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**FAIR HOUSING CENTER OF CENTRAL INDIANA, INC.**

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September 26, 2019

**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: 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 to you on behalf of the Fair Housing Center of Central Indiana 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"). The existing Disparate Impact Rule serves the American public by providing an incentive for municipalities, large corporations, and others to modify policies that wrongly and unnecessarily keep people from the opportunities they need to be successful in life. We strongly oppose any changes to HUD's current Disparate Impact Rule.

The mission of the Fair Housing Center of Central Indiana (FHCCI) is to ensure equal housing opportunities by eliminating housing discrimination through advocacy, enforcement, education and outreach. To achieve this mission, the FHCCI offers the following programs:

- The Advocacy Program of the FHCCI works to assist persons who feel they may be victims of housing discrimination, in an advocacy basis, in understanding their rights and options under fair housing laws. We also conduct fair housing investigations, both client-based and systemic, to determine if unlawful discrimination may be occurring. We file enforcement actions as necessary to address uncovered housing discrimination.
- The Education Program of the FHCCI provides education programs and activities to increase fair housing knowledge. We conduct trainings and conferences, distribute publications, support community events, issue e-newsletters, provide social media alerts and a website, release reports, and other activities to advance knowledge about fair housing laws. We work with consumers, the housing industry, and state and local policy makers to advance fair housing.

- The Inclusive Communities Program of FHCCI offers programs to assist persons, neighborhoods, and communities who have been impacted by unlawful discrimination, disinvestment, or unequal housing opportunity.
- The Public Policy Program of the FHCCI works to increase the awareness of policy-makers and regulators about the issues associated with fair housing. We work with local, state and federal legislators to ensure strong fair housing laws and policies. We also collaborate with fellow organizations to strengthen fair housing laws.

In the past five years, the FHCCI has recorded 3,733 housing intakes, documented 947 fair housing allegations, and opened 209 targeted fair housing investigations. We have also assisted dozens of persons with disabilities in obtaining reasonable accommodations and/or modifications after initial denials from their housing providers.

From these activities, the FHCCI has initiated 12 federal court actions, 17 HUD/FHAP complaints, and 2 other actions to stop identified violations of fair housing law. This has also included two class action lawsuits to represent over 3,000 identified victims of housing discrimination. Other actions are currently pending. In addition to seeking justice for individual complainants, we have also successfully resolved actions resulting in retrofitting of inaccessible multi-family housing units, removed biased zoning ordinances, negotiated the addition of banking branches and loan production offices in neighborhoods of color, stopped the sexual harassment of female public housing tenants, and confronted the use of predatory rent to own and land contracts.

As a nation, we have a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics. The Fair Housing 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.

The FHCCI shares this central mission and we write to urge you *not* to revise HUD’s existing Disparate Impact Rule. HUD’s new proposed rule would cause the Department to fail to meet its critical obligation to achieve the Fair Housing Act’s “central purpose . . . to eradicate discriminatory practices within a sector of our Nation’s economy.”<sup>1</sup> HUD’s current Disparate Impact Rule is a necessary tool in the ongoing effort to achieve open housing markets, free of discrimination, and to eliminate all forms of housing discrimination and illegal segregation.

In recent years, the FHCCI has challenged discriminatory housing practices through use of the Disparate Impact Rule, including:

- Providing protection for families with children who would have otherwise been excluded from housing they can afford through policies overly restricting occupancy in a housing

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<sup>1</sup> *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 125 S. Ct. 2507, 2511 (2015), available at: <https://casetext.com/case/texas-dept-of-housing-and-community-affairs-v-inclusive-communities-project-inc>.

unit without taking into account the size of bedrooms, overall square footage of the housing unit, local health and safety code, and other issues.

- Challenging rent to own housing companies who disproportionately targeted neighborhoods and persons of color with their predatory lending products which included inflated sales prices, high interest rates, and uninhabitable homes.
- Resolving lending disparities by banks as it relates to persons of color and including the location of new banking branches, marketing, and realistic assessment areas.
- Providing protection for survivors of domestic abuse who faced eviction under policies that would penalize them for the violence they experienced or for seeking police aid.
- Negotiating the removal of ordinances restricting affordable housing development.
- Assisting in resolution of situations which required employment in order to be accepted for rental when persons with disabilities may have other forms of income to pay rent.

In its current form, the Disparate Impact Rule has proven practical and effective. It also comports 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). In fact, *Inclusive Communities* quoted HUD's existing rule at length without any suggestion that its opinion was in tension with that rule. 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, particularly when overlaid on preexisting, long-standing disparities, they unnecessarily exclude minorities from housing. HUD's proposal; however, would prevent disparate impact from performing this function by effectively limiting its application to classic disparate treatment cases.

Accordingly, HUD's existing rule should not be revised. Instead, HUD must focus on vigorous enforcement of the Rule to remove unnecessary barriers to housing choice throughout our housing markets.

### **HUD's Proposed Rule Would Destroy Disparate Impact Liability in the Housing Markets**

HUD's Proposed Rule would make drastic changes to fundamentally weaken this longstanding enforcement tool and would allow insurance companies, financial institutions, and other major corporations to engage in covert discriminatory practices with impunity. The Proposed Rule would destroy disparate impact liability and eliminate the incentives for major corporations to continue doing their part to eliminate discrimination. Accordingly, the Proposed Rule is directly contradictory to the Fair Housing Act and its basic purposes.

