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Rules Docket Clerk, Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20110-00

Re: **HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**
Docket No. FR-6111-P-02, RIN 2529-AA98

To Whom It May Concern:

Please accept this correspondence as the comments of Klein Hornig LLP ("Klein Hornig" or the "Firm") on its own behalf and on behalf of the Poverty & Race Research Action Council ("PRRAC") in response to the August 19, 2019 notice of proposed rulemaking ("NPRM") published at 84 Fed. Reg. 42854 (August 19, 2019). The NPRM proposes to modify existing rules of the U.S. Department of Housing and Urban Development ("HUD") previously issued at 78 Fed. Reg. 11460 (February 15, 2013) and codified at 24 C.F.R. §100.500 (the "2013 Rule") that implement the disparate impact principles of the Fair Housing Act (the "the Act" or "Title VIII"). The comments that follow ask HUD to withdraw the NPRM as arbitrary, capricious and in violation of existing law.

1. Summary.

This letter begins with a description of the interests of PRRAC and the Firm that are affected by the NPRM. Substantively, it discusses the way NPRM upends longstanding congressional, judicial and regulatory approaches to disparate impact claims in the areas of land-use, lending and insurance. In those contexts, the comments discuss the improper changes made by the NPRM to the allocation of burdens of proof, the definition of what constitutes a legitimate interest that may justify a discriminatory effect, and the safe harbors that the proposed rule would unlawfully create for lenders and insurers. The comments conclude by observing that disparate impact liability under the Act is closely aligned with the duty to further fair housing imposed by Title VIII and related laws on HUD and its grantees. If adopted as final regulations, the changes made by the NPRM will so eviscerate the existing legal standards for asserting discriminatory effect claims under Title VIII as to eliminate them. Such a result is an abdication of HUD's responsibilities under the Act.

Please note that PRRAC separately submits comments with others regarding the relationship between the NPRM and environmental justice. The Firm endorses those comments. PRRAC and Klein Hornig also support the comments of the Center on Budget and Policy Priorities (a client of the Firm's). Other civil rights groups are also submitting comments specifically addressed to judicial standards for allocating burdens of proof in disparate impact disputes and the absence of HUD authority to override those standards. We endorse those comments as well.

2. Interests of PRRAC and the Firm.

PRRAC is a civil rights law and policy organization based in Washington, D.C. Its mission is to promote research-based advocacy strategies to address structural inequality and disrupt the systems that disadvantage low-income people of color. PRRAC's work focuses on developing actionable policies to overcome the mechanisms that continue to reproduce historical patterns of racial segregation. Its fair housing work encompasses implementation of HUD's mandate to affirmatively further fair housing, as well as research and advocacy to expand opportunity in federal housing programs at HUD, the Treasury Department, and state housing finance agencies.

Klein Hornig is a law firm whose work focuses solely on the development and preservation of affordable housing, the revitalization of distressed communities through improved housing conditions and access to decent, safe, affordable rental and homeownership opportunities, and the increased availability of social and economic opportunity through housing, community and economic development. Our practice is national, and our clients span the entirety of organizations active in affordable housing and community development. They include small, not-for-profit, place-based community development corporations; providers of housing and services to homeless households, elders and people with disabilities; tenant organizations, housing cooperatives, local and national civil rights groups; national affordable housing advocacy organizations; public housing agencies; national non-profit groups carrying out affordable housing development, preservation, property management and resident services; charter schools, health centers and others non-profit groups carrying out community development projects; socially motivated lenders making Community Reinvestment Act ("CRA") loans and investments in low-income communities and in projects serving low-income households located in higher-income places; and investors who provide capital for affordable housing and community development through such programs as the Low-Income Housing Tax Credit, the New Markets Tax Credit, investment energy credits, historic rehabilitation credits and Opportunity Zones.

Both PRRAC and Klein Hornig direct our efforts at achieving the twin goals of Title VIII identified by the Supreme Court in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015) ("*TDHCA v. ICP*"): to reverse both the deliberate exclusion of households of color from "affluent areas" and the deliberate segregation of people of color in "central cities marked by substandard housing and blight." *TDHCA v. ICP,* 135 S.Ct. 2515 to 2516 (internal citations omitted). "In light of the longstanding judicial interpretation of the Act to encompass disparate-impact claims and congressional reaffirmation of that result," the organizations we work with and the communities we serve "have come to rely on the availability of disparate-impact claims" as interpreted by the courts and codified in the 2013 Rule to address actions the consequences of which impede the ability to utilize affordable

housing and community and economic development as means of achieving the Act's objectives. *TDHCA v. ICP*, 135 S.Ct. 2518.

3. Land-Use Rules.

(a) Land Use Practices, Discrimination and Segregation. It is undisputed that local exclusionary land-use policies often have the effect, if not the purpose, of denying housing opportunity to people of color, families with children, people with disabilities and others protected by the Act who desire to live in prosperous, integrated locations. *See, e.g.,* Massey, Douglas S. and Rothwell, Jonathan, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas,* 44 Urban Affairs Review 779 (July 2009). In the Boston, Massachusetts metropolitan area, fair housing and civil rights analyses dating from the enactment of Title VIII identify zoning practices as a cause of continuing housing discrimination and racial segregation. *Report of the Legislative Research Council Relative to Restricting the Zoning Power to City and County Governments* (Commonwealth of Massachusetts, Sen. Rpt. No. 1133, June 1968), p. 140 (local "zoning and school policies may combine, under certain circumstances, to produce effects detrimental to minority groups"); *Route 128: Boston's Road to Segregation* (Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, January 1975), p. 17 (federal "assistance in financing single-family home ownership, exclusionary local policies of large-lot zoning, and restrictions on multi-family dwellings changed rural towns into suburban white enclaves"); *The Greater Boston Housing Report Card 2019: Supply, Demand and the Challenge of Local Control* (Northeastern University, Dukakis Center for Urban and Regional Policy, 2019), p. 67 ("More affluent communities in Greater Boston have zoning ordinances that effectively prohibit dense development. They often exclude the development of multifamily housing projects, and because of the connection between class and race, perpetuate current patterns of racial and income segregation"). An analysis carried out with a Sustainable Communities Planning grant from HUD surveyed about twenty of the analyses of impediments ("AI") to fair housing choice required under consolidated planning rules. "Almost all the AI consider land use regulation and the high cost of housing as a primary barrier to housing choice." *Fair Housing and Equity Assessment for Metropolitan Boston* (Citizen's Housing and Planning Association, 2013), p. 100. The Trump Administration itself appears to recognize that restrictive local land-use policies impede access to housing opportunity and place "strains on household budgets, limit educational opportunities, impair workforce mobility, slow job creation, and increase financial risks" for millions of low- and moderate-income families. *Executive Order 13878: Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing,* 84 Fed. Reg. 30853 (June 28, 2019).

