



MORTGAGE BANKERS ASSOCIATION

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FR-6111-A-01 Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

The Mortgage Bankers Association¹ ("MBA") is writing in response to the U.S. Department of Housing and Urban Development's ("HUD") Advanced Notice of Proposed Rulemaking ("ANPR") requesting comments on possible amendments to HUD's 2013 final rule implementing the Fair Housing Act's disparate impact standard. We appreciate the opportunity to comment on this important topic for our members.

The Mortgage Bankers Association (MBA) opposes discrimination in home lending. Our members are committed to providing fair and equitable access to credit. In this vein, our members support efforts to combat illegal discrimination and actively develop new products and strategies to reach underserved markets or communities. They also work diligently to understand their regulatory obligations and conform their conduct to the current state of the law.

This ANPR is in response to a significant change in that legal framework. In 2015, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act ("FHA" or "the Act") in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*").² The Court did not explicitly address the Department of Housing and Urban Development's ("HUD") 2013 final rule, "Implementation of the Fair Housing Act's Discriminatory Effects Standards" ("Disparate Impact Rule" or "Rule"), and reached its decision through its own analysis of the Act. In light of that decision, MBA supports HUD's review of the

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² 135 S. Ct. 2507, 2525 (2015).

Disparate Rule and the need to conform the Rule's burden-shifting standard and definitions in light of the decision in *Inclusive Communities*. Indeed, the Court essentially commands such a review:

“Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely “remov[ing] ... artificial, arbitrary, and unnecessary barriers.” And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.”³

A review of the Disparate Impact Rule and *Inclusive Communities* reveals that the Court's outline of the appropriate application of disparate impact under the Fair Housing Act varies significantly from the one outlined in the HUD Rule. HUD must amend the Rule to ensure it aligns with the standards articulated by the Court in *Inclusive Communities*. Specifically, the Rule must require that disparate impact plaintiffs establish robust causality between an impermissible disparity and a specific policy that is artificial, arbitrary, and unnecessary.⁴ The Rule must focus on removing “artificial barriers to housing” and not be used to second guess valid business decisions.⁵ By failing to incorporate these standards, the HUD Rule ignores the fundamental principle underpinning *Inclusive Communities*: that “[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.”⁶ It is with that objective in mind that we urge HUD to consider the following comments in response to the ANPR.

I. The HUD Rule – 24 CFR § 100.500

In 2013, HUD promulgated the standard for disparate impact liability under the Fair Housing Act in its Disparate Impact Rule.⁷ While most federal courts of appeal recognized that the FHA encompassed disparate impact claims, the Supreme Court had not yet ruled on the matter. The Supreme Court had previously held that language prohibiting discrimination “because of” certain factors reflects a congressional intent to address intentional discrimination only.⁸ The use of such “effects” based language would indicate congressional intent to prohibit neutral practices that have disparate impact. Although the Act lacks the latter language, the 2015 Supreme Court decision in *Inclusive Communities* focused on the “results-oriented” language and recognized disparate impact claims as cognizable under the Act.⁹

³ *Id.* at 2524 (internal citation omitted).

⁴ *Id.* at 2521-22.

⁵ *Id.* at 2524 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

⁶ *Id.* at 2518 (internal quotations and alterations omitted).

⁷ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11459 (Feb. 15, 2013).

⁸ See generally *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005).

⁹ *Inclusive Communities*, 135 S. Ct. 2507, 2518-19.

HUD issued its rule without any Supreme Court or recent congressional guidance, against the backdrop of the Court considering this question in *Magner v. Gallagher*.¹⁰ The ruling in *Inclusive Communities* came two years later and established a much more reasonable approach, discussed in detail below, that is closer in line to congressional intent than the rule promulgated by HUD.

To review, the HUD's Disparate Impact Rule states that "liability may be established under the [Act] based on a practice's discriminatory effect . . . even if the practice is not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification."¹¹ A practice has a discriminatory effect where it "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."¹²

The burden-shifting standard under the HUD rule begins with the charging party, or plaintiff, who bears the burden of proving its *prima facie* case that a challenged practice caused or predictably will cause a discriminatory effect.¹³ Upon making a *prima facie* claim, and meeting the burden of proof, the burden shifts to the respondent entity.

