CHICAGO COMMUNITY BOND FUND

October 18, 2019

Submitted via www.regulations.gov
Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

**Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard
Docket Number: FR-6111-P-02, RIN 2529-AA98**

To Whom It May Concern:

I am writing to oppose HUD's 2019 proposed rule "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." HUD's proposal would make it nearly impossible for people to bring disparate impact claims. As the Supreme Court recognized in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* the Fair Housing Act "was enacted to eradicate discriminatory practices within a sector of our Nation's economy."[1] HUD's proposal would allow discriminatory practices to continue unchecked as long as the business, housing provider, or government actor did not state an intent to discriminate. I strongly urge HUD to withdraw this proposed Rule.

Chicago Community Bond Fund ("CCBF") pays bail for people incarcerated while awaiting trial in Cook County, Illinois. Through a revolving fund, CCBF supports individuals whose communities cannot afford to pay the bails themselves and who have been impacted by structural violence. By paying bail, CCBF restores the presumption of innocence before trial and enables people to remain free while their cases proceed. CCBF also engages in public education about the role of bail in the criminal legal system and advocates for the abolition of money bail. CCBF is committed to long-term relationship building and organizing with people most directly impacted by criminalization and policing. Inability to pay bail results in higher rates of conviction, longer sentences, loss of housing and jobs, separation of families, and lost custody of children. Access to housing is a significant issue for nearly everyone with whom CCBF works. HUD's proposed rule would disproportionately harm the people CCBF supports by making housing harder to access, thus increasing instability and the likelihood of re-incarceration. For this reason, we strongly oppose the proposed rule.

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[1] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2521.

I.   HUD's proposed rule contradicts the central purpose of the Fair Housing Act.

In passing the Fair Housing Act, Congress sought to eradicate discriminatory housing practices in the strongest possible terms. Congress intended the Act to provide "a clear national policy against discrimination in housing."[2] With *Inclusive Communities Project*, the Supreme Court realized that intent by confirming that disparate impact is a cognizable theory under the Act, and is in fact essential to realizing Congress' central goals. This proposed Rule does not reflect the Supreme Court's interpretation of disparate impact; it renders disparate impact an unusable theory by holding plaintiffs to an impossible pleading standard and allowing defendants to evade liability.

II.   HUD's Rule undermines the Fair Housing Act rather than enforcing it.

HUD has an obligation to affirmatively further fair housing through its actions.[3] Instead of furthering fair housing goals, this proposed Rule would impede enforcement of the Act by requiring plaintiffs to prove facts and intentions that are impossible to discern without discovery and by establishing an unrealistic causation standard. The proposal is yet another politically motivated attack on communities of color and must be withdrawn.

HUD concedes that the first proposed prong of its prima facie standard may require an impossible showing. The preamble states that "HUD recognizes that plaintiffs will not always know what legitimate objective the defendant will assert in response to the plaintiff's claim or how the policy advances that interest, and, in such cases, will not be able to plead specific facts showing why the policy or practice is arbitrary, artificial, and unnecessary. In such cases, a pleading plausibly alleging that a policy or practice advances no obvious legitimate objective would be sufficient to meet this pleading requirement." How can a plaintiff plausibly allege the absence of a legitimate objective? Even if the plaintiff successfully makes this showing, HUD's proposal allows the defendant to rebut the claim by "identifying" a valid interest—with no standard of proof.

III.   HUD's Rule improperly attempts to eliminate the "perpetuation of segregation" theory of discriminatory effects liability.

The Rule attempts to erase liability under the perpetuation of segregation theory, which encompasses the very core of what the Fair Housing Act is about: ending segregation. The Fair Housing Act was passed to combat racial segregation in the United States, yet our communities remain segregated to this day.[4] HUD's proposal will take away a critical tool for tackling this fundamental civil rights issue.

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[2] H.R. Rep. No. 100-711, p. 15 (1988).