The ability to rely on the Act to remove zoning barriers to affordable housing development in high opportunity areas of racial exclusion is essential. The concept of disparate impact makes it possible to overcome land-use impediments to housing for families with children, *Gibson v. Cty. of Riverside*, 181 F. Supp. 2d 1057 (C.D. Cal. 2002), affordable developments likely to be occupied by people of color, *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581 (2016), and supportive housing, including residences for victims of domestic violence, *Doe v. City of Butler, Pa.,* 892 F.2d 315, 324 (3d Cir. 1989) and people with disabilities. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003). We are deeply

concerned that the NPRM, if adopted, would eviscerate the ability to use Title VIII as a means of removing land-use barriers.

(b) Removal of Perpetuation of Segregation as Prohibited Conduct. The proposed changes to 24 C.F.R. §100.70(d)(5) purport to expand the examples of land-use practices that violate Title VIII by adding to the list of prohibited sale and rental conduct the "enactment or implementation of building codes [and] permitting rules" that "could be considered as restricting or denying housing opportunities or otherwise making unavailable or denying dwellings." 84 Fed. Reg. 42857 and 42862. The preamble to the NPRM observes that 24 C.F.R. §100.70 makes unlawful conduct that may "perpetuate, or tend to perpetuate, segregated housing patterns." 84 Fed. Reg. 42857. That observation is, of course, consistent with the view of the *ICP* Court. *See, TDHCA v. ICP,* 115 S.Ct. 2522 ("unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability..."). It is also consistent with HUD's earlier findings in promulgating the 2013 Rule, as well as with judicial holdings spanning nearly five decades from the very first decisions recognizing the viability of disparate impact claims under the Act. *See,* 78 Fed. Reg. 11469 and the cases collected at note 102.

Despite the undisputed authorities, the NPRM removes all mention of perpetuation of segregation as a prohibited discriminatory effect. *See,* proposed modification to 24 C.F.R. §100.500(a), 84 Fed. Reg. 42862. The NPRM offers no explanation for the revision. Considering the longstanding and undisputed authorities both before and after the decision in *TDHCA v. ICP,* there can be no legitimate justification for reading the concept of perpetuation of segregation out of the proposed rule. *See, TDHCA v. ICP,* 115 S.Ct. 2522 (the purpose of disparate impact is to avoid "arbitrarily creating discriminatory effects or perpetuating segregation"). *See also, Mhany Management, Inc. v. County of Nassau*, 819 F.3d 623 (unlawful "steering" of "affordable housing to low-income, majority-minority communities"). The absence of any basis for deleting references to perpetuation of segregation is reason enough to withdraw the proposed rule.

(c) The Prima Facie Case and the Allocation of Burdens of Proof. From the first land-use case recognizing the concept of disparate impact under Title VIII, an uninterrupted line of judicial decisions has relied on a basic standard for establishing a *prima facie* case of discriminatory effect. The calculus that emerges from the cases is virtually identical to the content of the 2013 Rule. *See, e.g., United States v. City of Black Jack, Missouri,* 508 F.2d 1179, 1184 (8th Cir. 1974) ("To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect"); *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 934 (2d Cir.), *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.,* 109 S. Ct. 276 (1988) (same); *Dews v. Town of Sunnyvale, Tex.,* 109 F. Supp. 2d 526, 531 (N.D. Tex. 2000) ("Discriminatory effect may be proven by showing either (1) 'adverse impact on a particular minority group' or (2) 'harm to the community generally by the perpetuation of segregation.'"); *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 618 (to same effect). These decisions assign the obligation of a respondent to rebut the *prima facie* showing by asserting that the challenged policy "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *TDHCA v. ICP,* 115 S.Ct. 2515 (quoting the 2013 Rule).

It is evident that the Court in *TDHCA v. ICP* adopted the same standard, with its favorable references to the 2013 Rule, the holding in *Huntington Branch, N.A.A.C.P.* and the decision in *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563 (E.D. La. 2009), which embraced exactly the standards utilized by the courts that preceded it. *TDHCA v. ICP,* 115 S.Ct. 2515 and 2522.

The Court in *TDHCA v. ICP* recognized that the purpose of the longstanding approach to the shifting burden of proof in cases of disparate impact is 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." *TDHCA v. ICP,* 115 S.Ct. 2522. The NPRM abandons existing doctrine in favor of an approach that places the burden on the complainant of proving not only that a land-use policy is the cause of a discriminatory effect, but also proving a negative: the absence of a "valid interest or legitimate objective." 84 Fed. Reg. 42862 (replacing 24 C.F.R. §100.500(b)(1)). The 2013 Rule is crafted to avoid such a result. *See,* 78 Fed. Reg. 11474 (the burden shifting framework in the 2013 Rule "makes the most sense because it does not require either party to prove a negative"). The change proposed by the NPRM is entirely unjustified because it is completely misaligned with existing decisional law, including *TDHCA v. ICP.* To alter the "steps necessary to make out a *prima facie* case places too onerous a burden on appellants. The legislative history of the Fair Housing Act… argues persuasively against so daunting a *prima facie* standard." *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 935–36.

