rule and reinstitute the 2013 Rule and 2016 Supplemental Rule. Thank you for the opportunity to comment on the proposed regulation implementing the FHA's discriminatory effect standard. If you have any questions, please contact Linda Jun, Senior Policy Counsel, Americans for Financial Reform Education Fund, at linda@ourfinancialsecurity.org.

Sincerely,

Americans for Financial Reform Education Fund
California Reinvestment Coalition
Center for Community Progress
Center for Responsible Lending
Coalition on Human Needs
Community Legal Services of Philadelphia
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
Delaware Community Reinvestment Action Council, Inc.
Habitat for Humanity of Camp County, TX Inc.
HPP CARES CDE
Integrated Community Solutions, Inc.
Jacksonville Area Legal Aid, Inc.
Japanese American Citizens League
Kentucky Resources Council, Inc.
Manufactured Housing Action (MHAction)
MICAH- Metropolitan Interfaith Council on Affordable Housing
Mountain State Justice
National Association for Latino Community Asset Builders
National CAPACD- National Coalition for Asian Pacific American Community Development
National Coalition For The Homeless
National Consumer Law Center (on behalf of its low-income clients)
National Council of Asian Pacific Americans (NCAPA)
National Fair Housing Alliance
National Housing Resource Center
New Jersey Citizen Action
Northwest Fair Housing Alliance
Pisgah Legal Services
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Public Good Law Center
Savannah-Chatham County Fair Housing Council, Inc.
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