October 18, 2019

The Honorable Ben Carson  
Secretary  
U.S. Department of Housing and Urban Development  
451 7th Street S.W.,  
Washington, DC 20410  

Re: HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard  
Docket No. FR-6111-P-02  

Dear Secretary Carson:  

The Robert Wood Johnson Foundation (RWJF) is pleased to have the opportunity to comment on the proposed rule regarding implementation of the Fair Housing Act’s (FHA) Disparate Impact (DI) standard.  

A safe, affordable, and stable home in a community with good schools, fair-paying jobs, and access to healthy foods and green spaces is foundational for well-being. However, housing discrimination continues at unjustifiably high rates for people of color, families with children, and those with disabilities, among others. Today’s bias is often hidden in policies that, on their surface, seem non-discriminatory but whose harms are disproportionately experienced by groups deserving protection under the FHA.* In addition, past and ongoing housing discrimination in the United States has created pervasive segregation by race and by income, fostering our nation’s race- and income-based health inequities. The proposed rule would make it nearly impossible to establish housing discrimination under the DI standard, eliminating legal recourse for individuals and communities facing significant prejudice in rental and mortgage lending decisions. Therefore, HUD should preserve the DI standard in its current form and enhance federal, state, and local enforcement of the FHA to ensure everyone in America has a fair and just opportunity for good health.

*For example, if an insurance company refused to insure homes under a certain dollar value, such a system would inordinately prevent African-American homeowners from fully protecting their homes from damage due to fire, hurricanes, or other disasters. Homes of equal quality in communities with similar amenities have 23 percent less value in majority black neighborhoods compared to those with few or no black residents. (Perry A et al. The Devaluation of Assets in Black Neighborhoods. Brookings Metropolitan Policy Program, November 2018.)
A Safe, Affordable, and Stable Home is Essential to Good Health

RWJF is the nation’s largest philanthropy dedicated to improving health and health care in the United States. We are working alongside others to build a national Culture of Health that provides everyone in America a fair and just opportunity for health and well-being. RWJF has long recognized the importance of well-built and well-maintained housing for preventing children’s exposure to lead paint and asthma triggers such as mold, dust, and cockroaches; and the value of subsidized housing for people who are chronically ill and chronically homeless.1

More recently, RWJF along with many other health organizations, have come to recognize that other dimensions of housing are just as influential on health. For example, when people must devote a substantial portion of their income to housing, it squeezes their ability to pay for other essentials including health care, food, and transportation. Currently, more than 1 in 10 households experience severe housing cost burden, paying 50 percent or more of their income on housing.2 This rate increases to 1 in 4 among renters and to 1 in 2 among low-income renters. Severely cost-burdened renters are 23 percent more likely than those with less severe burdens to face difficulty purchasing food and are more likely to forgo needed medical care.3,4 Housing affordability is closely related to stability. When people are forced to move because of rapidly increasing rents, unscrupulous landlords, or predatory high-interest loans, their health suffers. Housing instability is associated with increased risks of pregnancy, drug use, and depression among teens; absenteeism and poor school performance among children; and billions in avoidable health care and education costs.5,6,7

The neighborhoods surrounding our homes also profoundly shape our opportunities for health. Groundbreaking studies from Harvard University’s Raj Chetty and colleagues demonstrate that children’s chances for social mobility—moving from the lowest to the highest income quintile over their lifetime—are closely tied to the communities they call home.8 Moreover, when people move from racially and economically segregated neighborhoods to those with modestly less segregation, they experience improvements in many health and social outcomes, including lower rates of obesity and diabetes among adults and better school performance and higher incomes in adulthood among children who moved before the age of 13.9,10 Additionally, these connections between health and housing are reinforcing. For example, communities with higher levels of residential segregation have higher rates of severe housing cost burden for households headed by White or Black residents.11

Housing Discrimination is Pervasive

Despite legal protections created through the FHA along with state and federal anti-discrimination laws, bias in rental and mortgage lending practices persists at unjustifiably high rates. In 2016, there were approximately 28,000 formal complaints of housing discrimination, which, when accounting for systematic under-reporting, suggests more than four million instances of discrimination occurred.12
Under-reporting occurs because people fear retaliation, do not trust that cases will be handled in a timely or fair manner, and have other pressing demands on their time and resources. More than half of complaints alleged discrimination based on disability status; 20 percent, based on race; and nine percent, based on family status. A recent RWJF-funded national poll revealed that large proportions of people from marginalized communities have experienced discrimination when trying to rent an apartment or buy a house: 45 percent of African-Americans, 31 percent of Latinos, and 22 percent of people identifying as lesbian, gay, bisexual, transgender, or queer.\textsuperscript{13}