(d) Legitimate Objectives. The NPRM articulates a new standard for assessing whether an asserted municipal interest is "valid" or serves a "legitimate objective:" the interest is legitimate if it addresses a "practical business, profit, policy consideration, or requirement of law." 84 Fed. Reg. 42862. Such standards for measuring the legitimacy of proffered interests create an absolute defense to disparate impact liability when discriminatory effect is proven. They are inconsistent with the law and must not be adopted.

Title VIII requires a far more searching analysis when a land-use policy causes a discriminatory outcome or perpetuates segregation. HUD, in its administrative enforcement capacity, or a court has "the obligation to assess whatever justifications the town advances and weigh them carefully against the degree of adverse effect the plaintiff has shown. Though a town's interests in zoning requirements are substantial… they cannot, consistently with Title VIII, automatically outweigh significant disparate effects." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926. *See also, TDHCA v. ICP*, 135 S.Ct. 2522 ("The Act aims to ensure that [local housing] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation… in order to prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping"); *United States v. City of Black Jack, Missouri,* 508 F.2d 1186–87 ("we must examine: first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it").

4. Lending Discrimination and Algorithmic Models.

Fair and equal access to credit is a bedrock principle of Title VIII. Fair lending enforcement does more than redress the history of federal sponsorship of redlining and lending discrimination by the Federal

Housing Administration ("FHA"), the Federal Home Loan Bank Board and other agencies. It promotes housing choice and dismantles segregation. Friedman, S. and Squires, G., *Does the Community Reinvestment Act Help Minorities Access Traditionally Inaccessible Neighborhoods?* (Social Problems, vol. 52, no. 2, 2005). Many of Klein Hornig's clients are engaged in expanding homeownership opportunities for low- and moderate-income households in order to redress racial inequities in rates of homeownership and accumulation of family assets, as well as to revitalize and stabilize areas of distress and racial concentration. Equal access to credit for homeowners is an obvious and key linchpin of such efforts. The NPRM threatens to undermine the ability to use Title VIII to facilitate fair access to credit in several ways.

(a) Prohibited Lending Practices. The NPRM proposes to make two changes to the description of discriminatory lending practices in 24 C.F.R. §100.120(b)(1). First, it would inject a "materiality" requirement into the prohibition on providing inaccurate or different information based on a protected characteristic. It also creates a safe harbor for practices that may be discriminatory but consist of "providing accurate responses to requests for information related to an individual's particular circumstances." 84 Fed. Reg. 42862.

The NPRM reasons that these changes are needed "to clarify, in accordance with guidance in *Inclusive Communities,* that informational disparities that are inconsequential do not violate the Fair Housing Act." 84 Fed. 42857. That statement is not supported by the majority decision in *TDHCA v. ICP*, which makes no reference to either lending or informational disparities. It is contrary to the evidence of how lending discrimination takes place. It is also in conflict with longstanding regulations enforcing the Equal Credit Opportunity Act ("ECOA") and the fair lending bank examination procedures of federal regulators.

Studies of lending discrimination show that the kind of conduct that violates Title VIII can be subtle. At the application stage, for example, differential treatment may result as much from a failure to provide information or spend time with or coach a credit applicant as it occurs due to inaccurate information. *See, e.g.,* Turner, Margery A. and Skidmore, Felicity, ed., *Mortgage Lending Discrimination: A Review of Existing Evidence* (Urban Institute, June 1999), p. 26. Persistent lending discrimination is also blamed in part on the structural segmentation of the mortgage market where loan originations are divided within the industry between low-cost prime sector serving mainly white borrowers, an FHA-insured sector disproportionately serving borrowers of color, and a subprime sector "that facilitated the frequent placement of black and Latino borrowers into higher-cost, higher-risk loans than white borrower with similar characteristics." Steil, Justin P., *et al, The Social Structure of Mortgage Discrimination* (Housing Studies, Vol. 33, No. 4, November 2017). *See also,* Bostic, Raphael W., *Market Channel Segmentation, Its Patterns and Effects: What Role has the Government Played in Creating a Dual Mortgage Market in the Past and How Likely is One to Emerge in the Future* (market segmentation has created a "dual" mortgage market, with conventional loans available to whites, and Federal Housing Administration-insured or subprime credit available to blacks and Latinos).[1]

[1] Available at https://www.jchs.harvard.edu/sites/default/files/hbtl-09.pdf (last visited October 11, 2019).

Lending regulators understand this dynamic. "Disparate treatment ranges from overt discrimination to more subtle disparities in treatment. It does not require any showing that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself. It is considered by courts to be intentional discrimination, because no credible, nondiscriminatory reason explains the difference in treatment on a prohibited basis." *Policy Statement on Discrimination in Lending,* 59 Fed. Reg. 18266, 18268 (April 15, 1994). Words of discouragement may result in discrimination. *See,* 12 C.F.R. §1002.4(b). Limiting information about available types of credit may violate the Fair Housing Act or ECOA when it results in steering borrowers of color to subprime products. "A creditor" who "provides more comprehensive information to men than to similarly situated women" engages in discrimination. 24 C.F.R. Pt. 1002, Supp. I (Official Staff Interpretations), Section 1002.4, par. 4(a). These standards are embedded in all the federal regulatory banking examination manuals. *See, e.g.,* Office of Comptroller of the Currency, *Comptroller's Handbook: Fair Lending;* Federal Reserve, *Consumer Compliance Handbook; Federal Fair Lending Regulations and Statutes;* Federal Deposit Insurance Corporation, *Consumer Compliance Examination Manual, Ch. IV, Fair Lending Laws and Regulations.*

For these reasons, the longstanding approach to understanding lending discrimination does not import a materiality requirement or provide a safe harbor for accurate answers to questions when they result in a violation of Title VIII or ECOA, as a matter of either disparate treatment or disparate impact. *See, e.g., Policy Statement on Discrimination in Lending,* 59 Fed. Reg. 18268 (it is prohibited for a lender to "Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards.'). This standard is not changed by the outcome in *TDHCA v. ICP.* It should not be modified by HUD.

