CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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October 18, 2019

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

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Sir or Madam:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the proposed rule ("Proposal") issued by the Department of Housing and Urban Development ("HUD") regarding its implementation of the disparate impact standard under the Fair Housing Act ("FHA").[1]

Discrimination is illegal and immoral. The business community strongly supports effective anti-discrimination policies in the housing market, including under the FHA. Responsible companies work hard—and invest substantial resources in compliance systems—to ensure compliance with the law.

Uncertainty about the availability of disparate impact claims under the FHA and the contours of any such liability make it challenging for companies to understand their compliance obligations in this context. Varying regulatory and judicial interpretations of the FHA, and related statutes, further complicate these efforts.

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[1] *See* Proposed Rule, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019) ("Proposal").

At the same time, companies have to manage the risk of unintentionally adopting quotas in the name of avoiding disparities. Adding to these challenges, companies face the threat of litigation based on indeterminate disparate impact theories. Such litigation poses reputational risk even if it is ultimately proven to have not been at fault. As a result, companies often decide to avoid undertaking beneficial new projects, offering valuable features, or developing innovative products out of fear of later being second- guessed under a disparate impact theory. As the Supreme Court recognized in its decision in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, such outcomes "undermine[] [the] purpose [of the FHA] as well as the free-market system."[2]

Clarification of the contours of disparate impact liability will help both companies and the customers they serve. Most directly, it will help companies achieve a goal we all share: compliance with the FHA. In addition, it will help reduce the regulatory uncertainty that deters companies from engaging in these beneficial activities based on concerns related to litigation and reputational risk. We welcome HUD's commitment to clarifying the disparate impact standard under the FHA, and appreciate HUD's effort to align its rule with the Supreme Court's governing *Inclusive Communities* decision—a critical step for achieving regulatory clarity.

We also appreciate HUD's recognition of two important issues specifically addressed in the Proposal: state regulation of the business of insurance and the use of algorithmic models in the housing market. We believe that HUD should finalize the portion of its Proposal relating to the state regulation of the business of insurance. As to algorithmic models, we ask that HUD ensure its approach is aligned with the work of other federal regulatory and non-regulatory agencies before deciding whether to address such models in any final rule.

We consequently write to emphasize three points:

- **HUD should continue to seek to provide regulatory clarity in any final rule.**
- **HUD should finalize the elements of the Proposal that would preserve state regulation of the business of insurance.**
- **HUD should coordinate its activities relating to the use of algorithms with other government agencies that have relevant authority and expertise.**

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[3] *Inclusive Communities*, 135 S.Ct. at 2522.

Discussion

I. HUD should continue to seek to provide regulatory clarity in any final rule.

It has always been clear that intentional discrimination—or disparate treatment—is illegal under the FHA. Prior to the *Inclusive Communities* ruling, however, there was significant uncertainty whether disparate impact claims, which do not require a showing of discriminatory motive or intent, were cognizable under the FHA.

The Supreme Court held in *Inclusive Communities* that disparate impact claims are cognizable under the FHA. Importantly, however, it also made clear that such claims are subject to a series of significant limitations. Thus, Justice Kennedy explained that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[3] The "FHA is not an instrument to force housing authorities to reorder their priorities," but rather seeks "to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."[4] Moreover, under a "robust causality requirement," a "disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies that cause that disparity."[5] Without such "safeguards at the prima facie stage, disparate impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."[6]

While we disagreed with the Court's decision that disparate impact claims are cognizable under the FHA, it is now governing law. HUD should now focus on supporting responsible businesses in their efforts to comply with the law. Clear alignment of HUD's rule and *Inclusive Communities* is critical to achieving such regulatory clarity. In contrast, leaving in place the 2013 rule, which was promulgated prior to the *Inclusive Communities* decision, would muddy the regulatory waters by leaving businesses and courts to wrestle with how to interpret that rule in light of *Inclusive Communities.* That ruling clearly articulated the Court's view of the requirements for a disparate impact claim under the FHA. As HUD has recognized, it must amend its rule to bring it clearly in line with the Supreme Court's decision.

We are pleased that HUD emphasizes fidelity to the Supreme Court's decision in *Inclusive Communities* in the Proposal. We appreciate that "HUD's objective in this proposed rule is to ensure consistency and uniformity, given the Supreme Court

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[3] *Inclusive Communities*, 135 S.Ct. at 2522.
[4] *Id.*
[5] *Id.* at 2523.
[6] *Id.*.

decision [in *Inclusive Communities*], and, thereby, provide clarity for the public."[7] As HUD notes, it is important for its rule to "allow for a quicker, less costly method [for entities to understand] their burden and responsibility under disparate impact law."[8] And we agree that "all parties, including small entities" would benefit from clarifications that "reconcil[e] HUD's existing regulatory framework for discriminatory effect claims with *Inclusive Communities* and subsequent case law."[9]

In response to the ANPR, we particularly urged HUD to align its rule with the *Inclusive Communities* decision by implementing the "robust causality requirement" it emphasized. As an initial matter, it is fundamentally unfair to hold companies accountable for disparities that they did not cause. Such an approach would significantly distort company behavior in a manner that hurts all consumers. Companies would be forced to pursue policies that avoid disparities—even absent any causal connection between the policy and any disparity—and thereby run the risk of effectively adopting a quota-based approach to financial services and depriving consumers of innovative and beneficial services.

As the Court explained in *Inclusive Communities*, "[d]isparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[10] A robust causality requirement is central to enabling companies to be able to make these decisions, which are critical to the success of the housing market and of the economy more broadly. We consequently are pleased that HUD has appropriately reflected the Supreme Court's emphasis on a "robust causality requirement" in the Proposal.

