August 20, 2018

VIA ELECTRONIC SUBMISSION

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

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

Dear Sir or Madame,

The undersigned civil rights, faith-based, consumer advocacy, housing, and community development organizations, fair housing practitioners, and local governments/agencies write to offer comments in response to the above-docketed notice ("Notice") concerning the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development ("HUD"). The Disparate Impact Rule functions to eliminate policies that wrongly keep people from obtaining safe housing and accessing opportunities they need to be successful in life. Each year, there are over 4 million instances of discrimination impeding people's ability to secure affordable insurance products, access quality credit, rent affordable and safe housing, and obtain accessible housing units. Discriminatory policies and practices make it more difficult for survivors of domestic violence, families with children, and returning veterans to obtain or keep housing. HUD must vigorously enforce, rather than reconsider, the strong laws that level the playing field and give everyone a fair shot. In these following comments, we share our strong support for the robust implementation of the current Disparate Impact Rule, and urge HUD not to amend the Rule.

Our nation has a shared interest in ensuring that housing opportunities are available to every individual, regardless of their personal characteristics. This shared interest is also embedded in HUD's mission and the Fair Housing Act itself which established "the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States."[1] Passed in 1968, exactly seven days after the assassination of Dr. Martin Luther King, Jr., the federal Fair Housing Act prohibits discrimination in housing and housing-related services on the basis of race, color, national origin, religion, sex, familial status, and disability. The Fair Housing Act makes it the policy of the United States to support the development and maintenance of diverse, inclusive, neighborhoods where every person has access to the community assets necessary to flourish. Fulfilling the promises of the Fair Housing Act for every person in the United States is a central component of HUD's mission and national policy.

[1] 42 U.S. Code § 3601.

The fair housing movement and the undersigned organizations support this central mission and we urge you to ensure that any reconsideration of HUD's implementation of the Fair Housing Act's disparate impact standard not put at risk the department's critical obligation to achieve the goals of the Fair Housing Act. Achieving truly fair and equitable housing in all neighborhoods is one of the greatest challenges our nation faces. Ratifying disparate impact liability, Justice Anthony Kennedy wrote, "Much progress remains to be made in our Nation's continuing struggle against racial isolation. ... The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[2] HUD's current Disparate Impact Rule serves as a valuable tool for victims of housing discrimination, communities, fair housing practitioners, and the housing industry in the ongoing struggle to achieve open housing markets, free from discrimination.

Many of the undersigned civil rights, housing, and community development offices have a long history of engagement in federal litigation, administrative enforcement, or rulemaking involving disparate impact liability under the Fair Housing Act. Some of the undersigned offices have been active in using disparate impact to stop discriminatory behavior including insurance and lending redlining. Several undersigned organizations filed amicus briefs in the Supreme Court supporting the lower courts' view that the Act encompasses a disparate impact claim in *Magner v. Gallagher*, No. 10-1032,[3] *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507,[4] and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, No. 13-1371,[5] as well as briefs supporting the standing of cities to bring fair housing claims in *Bank of America Corp. v. City of Miami*, No. 15-1111.[6] Many of the undersigned offices have also filed *amici curiae* briefs in both currently-pending insurance industry challenges to the Disparate Impact Rule.[7] Others have also pursued litigation of disparate impact claims in federal court under *Inclusive Communities* and the current Rule.[8]

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[2] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2525–26 (2015) (majority opinion).

[3] *See e.g.,* Brief amici curiae National Fair Housing Alliance, et al. filed, available at: http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032bsac.pdf.

[4] *See e.g.,* Brief amici curiae National Fair Housing Alliance, et al. filed, available at: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-1507_resp_amcu_nfha-etal.authcheckdam.pdf.

[5] *See e.g.,* Brief amici curiae National Fair Housing Alliance, et al. filed, available at: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_resp_NFHA.authcheckdam.pdf.

[6] https://www.aclu.org/legal-document/bank-america-v-city-miami-amicus-brief (2014 brief in *AIA v. Dep't of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.)); https://www.aclu.org/legal-document/aia-v-hud-amicus-brief (2016 brief in *AIA v. Dep't of Hous. & Urb. Dev.*, *supra*); https://lawyerscommittee.org/wp-content/uploads/2015/06/0219.pdf (2015 brief in *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.)).

[7] *See e.g.,* Unopposed Motion for Leave to File a Brief Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., et al. filed, available at: https://www.aclu.org/legal-document/american-insurance-association-v-hud-amicus-brief.

