



## For economic and racial justice

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Via [www.regulations.gov](http://www.regulations.gov)

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street SW, Room 10276  
Washington, DC 20410

### **Re: Docket No. FR-6251-P-01: Notice of Proposed Rulemaking: Reinstatement of HUD's Discriminatory Effects Standard**

To Whom It May Concern:

Thank you for the opportunity to comment in support of HUD's proposed rule [Restoring HUD's Discriminatory Effects Standard](#) ("rule" or "proposed rule"), which is consistent with existing jurisprudence and restores the 2013 Rule's<sup>1</sup> robust approach to Fair Housing Act enforcement. These comments, filed on behalf of the Shriver Center on Poverty Law and the undersigned organizations and individuals, fully support the proposed rule with particular focus on how the proposed rule serves as an essential check against criminal records screening policies which have unjustified disparate effects upon protected classes under the Fair Housing Act. As such, these comments also discuss specific ways in which the proposed rule sets the stage for HUD to utilize disparate impact theory to target discriminatory screening policies and build upon its essential 2016 [Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions](#) ("Criminal Records Guidance" or "2016 Guidance").

The Shriver Center on Poverty Law has long advocated to ensure that all people have access to vital resources and programs that provide for their basic needs and that advance their long-term well-being and opportunity. Through our decades of work on behalf of and in partnership with families and people living with low incomes in Illinois, we have developed deep expertise in fair housing law and the role that it plays in securing safe, decent, affordable, and accessible housing for all.

Importantly, this letter was drafted in conjunction with organizations lead by and comprised of individuals with direct contact with the criminal justice system, who are thus able to provide unique expertise, including:

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<sup>1</sup> "2013 Rule" and "2020 Rule" will be used here as they are used in the preamble to the proposed rule.

- The Formerly Incarcerated, Convicted People and Families Movement: A broad coalition of justice-involved individuals and organizations lead by justice-involved individuals dedicated to achieving holistic and radical change to the criminal justice system;
- Voice of the Experienced (VOTE) - Louisiana: A grassroots organization founded and run by formerly incarcerated people, dedicated to restoring full human and civil rights to people impacted by the criminal legal system;
- A New Way of Life: a California-based organization dedicated to promoting healing, power and opportunity for formerly incarcerated people by taking a multifaceted approach to mitigating the effects of, and ultimately eliminating, mass incarceration;
- Operation Restoration: Headquartered in New Orleans, LA, Operation Restoration (OR) was formed in 2016 and is led by formerly incarcerated women. OR's mission is to support women and girls impacted by incarceration to recognize their full potential, restore their lives, and discover new possibilities. OR's goal is to end the incarceration of women and girls.

### **1. The Proposed Rule is Consistent with Existing Jurisprudence and the Purpose of the Fair Housing Act**

First and foremost, these comments serve to fully support the proposed rule. The proposed rule restores a robust and workable disparate impact standard consistent with existing case law. Similarly, the proposed rule replaces and avoids the harms of the [2020 Disparate Impact regulation](#) (“2020 Rule”) enacted by the previous Administration. To illustrate how the 2020 Rule was inconsistent with relevant jurisprudence and served as an impediment to proper fair housing enforcement, and to thus also illustrate the corresponding advantages of the proposed rule, these comments incorporate the Shriver Center’s comments opposing the 2020 Rule, attached here as Exhibit 1.

