August 24, 2021

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410

Re: Reinstatement of HUD's Discriminatory Effects Standard; Document No. FR-6251-P-01

To Whom It May Concern:

The American Financial Services Association ("AFSA")[1] appreciates the opportunity to comment on the Department of Housing and Urban Development's ("HUD" or the "Department") June 25, 2021 proposed rule amending its interpretation of the Fair Housing Act's disparate impact standard.

At the outset, AFSA stresses that the association and its members abhor discrimination. Illegal discrimination has no place in this country, and we strongly support its prohibition under the Fair Housing Act.

This letter merely seeks that HUD conform any disparate impact rule to applicable Supreme Court precedent. HUD's proposal to return to the Department's 2013 Implementation of the Fair Housing Act's Discriminatory Effects Standard ("2013 Disparate Impact Rule") ignores the Supreme Court's subsequent landmark 2015 decision in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc*. ("*Inclusive Communities*") and other binding Supreme Court precedent.[2]

HUD's 2013 Disparate Impact Rule does not conform to the standards enunciated by the Supreme Court in its 2015 *Inclusive Communities* decision because HUD's rule was finalized two years before the Supreme Court's decision. Although there arguably are a myriad of ways in which the 2013 Disparate Impact Rule does not align with the Supreme Court's *Inclusive Communities* decision; we highlight four key areas below and explain how the 2013 Disparate Impact Rule does not conform to applicable Supreme Court precedent.

(1) The 2013 Disparate Impact Rule does not include important safeguards for defendants.

The Supreme Court in *Inclusive Communities* made clear that disparate-impact claims under the Fair Housing Act must be analyzed "with care"[3] at the pleading stage to ensure that "the specter of disparate-impact litigation"[4] does not prevent parties "from achieving legitimate objectives."[5] Throughout its decision, the Supreme Court

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumer with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail finance sales.
[2] 135 S. Ct. 2507, 2512 (2015).
[3] *Inclusive Communities*, 135 S. Ct. 2507, 2512 (2015).
[4] *Id.* at 2524.
[5] *Id.*

cautioned against overreaching disparate impact claims and detailed heightened pleading standards for these types of claims to deter "abusive" disparate impact litigation. The Supreme Court advised, "Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important."[6] The Supreme Court also underscored that there must be "adequate safeguards at the prima facie stage" to ensure that the threat of disparate-impact liability does not lead to the use of "numerical quotas" which would result in "serious constitutional questions."[7]

Notably, the 2013 Disparate Impact Rule does not contain any important safeguards for defendants that are now required by the Supreme Court.

(2) The 2013 Disparate Impact Rule does not include a robust causality requirement.

The Supreme Court's announcement of a "robust causality" requirement is at the heart of its decision in *Inclusive Communities*. The Court stated plainly in its decision: "A plaintiff who fails to allege facts *at the pleading stage* or produce statistical evidence demonstrating *a causal connection cannot make out* a prima facie case of disparate impact."[8] The Court also explicitly stated 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."[9] A showing of robust causality, according to the Supreme Court, is required to ensure that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" thus "protect[ing] defendants from being held liable for racial disparities they did not create."[10] In *Inclusive Communities*, the Court also noted that the robust causality requirement is deeply rooted in Supreme Court precedent. The Court pointed out that disparate-impact liability "has always been properly limited in key respects to 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."[11]

HUD's 2013 Disparate Impact Rule does not conform to applicable Supreme Court precedent because it does not include a robust causality requirement.

(3) The 2013 Disparate Impact Rule does not include require a direct link between disparate impact and alleged injury.

In *Bank of America Corp. City of Miami*,[12] the Supreme Court held that a claim for damages under the Fair Housing Act is akin to a tort action and is thus subject to the common-law requirement that the alleged loss is attributable to the proximate cause and "not to any remote cause."[13] The Supreme Court specifically held that "foreseeability alone is not sufficient to establish proximate cause" under the Fair Housing Act.[14] The Court noted that, because "[t]he housing market is interconnected with economic and social life," a violation of the Fair Housing Act is expected "to cause ripples of harm far beyond the defendant's misconduct."[15] As a result, in order to establish proximate cause under the Fair Housing Act, a plaintiff "must do more than show that its injuries

[6] *Id.* at 2523 (citing *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971)).
[7] *Inclusive Communities*, 135 S. Ct. 2507, 2522.
[8] *Id.* at 2523 (emphasis added).
[9] *Id.* (emphasis added).
[10] *Id.* at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).
[11] *Id.* at 2522.
[12] 137 S. Ct. 1296 (2017).
[13] *Id.* at 1305.
[14] *Id.*
[15] *Id.* at 1306 (internal quotations omitted).

foreseeably flowed from the alleged statutory violation."[16] Instead, proximate cause under the Fair Housing Act requires, according to the Supreme Court, "some *direct relation* between the injury asserted and the injurious conduct alleged."[17] This direct relation requirement is not articulated in HUD's 2013 Disparate Impact Rule.

(4) The 2013 Disparate Impact Rule declined to recognize practical business considerations as a valid business objective.

Another critical component of the Supreme Court's decision in *Inclusive Communities* is the recognition that a valid business objective can be based on practical business considerations, such as profitability. In contrast, in its 2013 Disparate Impact Rule, HUD explicitly declined to acknowledge that profitability can be a valid interest under a disparate impact analysis. The Supreme Court stated that disparate impact liability must be limited to ensure that "regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[18] The Supreme Court explicitly cautioned against "second-guess[ing] which of two reasonable approaches" an entity might follow in the sound exercise of its discretion.[19] HUD's 2013 Disparate Impact Rule does not account for the Supreme Court's recognition that practical business considerations are valid interests under a disparate-impact analysis.

Clearly, HUD's 2013 Disparate Impact Rule does not align with binding Supreme Court precedent; and it would be incongruous to return to the use of an outdated rule that was finalized two years before the Supreme Court's landmark *Inclusive Communities* decision.

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AFSA appreciates the opportunity to provide comments on HUD's Proposed Rule. We hope you find our recommendations useful. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,

Celia Winslow

Celia Winslow
Vice President, Legal & Regulatory Affairs
American Financial Services Association

[16] *Id.* at 1301.
[17] *Id.* at 1306 (citing *Homes v. Securities Investors Protection Corporation*, 503 U.S. 258, 268 (1992))(emphasis added).
[18] *Id.* at 2518 (emphasis added).
[19] *Id.*