[8] *See e.g., National Fair Housing Alliance v. Federal National Mortgage* Ass'n, 294 F. Supp. 3d 940 (N.D. Cal. 2018); *National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F. Supp.3d 20 (D.D.C. 2017).

Additionally, many of the undersigned offices submitted comments on the proposed Disparate Impact Rule in 2012[9] and on the HUD Reducing Regulatory Burden notice in 2017.[10]

On the basis of this extensive experience and our shared interest in ridding housing markets of discrimination, we strongly assert that HUD should not amend the current Disparate Impact Rule. HUD should instead focus on vigorous enforcement of the current Disparate Impact Rule to remove unnecessary barriers to housing choice and give everyone a fair shot throughout our housing markets.

The Disparate Impact Rule Was Validated in the *Inclusive Communities* Decision, which Adopted Its Reasoning.

The U.S. Supreme Court implicitly adopted the current Disparate Impact Rule in the *Inclusive Communities* decision. The decision—holding that disparate impact is cognizable under the federal Fair Housing Act—adopts the construction of the Fair Housing Act that underlies the Disparate Impact Rule, including statutory interpretation and four decades of jurisprudence in the lower federal courts. Nothing in the *Inclusive Communities* decision—in its holding or dicta—necessitates any reconsideration of the current Disparate Impact Rule.

Since *Inclusive Communities*, courts have found that the Rule is consistent with the Supreme Court's decision. The Second Circuit held in *MHANY Mgmt., Inc. v. Cty. of Nassau* that in *Inclusive Communities* "[t]he Supreme Court] implicitly adopted HUD's approach."[11] The Northern District of Illinois issued a decision analyzing the relationship between the Rule and the Supreme Court decision and concluded that, "[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that requires correction."[12] The Massachusetts Supreme Judicial Court also found that *Inclusive Communities* adopted the Rule's burden-shifting framework.[13] Further, on remand from the Supreme Court and the Fifth Circuit, the district court noted that the Supreme Court had affirmed "the Fifth Circuit's decision adopting the HUD regulations."[14] In short, as federal courts have recognized, nothing in the *Inclusive Communities* decision—in its holding or dicta—necessitates any reconsideration of the current Disparate Impact Rule.

When defending the Disparate Impact Rule in a challenge by an insurance trade group subsequent to *Inclusive Communities* in August 2016, HUD itself argued that the Supreme Court's decision is "fully consistent with the standard that HUD promulgated" relying on

[9] *See e.g.,* National Fair Housing Alliance comment, Implementation of the Fair Housing Act's Discriminatory Effect Standard (2012), Docket No. FR-5508-P-01.
[10] *See e.g.,* National Fair Housing Alliance comment, Reducing Regulatory Burden; Enforcing the Regulatory Reform Act (2017), Docket No. HUD-2017-0029.
[11] *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).
[12] *Prop. Cas. Insurers Ass'n of Am. v. Carson,* 2017 WL 2653069 at *8 (N.D. Ill. June 20, 2017).
[13] *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 126–27 (D. Mass. 2016).
[14] *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 2015 WL 5916220 at *3 (N.D. Tex. October 8, 2015).

existing jurisprudence.[15] Again in March 2017, in response to the insurance trade group's motion to file an amended complaint against the Rule, HUD stated that the Rule is wholly in line with the *Inclusive Communities* decision:

> "[T]he Supreme Court's holding in *Inclusive Communities* is entirely consistent with the Rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims. 135 S. Ct. at 2516-22. And the portions of the Court's opinion cited by [PCIA]—which discuss limitations on the application of disparate impact liability that have long been part of the standard—do not give rise to new causes of action, nor do they conflict with the Rule. *See id.* at 2522-25 ("[D]isparate-impact liability has always been properly limited in key respects . . . ."). Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice in support of its analysis. *See* 135 S. Ct. at 2522-23."[16]

Leading fair housing scholars echo the consensus that *Inclusive Communities* is consistent with the current Disparate Impact Rule. Tulane University Law School Professor Stacy Seicshnaydre, whose scholarship on the subject was cited by Judge Kennedy in the *Inclusive Communities* decision,[17] looking to both the language of the opinion and its overarching message about the integration imperative of the Fair Housing Act, writes that the decision is in concert with the HUD rule.[18] Additionally, University of Kentucky School of Law Professor Robert Schwemm summarized, "the fact that HUD described [the Disparate Impact Rule] as analogous to the Title VII-*Griggs* standard suggests that it is consistent with the Court's views in *Inclusive Communities*."[19]

The proposition raised by lending and insurance industry representatives that *Inclusive Communities* requires HUD to reconsider the Disparate Impact Rule is simply erroneous. Relying on inaccurate representations of landmark Supreme Court rulings would directly contradict HUD's mission to fully and effectively enforce the Fair Housing Act and compromise the uniformity of a long-accepted legal standard.