New technologies are fueling a modern breed of discrimination with wide-ranging impacts. For example, HUD recently sued Facebook for enabling advertisers to exclude people with certain characteristics from seeing ads for rental properties or homes. This exclusion tool could be applied to those who were “non-American-born,” “non-Christian,” “interested in Hispanic culture,” interested in “deaf culture,” or interested in “child care” or “parenting” along with those living in particular ZIP codes.\textsuperscript{14,15} In addition, many landlords and mortgage lenders use machine-learning algorithms to screen tenants and homebuyers, enabling them to sift out people based on non-protected characteristics even though the impacts of such selection may be disparate for people of color along with other marginalized groups.\textsuperscript{16,17,18} It is just these types of hidden discrimination that the DI standard was meant to protect against.

Below are three representative cases\textsuperscript{19} that highlight other ways in which seemingly non-discriminatory policies can have unjust impacts:

\textbf{People with Disabilities—United States of America v. Fitchburg Housing Authority, et al.}
Sally Wiesman was a woman from Fitchburg, Massachusetts, living in a housing authority apartment. She suffered from multiple sclerosis, major depression, and panic disorder—all of which substantially limited her ability to sleep, work, and carry on other important daily activities. Ms. Wiesman’s condition worsened after her downstairs neighbor initiated and repeated confrontational behavior toward her. Ms. Wiesman asked to be transferred to a different apartment to help with her condition. The housing authority denied her request, citing a policy that only allowed tenants with mobility impairments to transfer apartments. The Department of Justice (DOJ) filed on Ms. Wiesman’s behalf in 2009 and obtained a consent decree. The housing authority had to revise its transfer policy so as to not have a disparate impact on people with non-mobility-related disabilities.

Drita and Florim Gashi lived in a one-bedroom condo they owned in Stamford, Connecticut. After they had their first child, they got a notice from the condo association informing them that they were in violation of a two-person-per-bedroom occupancy limit. They could either pay a $500 monthly fine to stay, or vacate their home. Not being able to afford the additional monthly rent, the Gashis had to sell their condo at a loss. The Gashis contacted the Connecticut Fair
Housing Center, which brought a fair housing case on their behalf. The Center and the Gashis claimed the two-person-per-bedroom rule had a disparate impact on families with children. In June 2011, a District Court granted the Gashis’ motion for summary judgment noting that the condo association could not justify the policy and the association dropped its restrictive occupancy standards, opening 150 units of housing to families with children.


From 2004 to 2008 Countrywide Financial Corporation had a business practice that allowed its loan officers and brokers discretion in varying a borrower’s interest rate and other fees after the price was set based on objective credit-related factors. This resulted in more than 200,000 African-American and Latino borrowers paying more for prime loans. Additionally, thousands of borrowers of color were wrongly steered to higher-cost subprime loans as compared to similarly qualified white borrowers who got prime loans. In a similar case, the DOJ alleged that Wells Fargo’s business practices allowed brokers and officers to place individuals in subprime loans even if they qualified for prime loans, resulting in 300,000 African-American and Latino borrowers paying more than similarly-situated white borrowers. In December 2011, DOJ reached a $335 million settlement with Countrywide and in July 2012, a $175 million settlement with Wells Fargo. Both Countrywide and Wells Fargo were required to revise their discretionary policies.

**Historical and Ongoing Housing Discrimination Fosters Health Inequities**

Housing policy in this country is replete with systemic discrimination and its effects continue to be felt today in the form of racial and economic segregation. This history of de jure discrimination is vividly and rigorously detailed in Richard Rothstein’s *The Color of Law*. It highlights, for example, the practice of redlining enabled by the federally funded Home Owner’s Loan Corporation, which denied mortgage refinancing to African-Americans during the Great Depression; the creation of white-only suburbs from the 1930s to the 1960s through mortgages insured by Federal Housing Administration; and the segregation of once integrated public housing communities in cities across the country.

