

Comments from Self-Help/Center for Responsible Lending/Hope Credit Union to OMB and HUD on HUD's Disparate Impact Proposed Rule

Executive Order 12866 Meeting

June 22, 2020

Good afternoon, I am Nikitra Bailey. I serve as an Executive Vice President at the Center for Responsible Lending.¹ For almost 20 years, CRL has worked to stop predatory lending practices from harming low-to moderate income families and people of color. Structural and historic discrimination left these families more vulnerable going into the 2008 crisis, and that crisis and the response to it left them even worse off. This crisis is likewise hitting these families the hardest again, and the response so far is not equitable or sufficient. Most important, we have to address the long-term structural flaws that produce and perpetuate this inequity. These inequities demonstrate why strong fair lending laws are so important and why HUD's disparate impact rule should not be gutted. The disparate impact rule is a key civil rights enforcement tool. We urge you not to finalize your proposed rule and instead it should be withdrawn.

The Great Recession wiped away previous gains in homeownership where African American and Latino homeownership rates were just under 50% compared to 73% for White families. Communities of color lost \$1 trillion in spillover cost from the foreclosure crisis that they have yet to recover. The Black homeownership rate returned to rates not seen since 1968 when the Federal Fair Housing Act was passed. In rental housing, many tenants are severely cost-burdened today. A quarter of all renters in the United States pay over half of their incomes just for rent, including more than 30% of African American renters and 28% of Latino renters.

Today, homeownership rates in communities of color continue to lag white homeownership rates. The Latino homeownership rate now is 48% and the Black homeownership rate is 44%. Further, research shows that in the nation's 46 largest housing markets, a median income Black household can only afford 25% of homes on the market last year, while 57% of median income white households could. Without adequate fair lending protections, these figures are likely to drop substantially.

Homeownership is the primary way that most Americans built their wealth through the use of home equity, which was passed forward to succeeding generations. Structural discrimination in

¹ CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 40 years, Self-Help and its affiliates have provided over \$8.5 billion in financing through 159,000 loans to homebuyers, small businesses, and nonprofits. It serves more than 150,000 mostly low-income members through 60 retail credit union locations in California, Florida, Illinois, North Carolina, South Carolina, Virginia, and Wisconsin.

the housing finance system prohibited families of color from accumulating similar levels of wealth as white families. White families today have 10 times the wealth of Black families and 8 times the wealth of Latino families and most of this wealth difference is the result of discriminatory housing policies. As a result, these families have less of an economic cushion to weather the financial crisis that the COVID-19 pandemic created.

Even before the onset of COVID-19, researchers discovered ongoing bias in mortgage lending. UC Berkeley found that both face to face and algorithmic lending bias cost Latinx and African American homebuyers an extra \$765 million in fees annually. Artificial intelligence is touted as a solution to discrimination, yet it has manifested the same disparate outcomes. Families need protection from discrimination that they cannot see.

Further, the mortgage market is already tightening. Many lenders now require borrowers to have a minimum of 20% down payment and credit scores above 700 to secure a new low-cost mortgage. Black and Latino families generally have less wealth for a down payment and less pristine credit profiles due to lower levels of wealth. The action of factoring wealth into credit scoring perpetuates discrimination since the wealth accumulated from discriminatory housing practices and residential segregation have yet to be rectified through public policy. Further, homes in neighborhoods of color are undervalued in comparison to homes in white communities due to redlining. These families will not have access to similar levels of home equity to help offset job losses and medical expenses related to COVID-19. Moreover, we continue to expect wealthier homeowners to seek out mortgage loan refinances taking advantage of historically low rates. However, many LMI families and people of color are not in an equal position to do so.

These economic disparities do not just harm Black and Latino communities but hurt the economy overall. McKinsey & Company reports that discrimination targeted at Black Americans is a drag on the nation's GDP and that our economy would increase \$1 trillion to \$1.5 trillion dollars if this discrimination is addressed.

More resources are also needed for fair housing and lending enforcement, as the crisis has brought on increased incidents of discrimination. Just last week, the New York Times reported that even cashing a check for Black Americans at their existing banks presents a minefield.² Further, that there was a decline of 41% of existing Black owned businesses and 32% of Latino owned businesses since March.³ Many of these business owners were unable to access the Paycheck Protection Program as the first in line nature of the SBA's PPP raised many fair lending concerns.

² Emily Flitter, 'Banking While Black': How Cashing a Check Can Be a Minefield, NY Times, June 18, 2020, <https://www.nytimes.com/2020/06/18/business/banks-black-customers-racism.html>.

³ Lauren Leatherby, Coronavirus Is Hitting Black Business Owners Hardest, NY Times, June 18, 2020, <https://www.nytimes.com/interactive/2020/06/18/us/coronavirus-black-owned-small-business.html>.

Just as COVID-19 is exacting a financial crisis in communities of color, it is equally a profound public health crisis. The virus has devastated families across the nation and has fallen disproportionately on communities of color.