(b) Safe Harbors for Algorithms. The NPRM creates an absolute defense to disparate impact claims when a complainant asserts discrimination related to an algorithmic model, and the respondent shows that the model is made available by a "third party that determines industry standards" or that the variables within the model are shown not to be "substitutes or close proxies for" a protected characteristic. 84 Fed. Reg. 42862, proposing a new 24 C.F.R. §100.500(c)(2). Creating a lender safe harbor for algorithmic models is inappropriate.

- *HUD Lacks an Adequate Basis for Creating a Safe Harbor for Algorithms.* At the outset, we observe that the use of automated underwriting models, and so-called "big data" and "FinTech" algorithms (including the use of machine learning) continues to evolve. Such systems have the power to both amplify and remediate existing patterns of lending discrimination. The Bureau of Consumer Financial Protection ("CPFB") recognized as much when it issued a *Request for Information Regarding Alternative Data and Modeling Techniques in the Credit Process* ("RFI"). The RFI acknowledges the wide interest among banking regulators and others in the potential for both consumer benefits and consumer risks, including risk of discrimination, in the use of alternative data. 82 Fed. Reg. 11183 (February 21, 2017). Agency interest includes the Community Reinvestment Act ("CRA") where regulators examine the effectiveness of alternative methods of making credit available to low- and moderate-income people and geographies. *Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment;*

Guidance, 81 Fed. Reg. 48506, 48542 (July 25, 2016). Questions about the use of alternative forms of credit scoring are also under review by CPFB as it considers revising its approach to the definition of a "qualified mortgage" under the ability to repay requirements of 15 U.S.C. §1639c. *Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z); Advance Notice of Proposed Rulemaking,* 84 Fed. Reg. 37155, 37161-62 (July 31, 2019). The Federal Housing Finance Agency ("FHFA") recently issued new rules regulating the creation and use of credit scoring models for the purchase of mortgages by the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ("GSE"). *See, Validation and Approval of Credit Score Models,* 84 Fed. Reg. 41886 (August 16, 2019), promulgating 12 C.F.R. part 1254.

Some studies find that racial disparities in mortgage pricing are reduced but not eliminated by the utilization of FinTech models. *See, e.g.,* Bartlett, Robert, *et al, Consumer-Lending Discrimination in the FinTech Era* (May 2019) ("We find that lenders charge Latinx/African-American borrowers 7.9 and 3.6 basis points more for purchase and refinance mortgages respectively, costing them $765M in aggregate per year in extra interest. FinTech algorithms also discriminate, but 40% less than face-to-face lenders.") Other analyses are more cautionary. "So much depends on exactly which data are used, whether the data are accurate and representative, and how the data are used… while statistical models have the potential to increase consistency in decision-making and to ensure that results are empirically sound, depending on the data analyzed and underlying assumptions, models also may reflect and perpetuate existing social inequalities." Evans, Carol A., *Keeping FinTech Fair: Thinking About Fair Lending and UDAP Risks,* Consumer Compliance Outlook (Federal Reserve, 2017).

In a larger regulatory and compliance environment where so much is changing and there is so much risk of discrimination, it is inappropriate for HUD to create any safe harbor for algorithms. Government agencies and "Companies are still learning how to deal with big data and unlock its potential while avoiding unintended or unforeseen consequences," including whether and how the use of FinTech, artificial intelligence, credit scoring and big data influence the availability of credit to borrowers of color and others protected by Title VIII. Federal Trade Commission, *Big Data, A Tool for Inclusion or Exclusion? Understanding the Issues* (January 2016), p. 5. For this reason alone, the safe harbor for data driven lending with a discriminatory effect should be withdrawn.

- *Algorithmic Safe Harbors are not Authorized by Title VIII.* Beyond these practical considerations, a safe harbor for algorithms is not authorized because Congress has already created a lender safe harbor in the self-test provisions of the Fair Housing Act and ECOA. Self-testing allows a lender to carry out a voluntary "program, practice or study… to determine the extent or effectiveness of compliance with the Fair Housing Act." When a lender undertakes a "corrective action to address likely violations identified by the self-test" the "report or results of a self-test are privileged" and may not be used in a fair lending enforcement action or examination. 24 C.F.R. §100.141 (definition of "self-test"); §100.143(a) (corrective action) and §100.144 (privilege). *See also,* 42 U.S.C. §3614-1 (self-tests under Title VIII); 12 U.S.C. §1691c-1 (same; ECOA); 12 C.F.R. §1002.15 (ECOA self-test rule). Corrective actions taken in connection with a self-test extend to

correction of neutral policies that have a discriminatory effect. *See, Policy Statement on Discrimination in Lending,* 59 Fed. Reg. 18270-71 (corrective actions include "Correcting any bank policies or procedures that may have contributed to the discrimination"). HUD has no authority to create a new safe harbor for algorithmic models that go beyond the self-test provisions of Title VIII or ECOA.

- *Third-Party Determinations do not Relieve Lenders of Due Diligence Obligations.* Concepts of self-testing and self-evaluation in existing HUD policies, bank examination manuals and other contexts specifically include automated underwriting and other forms of data-driven credit scoring. None of these authorities create a safe harbor for algorithms vetted by a "third party that determines industry standards." For example, the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("FHEFSSA") directs HUD to "prohibit each [GSE] from discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a discriminatory effect." 12 U.S.C. §4545(1). Implementing rules impose an affirmative obligation on the GSE to "assess underwriting standards, business practices, repurchase requirements, pricing, fees, and procedures that affect the purchase of mortgages… that may yield disparate results based on" protected characteristics under the Fair Housing Act and ECOA. 24 C.F.R. §81.43(a). FHFA expects the same of the GSE in developing any model for credit scoring. *See,* 12 C.F.R. §1254.8(b)(2) (GSE "must evaluate the fair lending risk and fair lending impact of the credit score model in accordance with" ECOA, Title VIII and FHEFSSA). Similar standards apply to bank examinations. *Comptroller's Handbook: Fair Lending,* App. B (OCC, banks are expected to maintain and examiners should review "monitoring reports, including data integrity checks, generated (including front-end, back-end, account management and any disparate impact analyses), the frequency of generation, and [obtain] recent copies of each"); *Consumer Compliance Handbook; Federal Fair Lending Regulations and Statutes,* Fair Lending Examinations, Appendix (Federal Reserve, same)*; Consumer Compliance Examination Manual, Ch. IV, Fair Lending Laws and Regulations,* Appendix (FDIC; same).

