October 18, 2019

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

Docket Number: HUD-2019-0067
Docket Name: FR-6111-P-02 HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard

Dear Sir or Madam:

The National League of Cities (NLC) appreciates the opportunity to comment on the proposed rule to revise HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard. NLC is the voice of America’s 19,000 cities, towns and villages, representing more than 200 million people, and is a resource and advocate for the nation’s cities and their leaders.

The National League of Cities is Opposed to the Proposed Rule and Urges HUD to Withdraw it

The National League of Cities (NLC) strongly supports the Fair Housing Act and opposes HUD’s proposed rule that would undo fair housing protections provided for in the 2013 HUD disparate impact rule. The current regulation in place to prevent and account for disparate impact is one of the most important tools cities use to enforce fair access to safe and affordable housing for all residents. Moreover, the application of existing disparate impact regulations to address housing issues in municipalities can be a necessary component of a process to reveal and address longstanding impacts of public policies that embed discrimination into otherwise race neutral policies and practices.

The proposed rule would significantly set back efforts undertaken by local governments to fulfill their responsibility to advance racial equity within their communities - and to foster economic opportunity for every resident. The rule would weaken these efforts by creating complicated and unreasonably high standards for proving disparate impact. For cities, towns, and villages, “housing” is the single biggest factor impacting economic mobility over which local governments can exercise influence. Stable housing is a prerequisite for economic mobility, job
security, and health and well-being. When residents have stable living conditions, the benefits are apparent — students do better in school and health outcomes improve, and demand for costly local emergency and human services fall.¹

**Policies advancing economic opportunity must be clearly and purposefully connected to racial equity, or disparate impact will be the nearly inevitable result.** One of the key goals of the 1968 Fair Housing Act (FHA) was to undo not only explicitly discriminatory policy, but also to protect against violations of civil rights based on implicit biases baked into policies and systems governing housing markets and financing practices. To that end, NLC supports federal legislative and regulatory proposals that fix inequities in housing development and the housing finance system. Furthermore, NLC recommends that local governments prioritize equitable outcomes in local housing and land use planning as an essential component for success.² Unfortunately, this proposed rule would make it more difficult for either level of government to accomplish these objectives.

**HUD’s Proposed Rule will make it harder for local governments to identify and remedy their own discriminatory practices.** As has been extensively documented³, national policy sanctioned by the Federal Housing Administration included colored lines drawn on maps to delineate areas where financial institutions should or should not invest. The federal government built redlining practices into its developing federal mortgage system, transforming American cities. In the 1930s, redlining converted clear racist action into structural racism that has resulted in long-lasting negative impacts. The impacts of embedding de facto segregation into the geography of American cities, towns and villages have been significant across housing, education, health and other outcomes to this day. If during the drafting of the Fair Housing Act, an argument that only de jure segregation would be considered discriminatory had won the day, there would be no legal recourse for many of the most insidious drivers of inequities, which remain race neutral. In fact, de facto segregation, of the sort against which this proposed rule would allow no legal recourse, at times has more deleterious outcomes than de jure segregation.

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Disparate Impact is necessary to challenge discriminatory actions by businesses, landlords, insurance companies, financial institutions, local and state governments, and the federal government. The ability to sue to protect residents and city coffers from discriminatory housing, lending and insurance decisions is critical to America’s cities’ ability to enact one of their primary missions—to ensure safe, affordable access to housing for city residents. Since the Supreme Court’s ruling in *Gladstone, Realtors v. Village of Bellwood,* in which a municipality challenged a real estate company’s discriminatory steering practices, courts have recognized that cities have standing to utilize the Fair Housing Act, including the existing disparate impact standard.

More recently, the City of Miami has relied on the existing disparate impact standard to hold major financial institutions accountable for discriminatory practices that have harmed the city itself, as well as to pursue cases against lenders’ actions with discriminatory impacts to its residents. These include reverse redlining, providing predatory loans with exploitative terms, and using other deceptive practices in connection with marketing and underwriting loans. Other cities, including Oakland, Baltimore, and Memphis, have utilized the Fair Housing Act to challenge these types of practices. In all these cases, the disparate impact standard has been crucial for successful legal challenges to financial institutions’ failure to lend in communities or steering residents of color towards higher risk or higher cost mortgage products. Since discriminatory intent is more difficult to prove for mortgages vs. the intent of actions of a real estate agent, the fact that these cities did not have to demonstrate discriminatory intent was critical to being able to protect their residents under federal law.

HUD’s Proposed Rule will also make it more difficult for local governments to hold private enterprise accountable as reliance on algorithms increases. The proposed rule’s elimination of accountability for algorithms that yield differential impacts by race ignores the reality of complexities in the housing, lending, and insurance industries. Regardless of intent, housing, banking, and insurance institutions have routinely used racially biased factors as part of their risk calculations. Dating back to the 1881 introduction of race into risk calculations by Prudential Insurance, the definition of “risk” has not been absent of disparate impact by race. As was demonstrated through the real estate industry’s use of the

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*4 441 U.S. 91 (1979). Although *Gladstone, Realtors* was an intentional discrimination case, the Supreme Court’s decision enshrined the role of municipalities as plaintiffs in Fair Housing Act cases, a role that is equally available to municipalities in disparate impact cases.
*5 Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017).
Home Owners Loan Corporation (HOLC) maps in the 1930s, if risk calculations that base higher risk levels on factors known to be disproportionately distributed amongst communities of color are embedded within algorithms, a new standard that allows these algorithms to remain in place will make it nearly impossible for cities to take basic steps to address unintentionally discriminatory lending practices. Simply put—by requiring that an algorithm’s inputs be explicit about race in order to demonstrate disparate impact of its use, the proposed rule is saying that race-neutral characteristics cannot be used to produce disproportionate results by race. This assumption is patently false. Complex algorithms have used ostensibly race-neutral characteristics to approximate characteristics like race for decades. More recently, an algorithm for tenant screening by CoreLogic was proven liable of disparate impact in federal court⁸.

Discrimination in renting, lending, and selling remains a significant burden on local governments and their efforts for community and economic development. Today, real estate and financial industries persistently and stubbornly deny low-interest loans to people of color at higher rates than they do to white people⁹. Maintaining the ability to hold firms liable for these impacts is the only way to protect consumers, tenants and homebuyers from discrimination.

NLC Urges HUD to Enforce the 2013 Final Disparate Impact Rule Without Amendment.

For local governments, the proposed change would jeopardize community revitalization and economic mobility at the local and regional level. And it would harm already vulnerable residents. In New Orleans, for example, a lawsuit challenging a neighboring jurisdiction’s ordinance prohibiting rental of single-family residences - except to blood relatives - was successful in proving disparate impact would result.¹⁰ That successful lawsuit both protected vulnerable residents from discriminatory practices and ensured the neighboring parish would remain open to all as a place to call home.

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HUD’s proposed replacement of the current discriminatory effects standard will not bring HUD’s disparate impact rule into closer alignment with the guidance provided in the Supreme Court’s 2015 ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc; or the Fair Housing Act and its amendments to eliminate housing discrimination based on race, color, sex, religion, family status, national origin, and disability.

Thank you for the opportunity to submit comments on this important topic. If you have any questions regarding our response, I encourage you to reach out to Michael Wallace, Program Director for Community and Economic Development, NLC, at 202-626-3025, wallace@nlc.org; or Aliza Wasserman, Senior Associate for Race, Equity and Leadership (REAL), NLC, at 202-626-3055, wasserman@nlc.org.

Sincerely,

Clarence E. Anthony
CEO and Executive Director
National League of Cities