There Must Be No "Safe Harbor" For the Insurance Industry.

The Disparate Impact Rule and supplemental response to insurance industry comments appropriately applies a case-by-case analysis under *Inclusive Communities* to all housing-related industries – including the insurance industry. The courts are in broad agreement that the Fair

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[15] Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 65, at 33, *AIA v. Dep't of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C.).
[16] Defendants' Opposition to Plaintiff's Motion for Leave to Amend Complaint, ECF. No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.).
[17] Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 Geo. Mason L. Rev. 663 (2017).
[18] Robert Schwemm, *Fair Housing Litigation After* Inclusive Communities: *What's New and What's Not*, 115 Colum. L. Rev. Sidebar 106 [now: CLR Online] (2015).
[19] *Id.*

Housing Act can be applied to discriminatory practices of homeowners insurers. In the more than twenty years since the Fair Housing Act was amended and HUD issued interpretive regulations, courts that have considered the issue have consistently held that the Fair Housing Act prohibits acts of discrimination by homeowners' insurers.[20]

In the past few decades, the insurance industry has modified its practices on account of Fair Housing Act disparate impact liability to be more inclusive, removing the barriers that restrict homeowners' insurers from writing policies in communities of color and creating industry opportunities to expand their market penetration. In response to disparate-impact challenges, insurers have refined their underwriting and pricing systems to eliminate unnecessary, arbitrary barriers to the availability of adequate homeowners' coverage.[21] For decades, insurance companies who have amended their policies to remove disparate impacts and discriminatory effects have seen their businesses grow. Consumers have benefited greatly from having access to quality insurance products and services. Much work remains to be done to open insurance markets, but progress has been made in challenging policies that have an unjustified negative effect on neighborhoods of color. Fair housing experts have used the Fair Housing Act and the disparate impact doctrine to significantly reduce discrimination in the insurance sector. HUD must not limit or remove this important tool in the effort to eliminate discrimination in housing and insurance markets.

The Disparate Impact Rule's application to insurance markets, as it is carefully outlined in HUD's supplemental response to insurance industry comments, is consistent with sound actuarial practices. The Rule's burden-shifting approach accommodates underwriting decisions that are based on any legitimate business purposes. As such, the Rule is consistent with actuarially sound principles and only establishes liability for insurance policies and practices that are artificial, arbitrary, and unnecessary, i.e., that have the effect of discriminating on a protected basis without a business need to do so. Such practices are, by definition, not actuarially sound.[22]

The Disparate Impact Rule is Critical to Ensuring Fair Housing Act Compliance and Recourse for Victims of Systemic Discrimination.

The disparate impact standard, as detailed in the Rule and affirmed by the Supreme Court, is critical to ensuring optimum compliance with the federal Fair Housing Act and providing victims of wide-spread discrimination with appropriate recourse. The disparate impact doctrine helps us

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[20] *See, e.g., Ojo v. Farmers Group Inc.*, 600 F3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110. 1117-1122 (W.D. Wash. 2004); *National Fair Hous. Alliance v. Prudential Ins. Co. of America,* 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.,* 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994).

[21] Joseph B. Treaster, "Protest and Possible Profit Bring Back the Insurers," New York Times, October 30, 1996, available at: http://www.nytimes.com/1996/10/30/business/protest-and-possible-profit-bring-back-the-insurers.html?pagewanted=all.

[22] *Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay*, Banking & Financial Services Policy Report, Vol. 33, No. 6 (June 2014), at pp. 1-12.

maintain open markets free from discrimination – a critical component to America's future prosperity. Discrimination disrupts our economy, causing inefficiency and instability by constraining the full economic participation of all Americans.