The Proposed Rule includes deeply flawed changes that shift the burden of proof and inserts inordinately high barriers that would make it virtually impossible to bring the bedrock and heartland housing discrimination cases that Justice Kennedy expressly stated should be brought using disparate impact.<sup>2</sup>

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<sup>2</sup> *Inclusive Communities*, 135 S. Ct. at 2522.

The FHCCI has identified several components of the Proposed Rule which are particularly problematic, overly burdensome, and greatly impair the ability of victims of housing discrimination to get justice:

- Victims of discrimination will face a drastically higher burden to prove a disparate impact claim under the Fair Housing Act, making it virtually impossible to succeed. Specifically, victims are asked to read the Defendant's mind, trying to guess which justifications they might invoke and preemptively debunk them.
- A rule or policy that produces a profit will be immune from challenge for its discriminatory impact under the Proposed Rule unless there is an alternative approach that produces almost just as much money, even if the business could use alternate business approaches that are less discriminatory while still being significantly profitable.
- A business practice that relies on statistics or algorithms and has some predictive value will almost always be immune from liability, such that credit scoring, pricing, marketing, or underwriting models would be exempt from the Fair Housing Act, even if it is clear that they result in the discriminatory denial of access to housing and home loans.
- Businesses will no longer be incentivized to collect important data that can reveal discrimination. This will mean that victims of discrimination will lack access to information on whether discrimination is happening behind their backs and will lack the ability to challenge it if they do detect discrimination.

Ultimately, the Proposed Rule contains a host of changes that, in practice, amount to insurmountable obstacles to proving what should be clear claims of housing discrimination. These proposed changes would ultimately result in an inoperable disparate impact standard of liability. Moreover, the proposed changes dangerously move companies and housing providers away from the practice of seeking out less discriminatory alternatives to harmful policies and practices.

Here in Indiana, we have several cities which are ranked as the highest evicting cities in the country. In addition, hard working families cannot afford basic rental units without working multiple jobs.<sup>3</sup> Yet, Indiana has been hit with story after story about inhabitable rental housing. When tenants complain, they are served an eviction or a notice of lease nonrenewal. That notice of eviction – even if not court ordered – will follow these hard working families from rental complex to rental complex and keep them out of habitable housing. The result are tenants who are forced to rent substandard housing or enter into risky or predatory contracts to ensure a roof over their heads and for their families. In addition, potential homeowners of color remain shut out of much of the housing stock expanding the racial homeownership gap. Banks do not market to them and do not have branches in their neighborhoods. Homes that they may own have decreased in significant value post-foreclosure crisis due to the presence of foreclosed homes on their streets.

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<sup>3</sup> <https://fox59.com/2019/06/18/study-shows-affordable-housing-remains-out-of-reach-for-many-hoosiers/>

## **The Disparate Impact Rule is Critical to Ensuring Housing Is Free of Systemic Discrimination**

The existing Disparate Impact Rule is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of widespread discrimination with rightful recourse.

In our service area of Central Indiana, systemic discriminatory policies and practices limit housing opportunities and choices that the current Disparate Impact Rule can be useful in addressing. Those include a HUD complaint we filed against a City which had banned affordable housing development and limited multi-family development to two bedrooms or less to restrict housing choice for families with children. It can also include a testing report we released showing that 82% of properties tested in Marion County denied Section 8/housing choice voucher holders. The rule can ensure that persons with a criminal history but not of any risk to current residents, can get a needed roof over their head, thereby dramatically decreasing recidivism rates. It may also include a lender's use of financial qualifying techniques that disproportionately exclude racial minorities; an insurance company's refusal to insure older, well-maintained homes; financial institutions adopting policies that result in the blight and deterioration of foreclosed homes in communities of color; a jurisdiction's use of residency preferences that exclude people of color; or a lender that denies an applicant because they cannot provide proof that their disability assistance will continue for years, when similar requirements are not made for other applicants showing future income.

The discriminatory impact of these policies can and should be altered. The focus on less discriminatory alternatives encourages housing providers to adopt less restrictive practices while meeting their business needs, but the Proposed Rule would ultimately preserve discriminatory barriers to open housing markets by not allowing victims to get past the burden of establishing that a policy has a discriminatory impact.

### **Conclusion**

The Proposed Rule operates to destroy disparate impact liability. It is in direct contradiction to HUD's mission, decades of legal precedent and the Supreme Court's recent decision in *Inclusive Communities*.

Before finalizing the current Disparate Impact Rule in 2013, HUD engaged in a thoughtful and thorough process, considering decades of federal court jurisprudence. The FHCCI was one of many parties who submitted comments in the prior comment period. In 2016, HUD considered additional federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. HUD should not change the current Disparate Impact Rule.

Thank you for the opportunity to comment. Please contact Amy Nelson, 317-644-0673 x1001 or [anelson@fhcci.org](mailto:anelson@fhcci.org) with any questions regarding these comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy Nelson".

Amy Nelson  
Executive Director