  The GSE and lenders are expected to carry out an independent self-evaluation of automated credit scoring and algorithmic models whether or not the model is developed by a third party. *See, e.g.,* 12 C.F.R. §1254.8(b)(5) (GSE credit assessment models; third party provider review); *see also,* 84 Fed. Reg. 41903 ("This review should address any financial, governance, operational, compliance, legal, and reputational risks associated with the third party."); *Comptroller's Handbook: Fair Lending,* App. B (OCC, bank procedures to review the "vendor of each credit score and any vendor recommendation or guidance on the usage of the score relied upon by the bank;" and "The bank's basis for using the particular bureau or secondary market score…"); *Consumer Compliance Handbook; Federal Fair Lending Regulations and Statutes,* Fair Lending Examinations, Appendix (Federal Reserve, same)*; Consumer Compliance Examination Manual, Ch. IV, Fair Lending Laws and Regulations,* Appendix (FDIC; same).

There are important reasons for placing a due diligence requirement on lenders where data or an underwriting model originates with a third party. When lenders buy data from outside sources, the data set may include factors that appear to be neutral but in practice discriminate, including, for example, information about educational attainment or a "consumer's on-line social network" that appear to be facially neutral but in application result in exclusion or disparities in loan terms. "These data should be carefully evaluated for legal compliance before being used." *Keeping FinTech Fair: Thinking About Fair Lending and UDAP Risks.* Moreover, bank examination procedures recognize that automated underwriting is often used in combination with subjective determinations that may alter the outcome or reverse the result of an underwriting conclusion reached by an algorithm, and that these "overrides" can result in disparate treatment or a disparate impact. *Comptroller's Handbook: Fair Lending,* App. B (OCC; banks must self-monitor the "process, criteria, and authority for overrides, how override decisions are documented, what reports are available on override activity; and the number of all high-side and low-side overrides for each type of override occurring during the examination period and any guidance given to employees on their ability to override"); *Consumer Compliance Handbook; Federal Fair Lending Regulations and Statutes,* Fair Lending Examinations, Appendix (Federal Reserve, same)*; Consumer Compliance Examination Manual, Ch. IV, Fair Lending Laws and Regulations,* Appendix (FDIC; same).

There is no room in the present enforcement and oversight structure for a policy that relieves a lender of the due diligence that ought to be carried out even when an algorithmic model originates with a third-party. There should be no such safe harbor under the Fair Housing Act.

- *The Absence of Proxies for Protected Characteristics does not Disprove Unlawful Effect.* The concept of defending a claim of discrimination by showing the absence of a proxy for a protected characteristic may be appropriate as part a rebuttal to a claim of discriminatory *intent* or disparate *treatment* where there is no "'overt evidence of discrimination'" but there are facts to suggest that the "lender treats applicants differently on the basis of a prohibited factor." In such situations, the lender may rebut the *prima facie* showing of intentional discrimination by showing that there is a "credible and legitimate nondiscriminatory explanation." In the situation where a complainant asserts that a credit scoring or underwriting model is the cause of intentional discrimination, rebuttal of a *prima facie* case may include a proffer by a lender that the model includes no proxies for a protected characteristic. Even then, if "an agency determines that a lender's explanation… is a pretext for discrimination, the agency may find that the lender discriminated notwithstanding the lender's explanation." *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18268-69. "To establish pretext, the plaintiff must produce evidence sufficient to support a reasonable inference 'that a discriminatory reason more likely motivated' the defendant or that the defendant's 'proffered explanation is unworthy of credence.'" *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1294 (11th Cir. 2019) (internal citations omitted).

  Standards of proof applicable to complaints of intentional discrimination have no place in the context of disparate impact. Some studies of underwriting algorithms in fact find that "disparity

can indeed persist despite the exclusion of" discriminatory "input variables." Gillis, Talia B. and Spiess, Jann L., *Big Data and Discrimination,* 86 Chicago L. Rev. 459 (2019). "The results-oriented phrase 'otherwise make unavailable'" in Title VIII refers solely "to the consequences of an action rather than the actor's intent." *TDHCA v. ICP,* 115 S.Ct. 2518. This concept is firmly embedded in federal standards governing lending discrimination. A "creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis." 12 C.F.R. §1002.6(a). Discrimination includes "Policies and practices that are neutral on their face and that are applied equally" but nonetheless "may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit." *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18269. Bank examiners are instructed to use these approaches when evaluating the fair lending effect of lender credit scoring models. *See,* Office of Comptroller of the Currency, *Comptroller's Handbook: Fair Lending,* App. B (credit scoring models) and App. G (disparate impact); Federal Reserve, *Consumer Compliance Handbook, Federal Fair Lending Regulations and Statutes* App. p. 31 (credit scoring) and p. 40 (disparate impact); Federal Deposit Insurance Corporation, *Consumer Compliance Examination Manual, Ch. IV, Fair Lending Laws and Regulations,* §IV-1.3 (disparate impact) and App. p. IV-2.8 (credit scoring). The presence or absence of a proxy for a protected characteristic is irrelevant under these criteria. Such an approach should not be imported into HUD's Title VIII rules.