[3] 42 U.S.C. § 3608(e)(5).

[4] *Racial Segregation in the San Francisco Bay Area*, Part 1, Stephen Menendian and Samir Gambhir (Oct. 29, 2018) Available at: https://haasinstitute.berkeley.edu/racial-segregation-san-francisco-bay-area.

As reflected in HUD's 2013 disparate impact rule, and in court decisions that have considered the question,[5] discriminatory effects liability may be established where a policy "perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[6] In many areas of the United States, segregation is increasing rather than decreasing; this theory is more important to realizing the Fair Housing Act's goals than ever.[7]

Retaining meaningful tools for challenging actions that increase segregation is especially important in our community because segregation has long marred the development of fair housing throughout the city of Chicago. Beginning with housing covenants in the early 20th century to mid-century "Urban Renewal" and redlining, local residents and businesses have utilized both legal and extra-legal means of maintaining racial segregation. These issues have directly contributed to Chicago becoming one of the most racially segregated cities in the United States. According to the *Chicago Tribune* in 2018, Chicago is the 13th most segregated metropolitan area in the United States.[8] HUD's proposed rule would act as a major step of the Federal government in contributing to this long history of racial segregation.

HUD removes all reference to perpetuation of segregation from 24 C.F.R. section 100.500 *without explanation or discussion.* These changes have critically important implications for our nation; research has demonstrated that "the neighborhood in which a child grows up is a significant predictor of his or her later life outcomes, even at a very local level."[9] Racial segregation impacts every aspect of community well-being; people of color are excluded from high quality schools, jobs, even access to fresh food or drinkable water.

HUD's omission of perpetuation of segregation theory from the proposed Rule is a blatant attack on the ideals of integration that the Fair Housing Act was intended to make possible. Coupled with HUD's suspension of implementation of its Affirmatively Furthering Fair Housing regulation, HUD is retreating from its obligation as an agency to meaningfully combat segregation.

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[5] *See e.g. Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1290 ("There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act").
[6] 24 C.F.R. 100.500(a).
[7] *See e.g.*, *Rising Housing Costs and Re-Segregation in the San Francisco Bay Area*, UC Berkeley's Urban Displacement Project and the California Housing Partnership, Philip Verma, Dan Rinzler, Eli Kaplan, and Miriam Zuk. Available at: https://www.urbandisplacement.org/sites/default/files/images/bay_area_re-segregation_rising_housing_costs_report_2019.pdf.
[8] https://www.chicagotribune.com/real-estate/ct-re-0603-housing-segregation-20180525-story.html.
[9] *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility*, by Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones, Sonya R. Porter, October 2018, at p. 25. Available at: https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf.

IV.   Suits targeting single land use decisions are the heartland of disparate impact liability under the Fair Housing Act, and this Rule would exclude them.

In *Inclusive Communities Project,* the Supreme Court recognized that "suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability."[10] HUD's proposal blatantly ignores the Supreme Court's guidance by proposing that most zoning decisions will not be actionable under disparate impact theory: "Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government's zoning decision or a developer's decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice."[11] In support of this proposition, HUD cites an unpublished district court case currently on appeal,[12] and ignores Supreme Court and circuit court decisions holding that individual zoning decisions are a proper target for disparate impact liability.[13] HUD's proposal would improperly shield zoning and planning decisions from scrutiny under the Fair Housing Act.

In CCBF's community, land use has been utilized to further segregate communities. For at least the better part of the last 10 years, HUD has placed most of its federal housing in low-economic community areas, see *Hanna v City of Chicago (2015).* Against its own policy of affirmatively furthering fair housing, the city of Chicago has repeatedly and falsely reported that HUD funding would be used to affirmatively further fair housing in high opportunity areas within the city of Chicago. Affordable housing corporations abuse the federal funding system, and the city of Chicago and the federal government aids and abets this abuse by failing to hold people accountable for the misuse of federal funds. By instituting this new rule, the federal government is removing one of the few mechanisms through which Chicagoans can still leverage and exercise their right to fair housing.