The respondent entity, or defendant, must then provide a legally sufficient justification. A legally sufficient justification exists when the challenged practice is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."¹⁴ If the defendant satisfies their burden, the plaintiff may still prevail upon proving that the "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."¹⁵

II. The Inclusive Communities Decision

The Supreme Court's *Inclusive Communities* opinion held that disparate impact claims are actionable under the Fair Housing Act. The Court found that the phrase "otherwise make unavailable" from § 3604(a) of the FHA echoed the "otherwise adversely affect" language found in Title VII of the Civil Rights Act of 1964. According to the Court, both statutes support disparate impact claims because they refer "to the consequences of an action rather than the actor's intent."¹⁶

The Court proceeded to lay out its own interpretation of the application of disparate impact to the FHA, guided by the notion that disparate impact liability should be substantially limited and is not an occasion for judicial second-guessing of business decisions.¹⁷ The Court's analysis

¹⁰ Docket No. 10-1032, 567 US __ (2012). Prior to argument, both parties involved agreed to dismiss the case, leaving the question of disparate impact claim liability under the Fair Housing Act unanswered until *Inclusive Communities*.

¹¹ 24 CFR 100.500 – Discriminatory effect prohibited.

¹² 24 CFR 100.500(a).

¹³ 24 CFR 100.500(c)(1).

¹⁴ 24 CFR 100.500(c)(2).

¹⁵ 24 CFR 100.500(c)(3).

¹⁶ *Inclusive Communities*, 135 S. Ct. 2507, 2518.

¹⁷ *Id.* at 2518 (internal quotations and alterations omitted).

incorporates a three-part burden-shifting framework for disparate impact claims under the FHA. In its explanation of this framework, the Court ties the proper handling of FHA disparate impact claims to their equivalent claims under Title VII. Critically, although there were several dissents, the *Inclusive Communities* opinion commanded a five-justice majority of the court and there are no concurring opinions that should further complicate HUD's and the industry's understanding of the application of disparate impact to the Fair Housing Act.

Burden shifting framework

Under the first step, the plaintiff must establish a *prima facie* case of discrimination,¹⁸ i.e. that the challenged practice had a disparate impact on members of a protected class. There are four elements to the plaintiff's *prima facie* case. The plaintiff must allege: (1) a statistical disparity indicative of an adverse impact on a protected class; (2) a specific policy of the defendant that is the cause of the disparity; (3) that policy was "artificial, arbitrary, and unnecessary"; and (4) "robust causality" linking the policy to the disparate impact. As explained below, the Court purposely raised the *prima facie* pleading requirements for a disparate impact claim to "protect[] defendants from being held liable for racial disparities they did not create."¹⁹

If the plaintiff satisfies the first step, the burden shifts to the defendant to prove the challenged policy "is necessary to achieve a valid interest."²⁰ To explain this step, the Court turned to precedent from disparate impact cases in the employment context. In one such case, *Wards Cove Packing Co., Inc. v. Atonio*, the Court held "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the . . . business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet."²¹ According to the Court in *Inclusive Communities*, disparate impact liability cannot be used to "second-guess which of two reasonable approaches" a defendant can use.²² Disparate impact is aimed at eliminating "policies [that] are 'artificial, arbitrary, and unnecessary barriers[.]'"²³ This implies that disparate impact is intended to capture policies that act as proxies for intentional discrimination, effectively proscribing artificial or pre-textual barriers to housing, rather than targeting legitimate business practices. Therefore, to satisfy this second step the defendant must only show that the policy serves a "valid interest."

Where the defendant meets the burden of demonstrating a valid business justification, the burden shifts back to the plaintiff to prove "there is 'an available alternative . . . practice that has less disparate impact and serves the [defendant's] legitimate needs.'"²⁴ Importantly, the less discriminatory alternative must be "equally effective" as the challenged practice.²⁵

¹⁸ *Id.*

¹⁹ *Id.* at 2523.

²⁰ *Id.*

²¹ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989).

²² *Inclusive Communities*, 135 S. Ct. at 2522.

²³ *Inclusive Communities*, 135 S. Ct. at 2524 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

²⁴ *Id.* at 2518 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 557, 558 (2009)).

²⁵ *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989).

