October 18, 2019

Submitted via Regulations.gov

Ms. Anna Maria Farías
Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street, SW
Washington, D.C. 20410

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard Notice of Proposed Rulemaking, HUD-2019-0067, RIN 2529-AA98

Dear Assistant Secretary Farías,

The National Health Law Program (NHeLP) protects and advances the health rights of low-income and underserved individuals and families by advocating, educating, and litigating at the federal and state level. We write to express our strong opposition to the proposed rule change regarding "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" Notice of Proposed Rulemaking (NPRM).

The existing disparate impact rule efficiently and successfully serves the American public as a tool for challenging the structural inequalities that persist in housing and financial markets. Access to safe and affordable housing is important to health, but housing policy--including discriminatory housing practices—often negatively influence place-based inequities.[1] Instead of fulfilling the stated goal of the Fair Housing Act (FHA) to provide for fair housing, the proposed rule will create overwhelming obstacles for people who experience discrimination and then seek to enforce their rights based on a disparate impact claim.

HUD's 2013 final rule on "disparate impact" has been critically important for ensuring effective implementation of the FHA.[2] In its current form, the Disparate Impact Rule has proven practical and effective. It comports with decades of established judicial precedent, including the 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[3] In that case, the Supreme Court established that housing decisions with a disparate impact are prohibited under the FHA, and disparate impact liability also "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classifications," and in that way "may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[4]

The current burden-shifting framework established under the 2013 final rule adequately and appropriately accommodates legitimate justification and defenses. The proposed rule, by contrast, is fundamentally inconsistent with the framework established in *Inclusive Communities Project*. The proposed rule, if finalized as written, risks permitting covert discriminatory practices to proliferate without the appropriate and necessary enforcement tool of disparate impact liability. The proposed rule miscalculates the balance of interests by weighting the process unfairly against individuals alleging discrimination, obstructing accountability, making it prohibitively difficult for people facing discrimination to access an appropriate and timely remedy, and dismantling an important tool for addressing systemic discrimination under the FHA.

The proposed revisions in §100.500 will drastically increase the burden to a plaintiff of bringing a case to address prohibited discrimination. In the proposed rule, the current burden-shifting standard is replaced with a five-part component set of tests, placing nearly all of the burden on the people who are intended to be protected from discrimination under the Fair Housing Act. For example, people experiencing discrimination may be asked to essentially identify the justifications the defendant will raise and address them. A plaintiff may be required to prove by the preponderance of evidence that "a less discriminatory policy or practice would serve the interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant." The proposed rule not only sets a much higher bar for a person experiencing discrimination to meet, but one based on information that only the entity with the discriminatory policy may have. The proposed rule's burden shifting would also sharply decrease the FHA's built-in incentive to examine disparities and their causes to identify better, fairer practices and policies that do not discriminate.

The proposed changes include additional elements that are fundamentally inconsistent with nondiscrimination protections. We are concerned that the proposed rule at §100.500(c)(2)

gives entities covered by the FHA three extremely overbroad defenses against claims of discrimination under disparate impact theory.

Algorithms are frequently used in the context of housing, including in lending practices, credit scoring, pricing, marketing, underwriting, and tenant screening. And they have a history of being used to discriminate against protected classes.[5] For example, in some cases housing providers may use algorithms such as credit scores or criminal background screenings in ways that have a disparate impact on people with disabilities and other protected classes.[6]

Algorithms are not wholly inappropriate in certain housing-related contexts. However, the data sets used to construct many algorithms were created in an environment that includes a long history of inequality and injustice, which can build implicit bias into the algorithms, such as the FinTech example discussed below.[7] This problem may be particularly acute in the housing context, given America's long and continuing history of housing segregation.[8] Therefore, even if an algorithmic tool is empirically derived and statistically sound, it may still produce results that have a disparate impact. Importantly, algorithms often lack transparency, making it difficult to analyze the basis of the algorithm and how it works. While using algorithms in and of themselves may not be improper, currently algorithms are rarely used in a way that allows for open analysis and understanding of the factors used in the algorithm and the impact of the algorithm itself.

The proposed rule's first defense at § 100.500(c)(2)(i) allows entities covered by the FHA to rely on algorithmic tools without disparate impact liability, provided the inputs are not "substitutes or close proxies for protected classes under the FHA and that the model is predictive of credit risk or other similar valid objective." However, this defense misinterprets how algorithms can be used to discriminate. Algorithms often rely on *interactions* between multiple variables, which in combination can have a disparate impact on a protected class. Even if each individual variable may not have a disparate impact, the patterns that result from combining multiple variables may pose significant disparate impact concerns.[9] Additionally, even if a factor is not directly a "substitute or close proxy" for a protected class, or appears facially neutral, it can still create a disparate impact. For example, an algorithmic input of criminal justice involvement could have a disparate impact on people with disabilities, but criminal justice involvement may not necessarily be considered a "substitute or close proxy" for disability under this proposed rule. [10] Further, the proposed rule would permit discrimination under disparate impact theory so long as the algorithm was "predictive" of risk, even if a less discriminatory alternative would perform just as well, contrary to the intent of *Texas v. Inclusive Communities*.[11]