### **2. The Proposed Rule is an Essential Check against Discriminatory Screening Policies**

The proposed rule restores an essential check against criminal records screening policies and practices which have an unjustified disparate impact against Black and Brown people and other protected classes. “Criminal records screening policies and practices” and the like refer both to the publication of reports by tenant screening companies and the use of those reports by housing providers and public housing authorities. Disparate impact liability under the Fair Housing Act serves to fulfill the FHA’s purpose of, not only prohibiting intentional discrimination, but also addressing policies which perpetuate systemic inequity and entrench segregation.<sup>2</sup>

Racial segregation and housing discrimination cannot be meaningfully addressed without specific attention being paid to criminal records screening practices which disproportionately

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<sup>2</sup> See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539-40 (2015).

exclude Black and Brown people from housing. In her groundbreaking work *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander observes as follows:

[I]t is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind.<sup>3</sup>

Despite often being facially neutral, it is largely these criminal screening policies which perpetuate "the new Jim Crow" in housing.<sup>4</sup>

Similarly, persons with disabilities [are far more likely than those without disabilities to face arrest or incarceration](#) and thus face exclusion from housing based upon a criminal record.<sup>5</sup> Currently, the 2016 Criminal Records Guidance does not address the disparate effects of criminal records screening on those with disabilities.

Curtailing the discriminatory effects of criminal records screening is thus not merely within the penumbra of appropriate Fair Housing enforcement but at its core. Fortunately, the disparate impact theory of liability is well-suited to address these systemic inequities, as illustrated by both the 2016 Criminal Records Guidance and case law applying disparate impact analysis to criminal records screening policies.<sup>6</sup>

By providing an erroneous interpretation of the Fair Housing Act's disparate impact standard, the 2020 Rule erected obstacles to its proper application to criminal records screening. For example, as discussed in the comments attached as Exhibit 1, the 2020 Rule broadly shields the use of algorithms from disparate impact liability, thus protecting conduct which should fall squarely within the FHA's prohibitions. The 2020 Rule's requirement that plaintiff must, at the initial pleading stage, sufficiently allege that the criminal records screening policy is "arbitrary, artificial, and unnecessary to achieve any valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law" both requires plaintiff to have extensive evidence generally not available before discovery and broadly defers to "bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record."<sup>7</sup> The 2020 Rule was in obvious tension with the 2016 Guidance, though the Trump Administration never rescinded such Guidance.

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<sup>3</sup> Alexander, Michelle. *The New Jim Crow : Mass Incarceration in the Age of Colorblindness*. New York: [Jackson, Tenn.]: New Press; Distributed by Perseus Distribution, 2010.

<sup>4</sup> See Tex Pasley et al., *Screened Out, SHRIVER CNTR. ON POVERTY LAW* (Jan. 2021), [www.povertylaw.org/report/tenant-screening-report/](http://www.povertylaw.org/report/tenant-screening-report/).

<sup>5</sup> Rebecca Vallas, "Disabled Behind Bars," Center for American Progress, Jul. 18, 2016, <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/>; Harvard Law School Tenant Advocacy Project, comments to 2020 Rule

<sup>6</sup> See, e.g., *Connecticut Fair Housing Center v. CoreLogic Rental Property Solutions*, 478 F.Supp.3d 259 (D. Conn. 2020); *Jackson v. Tryon Park Apartments, Inc.*, No. 6:2018-cv-06238 (W.D.N.Y. 2019), available at <https://law.justia.com/cases/federal/district-courts/new-york/nywdce/6:2018cv06238/116525/17/>; *Sams v. Ga West Gate, LLC*, 2017 WL 436281 (S.D. Ga., Jan. 30, 2017).

<sup>7</sup> Criminal Records Guidance, p. 5.

On the other hand, again as illustrated by the 2016 Guidance and cited case law,<sup>8</sup> by properly interpreting the Fair Housing Act, the proposed rule lays the groundwork for HUD to utilize the disparate impact standard to target criminal records screening practices which create unjustified adverse effects on members of protected classes. As such, the proposed rule sets the stage for HUD to continue to build off of the 2016 Guidance to address this essential civil rights issue.