The disparate impact doctrine strengthens our communities and our nation by allowing victims of all types of systemic discrimination to seek recourse and change policies and practices that limit their housing opportunities or worse, put them in danger. For example, a landlord or municipality that adopts a policy that penalizes people who call emergency services for assistance more than once can cause eviction for victims of domestic violence. A lender's policy to not originate loans under $100,000 restricts housing opportunities for thousands of hard-working families and disproportionately impacts people with disabilities, female-headed households, and communities of color. An insurer's policy to not allow coverage on well-maintained houses with a market value under $100,000 can have disastrous effects on communities of color. Additionally, an apartment complex that only allows people with full-time jobs, despite how much income they have, may bar veterans or elders with disabilities who cannot work, even if they can afford the apartment. These practices can be easily tailored to promote best practices in industry policy, and the burden-shifting framework involving assessment of less discriminatory alternative policies encourages housing providers to adopt less restrictive practices.[23]

Recent cases brought by HUD and the Department of Justice ("DOJ") show how fundamental disparate impact claims are to maintaining an open housing market.[24]

HUD has employed disparate impact liability to expand housing opportunities for families with children. For example, in the case of *Mountain Side Mobile Estates P'ship v. HUD*,[25] the HUD Secretary, upon review of a decision by a HUD Administrative Law Judge, applied a disparate impact analysis to a complaint alleging familial status discrimination. The Secretary determined that a three-person-per-dwelling maximum occupancy policy in a mobile home community had a discriminatory effect on families with children. When the final agency decision was appealed to the Tenth Circuit, the HUD Secretary, as the respondent, submitted a brief in support of this position and cited statistics that the policy would exclude families with children at more than four times the rate of households without minor children.

In *United States of America v. Countrywide Financial Corporation*[26] and *United States of America v. Wells Fargo*,[27] DOJ pursued disparate impact claims on behalf of African-American and Hispanic borrowers who were targeted with toxic, sub-prime loans and steered to pay more than similarly-situated White borrowers for the same products. DOJ alleged that, from 2004 to

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[23] *The Potential Impact of Texas Department of Housing and of Community Affairs v. Inclusive Communities Project on Future Civil Rights Enforcement and Compliance*, The Federal Lawyer, Vol. 63, No. 5 (July 2016).
[24] *See e.g.,* Brief amici curiae Henry G. Cisneros, et al. filed, available at: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_resp_cisneros.authcheckdam.pdf.
[25] *HUD v. Mountain Side Mobile Estates Partnership*, No. 08-92-0010, 1993 WL 307069, at *3-7 (HUD Sec'y July 19, 1993), *aff'd in relevant part*, 56 F.3d 1243 (10th Cir. 1995).
[26] *United States of America v. Countrywide Financial Corporation*, No. 2: 11-CV-10540-PSG-AJW (C.D. Cal. 2011).
[27] *United States of America v. Wells Fargo*, No. 1:12-cv-01150-JDB (D.D.C. 2012).

2008, Countrywide allowed its brokers to vary rate and fees, resulting in more than 200,000 African-American and Hispanic borrowers paying more than similarly-situated White borrowers. Borrowers of color who were qualified for prime loans were also wrongly steered to higher-cost subprime loans, while White borrowers got prime loans. In *Wells Fargo*, DOJ alleged the bank allowed similar practices, resulting in 300,000 African-American and Hispanic borrowers paying more than similarly-situated White borrowers. In December 2011, DOJ reached a $335 million settlement with Countrywide, followed by a $175 million settlement with Wells Fargo in July 2012. Both settlements required the lenders to revise their policies to eliminate these discriminatory effects.

These cases demonstrate the importance of disparate impact liability under the Fair Housing Act, which has been utilized in over four decades of federal jurisprudence, codified in the Rule, and ratified in *Inclusive Communities*.

Unfair policies that harm people threaten basic American values and hold people back from fulfilling their potential. HUD has a direct responsibility to ensure equal opportunity and freedom from discrimination, even if that discrimination is subtle. That means HUD must pay attention to how policies and rules impact people. It must be aware of negative consequences, whether they are intended or not. We have strong laws intended to knock down arbitrary and subtle barriers to equal access to the opportunities we all need to thrive and those laws must be enforced vigorously, both to uphold the value that we place on fairness and to ensure stability and prosperity. Disparate impact liability under the Fair Housing Act is critical for this end, and the Rule provides clear standards for assessing this responsibility in the market.

Responses to HUD Disparate Impact Rule Notice Questions.

The Notice seeks public comment on six specific question, addressed in turn below.

First: the Notice asks whether the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assigns burdens of production and burdens of persuasion, and whether such burdens are appropriately assigned.

Answer: The Rule's burdens of production and persuasion are clearly and appropriately defined.