The second defense, at §100.500(c)(2)(ii), could potentially provide an overbroad safe harbor from disparate impact liability if a defendant is using an industry-standard algorithm from a third party. A model or methodology may be "standard in the industry" and still serve to perpetuate discrimination in its outcome or application; merely saying that other housing providers are using the same discriminatory method should not be enough to escape disparate impact liability.[12] For example, credit scores are commonly used in housing, but the algorithms used to create some credit scores have recognized bias.[13] This defense could be sweeping in its scope: for example, almost all mortgages are underwritten using third-party models.[14] In effect, this proposal may give wide latitude to entities covered by the FHA to discriminate without concerns for disparate impact liability, just so long as the tool or method is an industry standard.

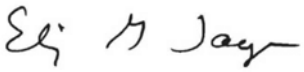
The final defense to disparate impact liability at §100.500 (c)(2)(iii) is that the defendant shows that the model was "validated by an objective and unbiased neutral third party," who finds the algorithm is accurately predictive and that the factors used are not "substitutes or close proxies" for protected classes. This provision has similar problems as the first defense. Further, this defense sets no standards for who can qualify as an "unbiased neutral third party," what it takes to "validate" an algorithm, or how to delimit a close proxy This vagueness leaves significant questions as to how this would be operationalized.

All these defenses based on algorithms shift the burden unfairly and impermissibly against those claiming discrimination. Algorithms are often complex, and those who create and use algorithms frequently claim that details are protected as intellectual property or trade secrets, blocking transparency.[15] In other contexts, such as Medicaid functional assessments, legal advocates have encountered major difficulties gaining access to the data and information necessary to understand why an individual was denied or how the tool produced a particular outcome.[16] Similar issues with transparency and access to how a decision was made have occurred in public benefits, criminal defense, social services, education, and other areas that have resulted in unfair and negative impacts on people's lives.[17] Even if an algorithm's structure becomes available, deciphering how the algorithm functions takes a specific, often costly, skill set. It also requires obtaining and understanding information on the methodology for creating the algorithm, the research conducted to validate it, the integrity of the data it relies on, and the steps taken to ensure the tool is properly applied. Given all these transparency, technical, and informational issues, it would likely be difficult for plaintiffs to get far enough along in litigation to get the information necessary through discovery to meet the standard. The standards set by this section would thus constitute too high a bar, foreclosing meaningful access to challenging discriminatory actions under disparate impact theory.

The potential obstacles to successfully bringing a disparate impact claim under this proposed rule might best be illustrated through a concrete example. A recent study found that financial technology (FinTech) companies price mortgages in ways that have a racially discriminatory impact using algorithms. The researchers hypothesize that racial minorities are less likely to comparison shop for mortgages, potentially due to factors such as geography and lack of experience with lending, and the lenders therefore strategically charged them higher prices.[18] According to one co-author, "[t]he mode of lending discrimination has shifted from human bias to algorithmic bias… Even if the people writing the algorithms intend to create a fair system, their programming is having a disparate impact on minority borrowers—in other words, discriminating under the law."[19] It is extremely concerning that under this proposed rule, minority borrowers might not have the ability to seek redress for this discrimination based on its disparate impact. For example, under the first proposed defense, lenders could try to show that the likelihood of comparison shopping is not a "substitute or direct proxy" for race. If these FinTech algorithms become prevalent, the lender may also escape disparate impact liability under the second proposed defense simply by contracting out their pricing and claiming the algorithm is "standard in the industry". Finally, under the third proposed defense, a lender might escape disparate impact liability in ways similar to the first defense. This proposed rule goes against the purpose of the FHA non-discrimination provisions; instead of protecting access to fair housing, it protects those who would be defendants in FHA claims.

To move forward with the rule as proposed will create confusion and increase uncertainty, and would be counter to the purpose and policy of the law - to provide, within constitutional limitations, for fair housing throughout the United States.[20] It would also work counter to HUD's mission to "create strong, sustainable, inclusive communities and quality affordable homes for all" and its work to "build inclusive and sustainable communities free from discrimination…"[21] We urge HUD to withdraw this proposed rule, and leave intact important, existing protections for those intended to be protected under the Fair Housing Act.