Inclusive Communities Safeguards

In its articulation of the legal framework for disparate impact claims under the FHA, the Court inserted several important safeguards that have the effect of limiting disparate impact liability. The Court explained that these safeguards were designed to “protect potential defendants against abusive disparate-impact claims.”²⁶ The Court recognized that without these safeguards, the threat of disparate impact litigation would have perverse consequences. For instance, “[i]f the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system.”²⁷ According to the Court, the possibility of litigation under an unbounded disparate impact framework may force businesses to “use ‘numerical quotas,’” a result that itself would bring about “serious constitutional questions.”²⁸

The safeguards laid out in *Inclusive Communities* are designed to prevent these consequences by ensuring that disparate impact liability does not penalize the pursuit of legitimate business objectives but rather serves to identify and remove “artificial, arbitrary, and unnecessary barriers.”²⁹ As currently constructed, the HUD Rule does not incorporate these crucial safeguards.³⁰ MBA’s principal aim in responding to the ANPR’s questions is to highlight this shortcoming.

III. ANPR Questions

1. Does the Disparate Impact Rule's burden of proof standard for each of the three steps of its burden-shifting framework clearly assign burdens of production and burdens of persuasion, and are such burdens appropriately assigned?

No. The current Disparate Impact rule does not appropriately assign the burdens of persuasion in light of the *Inclusive Communities* decision. While the Rule features shifting burdens of proof, the thresholds of persuasion expected of the parties in the Rule do not conform to the standards set forth in *Inclusive Communities*. To align with applicable law, HUD’s Rule must be clear: the burden of persuasion stays with the plaintiff at all times.³¹

²⁶ *Inclusive Communities*, 135 S. Ct. at 2521.

²⁷ *Id.* at 2521.

²⁸ *Id.* at 2523 (citing *Ward's Cove Packing Co. v. Atonio*, 490 U. S. 642, 653 (1989)).

²⁹ *Inclusive Communities*, 135 S. Ct. at 2522 (citing *Griggs v. Duke Power Co.*, 401 U. S. 424, 431).

³⁰ This is perhaps unsurprising given the HUD Disparate Impact Rule preceded the Court’s decision.

³¹ *Ward's Cove Packing Co. v. Atonio*, 490 U. S. 642, 659 (1989) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988)). While the *Ward's Cove* decision’s holding on burdens of persuasion for disparate impact claims under Title VII (employment discrimination) was superseded by the Civil Rights Act of 1991, the decision remains instructive for disparate impact claims under the FHA and was cited for such by the Court in *Inclusive Communities*.

Under the Disparate Impact Rule, a plaintiff's initial pleading must only make a *prima facie* case that a challenged practice will cause or predictably result in a discriminatory effect. This is in contrast to the Court's ruling, which premises disparate impact liability under the FHA on a showing of robust causality that a specific policy (or policies) is causing a discriminatory effect. Failure to adopt such a standard is inconsistent with *Inclusive Communities*.³²

The Court is clear that "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."³³ The Court then stated that a failure to produce facts or statistical evidence "demonstrating a causal connection cannot make out a *prima facie* case of disparate impact."³⁴ While HUD declined in 2013 to "describe how data and statistics may be used in the application of the standard,"³⁵ any new rule purporting to govern the burden shift required by the Act should include the robust causality requirement from *Inclusive Communities* in the description of the initial threshold for bringing a claim.

The second prong of the current Rule then raises the threshold for the defendant business, requiring them to persuade the Court that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. This is contrary to the Court's instruction in *Inclusive Communities* outlining a standard for business justification to ensure that the justification is not pretext as "...private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers."³⁶ This standard articulated by the Court plainly is not intended to penalize any legitimate business objective, let alone require that such an objective also be "substantial." According to the Court, a showing of any legitimate business justification—as opposed to the defendant having to prove the practice is "necessary"—should be sufficient to meet that standard and end the judicial inquiry in favor of the defendant.

Moreover, the Rule does not clearly assign burdens of production and burdens of proof at this stage. Both disparate impact case law and the Federal Rules of Evidence establish that while the defendant carries the burden of producing evidence of a business justification, the burden of persuasion "remains with the disparate impact plaintiff."³⁷ Specifically, the plaintiff has the burden of disproving the defendant's assertion of a legitimate business justification.³⁸

The third prong of the current Disparate Impact Rule establishes the threshold a plaintiff is required to meet, requiring that a plaintiff merely demonstrate that an alternative practice with less discriminatory effect is available. This is inconsistent with the appropriate burden of persuasion, articulated in *Wards Cove*, that the plaintiff must prove the alternative practice is *equally effective*

³² "But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity." *Inclusive Communities*, 135 S. Ct. at 2522. This reference to proper limitations presumably does not include the HUD rule.