### **3. The Proposed Rule Empowers HUD to Take Additional Steps against Discriminatory Criminal Records Screening**

The proposed rule, once enacted, thus sets the stage for HUD to further fulfill the purpose of the Fair Housing Act and its statutory obligation to “affirmatively further fair housing”<sup>9</sup> by taking additional steps to reign in the discriminatory use of criminal background checks. HUD should do so in a number of ways, including but not limited to the following:

#### **a. Improving Criminal Records Guidance**

The 2016 Guidance was an essential step which HUD should continue to build upon. For one, in addition to race, the 2016 Guidance should be amended to analyze the disparate effects of criminal records screening on persons with disabilities.<sup>10</sup>

Most importantly, so that it cannot be easily rescinded and to ensure it gets adequate deference from the courts, HUD should enact regulation applying the disparate impact standard to the criminal records screening practices. This can be done in a number of ways. Ideally, the 2016 Guidance, or an enhanced version of this Guidance, would be codified.<sup>11</sup> While the 2016 Guidance simply provides a framework through which to analyze a diverse array of fact-specific scenarios, this should not preclude its codification into regulation. Indeed, Fair Housing regulations are often structured as such.<sup>12</sup>

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<sup>8</sup> See fn. 6, at *supra*.

<sup>9</sup> 42 U.S.C. § 3608(e)(5).

<sup>10</sup> Harvard Law School Tenant Advocacy Project, Comments on HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard Docket Number: FR-6111-P-02, RIN 2529-AA98, Oct. 17, 2019, *available at* <http://clinics.law.harvard.edu/tap/files/2020/01/Tenant-Advocacy-Project-Disparate-Impact-Comment-October-2019.pdf>.

<sup>11</sup> See, e.g., 2 CA ADC § 12269 & see, e.g., generally 2 CA ADC § § 12264 - 12270 (regulations under California fair housing law effectively codifying the 2016 Criminal Records Guidance).

<sup>12</sup> See, e.g., 24 CFR §§ 100.200 – 100.205. These regulations provide a general framework to analyze reasonable accommodation, modification, and construction requirements, which must then be applied to a diverse array of fact-specific permutations to determine in a specific situation, for example, whether one’s impairment impedes “Major life activities . . . such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working,” § 100.201(b), when it is necessary for the landlord to establish a tenant escrow account “in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy,” § 100.203, and when “it is impractical to [to have at least one building entrance on an accessible route] because of the terrain or unusual characteristics of the site,” § 200.105(a).

Enacting regulation focused upon illustrative examples of how the disparate impact standard applies to criminal records screening would also go a long way in furthering housing equity.<sup>13</sup>

Similarly, despite the consistency between *Inclusive Communities* and HUD's 2013 Rule, we urge HUD to, in the preamble of the proposed rule, discuss criminal records screening practices as examples of policies that may have an unjustified disparate impact on protected classes. A number of federal court decisions cited herein provide useful illustrations of this approach.<sup>14</sup>

Each of these approaches necessitates significant input from directly impacted individuals and advocates whose analysis and illustrations are informed by their own unique experience.

### **b. Enforcement Action**

HUD can also further actualize the protections embodied in the proposed rule and 2016 Criminal Records Guidance by taking aggressive enforcement action within this context. Doing so would not only send a necessary signal to tenant screening companies and housing providers who employ their services, but would also help generate positive case law in this area. While advocates will continue to file complaints, the duty to "affirmatively further fair housing"<sup>15</sup> also obligates HUD to independently initiate and pursue such enforcement action.

### **c. Application to Subsidized Housing**

It is imperative that HUD apply the proposed rule to its own housing programs more equitable and FHA-compliant. Unlike the preamble to the 2020 Rule, the proposed rule does not suggest that a more difficult standard of proof may apply when the disparate impact theory is used to target housing authorities.<sup>16</sup> This correction, and the proposed rule's consistency with the FHA's purpose generally, enables HUD to take action to ensure that subsidized housing providers are not using criminal background checks in a way that creates unjustified adverse effects for People of Color and persons with disabilities. For purposes of this comment, housing choice voucher, public housing, subsidized housing and other HUD-assisted housing programs will be referred to as "subsidized housing" programs. Housing providers participating in these programs, including housing authorities, will be referred to as "subsidized housing providers" or the like.