In particular, defendants rightly bear the burden of persuasion under the second step in the standard, contrary to industry representatives' assertions otherwise. Assigning defendants a burden of production at the second step of the standard would eliminate the efficacy of the Rule. Operationally, this would make bringing a claim under the Rule meaningless since any defendant can conceive of a purported purpose for a policy, whether or not such a purpose is actually legitimate. *Wards Cove* does not constitute an appropriate framework to assess who bears which standard at the second step because the courts have found that the "business necessity" standard in employment discrimination cases does not translate well in the housing context.[28]

[28] *See e.g., Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977).

Second: The Notice asks whether the second and third steps of the Disparate Impact Rule's burden-shifting framework are sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability.

Answer: The Rule's burden-shifting framework sufficiently operates to ensure that policies subject to disparate impact liability are artificial, arbitrary, and present unnecessary barriers.

Inclusive Communities' phrase "artificial, arbitrary, and unnecessary barriers" derives from *Griggs*, in reference to the operational capabilities of the burden-shifting framework.[29] The Disparate Impact Rule was developed under *Griggs* and subsequent jurisprudence to detail an efficient standard for challenging policies deemed to be without justification. *Inclusive Communities* ratifies this approach when it cites to the Rule when analogizing the Title VII framework. The Rule, like *Inclusive Communities*, does not provide for the finding of disparate impact liability based solely on statistical evidence, as under the burden-shifting scheme defendants must have an opportunity to explain the valid interest served by their policies.

Third: The Notice asks whether the Disparate Impact Rule's definition of "discriminatory effect" in 24 CFR 100.500(a) in conjunction with the burden of proof for stating a prima facie case in 24 CFR 100.500(c) strikes the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims.

Answer: The Rule's definition of "discriminatory effect" and the burden of proof for stating a prima facie case strike a proper balance in encouraging legitimate action.

The definition of discriminatory effects is appropriately case-specific. Due to the wide variety of possible practices that may be subject to challenge, federal jurisprudence and the Rule appropriately reject any single test for evaluating statistical evidence in housing cases.[30]

Fourth: The Notice asks whether the Disparate Impact Rule should be amended to clarify the causality standard for stating a prima facie case under *Inclusive Communities* and other Supreme Court rulings.

Answer: The Rule does not need to be amended to clarify the causality standard.

Disparate impact cases may be defended using safeguards in the burden shifting framework and evidentiary requirements such as the needed causal connection between a policy and the showing of disparate impact. Though the "robust causality" requirement was referenced in *Inclusive Communities*, it is nothing new. In her article cited in *Inclusive Communities*, Professor Seicshnaydre assessed the rigorous lens applied to disparate impact claims under the Act, finding

[29] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971).
[30] *See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011); *Bonasera v. City of Norcross*, 342 F. App'x. 581, 585 (11th Cir. 2009); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000).

they obtained positive outcomes on appeal only 20% of the time.[31] Disparate impact causation issues have always been examined closely and the Rule appropriately clarifies this scrutiny.

The recent *City of Miami v. Bank of America, et al.* decision dealt with the very different questions of standing and proximate cause under the Fair Housing Act. The proximate cause doctrine is a distinct legal standard from that outlined in the Disparate Impact Rule. While both touch on the question of cause and effect, the causation issues they address are different: the Rule requires a showing that a policy was the cause of an identified disparity, while *Bank of America* finds that a private plaintiff suing under the Fair Housing Act must show the challenged action proximately caused the alleged harm.

Fifth: The Notice asks whether the Disparate Impact Rule should provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant's discretion or another federal statute requires adherence to state statutes).

Answer: The Rule should not provide for blanket safe harbors because the burden-shifting framework appropriately accommodates legitimate justification defenses.

Actors have discretion under federal and state laws in certain areas, such as participation in the Housing Choice Voucher program (Section 8), however this does not mean that there cannot be disparate impact liability in association with program participation under these statutes in any circumstances. The appropriate analysis is to go through the three-step framework on a case-by-case basis, and if there is a legitimate, nondiscriminatory, justification for choosing not to participate in Section 8, for example, the analysis will bear this out and the court would then assess any showing of a less discriminatory alternative. Similarly, state housing finance agencies and other actors retain significant discretion in their policies around siting criteria and incentives under the Low Income Housing Tax Credit program, and the Rule outlines an appropriate framework for identifying policies that are discriminatory in outcome and are not otherwise tailored to a strategic redevelopment strategy.