³³ *Inclusive Communities*, 135 S. Ct. at 2523.

³⁴ *Id.*

³⁵ 78 Fed. Reg. 11,468.

³⁶ *Inclusive Communities*, 135 S.Ct. at 2524 quoting *Griggs v. Duke Power Company*, 401 U.S. 424, 431. (1971).

³⁷ *Ward's Cove Packing Co.*, 490 U. S. at 659.

³⁸ *Id.* at 660.

as the challenged practice in achieving the defendant's business objective.³⁹ The determination of whether an alternative is equally effective requires consideration of "the cost or other burdens" of the proposed alternative practice.⁴⁰ In addition to "equally effective," the alternative must be "available," meaning the alternative cannot be hypothetical.⁴¹ The alternative practice must have been a realistic possibility for the defendant, which would have been equally effective in meeting their legitimate business need.

2. Are the second and third steps of the Disparate Impact Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability?

No. As discussed above, the current Rule sets forth a more difficult and potentially punitive standard for defendants than the Fair Housing Act requires. Under the Rule, defendants are expected to prove the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.

In contrast, the Supreme Court stated defendants must not be prevented from achieving legitimate objectives through possible liability.⁴² Under the current Disparate Impact Rule, businesses will be required to ensure that their practices are *necessary* to achieve a *substantial* interest, possibly forcing businesses to make racial considerations to avoid potential liability under such a broad standard. Alternative practices may then be considered solely in the anticipation of liability and whether those alternatives are less discriminatory, regardless of the alternative practice's viability in satisfying the legitimate business need. This is far beyond what is required and would lead to the result the Court cautions against – i.e., the "[injection of] racial considerations into every housing decision."⁴³

Additionally, the threshold a plaintiff is required to meet in order to prevail beyond a defendant's showing in the second prong fails to give any consideration to a business's legitimate needs. The current Rule requires only that a plaintiff make a showing of an alternative that has a less discriminatory effect. The Supreme Court gave substantial deference to a valid "business justification" by requiring courts to consider whether the plaintiff's purported alternative is equally effective in meeting the defendant-business needs.⁴⁴ A less discriminatory practice may not necessarily be as effective as a challenged practice.

³⁹ *Id.* at 661.

⁴⁰ *Ward's Cove Packing Co.*, 490 U. S. at 661 quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 996 (1988).

⁴¹ *Inclusive Communities*, 135 S.Ct. at 2517.

⁴² *Id.* at 2524 quoting *Griggs v. Duke Power Company*, 401 U.S. 424, 431. (1971) (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.* at 2518 (internal quotations and alterations omitted).

3. Does 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) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

No. The Court in *Inclusive Communities* established a heightened standard for the plaintiff's *prima facie* case that is not reflected in the Disparate Impact Rule. This heightened standard represents a crucial safeguard against abusive disparate impact claims and so must be incorporated into HUD's rules.

Under *Inclusive Communities*, there are four elements to a *prima facie* case of disparate impact: (1) the plaintiff must show a sufficiently large statistical disparity that adversely and disproportionately affects a protected class; (2) the plaintiff must identify a specific policy [or policies] used by the defendant; (3) the plaintiff must show that such policy was "artificial, arbitrary, and unnecessary;" and (4) the plaintiff must provide factual allegations linking the defendant's policy [or policies] to the adverse disparity.

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The first element—showing a disparity in how the defendant's policy affects a protected class—requires guidance. Clearly, there must be a disparity i.e. there must be a measureable difference between how the policy affects a protected class and how it affects others.^{46, 47} The Court requires disparities be "sufficiently substantial" so as to "raise such an inference of causation[.]" but has not outlined what constitutes a "sufficiently substantial" disparity.⁴⁸ HUD guidance in a forthcoming proposed rule on this matter would be valuable.⁴⁹ It would allow businesses to identify and address potentially problematic instances of disparate impact through its compliance management systems and harmonize the understanding of legal requirements among prudential regulators. Guidance would also reduce the likelihood of spurious litigation.⁵⁰

⁴⁵ See, e.g., *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017); *Cobb County v. Bank of America Corp.*, 183 F.Supp.3d 1332 (N.D. Ga. 2016); *City of Miami v. Bank of America Corp., et al.*, 13-224506, 2016 WL 1072488 (S.D. Fla. Mar. 17, 2016).