The proposed rule, in conjunction with the 2016 Criminal Record Guidance and HUD Notice H 2015-10, can thus assist HUD in clarifying the scope of subsidized housing providers' discretion to deny residents and applicants housing due to their criminal records. For example:

- Housing providers' use of one strike policies and use of arrest records in housing decisions cannot be squared with the proposed rule. HUD should thus issue regulations explicitly prohibiting subsidized housing providers from engaging in these practices.

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<sup>13</sup> See, e.g., the following which, in part, regulate through illustration: 24 CFR §§ 100.203(c), 100.204(b), 100.205(b); 2 CA ADC § § 12176, 12180.

<sup>14</sup> See fn. 6, at *supra*.

<sup>15</sup> 42 U.S.C. § 3608(e)(5).

<sup>16</sup> See Preamble to 202 Rule, Docket No. FR-6111-P-02.

- The proposed rule and 2016 Guidance should explicitly inform subsidized housing provider discretion to deny admission to a household because a household member is “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents,” 42 USCA § 13661. In light of the proposed rule and 2016 Guidance, terms such as “drug-related,” “violent criminal activity” and “other criminal activity . . .” must be read as being meaningfully limited in scope to guard against subsidized housing providers abusing their discretion in a way that has unjustified disparate effects on protected classes;
- The proposed rule and 2016 Guidance should also prompt HUD to clarify what constitutes a “reasonable” look-back period for criminal background checks per 42 U.S.C. § 13661(c) to ensure that subsidized housing providers and housing authorities do not utilize look-back periods which result in unnecessary adverse effects upon members of a protected class. This analysis again must be formulated in consultation with directly impacted experts;
- HUD should ensure, both in policy and in practice, that emergency housing vouchers are widely available to those with records and that the HUD definition of “homelessness” is adjusted to widely encompass those reentering from incarceration;
- HUD should take further steps to ensure subsidized housing providers are properly monitored for compliance with the 2016 Criminal Records Guidance and the proposed rule as applied to criminal record screening practices.

Further, to better ensure its housing programs are FHA-complaint, HUD should integrate HUD Notice H 2015-10 and the 2016 Criminal Records Guidance into its subsidized housing guidebooks. As stated by the GAO, “updating its HCV and public housing guidebooks to reflect newer criminal history guidance [is necessary for HUD to] ensure that these guidebooks serve as consolidated and up-to-date references for PHAs that accurately communicate HUD’s current guidance on criminal history policies.”<sup>17</sup> Further, integration of this guidance into the Guidebooks is subject to notice and comment and thus entitles such guidance to a higher level of deference.

## **Conclusion**

Thank you for providing the opportunity to comment. We again want to express our unambiguous support of the proposed rule. As supported by the attached comments, the proposed rule provides an interpretation of disparate impact liability which is consistent with the purpose of and jurisprudence surrounding the Fair Housing Act. In particular, as highlighted here, the proposed rule fulfills the central purpose of the Fair Housing Act by setting the stage for HUD to further target practices which serve as a primary driver of systemic housing inequity, such as criminal records screening practices which adversely affect protected classes.

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<sup>17</sup> GAO-18-429, Rental Housing Assistance: Actions Needed to Improve Oversight of Criminal History Policies and Implementation of Fugitive Felon Initiative (Sept. 20, 2018), p. 23, <https://www.gao.gov/assets/700/693855.pdf>.

Best Regards,

/s/

A New Way of Life Reentry Project  
Communities United for Restorative Youth Justice  
Formerly Incarcerated Convicted People and Families Movement  
Operation Restoration  
Voice of the Experienced

American YouthWorks  
Building Promise USA  
Chicago Area Fair Housing Alliance  
Florida Rights Restoration Coalition  
JustLeadership USA  
Legal Services for Prisoners with Children  
National Alliance to End Homelessness  
National Housing Law Project  
Shriver Center on Poverty Law  
Sponsors, Inc.  
Uptown People's Law Center  
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