If you have any questions, please contact us via email – Elizabeth Edwards (edwards@healthlaw.org) or David Machledt (machledt@healthlaw.org).
Sincerely,



Elizabeth G. Taylor
Executive Director

[1] *See generally* Robert Wood Johnson Foundation, Housing and Health: A Safe, Secure, and Affordable Home Is a Foundation for Good Health, https://www.rwjf.org/en/library/collections/housing-and-health.html; *see also* Jessica Mark & Najaf Ahmad, *Home is Where our Health Is,* RWJF Culture of Health Blog (July 22, 2019), https://www.rwjf.org/en/blog/2019/07/home-is-where-our-health-is.html (describing the role of discriminatory housing policies in health);
[2] 24 C.F.R. § 100.
[3] *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 35 S. Ct. 2507, 192 L. Ed. 2514 (2015).
[4] *Id.* at 2522.
[5] *See generally* National Consumer Law Center, Past Imperfect: Howe Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf (collecting studies showing racial disparities in credit scores).
[6] Christopher P. Guzelian, Michael Ashley Stein & Hagop S. Akiskal, *Credit Scores, Lending, & Psychosocial Disability*, 95 B.U.L. Rev. 1807, 1808 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2765649; Aastha Uprety, How Criminal Background Checks Can Prevent People with Disabilities from Finding Stable Housing, Equal Rights Center (Sept. 19, 2019), https://equalrightscenter.org/criminal-record-disability-housing/; Rebecca Vallas, Disabled Behind Bars: the Mass Incarceration of People with Disabilities in America's Jails and Prisons (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf; Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U.L. REV. 949 (2013), http://suffolklawreview.org/wp-content/uploads/2014/01/Rice-Swesnik_Lead.pdf.; U.S. Dept. of Housing & Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF; *Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019).
[7] *Id.*; *see also infra* note 10; A.I. Now, The AI Now Report: The Social and Economic Implications of Artificial Intelligence Technologies in the Near-Term, 6 (2016), https://ainowinstitute.org/AI_Now_2016_Report.pdf. F
[8] *See, e.g.,* Joseph Williams, *Segregation's Legacy,* U.S. News and World Report (Apr. 20, 2018), https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act.
[9] Andrew Selbst, A New HUD Rule Would Effectively Encourage Discrimination by Algorithm (Aug. 29, 2019, 10:31 AM), https://slate.com/technology/2019/08/hud-disparate-impact-discrimination-algorithm.html ("When it comes to discussions about algorithmic discrimination, the concern is not only that someone might use a well-known substitute for protected class, like ZIP code, as an input when they secretly want to use race…Algorithms present a more complex problem: Machine learning models rely on interaction between features to find unexpected patterns in the data, which can disproportionately harm people in disadvantaged groups… [For example,] a tool that relies on social media and frequency of bar visitation to build a personality profile might penalize someone who is clinically depressed or just found out about a serious medical condition. If the landlord makes decisions on that basis, it would be illegal disability discrimination. These discriminatory patterns usually cannot be accounted for in any one feature in the model."); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 712 (2016).

[10] *See* sources cited *supra* note 6.
[11] Michelle Arnowitz & Edward Golding, Urban Inst., HUD's Proposal to Revise the Disparate Impact Standard Will Impede Efforts to Close the Homeownership Gap 4 (2019), https://www.urban.org/sites/default/files/publication/101015/huds_proposal_to_revise_the_disparate_impact_standard_0.pdf.
[12] *See, e.g.,* Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data,* 18 Yale J. L. & Tech. 148 (2016), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1122&context=yjolt (describing how AI may combine facially neutral data and use them as proxies for immutable characteristics that may be protected classes, other issues of discrimination in algorithms, and the problems related to transparency); *see also* Rose Eveleth, *Credit Scores Could Soon Get Even Creepier and More Biased,* Vice News (Jun. 13, 2019), https://www.vice.com/en_us/article/zmpgp9/credit-scores-could-soon-get-even-creepier-and-more-biased (highlighting how artificial intelligence used to create credit scores can unintentionally reflect bias and transparency issues related to such algorithms); Jordan Pearson, *AI Could Resurrect a Racist Housing Policy*, VICE NEWS (Feb. 2, 2017), https://www.vice.com/en_us/article/4x44dp/ai-could-resurrect-a-racist-housing-policy (discussing algorithmic redlining and transparency problems with algorithmic decision making).
[13] Hurley & Adebayo, *supra* note 10; Eveleth, *supra* note 10; Pearson, *supra* note 10.
[14] Arnowitz & Golding, *supra* note 11 at 3.
[15] Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/70-Stan.-L.-Rev.-1343.pdf.
[16] A.I. Now Institute, Litigating Algorithms 8 (2018) *at:* https://ainowinstitute.org/litigatingalgorithms.pdf; A.I. Now Institute, Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems (2019), https://ainowinstitute.org/litigatingalgorithms-2019-us.pdf.
[17] *Id.; see also* VIRGINIA EUBANKS, AUTOMATING INEQUALITY (2018).
[18] Robert Bartlet et al., Consumer-Lending Discrimination in the FinTech Era 5 (2019), http://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.
[19] Laura Counts, Minority homebuyers face widespread statistical lending discrimination, study finds, (Nov. 13, 2018) https://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/.
[20] 42 U.S.C. § 3601.
[21] U.S. Dep't. of Housing & Urban Development, "Mission," https://www.hud.gov/about/mission (last visited Sept. 9, 2019).