The actions taken to contain COVID-19 and prevent far greater casualties have thrown over 35 million people out of work. The unemployment rate is now at 18.1% for Latinos and 16.7% for African Americans. Black and Latino families are overwhelmingly employed in the service industries that were hit first by social distancing mandates and stay-at home orders. Many of those jobs are not expected to return. Countless millions more have experienced drastic cuts to their pay.

Moreover, the virus is disproportionately affecting people of color – African Americans account for 30% of the U.S. fatalities, 2.5 times their representation in the population. Latino families are also facing high levels of impact in terms of illness and lives loss.

Now, is not the time for HUD to gut this important longstanding protection that can help America deliver on its promise of fairness and opportunity for all.

I'm Eric Stein, senior vice president of Self-Help. The main point that I would like to make is that HUD's current disparate impact rule is not broken. As OMB guidance recognizes, an Administration agency needs a very good reason to issue a new rule on a topic, and that reason is notably absent with respect to the disparate impact rule.

The 2013 disparate impact regulation codifies well-settled legal precedent. Disparate impact liability has existed under the Fair Housing Act for decades. HUD's 2013 rule formalized and harmonized decades of disparate impact jurisprudence and also reflects HUD's own longstanding interpretation of the Fair Housing Act. Additionally, the 2013 regulation is consistent with the *Inclusive Communities* Supreme Court decision.

The 2019 proposed rule decimates the existing burden-shifting framework and places all the burdens on the victims of housing discrimination. The existing framework has been at the heart of the disparate impact standard. The framework from the 2013 rule, including alleging and demonstrating business necessity, works and is intuitive to understand. Under the burden-shifting framework:

- Plaintiff has the burden of proving a prima facie case of either disparate impact or perpetuation of segregation;
- The burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more of the defendant's substantial, legitimate, nondiscriminatory interests;

- If the defendant satisfies its burden, the plaintiff may still establish liability by demonstrating that these substantial, legitimate, nondiscriminatory interests could be served by a practice that has a less discriminatory effect.

Under this last step, what legitimate business would not want to know it can equally serve its interests through a practice that doesn't discriminate? Why would HUD and OMB want to eviscerate this framework?

It is important to have consistent standards in the industry. Not only has the disparate impact analysis functioned as an enforcement tool for the Fair Housing Act, it has provided clear rules of the road to lenders. By rendering meaningless the disparate impact provision of the Fair Housing Act, this proposal will inject cost and uncertainty into the financial system, exactly what lenders, regulators and shareholders seek to avoid.

Further, it would be highly predictable that such a significant change from previous, long-standing practice that is not grounded in need would lead a future administration to return to that practice, making it very difficult for lenders to plan and maintain their compliance systems.

We recently spoke with Bank of American about the disparate impact rule, and they told us that we are able to communicate to you that Bank of America supports a delay on issuing a new rule at this time.

Good afternoon. My name is Ed Sivak and I am the Chief Policy and Communications Officer at Hope Credit Union. HOPE is a community development financial institution, credit union, and policy institute with 35,000 members headquartered in Jackson, Mississippi and serving people in the Deep South States of Alabama, Arkansas, Louisiana, Mississippi and Tennessee. Importantly, we are a Minority Depository Institution and 3 out of 4 members of our members are Black American.

There are two points that I want to communicate unequivocally today in urging you not to move forward with this rule change:

1. The rollback of this rule will disproportionately harm Black residents of our region and, by extension, severely cripple the economic recovery for the whole region from the pandemic
2. In HOPE's experience as a mortgage lender, the current rule has been good for our business and has never been a compliance burden.

On point number 1, it is important to place the demographics and economy into context. Mississippi remains the only state in the country where over 1/3 of our residents are Black. This fact is critically important when reviewing how our state fared coming out of the Great Recession. While the United States had recovered from the Great Recession, by May of 2014,

Mississippi would not achieve that same milestone until 2019 – five years after the national recovery and a decade after the economic fallout. Black residents were and remain disproportionately affected. Unemployment rates remain twice the rates of whites and the effects on homeownership have been devastating. Black homeownership rates in Mississippi are today - 5 percentage points below pre-recession levels – a level unchanged since 2013. In contrast, white homeownership rates had reached pre-recession highs by 2011. Similar disparities persist throughout the Deep South states. In each of the five states served by HOPE, the homeownership gap between black and white households in 2017 exceeded 20 percentage points. Of even more concern, the gap had widened in all five states in the last decade.

COVID threatens to widen these gaps even further, as Black homeowners in the Deep South, are far less certain about their ability to make next month's mortgage payments than white homeowners. According to Hope Policy Institute analysis of the U.S. Census Household Pulse Survey, white homeowners are twice as likely to be highly confident of their ability to make next month's mortgage as Black households (40% of white homeowners compared to just 20% of Black homeowners in the Deep South). This is a much wider disparity than the U.S. as a whole (47% for white households vs 34% of Black households nationwide). In some states, the disparity is even wider, in TN for example, nearly one in two of all white households (48%) are highly confident, compared to less than 1 in 5 (19%) of Black households.