The Disparate Impact Rule's application to insurance markets, in particular, is consistent with federal and state law. There is broad agreement in the courts that the Fair Housing Act can be applied to discriminatory practices of homeowners insurers without running afoul of the McCarran-Ferguson Act, including in every such case dealing with disparate impact liability since the 1988 amendments.[32] The Rule takes an appropriately nuanced position on this that is consistent with the McCarran-Ferguson Act and federal jurisprudence; the Rule's "case-by-case

[31] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev 2 (2013).
[32] *See, e.g., Ojo v. Farmers Group Inc.*, 600 F3d 1205, 1208 (9th Cir. 2010); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992); *Nevels v. Western World Ins. Co., Inc.*, 359 F. Supp. 2d 1110. 1117-1122 (W.D. Wash. 2004); *National Fair Hous. Alliance v. Prudential Ins. Co. of America,* 208 F. Supp. 2d 46, 55-9 (D.D.C. 2002); *Lindsey v. Allstate Ins. Co.,* 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994).

approach" accounts for varied discriminatory effects claims, insurer business practices, and differing insurance laws of the states, currently and in the future.[33]

Furthermore, nothing in the Ability to Repay, Qualified Mortgage, or Qualified Residential Mortgage Rules promulgated by the financial regulators present a conflict with the Disparate Impact Rule. These Rules were put in place to help ensure safety in the mortgage market and restrict the origination of toxic and harmful loan products – the type which significantly contributed to the collapse of the U.S. financial markets – and they simply require lenders to apply prudent qualifying criteria to ensure borrowers have the actual ability to pay their mortgages and that the originated loan is safe and does not contain risky features.

The Disparate Impact Rule and longstanding jurisprudence state clearly: creating exemptions beyond those found in the Fair Housing Act would run contrary to congressional intent.[34]

Sixth: the Notice asks whether there are revisions to the Disparate Impact Rule that could add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities and other members of the public in determining what is lawful.

Answer: The Rule provides clarity and consistency under a single standard of liability for housing consumers and industry professionals.

The Rule promotes significant administrative efficiency by creating national uniformity and regulatory certainty for the rental, real estate, lending, and insurance industries. The Rule provided clarity and reduced uncertainty by resolving which parties would be responsible for each prong of the burden-shifting regime. Prior to the promulgation of the Rule, there was some uncertainty about whether the onus was on the defendant or plaintiff for determining whether or not there would be a less discriminatory alternative for a policy that presented a discriminatory effect. The Rule clarified that the responsibility for this proof rests with the plaintiff, a stricter standard than that set forth by several district and appellate courts.

Conclusion

The proposition that *Inclusive Communities* requires HUD to reconsider the Disparate Impact Rule is erroneous. To reconsider the Rule based on incorrect interpretations of the Supreme Court's decision would be to act in direct contradiction to HUD's mission and in violation its own enabling legislation, which requires it to affirmatively further fair housing.[35]

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[33] Implementation of the Fair Housing Act's Discriminatory Effects Standard, Final Rule (Feb. 8, 2013) [78 Fed. Reg. 11459, 11475 (Feb. 15, 2013)]. *See also, Ojo*, 600 F3d at 1208; *Nationwide,* 52 F.3d at 1360; *United Farm Bureau,* 24 F.3d at 1014 n.8; *American Family,* 978 F.2d at 297-98, 300; *Nevels,* 359 F. Supp. 2d at 1119-20; *Lindsey,* 34 F. Supp. 2d at 641-43; *United States v. Massachusetts Indus. Fin. Agency*, 910 F. Supp. at 21, 27 (D. Mass. 1996); *Strange*, 867 F. Supp. at 1214.

[34] *Id.* at 11475, citing *Graoch Associates v. Lousville/Jefferson County Metro Human Relations Commission*, 508 F.3d at 375 (6th Cir. 2007)(''we cannot create categorical exemptions from [the Act] without a statutory basis'' and ''[n]othing in the text of the FHA instructs us to create practice-specific exceptions'').

[35] 42 U.S.C. § 3608(d).