⁴⁶ See cases cited in Schwemm, Robert G. and Bradford, Calvin, "Proving Disparate Impact in Fair Housing Cases After *Inclusive Communities*" (2016). Law Faculty Scholarly Articles. 594, n. 66, 67.

⁴⁷ "[N]umerous FHA decisions have held that the evidence did not show a large enough disparity to satisfy the plaintiff's burden of proof." See Schwemm and Bradford, at p. 699-700.

⁴⁸ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 (1988).

⁴⁹ For example, a list of factors relevant to the determination of whether a disparity is "sufficiently substantial" or a *de minimis* safe harbor could provide important clarity on this matter.

⁵⁰ See *City of Los Angeles v. Wells Fargo & Co.*, No. 213CV09007ODWRZX, 2015 WL 4398858, at *7 (C.D. Cal. July 17, 2015), *aff'd*, 691 F. App'x 453 (9th Cir. 2017) ("The City argues that 12 of the 4,260 loans to minority borrowers—or 0.28 percent of all loans issued to minorities—demonstrate a disparate impact claim under the Act. The Court, and apparently the City's own expert, is not convinced. The City is required to prove a "significantly adverse" effect on minorities. The City's only evidence to prove a significant adverse effect is the blistering statistical comparison of "0.0033% likelihood" to "0.0008% likelihood.") (internal citations omitted).

The second element, which requires the plaintiff to identify “a defendant’s policy or policies causing that disparity,” is not accurately represented in the Rule.⁵¹ *Inclusive Communities* requires the plaintiff point to the specific cause of the disparity. According to the Court, 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.”⁵² Along with specificity, the decision stresses the need to identify a “policy or policies” rather than a one-off decision because, as Justice Kennedy states, “a one-time decision may not be a policy at all.”⁵³ Decisions that do not rise to the level of a “policy or policies” cannot support a *prima facie* case. These distinctions are crucial and are not reflected in the current HUD rule.

HUD’s Disparate Impact Rule also fails to appropriately represent the third element of the plaintiff’s *prima facie* case, namely, that the plaintiff sufficiently plead that the policy at issue is “artificial, arbitrary, and unnecessary.”⁵⁴ The requirement that the plaintiff allege, and ultimately prove, that the defendant’s policy is “artificial, arbitrary, and unnecessary” helps ensure disparate impact liability is limited to policies that “are otherwise unjustified by a legitimate rationale.”⁵⁵ To conform to applicable law, this omission must be addressed in the HUD rules.

Finally, the HUD Rule does not include the “robust causality requirement” established by the Court in *Inclusive Communities*.⁵⁶ The causality component of the *prima facie* case is crucial. It limits disparate impact liability to instances where the defendant’s policy or policies directly and proximately *caused* the disparate impact. “If a statistical discrepancy is caused by factors other than the defendant’s policy, a plaintiff cannot establish a *prima facie* case, and there is no liability.”⁵⁷ This has the effect of protecting “defendants from being held liable for racial disparities they did not create[.]”⁵⁸

In adopting this limit, the Court also explicitly rejects the definition of “discriminatory effect” found in the current HUD Disparate Impact Rule. Under the current HUD definition, “[a] practice has a discriminatory effect where it ... creates, increases, *reinforces*, or *perpetuates* segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”⁵⁹ To the extent that it creates a cause of action for conduct that “reinforces, or perpetuates” impermissible disparities, the HUD Disparate Impact Rule goes far beyond what the Court would permit. It purports to create liability for racial disparities that the defendant did not create—exactly what the Court cautioned against.⁶⁰ To conform to applicable law, this must be corrected.

⁵¹ *Inclusive Communities*, 135 S. Ct. at 2523.

⁵² *Id.* at 2524. *See also*, *Gallagher v. Magner*, 619 F.3d 823 (2010).

⁵³ *Inclusive Communities*, 135 S. Ct. at 2521.