(c) The Prima Facie Case and the Allocation of Burdens of Proof. Earlier in these comments, we catalogued the flaws in the proposed requirements for the complainant's *prima facie* case and the NPRM's allocation of burdens of proof. These observations apply equally in the context of fair lending and they are incorporated in this portion of our comments without repetition. For purpose of disparate impact claims of lending discrimination, it is crucial to say that the NPRM's treatment of these matters is at odds with statutory mandates, uninterrupted policy by multiple federal agencies including HUD and the decision in *TDHCA v. ICP.*

When ECOA was enacted in 1976, Congress was clear that not only did the law encompass claims of effect as well as intent, but it indicated that as to allegations of impact, the law was meant to apply the burden of proof articulated in the context of employment discrimination. The standard was later adapted by all the circuit courts for purposes of the Fair Housing Act, it was expressed in the approach in the 2013 Rule, and it was embraced by the Court in *TDHCA v. ICP. See,* 12 C.F.R. §1002.6(a), n. 2 ("The legislative history of the Act indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."). *See also,* Sen. Rpt. 94-589 (January 21, 1976) ("In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), 1 and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of this Act, especially with respect to the

allocations of burdens of proof."). That doctrine has persisted as the applicable standard in the forty years since. It is the foundation of current ECOA rules*:*

> The effects test is a judicial doctrine that was developed in a series of employment cases decided by the U.S. Supreme Court under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.,) and the burdens of proof for such employment cases were codified by Congress in the Civil Rights Act of 1991 (42 U.S.C. 2000e–2). Congressional intent that this doctrine apply to the credit area is documented in the Senate Report that accompanied H.R. 6516, No. 94–589, pp. 4–5; and in the House Report that accompanied H.R. 6516, No. 94–210, p.5. The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. 12 C.F.R. pt. 1002, Supp. 1, Section 1002.6(a)(2).

To be clear, *TDHCA v. ICP* recognizes that the Act "does not reiterate Title VII's exact language." Instead, "Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives." *TDHCA v. ICP,* 135 S.Ct. 2519. In adopting this same approach, federal regulators are implementing a congressional mandate to utilize the longstanding burden shifting approach ultimately adopted by HUD in the 2013 Rule and by the Court in *TDHCA v. ICP*. Based on the command of ECOA and related laws, HUD has no authority to import different standards into Fair Housing Act rules.

(d) Legitimate Objectives. We also refer to you our comments elsewhere in this letter rejecting the NPRM's approach to what constitutes a valid or legitimate interest that justifies an otherwise discriminatory effect. Those arguments are equally applicable in the context of lending discrimination, and they are incorporated by reference in this section.

To add to those observations for purposes of fair lending concerns, the NPRM must withdraw references to profit as a legitimate objective sufficient to outweigh a discriminatory effect, and it must delete the burden placed on a complainant to rebut the inference of a legitimate objective by showing that a less discriminatory alternative does not impose "materially greater costs… for the defendant." 84 Fed. Reg. 42862-63. It may be that factors "relevant to the justification" of a practice with a discriminatory impact "could include cost and profitability." However, a practice cannot be justified simply for reasons of cost or profit. It "still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect." *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18269.

As a matter of the safety and soundness regulation of the lending industry, profit and cost factors are addressed "at both the individual loan and portfolio level." They are utilized in support of three key objectives: "To grant loans on a sound and collectible basis…; To invest the bank's funds profitably for the benefit of shareholders and the protection of depositors…;" and "To serve the legitimate credit needs of

their communities." To these ends, lender underwriting tools take profitability, underwriting costs and risk of loss into account in credit transactions with individual consumers, and at the portfolio level, where cost and profitability are evaluated within the entirety of the lender's credit activities and across different credit products. In the end, loan policies must balance "standards for portfolio composition, individual credit decisions, fair lending, and compliance management." *See, Comptroller's Handbook: Loan Portfolio Management* (OCC, April 1998, updated July 26, 2017); *Commercial Bank Examination Manual, Pt. 2000, Assets,* §2040.1 (Federal Reserve, April 2015); *Risk Management Manual of Examination Policies, Pt. 1, Basic Examination Concepts and Guidelines,* §3.2. Loans (FDIC, September 2019) (to same effect). From the Title VIII and ECOA perspective, the balance to be established between profitability on the one hand and fair lending on the other requires lenders to "think critically about whether widespread, familiar requirements and practices have an unjustifiable disparate impact." Consequently, lenders "should also stay informed of developments in underwriting and portfolio performance evaluation so that they are well positioned to consider all options by which their business objectives can be achieved." *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18269.

The complexities inherent in these principles do not permit broad resort to profit or cost as justifications for a disparate impact. "Determination of what qualifies as a substantial, legitimate, nondiscriminatory interest for a given entity is fact-specific and must be determined on a case-by-case basis." 78 Fed. Reg. 11471 (preamble to 2013 Rule). The drive for excess profit in individual loans and the secondary mortgage market, for example, fueled discriminatory, predatory, subprime lending and related practices that stripped borrowers of color of home equity, led to a wave of foreclosures, and a national financial crisis that devastated racially identified neighborhoods throughout the United States. *See, e.g., City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260 (11th Cir. 2019); *Horne v. Harbour Portfolio VI, L.P.,* 304 F. Supp. 3d 1332 (N.D. Ga, 2018), *Cty. of Cook v. Bank of Am. Corp.*, 2018 WL 1561725 (N.D. Ill. Mar. 30, 2018); *Adkins v. Morgan Stanley,* 2013 WL 3835198 (S.D. N.Y., 2013); *Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2009); *Hargraves v. Capital City Mtg. Corp.,* 140 F. Supp. 2d 7 (D. D.C. 2000). In all these cases, profit was the motive underlying the discriminatory conduct. A profit-motivated justification for a discriminatory practice cannot "automatically outweigh significant disparate effects." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926. Such an approach should be removed from the proposed rule.

