CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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August 20, 2018

Mr. Paul Compton Jr.
General Counsel
Department of Housing and Urban Development
451 Seventh Street, SW Room 10276
Washington, DC 20410

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standards, Docket No. FR-6111-A-01

Dear Mr. Compton:

The U.S. Chamber of Commerce ("the Chamber") created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets in a 21st century economy. We appreciate the opportunity to respond to the Department of Housing and Urban Development's ("HUD") Advance Notice of Proposed Rulemaking ("ANPR") regarding implementation of the Fair Housing Act's ("FHA") disparate impact standard.

The Chamber vehemently opposes discrimination in any form. Financial discrimination is morally repugnant and harms the victims and our economy by denying credit to qualified Americans.

We request that HUD reassess its treatment of the disparate impact theory in light of the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*[1] We ask HUD to establish a causation

[1] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

standard and require that plaintiffs bringing a disparate impact claim identify a specific policy that has created the disparity. These actions are also necessary to allow states to continue to regulate homeowners' insurance and to protect competition in the insurance market.

I. Causation between a Policy and Disparity must be Present to Prove Disparate Impact.

We agree with the spirit of FHA that it should be illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[2] Discrimination based on these protected characteristics is wrong and the government should take action if it has occurred.

However, there remains uncertainty about what the law requires, especially in the disparate impact context. Courts have recognized three different legal theories for discrimination under FHA:

1. Overt evidence of discrimination: When a lender blatantly discriminates on a prohibited basis.[3]
2. Disparate treatment: When a lender treats applicants differently based on one of the prohibited factors.[4]
3. Disparate impact: When a lender applies a practice uniformly to all applicants, but the practice has a discriminatory effect on a prohibited basis and business necessity does not justify the practice.[5]

[2] 42 U.S.C. § 3604(a).
[3] Department of Housing and Urban Development, Policy Statement on Discrimination Lending (April 5, 1994) https://www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf.
[4] *Id.*
[5] *Id.*

II. In Light of the Recent Supreme Court decision, HUD should Clarify Disparate Impact Analysis under FHA.

a. Overview of *Inclusive Communities*

The recent precedent that the Supreme Court's decision in *Inclusive Communities* created has not yet been codified, causing legal uncertainty. In this case, the federal government provided low income tax credits to the Texas Department of Housing and Community Affairs ("Department"), which the Department subsequently allocated to homeowners. Plaintiffs alleged the Department caused segregated housing patterns by allocating more housing credits to low-income inner city African American neighborhoods than to white suburban neighborhoods. In its holding, the Court found that disparate impact claims are cognizable under FHA, but imposed causation standards and emphasized the importance of institutions' ability to make business decisions.

In reaching this conclusion, the Court relied on cases interpreting two other statutes, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Justice Kennedy wrote:

> [Prior decisions] instruct that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate 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. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative…practice that has less disparate impact and serves the [entity's] legitimate needs.[6]

[6] *Id.* at 2518.

The Court imposed the following limits on disparate impact: "a disparate impact claim relying on statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[7] This causation standard means that plaintiffs cannot merely identify a statistical disparity; instead, they must show a policy that created the disparate impact. Without such causation, any variety of factors that have nothing to do with discrimination – from credit scores to geographical differences – could create a disparity. Drawing on past precedent, the Court stated, "[r]acial imbalance…does not, without more, establish a prima facie case of disparate impact."[8]

The plaintiff's case in *Inclusive Communities* did in fact fail on remand because the plaintiff was unable to indicate a policy that created the disparity. After the case was sent back to the District Court, that court subsequently dismissed the case.[9] The court found that "because [Inclusive Communities Project] has not sufficiently identified a specific, facially-neutral policy that has caused a statistical disparity, the court cannot fashion a remedy that removes that policy."[10]

b. HUD Clarification is Necessary.

We respectfully request that HUD provide clarity based on *Inclusive Communities* by requiring that a plaintiff must prove causation by identifying a policy that created the disparity. Multiple factors (that have nothing to do with discrimination) go into a lender's decision to make a loan, and any of those factors could have an effect on the outcome and lead to denial of credit. Lenders and other regulated entities have strict underwriting standards governing whether they can issue loans, and they take into account a myriad of variables, including credit scores, income, and collateral.

As the court stated 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 the free-enterprise system."[11]

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[7] *Id* at 2509.
[8] *Id* at 2523 (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 653 (1989)).
[9] *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs,* Civil Action No. 3:08-CV-0546-D No. TX Dist.(Aug. 2016).
[10] *Id* at 16.
[11] *Inclusive Communities* at 2508 (2015).

Moreover, the Court found a "robust causality requirement…protects defendants from being held liable for racial disparities they did not create."[12] We urge HUD to issue much needed guidance codifying the *Inclusive Communities* precedent to ensure defendants are not liable for disparities they did not create and to allow defendants to make legitimate business decisions.

III. State Laws should Continue to Regulate Insurance.

In 2013, HUD issued a Final Rule, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" applying a disparate impact standard to homeowners insurance.[13] Insurance is unique and has a state-based regulatory structure. Under the McCarran-Ferguson Act, "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."[14] It affirmed that "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]

Congress has not explicitly subjected homeowners' insurance to FHA or to a disparate impact standard of legal liability (as contemplated under HUD's Final Rule). The FY 2018 report of the House Appropriations Committee Subcommittee for Transportation, Housing & Urban Development notes, "[t]he Committee is concerned that HUD's response [to the remand] continues to assert insurance regulatory authority that contradicts the McCarran-Ferguson statutory mandate and the limitations on disparate impact liability set forth by the US Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015)."[16]

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[12] *Id.*
[13] 78 FR 11459.
[14] 15 U.S.C. § 1101.
[15] 15 U.S.C. § 1012(b).
[16] House Committee on Appropriations, Departments of Transportation and Housing and Urban Development, and Related Agencies for the fiscal year ending September 30, 2019.

HUD must consider the effects on homeowners' insurance policy holders and the solvency framework of the insurance industry. This is consistent with a recommendation from the Treasury Department stating, "HUD should also reconsider whether such a rule would have a disruptive effect on the availability of homeowners insurance and whether the rule is reconcilable with actuarially sound principles."[17] Business of insurance providers rely on the ability to meet the claims of policyholders. Application of a disparate impact standard would disrupt insurance providers' ability to carry out actuarially sound underwriting and may adversely affect their ability to fill claims by policyholders. Disparate impact may occur if less-risky policyholders grant a subsidy to other policyholders that have higher risks, but identical costs. This unintended subsidy is prohibited by state law.

We urge HUD to consider whether application of a disparate impact standard would curtail the availability of homeowners' insurance in certain markets. Policyholders representing a protected class may require policies that reflect a higher risk simply because of the location of their home in an area that is at higher risk of damage from weather or other natural disasters. In the risk-based insurance market, such a disparate impact standard may impede insurers' ability to provide coverage.

IV. Conclusion

The Chamber opposes discrimination in any form and supports strong anti-discrimination laws. This ANPR serves to clear up confusion regarding application of the disparate impact standard, especially in light of the *Inclusive Communities* decision. We ask HUD to resolve this uncertainty, and create a robust causation standard that follows the standard the U.S. Supreme Court articulated.

[17] A Financial System That Creates Economic Opportunities: Asset Management and Insurance. Executive Order 13772 on Core Principles for Regulation the United States Financial System. October 2017.

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We appreciate the opportunity to comment and look forward to working together on this important issue.

Sincerely,

Tom Quaadman