Now, with the context of our region shared, I want to transition to our experience at Hope Credit Union as a mortgage lender. In 2007, in the eve of the Recession, 55% of HOPE's mortgage loans closed were to owners of color. That year, our charge off rate was 62 basis points. Last year, in 2019, fully 88% of our mortgage loans closed were to minority borrowers – nearly all Black – and the charge off rate had declined to 36 basis points. It's critically important to point out that over that time period, where our lending to Black borrowers increased, and overall portfolio performance improved, our mortgage portfolio grew over seven-fold – from a little over \$13 million to \$115 million. The evidence is clear – in no way did the disparate impact rule harm our business model or stand in the way of our mortgage production.

In preparation for this meeting, I also spent time with the head of our Compliance Department – a HOPE leader who has overseen compliance for 17 years – and put the question to her: have Fair Lending regulations and particularly the guidance on Disparate Impact ever been a burden on your department or for our broader team? Her response was absolutely not – it was just how we went about our business at HOPE. Furthermore, she went on to state that if our policies and procedures are resulting in the inequitable granting of credit or collections then we need to know and they need to be remedied immediately.

The Disparate Impact rule was put into place in response to historical, codified, housing discrimination. Discrimination, frankly, sanctioned by programs administered by this agency. The rule has been an effective break from that legacy. To roll this rule back now, especially today, will stunt the recovery from the pandemic for our entire region. Furthermore, given the data on our recovery from the Great Recession – it is clear that this action – if taken – will

further serve as an impediment to Black Homeownership – and widen the racial wealth gap, a gap created by public policy choices, choices such as the one under deliberation here.

Eric Stein:

I would like to present Self-Help's perspective on disparate impact and why we believe it is good for business. To do so, I would like to reiterate both of Ed's points.

On his first point, Self-Help's service area also includes concentrations of communities of color, primarily African American and Latino communities, in NC, SC, FL, Chicago, Milwaukee, and CA. These communities will be significantly harmed if OMB allows HUD's rule to move forward.

On Ed's second point, for Self-Help, as with Hope, the disparate impact rule has complemented, not interfered with, our business strategy. Self-Help is a credit union and community development organization that creates ownership and economic opportunity for all. When Self-Help started in 1980, we believed that ownership was the best way for families to build wealth and financial security and for our society to create strong, vibrant communities. Our experience over the past 40 years has only reinforced that belief.

We have provided \$8.5 billion in financing to families, individuals, and organizations and have over 150,000 members. Our market niche reflects our mission:

- 82% low-income borrowers,
- 40% women, and
- 61% people of color.

In 1985 we began making home loans to North Carolina families who were unable to get conventional mortgages. We saw that homeownership was the primary way for lower- and middle-class families to build wealth and financial security and that most small business owners relied on their home equity for start-up capital. To date our mortgage lending through our branch network and our national loan purchase program from banks has supported homeownership for over 50,000 households nationwide.

One last example where we see serving communities of color as a business opportunity rather than a compliance burden is the paycheck protection program. Under this COVID-19 program to sustain small businesses, we have provided:

- \$171 million in loans to 1,400 recipients,
- 59% of loans to businesses led by people of color, and
- maintained 18,000 jobs.

I'm Melissa Stegman, Senior Policy Counsel with the Center for Responsible Lending. HUD does not have the authority to create new safe harbors, including the safe harbor for algorithmic models. Particularly considering the federal government's history of explicit housing discrimination, Congress did not provide HUD the authority to create its own exemptions or safe harbors. The Fair Housing Act's exemptions are statutory. Some were part of the original Fair Housing Act. Others came later. For instance, permitting age 55 and up communities required an exemption from familial status discrimination under the Fair Housing Act. The Housing for Older Persons Act, a statute, created the exemption in 1995. HUD did not create it through a regulation. Also, as HUD itself stated in 2016, in response to a requested exemption for the insurance industry: "Categorical exemptions would undermine the Act's broad remedial purpose and contravene HUD's own statutory obligation to affirmatively further fair housing."

Nikitra Bailey:

The proposed rule introduces a new defense for those who design and use algorithmic models and operates as a safe harbor for the lending and insurance industries. Algorithms are "black boxes," which makes it extremely difficult to detect and address bias in the algorithmic system. This safe harbor falsely assumes that algorithms are objective and bias-free. Artificial intelligence and algorithms have been exposed as problematic in various sectors (employment, criminal justice, facial recognition, healthcare, etc).

The availability of disparate impact is also important for challenging emerging forms of discrimination.⁴ In the age of big data, employers, lenders, insurers and others have increasing access to data about us — things like where you shop, whether you just got married, whether you are interested in products for Black hair. Access to this data makes it easier to differentiate and target groups and easier to produce disparate impacts, affecting whether you see a job advertisement, how much you are charged for health insurance, or whether you are marketed a loan with high-risk terms. Thinking about disparate impacts is critical to ensuring that advances in technology do not expand inequality and segregation.

Thanks for the opportunity to discuss this important matter. Again, we ask that HUD not finalize the rule and instead withdraw it.

⁴ Rachel Goodman, Big Data Could Set Insurance Premiums. Minorities Could Pay the Price, ACLU, July 19, 2018, <https://www.aclu.org/blog/racial-justice/race-and-economic-justice/big-data-could-set-insurance-premiums-minorities-could>.