Prior to issuing the Disparate Impact Rule in 2013, HUD sought comments and considered concerns from stakeholders across the country, including from both housing industry and consumer interests. Additionally, HUD considered decades of federal court jurisprudence applying the Fair Housing Act in considering how to appropriately fashion a rule that provides a uniform standard. In 2016, HUD considered further federal court jurisprudence when it issued its well-reasoned supplement to insurance industry comments. To disregard the extensive record and the plain import of *Inclusive Communities* by retreating from the Rule now would be arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.[36] After the *Inclusive Communities* decision effectively adopted the HUD rule,[37] HUD would lack a reasoned basis for pulling back from a regulation.[38]

HUD therefore should proceed with vigorous enforcement of the current Disparate Impact Rule. The Rule provides clarity and consistency under a single standard of liability for housing industry professionals when faced with disparate impact claims and gives the public a greater understanding of their rights. With the Supreme Court reaffirmation of disparate impact and subsequent lower courts' application of the Rule, HUD has a strong legal foundation on which to pursue robust disparate impact enforcement.

Thank you for the opportunity to comment. Please contact Morgan Williams, General Counsel for the National Fair Housing Alliance, at MWilliams@nationalfairhousing.org, or at 202-898-1661 regarding these comments.

Sincerely,

National Organizations
Alliance for Housing Justice
America Walks
Americans for Financial Reform
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Responsible Lending
Civil Rights Clinic, Georgetown University Law Center
Consumer Action
Disability Rights Education & Defense Fund
Housing on Merit
Housing Partnership Network
Human Rights Campaign
Impact Fund
Klein Hornig LLP
Law Office of William Kennedy - Race Equity Project

[36] 5 U.S.C. § 706(2)(A).
[37] *See, e.g., Mhany Mgmt., Inc.*, 819 F.3d at 618.
[38] *See, e.g., Open Communities Alliance, et al. v. Carson, et al.*, No. 1:17-cv-02192 (D.D.C. 2018) (order granting preliminary injunction).

NAACP
NAACP Legal Defense and Educational Fund, Inc.
NABVETS HQs Opns
National Alliance of HUD Tenants
National Alliance of Community Economic Development Associations (NACEDA)
National Association of Hispanic Real Estate Professionals (NAHREP)
National Baptist Convention, USA, Inc.
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for the Homeless
National Consumer Law Center
National Disability Rights Network
National Fair Housing Alliance
National Housing Trust
National LGBTQ Task Force
National Low Income Housing Coalition
National Urban League
Opportunity Finance Network
Paralyzed Veterans of America
PFLAG National
PolicyLink
Prosperity Now
Public Citizen
The Arc of the United States
The Leadership Conference on Civil and Human Rights
UnidosUS
United Church of Christ

Local and State Organizations

State	City	Name of Organization
AL	Montgomery	Central Alabama Fair Housing Center
AZ	Tucson	Southwest Fair Housing Council
CA	Richmond	Bay Area Legal Aid
CA	Pescadero	Brancart & Brancart
CA	San Francisco	California Housing Partnership
CA	San Francisco	California Reinvestment Coalition
CA	Sacramento	Disability Rights California
CA	Riverside	Fair Housing Council of Riverside County, Inc.
CA	Panorama City	Fair Housing Council of the San Fernando Valley

CA	Napa	Fair Housing Napa Valley
CA	Napa	Greater Napa Valley Fair Housing Center
CA	So. San Francisco	Housing Equality Law Project (HELP)
CA	Los Angeles	Housing Rights Center (Southern California)
CA	Ontario	Inland Fair Housing and Mediation Board
CA	Santa Ana	Orange County Fair Housing Council, Inc.
CA	San Diego	The Fair Housing Council of San Diego
CO	Denver	Colorado Center on Law and Policy
CO	Denver	Colorado Coalition for the Homeless
CO	Denver	Colorado Cross-Disability Coalition
CO	Denver	Colorado Developmental Disabilities Council
CO	Denver	Del Norte Neighborhood Development Corp.
CO	Denver	Denver Metro Fair Housing Center
CO	Denver	Northeast Denver Housing Center Inc.
CO	Durango	Southwest Center for Independence
CO	Westminster	CRHDC
CT	Wethersfield	Connecticut Housing Coalition
CT	West Hartford	Fair Housing Association of CT, Inc.
CT	Norwalk	Norwalk (CT) Fair Housing Office
DC	Washington	Equal Rights Center
FL	Lantana	Fair Housing Center of the Greater Palm Beaches
FL	Rockledge	Fair Housing Continuum, Inc.
FL	West Palm Beach	Fair Housing Project of the Legal Aid Society of Palm Beach County, Inc.
FL	Orlando	Florida Legal Services, Inc.
FL	Miami	Housing Opportunities Project for Excellence (HOPE), Inc.
GA	Atlanta	Georgia Advancing Communities Together, Inc.
GA	Savannah	Savannah-Chatham County Fair Housing Council, Inc.
ID	Moscow	Disability Action Center - NW, Inc.
ID	Boise	DisAbility Rights Idaho
ID	Boise	Idaho Coalition Against Sexual & Domestic Violence
ID	Pocatello	Idaho Coalition for HIV Health and Safety, All Under One Roof LGBT Center
ID	Boise	Intermountain Fair Housing Council, Inc.
ID	Boise	Treasure Valley Branch NAACP
ID	Boise	United Vision for Idaho
IL	Chicago	Access Living of Metropolitan Chicago
IL	Chicago	Chicago Area Fair Housing Alliance
IL	Wheaton	HOPE Fair Housing Center
IL	Chicago	Housing Action Illinois
IL	Chicago	Housing Choice Partners
IL	Homewood	South Suburban Housing Center