5. Insurance

The interest of PRRAC and the Firm's community and economic development clients is simple. "It is elementary that without insurance, mortgage financing will be unavailable, because a mortgage lender simply will not lend money on the property. Without mortgage financing, homes cannot be purchased. Thus, the availability of insurance and the ability to purchase a home go hand in hand and vary, in direct proportion, to one another." *McDiarmid v. Econ. Fire & Cas. Co.*, 604 F. Supp. 105, 107 (S.D. Ohio 1984). This principle applies equally to the availability of casualty and liability insurance for affordable, multifamily rental housing. HUD will not permit FHA-insured multifamily financing to close without evidence of insurance meeting multifamily processing requirements. *Multifamily Program Closing Guide* (Federal Housing Administration, rev. February 2015), §3.7(A).

It is crucial to observe that the practice of redlining carried out by the Federal Home Loan Bank Board and FHA as a national policy for home mortgage lending over nearly four decades originated with the property insurance industry. Hood, Edwin T. and Weed, Cynthia M., *Redlining Revisited: A Neighborhood Development Bank as a Proposed Solution,* 11 The Urban Lawyer 139 (Winter, 1979). HUD policies have banned discriminatory conduct by property insurers under the FHA since 1978. *See, Dunn v. Midwestern Indem., Mid-Am. Fire & Cas. Co.,* 472 F. Supp. 1106, 1109, n. 7 (S.D. Ohio 1979), citing *Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Assistant Secretary for Equal Opportunity* (August 15, 1978). *See also, Insurance redlining: a guide for action* (HUD, 1979). Title VIII regulations have incorporated an explicit ban on discrimination by insurers since 1989, when the Office of Fair Housing and Equal Opportunity implemented the Fair Housing Amendments Act of 1988. 54 Fed. Reg. 3232, 3285 (January 23, 1989), promulgating 24 C.F.R. §100.70(d)(4). A nearly uninterrupted line of judicial decisions from 1979 to the present-day hold "that insurers—including insurers who sell products to landlords—can be held liable under the FHA." *Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 29 (D.D.C. 2017). The courts uniformly apply the same disparate impact approach to proof and legitimate business justifications in insurance cases as they have to land-use and lending disputes. "Inclusive Communities does not call those cases into question." *Id.* In light of these longstanding understandings of the obligations of property insurers under Title VIII, we are compelled repeat again our previous comments urging you to withdraw the NPRM's approach to the *prima facie* case and shifting burdens of proof, as well as to remove from any final rule references to "practical business" and "profit" as absolute justifications for discriminatory effect.

In addition to these concerns, the Firm rejects the NPRM's attempt to create immunity from disparate liability for insurers in two dimensions; a safe harbor based on the McCarran-Ferguson Act, and the algorithmic safe harbor.

(a) McCarran-Ferguson Act. The NPRM attempts to improperly shield insurers from disparate impact liability by saying that the rule does not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." *See,* proposed 24 C.F.R. §100.500(e), 84 Fed. Reg. 42863. According to the NPRM, the proposal is intended to codify "the general applicability of the 'reverse preemption' provisions of the McCarran-Ferguson Act as it applies to the Fair Housing Act." 84 Fed. Reg. 42860. The McCarran-Ferguson Act provides no such safe harbor. Rather, it requires a particularized inquiry into the specific details of state insurance law that are affected by an FHA claim, and the ways in which application of Title VIII might disrupt state insurance regulation. That concept is precisely the holding of *Ojo v. Farmers Grp.*, 600 F.3d 1205 (9th Cir. 2010), cited by the NPRM. "The states do not uniformly prohibit insurers from using race, religion, and national origin" in regulating insurance underwriting practices, and there is wide variation among the states in the degree of protection afforded against discriminatory practices. Avraham, Ronen, *et al, Understanding Insurance Anti-Discrimination Laws*, 87 S. Cal. L. Rev. 195 (2014). Considering the lengthy history of discrimination by property insurers, the creation of a complete safe harbor based on the McCarran-Ferguson Act is inappropriate.

Much of the discussion to date about Title VIII and its effect on insurance is directed at property and liability insurers. *See, e.g., Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance,* 81

Fed. Reg. 69012, 69014 (October 5, 2016) ("the history of discrimination in the homeowner's insurance industry is long and well documented"). The NPRM itself does not distinguish between property and liability coverage and the activities of other types of insurers. In this regard, we note that insurance companies of all types are a significant source of capital for housing, including the purchase of single family and multifamily mortgage-backed securities, direct multifamily lending (including FHA-insured lending), and investments in multifamily affordable housing through the purchase of tax-exempt bonds and Low-Income Housing Tax Credit investments. *See, e.g., Reinvesting after the crisis: Changes in the fixed-income portfolios of life insurers* (Federal Reserve Bank of Chicago, 2018); Davis, Sam, *Role of Insurance Companies in the Financing of Commercial and Multifamily Real Estate in America* (Mortgage Bankers Association, 2018); *Low-Income Housing Tax Credit Investment Survey* (Ernst and Young, 2009). The history of property insurance redlining is paralleled by a companion practice of insurance company discrimination in real estate lending and investment. Indeed, the first Supreme Court case to take up a dispute under Title VIII involved the segregationist tenant selection policies of a life insurance company in its ownership of urban renewal rental housing. *Trafficante v. Metro. Life Ins. Co.*, 93 S. Ct. 364 (1972). This sort of conduct was not isolated. *See, Dorsey v. Stuyvesant Town Corporation,* 87 N.E.2d 541 (Ct. of App. N.Y., 1949); *see also,* Schultz, Robert E., *Life Insurance Housing Projects* (Univ. of Penn. Press, 1959), p. 45 (describing relative financial performance of black and white segregated urban renewal projects owned by insurance companies) and p. 90 (describing tenant selection practices based on race). The NPRM must not create a McCarran-Ferguson Act safe harbor for discriminatory lending or investment activities by any insurer, whether a property and casualty company, a life insurance company, or any other type of insurance company.