⁵⁴ *See*, e.g., *Cobb County v. Bank of America Corp.*, 183 F.Supp.3d 1332 (N.D. Ga. 2016); *City of Miami v. Bank of America Corp.*, et al., 13-224506, 2016 WL 1072488 (S.D. Fla. Mar. 17, 2016).

⁵⁵ *Inclusive Communities*, 135 S.Ct. at 2513.

⁵⁶ *Id.* at 2521.

⁵⁷ *Id.* at 2514.

⁵⁸ *Id.* at 2523.

⁵⁹ 24 CFR 100.500(a) (*emphasis added*).

⁶⁰ *Inclusive Communities*, 135 S.Ct. at 2518 (internal quotations and alterations omitted).

In sum, the HUD Disparate Impact Rule must faithfully reflect each of these elements. Further, the HUD Rule should also incorporate the *Inclusive Communities* posture with respect to the plaintiff's *prima facie* case. Specifically, Justice Kennedy instructs courts to "examine with care" the plaintiff's proof in "a *prima facie* case of disparate impact" so as to encourage "prompt resolution" of claims before trial.⁶¹ Put differently, the Court has articulated a stringent standard to prove disparate impact liability that should be applied to the Plaintiff's pleadings to prevent protracted litigation. Any HUD rule should reflect this to the appropriate extent.

4. Should the Disparate Impact Rule be amended to clarify the causality standard for stating a *prima facie* case under *Inclusive Communities* and other Supreme Court rulings?

Yes. The Disparate Impact Rule should be amended to clarify the causality standard for stating a *prima facie* case as described above. As explained above, the HUD Rule does not reflect the *Inclusive Communities* "robust causality" standard for making a *prima facie* case. Absent this standard, a statistical disparity, in and of itself, could be sufficient to make a *prima facie* case. This directly conflicts with the Court's finding that a liability cannot be based solely on a statistical disparity. Rather, a plaintiff must identify a challenged practice or practices that has caused this significant disparity. Failure to do so raises serious constitutional concerns. The HUD Rule should be amended to include a "robust causality" standard in the plaintiff's *prima facie* case.

5. Should the Disparate Impact Rule 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)?

The Disparate Impact Rule should be amended to provide an affirmative defense or safe harbor to claims of disparate impact liability. Support for defenses or safe harbors can be found in the Court's discussion of the "robust causality" standard. It may "be difficult to establish causation because of the multiple factors that go into" a defendant's decision.⁶² The Court acknowledges that federal law may be one such factor influencing the defendant's decision. Specifically, federal law may "substantially limit the [defendant's] discretion," making it impossible for the plaintiff to establish the requisite causal connection between the defendant's conduct and the disparity.⁶³

This makes sense. For example, it may be appropriate to establish a defense or safe harbor where the actions of the defendant are substantially affected directly or indirectly by governmental action. In circumstances where the actions of the government or quasi-governmental entity substantially limit a business's discretion, any resulting disparity cannot be said to have been caused by the business. It is simply unjust to penalize a business for the actions of third parties—or in this case, the laws, regulations, guidance or supervisory imperatives, such as safety and soundness concerns, imposed by the government—over which the business lacks control. The Supreme Court

⁶¹ *Inclusive Communities*, 135 S.Ct. at 2523.

⁶² *Id.* at 2524.

⁶³ *Id.*

confirmed this principle in *Meyer v. Holley*, which limits vicarious liability under the Fair Housing Act to that recognized under traditional agency principles.⁶⁴

Federal and state statutes, regulations, guidance and supervisory jurisdiction control almost every aspect of the housing finance industry. When these rules—either individually or in combination—substantially limit a business's discretion, a safe harbor or other defense against liability for disparate impact is appropriate.

Without a safe harbor or defense, the rule has the potential for significantly adverse consequences. Suits can be brought against unsuspecting lenders, who due to the requirements of a separate agency, would have to contend with litigation defending the unintended consequences of a legitimate and required practice. Even if a defendant successfully succeeds on the merits of the case, litigation expenses can be astronomical and may cripple small businesses.

There are several examples of where such a safe harbor or affirmative defense would be welcome in the heavily regulated mortgage market. First, the Ability-to-Repay/Qualified Mortgage (ATR/QM) rule requires creditors to make a reasonable, good faith determination of a consumer's ability to repay the loan prior to extending credit. The rule's QM component includes explicit underwriting requirements that a lender must follow to gain the valuable benefit of conferred by the regulation. The QM rule substantially limits the lender's discretion and thus should qualify for a safe harbor from liability for disparate impact.