Such segregation was followed consistently and inescapably by public and private sector disinvestment, creating predominantly African-American central cities with few jobs in the formal economy, a weak tax base, high rates of crime, and schools starved of resources. Sociologists David Williams and Chiquita Collins describe how the construction of segregation by race and by class fostered—and now perpetuates—today’s health disparities:

“Segregation ... adversely affect[s] health by creating a broad range of pathogenic residential conditions that can induce adverse effects on health status.”
For people of color, segregation contributes to higher exposure to violence, less access to green space and high-quality health care, and greater exposure to industrial pollution and stores selling health-harming products such as tobacco and high-sugar foods and beverages. Williams and Collins go on to note:

“The evidence reviewed suggests that racial residential segregation, an institutional manifestation of racism, is one of the most important “spiders” responsible for persisting black-white inequalities in health. Inattention to eliminating residential segregation and/or the conditions created by it may limit the utility of well-intentioned efforts to reduce racial disparities in health. Thus, effective efforts to reduce racial disparities in health status should seriously grapple with reducing racial disparities in socioeconomic circumstances, and with targeting interventions not only at individuals but also at the geographic contexts in which they live.”

A recent RWJF-funded analysis makes the connection between housing, segregation, and health abundantly clear. Cities with the highest levels of segregation had the highest levels of place-based (and, by proxy, race-based) differences in life expectancy. Chicago, the city with the highest segregation score, had a 30-year life expectancy difference between the healthiest and least healthy census tracts, the latter of which is 91 percent African-American.22

The Proposed Rule Would Gut the DI Standard and Perpetuate Health Inequities

Currently, courts use a three-step process in applying the DI standard to cases of alleged discrimination. This approach balances the legitimate business interests of landlords, banks, and insurance companies and the rights of renters and homebuyers. However, under HUD’s proposed rule, those alleging discrimination would have to navigate a new five-part test to prove discrimination, demonstrating that the policy in question is “arbitrary, artificial, and unnecessary;” has a “robust causal link” with the negative impacts experienced by the plaintiffs; and is replaceable by less discriminatory policy that meets the defendant’s business interests without increasing costs or burdens for the defendant.23 Perversely, a business’s bottom line would be prioritized over people’s right to be free from discrimination. As such, the nation’s leading housing and civil rights groups have concluded that the proposed rule would “effectively destroy a 45-year-old protection against housing discrimination and would pave the way for widespread harm to millions of people across the country.”24

Two other provisions of the proposed rule also raise serious concerns. First, businesses using algorithms with discriminatory impacts could evade liability if said algorithms were created by a third party, essentially outsourcing the blame while eliminating accountability. As noted previously, the use of algorithms in the housing sector is growing among banks seeking to underwrite loans and landlords looking to screen tenants. While these technologies have an appropriate place in complex decision-making, they should not be a vehicle for hidden discrimination. Second, the proposed rule would narrow
the circumstances in which exclusionary zoning cases could be brought under the DI standard. Exclusionary zoning is the longstanding policy of only allowing single-family homes in most suburban and some urban communities across the country. Such rules limit the construction of multi-family properties that are often less expensive, effectively locking in the racial and socioeconomic segregation created through U.S. housing policy in the twentieth century.\textsuperscript{25}

Finally, this proposed rule cannot be viewed in a vacuum, as several other federal reforms are creating additional barriers to safe, affordable, and stable housing for people from marginalized communities. These include: HUD’s suspension of the Affirmatively Furthering Fair Housing rule that aims to tie federal housing funding to proactive efforts to desegregate cities; HUD’s proposed rule that would threaten subsidized housing access for families with mixed immigration status, including 55,000 children who are U.S. citizens or green card holders;\textsuperscript{26} and the Department of Homeland Security’s “Public Charge” rule that would compromise immigrants’ green card eligibility if they use federal housing subsidies among other public programs.\textsuperscript{27}

Ensuring that everyone has a fair and just opportunity for health in this country will require bold, evidence-based strategies for increasing access to safe, affordable, and stable housing in communities with access to good schools, fair-paying jobs, grocery stores, and green spaces. RWJF believes this proposed rule will undermine achieving this vision and asks that HUD preserve the current DI standard.

We appreciate the opportunity to submit our comments.

Sincerely,

Richard E. Besser, MD
President and CEO
Robert Wood Johnson Foundation