V.   Disparate impact theory is a critical tool in addressing implicit bias.

In *Inclusive Community Project*, the Supreme Court acknowledged that "[r]ecognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."[14] By setting an impossibly high standard of proof for disparate impact liability, HUD seeks to foreclose use of disparate impact theory that works to counteract the toxic impacts of implicit

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[10] *See, e.g., Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16–18, 109 S.Ct. 276.
[11] *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard,* (Aug. 19, 2019) FR-6111-P-02, RIN 2529-AA98, 84 Fed. Reg. 42,854, 42,858.
[12] *Barrow v. Barrow* (D. Mass., July 5, 2017, No. CV 16-11493-FDS) 2017 WL 2872820, at *3.
[13] *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619.
[14] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2522.

bias in housing decisions. HUD's proposal will make it much more difficult to realize the goals of housing integration.

VI. Discouraging housing providers from collecting data will hamper enforcement of the Fair Housing Act.

HUD's proposed section 100.5(d) states that "[n]othing in this part requires or encourages the collection of data" regarding protected classes. HUD provides no explanation for this provision, which appears to have no purpose other than to assist corporate entities in obscuring the discriminatory impacts of their practices. While data alone may not establish disparate impact liability, data is a critical tool in demonstrating the impact of housing-related practices on protected groups. This provision is another example of the way that HUD's proposal undermines the Fair Housing Act and tries to use regulation to negate the Supreme Court's core holding in *Inclusive Communities Project*: that disparate impact claims are cognizable under the Act.

VII. HUD's proposal regarding the use of algorithms does not reflect current research.

As HUD has recognized,[15] algorithms can be used as a tool of housing discrimination. Multiple studies have demonstrated that algorithms result in Black and Brown people being denied credit, employment, and housing at disproportionate rates.[16] Instead of tackling this difficult and complex issue, HUD's proposed rule creates a vague standard with many undefined terms that will shield housing providers from disparate impact liability whenever they use an algorithm to make a housing decision. For example, HUD's proposed section 100.500(c)(2)(ii) allows housing providers to defend a discriminatory impact claims where the algorithm employed meets "industry standards" even though the current industry standard has a discriminatory impact.[17] Algorithms function as gatekeepers for a broad range of industries; it is imperative that disparate impact theory remain an effective tool for ensuring they do not operate to perpetuate historical patterns of discrimination. Furthermore, it is unclear why this special defense for algorithms is necessary, since the current framework in 24 C.F.R. 100.500(c)(2) allows a defendant to show that the use of the algorithm would be "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." The complexity of algorithms should not be used as an excuse to provide defendants that use algorithmic models in housing decisions with what amounts to a broad liability shield—even when those defendants are engaging in discriminatory housing practices.

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[15] HUD v. Facebook, Charge of Discrimination, FHEO No. 01-18-0323-8 (Mar. 28, 2019).

[16] *When Algorithms Discriminate,* Claire Cain Miller, *New York Times* (July, 9, 2015)(Referencing multiple studies finding discriminatory impact of algorithms) Available at: https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html.

[17] *See Connecticut Fair Housing Center v. Corelogic Rental Property Solutions, LLC*, 369 F.Supp.3d 362, 374, 377-79 (D. Conn. 2019)(Tenant screening company may be held liable for discriminatory impact).

VIII.   We strongly oppose the Proposed Rule; HUD should withdraw it.

The Fair Housing Act was enacted to promote integration. HUD's proposed Rule ensures continued segregation and intentionally harms protected classes. This proposal is completely antithetical to HUD's mission and serves the interests of certain industry groups while restricting the rights of people who suffer housing discrimination every day. We oppose the proposed rule and call on HUD to withdraw it.

Sincerely,

Sharlyn Grace
Executive Director
Chicago Community Bond Fund