(b) Algorithms. Comments in earlier sections of this letter directed to safe harbors for lender underwriting algorithms apply also to the insurance industry, which utilizes a practice known as "price optimization" to combine "techniques from machine learning, pattern recognition, statistics, database theory, and visualization to extract concepts, concept interrelations, and interesting patterns automatically from large corporate databases." Guo, Lijia, *Applying Data Mining Techniques in Property-Casualty Insurance*.[2] Like the practices of its lender counterparts, there "is no single or widely accepted definition of price optimization" in the insurance industry. Typically, an insurer purchases one or more large datasets depicting individual consumer behavior, which include "factors that are unrelated to risk of loss in order to charge each insured the highest price that the market will bear," including characteristics that are protected, like gender, but also facially neutral factors that may result in discriminatory outcomes, like educational attainment, location, and credit ratings. *Price Optimization White Paper* (National Association of Insurance Commissioners, November 21, 2015). The process of using a price optimization algorithm often involves subjective "interpretation and evaluation." *Applying Data Mining Techniques in Property-Casualty Insurance, id.* Practices "vary from insurer to insurer, as each insurer may specify its own objectives and constraints." While many states prohibit rate structures that are "unfairly discriminatory," state regulators "do not currently have the data necessary for an independent evaluation of most of the insurer modeling

[2] Available on-line at:
https://www.semanticscholar.org/paper/Applying-Data-Mining-Techniques-in-Property-~-Guo-A.S./a20fe61da7609f924970357632bb02ffb24e44fe

and calculations." They may also be hampered by inaccurate or incomplete disclosures by insurers. *Price Optimization White Paper.* As of 2016, less than half of all state insurance regulators governed insurers' use of data mining and price optimization techniques. Cotter, Daniel A., *Status of Price Optimization Debate,* FORC Journal, vol. 27, ed. 3 (Federation of Regulatory Counsel, Inc., Fall 2016).

Our earlier admonitions bear repeating. HUD has not fully examined and lacks an adequate basis for creating an insurance safe harbor for algorithmic models. It is our view that insurers that purchase "commercially available software" from third parties assume the risk of Title VIII liability if they fail to carry out appropriate due diligence and self-monitoring, especially because outcomes may be paired with additional subjective decisions that result in discrimination. We emphasize again that the absence of an identifiable proxy for a protected characteristic does not disprove discriminatory effect. Finally, in a state compliance environment where regulation of price optimization techniques is not widespread or consistent, there is no place for a safe harbor for algorithms founded on the McCarran-Ferguson Act.

6. Conclusion: The NPRM Violates HUD's Obligation to Affirmatively Furthering Fair Housing. The courts have long recognized the close relationship between the duty to avoid discriminatory effects and HUD's obligation to further fair housing under 42 U.S.C. §3608(e)(5). *See, e.g., Resident Advisory Bd. V. Rizzo*, 564 F.2d 126, 140 (3d Cir. 1977) (in Title VIII dispute involving discriminatory effect of refusal to construct assisted housing, "HUD, obviously recognizing its affirmative duty" did not appeal from district court injunction). The Court in *TDHCA v. ICP* recognized as much when it observed that Title VIII ensures that public or business "priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." *TDHCA v. ICP,* 135 S. Ct. 2522. The duty to further fair housing includes carrying out enforcement activities to eliminate discrimination. *See., e.g., Clients' Council v. Pierce,* 711 F.2d 1406, 1408 (8th Cir. 1983) ("HUD officials abdicated their affirmative duty to eliminate the racially discriminatory practices of the Texarkana Housing Authority"). It also involves the obligation "to promulgate regulations which carry out the intent of Congress" so that HUD uses its authority "to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *N.A.A.C.P. v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

A rule that removes perpetuation of segregation from within the meaning of disparate impact, places onerous burdens of proof on complainants, permits so-called "legitimate" justifications without regard to discriminatory effect and creates safe harbors for discriminatory conduct contravenes HUD's duty to further fair housing. In the case of land-use practices, it removes from the definition of prohibited conduct a result that lies at the "heartland" of disparate impact doctrine and therefor abdicates HUD's "affirmative duty to eliminate… racially discriminatory practices." *TDHCA v. ICP,* 135 S.Ct. 2522; *Clients' Council v. Pierce, supra*. With respect to lending and insurance, such a rule protects conduct that deprives protected groups of homeownership opportunities and recalls the deliberate practices of FHA in redlining and loan denials, all to the purpose of encouraging and maintaining "the separation of the races." *TDHCA v. ICP,* 135 S.Ct. 2514.

We observe that the 2013 Rule reflects more than fifty years of judicial decisions interpreting the Act. It articulates in the form of regulation policies adopted by HUD dating to at least 1993. *See, e.g., Applicability of Disparate Impact Analysis to Fair Housing Cases* (Memorandum from Assistant Secretary for Fair

Housing Roberta Achtenberg, December 17, 1993) ("a prima facie case of disparate impact may be established by statistical evidence, including national statistics where there is no evidence of a large variation from local statistics, establishing that a facially neutral policy has a disparate impact on persons who are protected against discrimination... a respondent may rebut a prima facie case by evidence that the policy is justified by a business necessity which is sufficiently compelling to overcome the discriminatory effect. The business necessity justification may not be hypothetical or speculative"); *see also,* Handbook No.: 8024.01, CHG-1, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook,* par. 2-4(B) (November 1998) (to same effect).

The 2013 Rule is based on "longstanding judicial interpretations" of disparate impact. *TDHCA v. ICP,* 135 S.Ct. 2525. *See also,* 78 Fed. Reg. 11460 ("Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the Act."). It is consistent with Congressional mandates under Title VIII and ECOA. These longstanding legislative commands, judicial decisions and agency policies have "engendered serious reliance interests that must be taken into account." The NPRM entirely disregards those interpretations in a way that eliminates the viability of disparate impact claims. It is an "express abdication of" HUD's enforcement duties and amounts to "acquiescence or active participation in discriminatory practices." *Bennett v. New York City Housing Auth.*, 248 F. Supp. 2d 166 (E.D. N.Y., 2002). The NPRM must be withdrawn as arbitrary, capricious and an abuse of discretion. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126. (2016).

Thank you for considering our comments.

Sincerely,

Henry Korman