Another candidate for safe harbor or affirmative defense treatment are the underwriting requirements of the government-sponsored entities (GSEs). Both Fannie Mae and Freddie Mac have specific underwriting requirements that lenders must apply to their borrowers to facilitate financing. These requirements are policy decisions taken by GSEs, under the direct controls of the federal government in the form of the Federal Housing Finance Agency (FHFA) as conservator. Businesses who wish to originate loans through one of the GSE channels must follow GSE guidelines. Their discretion with respect to underwriting requirements is greatly limited. It follows that a disparate impact resulting from those underwriting requirements could not have been caused by the lender.

A business should not have to choose which of two competing government policies to follow, and which to ignore. A safe harbor or other defense to claims of disparate impact in situations where business discretion is substantially limited through government requirements would remove this Catch-22.

6. Are there 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?

Yes. HUD should align the Disparate Impact Rule with the standard set forth in *Inclusive Communities*. Doing so could help provide clarity, reduce uncertainty, limit unmeritorious litigation, and decrease the regulatory burden of regulated entities. It would also provide members

⁶⁴ *Meyer v. Holley*, 537 U.S. 280, 286-89 (2003).

of the public a clear outline on how to properly plead a case of disparate impact discrimination under the Fair Housing Act.

HUD should also amend the Disparate Impact Rule to address the remedies available for successful claims. As articulated in the *Inclusive Communities* decision, the Constitution requires that remedial orders “concentrate on the elimination of the offending practice” and, if additional measures are adopted “courts should strive to design them to eliminate racial disparities through race-neutral means.”⁶⁵ A forthcoming HUD Rule should be crafted to conform to these limits.

In addition to aligning the Rule with *Inclusive Communities* and addressing remedies, HUD could provide additional clarity by issuing guidance on the standards set forth by the Court in *Inclusive Communities*. As acknowledged throughout the decision, the possibility of disparate impact liability can influence business decision making. This is due to the severe reputational and financial consequences of disparate impact litigation. The consequences are such that businesses may, as Justice Kennedy suggests, decide against plans to “revitaliz[e] dilapidated housing in our Nation’s cities[.]” Or, in an effort to minimize the possibility—even a remote possibility—of a claim for disparate impact, businesses may be forced to consider the protected class status of those consumers likely effected by a given policy. The Court recognized that such an influence “raises serious constitutional questions” and is damaging to a free-market system.⁶⁶ The *Inclusive Communities* safeguards, particularly the Court’s mandate that disparate impact liability be limited to policies that are “artificial, arbitrary, and unnecessary” as well as the “robust causality” requirement, were designed to limit this. These safeguards help ensure “regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”⁶⁷

HUD should follow the example set by the Court. The Rule should apply the disparate impact standards in a way that reduces undue burdens on business decision making. Guidance in the proposed rule on the “robust causality” and “artificial, arbitrary, and unnecessary” standards would provide valuable clarity. Greater certainty on these standards would help businesses balance the need to avoid policies that cause disparities with the Court’s rejection of quotas and other preventative measures that “tend to perpetuate race-based considerations rather than move beyond them.”⁶⁸

IV. Conclusion

The Mortgage Bankers Association and our members strongly support the Fair Housing Act and fair lending. We oppose housing discrimination in all its forms. The mortgage industry expends substantial resources to combat illegal discrimination and actively develop new products and strategies to reach underserved markets. Our members also actively seek to understand their responsibilities under the law and conform the conduct accordingly.

⁶⁵ *Inclusive Communities*, 135 S. Ct. at 2524.

⁶⁶ *Id.* at 2522.

⁶⁷ *Id.* at 2518 (internal quotations and alterations omitted).

⁶⁸ *Id.* at 2523.

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The Mortgage Bankers Association urges HUD to revise the Disparate Impact Rule to align its burdens and standards of proof with those articulated in the Supreme Court's *Inclusive Communities* decision. We would welcome the opportunity to meet with HUD representatives to discuss our recommendations in more detail. If you have any questions please feel free to contact me at (202) 557-2878 or PMills@mba.org, or Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or jwiseman@mba.org.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is written in a cursive, flowing style.

Pete Mills
Senior Vice President
Residential Policy and Member Engagement