IN	Indianapolis	Fair Housing Center of Central Indiana
KY	Frankfort	Homeless and Housing Coalition of Kentucky
LA	New Orleans	Greater New Orleans Fair Housing Action Center
LA	New Orleans	Ulrich Consulting
MA	Boston	Massachusetts Law Reform Institute
MD	Baltimore	Public Justice Center
ME	Augusta	Maine Equal Justice Partners
MI	Ypsilanti	Fair Housing Center of Southeast & Mid Michigan
MI	Kalamazoo	Fair Housing Center of Southwest Michigan
MI	Grand Rapids	Fair Housing Center of West Michigan
MI	Grand Rapids	Linc up Community Development
MI	Detroit	Michigan Department of Civil Rights
MI	Jackson	Mississippi Center for Justice
MN	Minneapolis	HOME Line
MN	St. Paul	Minnesota Housing Partnership
MO	Jefferson City	Empower Missouri
MO	St. Peters	Habitat for Humanity of St. Charles County
MO	St. Louis	Metropolitan St. Louis Equal Housing and Opportunity Council
NC	Kannapolis	City of Kannapolis
ND	Grand Forks	High Plains Fair Housing
NJ	Trenton	Housing Community Development Network of NJ
NJ	Highland Park	New Jersey Citizen Action
NM	Albuquerque	United South Broadway Corporation
NV	Reno/Las Vegas	Silver State Fair Housing Council
NY	Syracuse	CNY Fair Housing, Inc.
NY	Bohemia	Long Island Housing Services, Inc.
NY	New York	Mobilization for Justice
NY	New York	Tenants & Neighbors
NY	White Plains	Westchester Residential Opportunities, Inc.
OH	Columbus	Coalition on Homelessness and Housing in Ohio
OH	Cleveland	Fair Housing Center for Rights & Research
OH	Akron	Fair Housing Contact Service
OH	Painesville	Fair Housing Resource Center, Inc.
OH	Dayton	Miami Valley Fair Housing Center, Inc.
OH	Toledo	The Fair Housing Center
OH	Cleveland	The Legal Aid Society of Cleveland
OH	Cleveland Heights	Heights Community Congress
OK	Tulsa	Mental Health Association Oklahoma
OR	Portland	Fair Housing Council of Oregon
PA	Pittsburgh	Fair Housing Partnership of Greater Pittsburgh Inc.
PA	Philadelphia	Fair Housing Rights Center in Southeastern Pennsylvania

PA	Philadelphia	Homeless Advocacy Project
PA	Jenkintown	Housing Alliance of Pennsylvania
PA	Fort Washington	Housing Equality Center of Pennsylvania
RI	Providence	HousingWorks RI
RI	Pawtucket	Rhode Island Coalition for the Homeless
SC	Charleston	South Carolina Community Loan Fund
TN	Nashville	Tennessee Fair Housing Council
TX	San Antonio	Fair Housing Council of Greater San Antonio
TX	Houston	Greater Houston Fair Housing Center
TX	Dallas	North Texas Fair Housing Center
TX	Austin	Texas Low Income Housing Information Service
VA	Fairfax	FACETS
VA	Alexandria	Habitat for Humanity of Northern Virginia
VA	Richmond	Housing Opportunities Made Equal of Virginia
VA	Richmond	Virginia Housing Alliance
VT	Burlington	Champlain Valley Office of Economic Opportunity
WA	Tacoma	Fair Housing Center of Washington
WA	Spokane	Northwest Fair Housing Alliance
WA	Seattle	Washington Low Income Housing Alliance
WI	Madison	Wisconsin Partnership for Housing Development