We likewise stressed in our response to the ANPR that, as part of a robust causality requirement, any plaintiff asserting a disparate impact claim should be required to identify the specific policy that caused the disparity at issue. As the Supreme Court explained, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[11] A one-off action is insufficient to establish disparate-impact liability. "For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a

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[7] Proposal, 84 Fed. Reg. at 42861.
[8] *Id.*
[9] *Id.*
[10] *Inclusive Communities*, 125 S.Ct. at 2518.
[11] *Id.* at 2523.

policy at all."[12] We appreciate that HUD recognized and highlighted this important principle in issuing the Proposal.[13]

Clear alignment with the Supreme Court's *Inclusive Communities* decision would help regulatory confusion and thereby support responsible businesses' efforts to comply with the law. In particular, HUD will bring regulatory clarity and certainty to the extent that its final rule accurately incorporates the particular safeguards identified by the Court in *Inclusive Communities*.[14] By building the specific safeguards identified by the Court into any final rule, HUD will help achieve the broader purpose of disparate-impact liability under the FHA of "remov[ing] . . . artificial, arbitrary, and unnecessary barriers" to housing. *Inclusive Communities*, 135 S.Ct. at 2524. HUD should continue to focus on these goals in its final rule.

II. HUD should finalize the elements of the Proposal that would preserve state regulation of insurance providers.

The Chamber appreciates that aspects of the Proposal are not intended to infringe upon any State law for the purpose of regulating the business of insurance. The 2013 Final Rule applied a disparate impact standard to homeowners insurance, which conflicts with State law and could have unintended consequences for the provision of insurance and the capital markets.

The Chamber argued in its August 20, 2018, response to HUD's ANPR that state laws should continue to regulate insurance and that application of a disparate impact standard of legal liability could disrupt insurance markets. The Chamber cited the McCarran-Ferguson Act, which states, "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance,"[15] to argue that application of the Fair Housing Act to insurance is inappropriate and contrary to Congressional intent. Furthermore, the letter urged HUD to consider whether such application of a disparate impact standard would curtail the availability of insurance in certain markets, disrupt the ability to carry out actuarially sound underwriting, or more broadly affect insurance markets.

The Proposal would recognize the McCarran-Ferguson Act and clarify the primacy of state law. The Proposal states, "nothing in § 100.500 is intended to

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[12] *Id.*.

[13] *See* Proposal, 84 Fed. Reg. at 42858.

[14] Accurate incorporation of the specific safeguards identified by the Court in *Inclusive Communities* also will reduce the risk of a successful legal challenge to any final rule, which in turn supports the goals of "remov[ing] . . . artificial, arbitrary, and unnecessary barriers" to housing and of achieving regulatory certainty.

[15] 15 U.S.C. § 1012(b).

invalidate, impair, or supersede any law enacted by any State for the purpose of regulation the business of insurance." This codifies the general applicability of the 'reverse preemption' provisions of the McCarran-Ferguson Act as it applies to the Fair Housing Act and clarifies that the Fair Housing Act does not "specifically relate to the business of insurance." The McCarran-Ferguson Act provides that provisions of Federal law in conflict with state insurance laws are preempted by state laws "unless such Act specifically relates to the business of insurance."

The Proposed Rule also notes the section for the 'complete defense where a defendant's discretion is by compliance with Federal, State, or local law, would have a similar effect to a safe harbor, in appropriate circumstances by ensuring that parties are never placed in a "double bind of liability" where they could be subject to suit under disparate impact for actions required for good faith compliance with. Given insurance is regulated by the states, insurance firms should not be subject to such a double bind of liability.

III. HUD should coordinate its activities relating to the use of algorithms with other government agencies that have relevant authority and expertise.

We applaud HUD's recognition of the importance of algorithmic models in the housing market. We appreciate HUD's willingness to address this important issue. We agree that regulatory certainty will support the use of tools that create enhanced value for consumers and increased access to housing, including, through use of non-traditional underwriting criteria.

We also recognize, however, that there has been a broad range of regulatory activity around algorithmic models, as well as other activity by non-regulatory agencies that are focused on supporting the continued development of sound practices for algorithmic models. The prudential banking regulators as well as the Consumer Financial Protection Bureau have provided guidance to entities subject to their respective authorities, for example. Moreover, the White House Office of Science and Technology Policy has been studying the issue and President Trump issued an Executive Order focused on artificial intelligence that contemplates extensive follow up actions by a broad range of agencies.[16]

We think it vital that any action by HUD relating to algorithmic models be appropriately coordinated with other related efforts across the federal government. Otherwise, HUD will run the risk of taking actions that are out of step with those of peer agencies. For example, it might create a regulatory standard that is inconsistent with the guidance offered by prudential regulators. Or it might define "algorithmic

[16] *See* E.O. 13859, *Maintaining American Leadership in Artificial Intelligence* (Feb. 11, 2019), 84 Fed. Reg. 3497 (Feb. 14, 2019).

models” in a manner that does not match up with definitions created by other agencies, thereby creating confusion within the marketplace or differing treatment of an individual tool across multiple agencies. We urge HUD to ensure that it has coordinated appropriately across all relevant regulatory and non-regulatory agencies before it takes any regulatory action specifically focused on algorithmic models.

As described above, insurance is regulated by the States. This regulation includes the regulatory approval of algorithms for underwriting practices or other purposes. Insurance firms should not be liable for a disparate impact claim under the Fair Housing Act for the use of an algorithm that has been approved by the appropriate regulator.

We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman