June 14, 2017

**By Federal E-Rulemaking Portal**

Regulations Division
Office of General Counsel
U.S. Department of Housing & Urban Development
451 7th St. SW, Room 10276
Washington DC 20410

Re: *Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777*
Docket No. FR-6030-N-01

Ladies and Gentlemen:

The American Bankers Association (ABA) and the undersigned state bankers associations (SBAs) submit this comment in response to the request of the U.S. Department of Housing and Urban Development (the Department or HUD) for "suggestions for specific current regulations that may be outdated, ineffective, or excessively burdensome, and, therefore, warranting repeal, replacement, or modification." In particular, this comment suggests that the HUD Rule implementing the Fair Housing Act discriminatory effects standard (codified at 24 CFR Part 100) is outdated and contradicts more recent guidance from the Supreme Court.[1]

ABA is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans. ABA and the SBAs vigorously support the Fair Housing Act, and the associations and our members devote substantial resources on an ongoing basis to ensure that credit decisions for all loan applicants are made without regard to race or other prohibited basis.

## I. Summary of Comment

ABA and the SBAs understand that the Department faces complex issues in enforcing the anti-discrimination provisions of the Fair Housing Act. Yet, we have serious concerns that the Department adopted an incorrect and improper standard for disparate-impact liability in promulgating the Rule. Reasoned suggestions for a proper approach to disparate-impact analysis were rejected by HUD, but the same approaches later were adopted, almost whole cloth, by the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) ("Inclusive Communities"). Thus, the Rule is both outdated and legally wrong. Even beyond these flaws, the Rule is ineffective because it contains virtually no guidance that would promote voluntary compliance and avoid frivolous complaints—in other words, it fails to achieve the overarching purpose of a rule. Rather, the Rule simply states that each situation must be decided on a "case-by-case" basis. The Supreme

[1] *See* 78 Fed. Reg. 11,460 (Feb. 15, 2013) (Disparate-Impact Rule or Rule).

Court, in contrast, believed it necessary to place limitations on the use of disparate impact to avoid important constitutional concerns—including limitations based on meaningful real-life scenarios that the Rule rejected.

In these circumstances, one option might be to jettison the Rule. At the same time, all entities subject to the Fair Housing Act, as well as organizations involved in the Act's enforcement, would benefit from a reasoned and meaningful Rule that might serve a proper purpose by minimizing the need for "case-by-case" determinations. ABA and the SBAs would be willing to participate in a collaborative process to develop a Rule that is consistent with Supreme Court precedent and that offers additional guidance to promote voluntary compliance, minimize frivolous lawsuits, and avoid constitutional concerns.

## II. The Rule Disregarded *Wards Cove* and Rejected Reasoned Comments from Financial Industry Participants Regarding the Applicable Disparate-Impact Standard

When the Rule was adopted in 2013, significant Supreme Court precedent existed that directed the Fair Housing Act standard for disparate-impact liability. The precedent arose largely from the Supreme Court's interpretation of Title VII disparate-impact claims in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) ("Wards Cove"). Yet the Rule explicitly—and improperly—rejected that precedent, stating: "HUD does not agree … that *Wards Cove* even governs Fair Housing Act claims."[2] The Rule provides no explanation for this position and cites no authority permitting a departure from governing Supreme Court precedent through administrative rulemaking.[3]

Many commenters—including ABA—raised the significance, and binding nature, of *Wards Cove* during the Rule's notice and comment period. Specifically, these commenters urged HUD to adopt the disparate-impact "standard set out in the Supreme Court's opinion in *Wards Cove*."[4] Indeed, commenters referenced Wards Cove as the applicable standard for no less than five separate issues.[5]

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[2] Disparate-Impact Rule, 78 Fed. Reg. at 11,473.

[3] As with any rule issued by any executive agency, the Disparate-Impact Rule is limited to defining the application of the Fair Housing Act in a manner consistent with judicial precedent. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.")

[4] Disparate-Impact Rule, 78 Fed. Reg. at 11,471.

[5] *See id.* at 11,469 ("commenter referring to *Wards Cove*" in support of position that "plaintiff should have to identify a specific practice and show that the alleged discriminatory effect is caused by that specific practice"); *id*. at 11,471 ("commenters suggested that HUD remove the word 'necessary' to make the standard … consistent with the Title VII standard set out in the Supreme Court's opinion in *Wards Cove*"); *id*. at 11,472 ("commenter requested that HUD replace 'cannot be served' with 'would not be served' because, under the Supreme Court's analysis in *Wards Cove*, a plaintiff cannot prevail by showing that a less discriminatory alternative could in theory serve the defendant's business interest"); *id*. at 11,473 ("commenters

Despite the comments addressing *Wards Cove*, the Department refused to acknowledge the applicability of the decision to the Rule. Instead, the Department stated that the "*Wards Cove* case" was "superseded" without providing any justification for its position.[6] The only conclusion possible is that Department officials did not agree with the standard set by the Supreme Court in *Wards Cove* and would have preferred a standard that was more rigorous for potential defendants.

But even beyond *Wards Cove*, in promulgating the Disparate-Impact Rule, the Department rejected the suggestions of commenters on a number of other issues, including:

- ***Statistics alone***. A "commenter expressed concern that the language in [the] proposed [Rule] would allow for lawsuits based only on statistical data produced under HMDA." The Department merely responded that "HUD and Courts have recognized that analysis of loan level data identified through HMDA may indicate a disparate impact."[7]

- ***Policy of "discretion***." A commenter suggested "that, in light of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*," 131 S. Ct. 2541 (2011), the Rule should "remove those aspects of the proposed rule that would give rise to disparate impact liability based on the exercise of discretion." The Department responded that "HUD does not agree that the Supreme Court's decision in *Wal-Mart* means that policies permitting discretion may not give rise to discriminatory effects liability under the Fair Housing Act."[8]

- ***Third-party policies***. HUD received several comments expressing concern that "complying with contractual obligations set by third parties, including the federal government" might create disparate-impact liability. The Department, however, simply notes that the "commenter misconstrues the discriminatory effects standard, which permits a defendant or respondent to defend against a claim of discriminatory effect by establishing a legally sufficient justification."[9]

- ***Valid justifications***. A commenter asked HUD to recognize that practices aimed at "increasing profits, minimizing costs, and increasing market share" are "legitimate, nondiscriminatory interests." The Department dismissed this request, stating simply, "HUD is not adopting these suggestions" and states that defenses of this type "must be determined on a case-by-case basis."[10]
- ***Quotas***. Commenters expressed concern that the threat of disparate-impact liability under the standard proposed by HUD might cause lenders to "extend credit to members of minority

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pointing to *Wards Cove* in support of [] position" that "the alternative practice must be equally effective as the challenged practice"); *id*. ("[s]ome commenters stated that the plaintiff or charging party should bear the burden of proof at all stages of the proceedings … citing *Wards Cove*").

[6] *Id.* at 11,471.
[7] *Id.* at 111,478.
[8] *Id.* at 11,468.
[9] *Id.* at 11,475.
[10] *Id.* at 11,471.

groups who do not qualify for the credit." HUD responded only that "the Fair Housing Act does not require lenders to extend credit to persons not otherwise qualified for a loan."[11]

- ***Available remedies.*** A commenter suggested that "the most appropriate remedy for a violation of the Act under an effects theory is declaratory or injunctive relief." Rather than providing analysis, the Department merely stated it "disagrees with the commenter. The Fair Housing Act specifically provides for the award of damages—both actual and punitive—and penalties."[12]

## III. The Supreme Court's *Inclusive Communities* Decision Confirms that the Comments Outlined above Properly Describe the Disparate-Impact Standard, and that by Rejecting them, the Rule Fails to Appropriately Implement Disparate Impact

Two years after the Rule was promulgated, the Supreme Court issued its decision in *Inclusive Communities* and announced the binding standards and limitations on disparate-impact liability under the Fair Housing Act. Although the Rule predates *Inclusive Communities*, the Supreme Court's decision confirms that commenters offered sound advice regarding the appropriate disparate-impact standard, that the Rule should have incorporated the comments, and that the resulting Rule conflicts with binding law and fails to properly implement disparate impact.

*Inclusive Communities* cites with approval the approach to a disparate-impact claim set forth in *Wards Cove*—thus confirming that HUD was wrong in concluding that "*Wards Cove* [does not] govern[] Fair Housing Act claims." Significantly, *Inclusive Communities* also confirms that the approach suggested by many commenters—and rejected by the Rule—are, in fact, necessary and vital considerations in the proper enforcement of the Fair Housing Act. For example:

- ***Statistics alone***. Contrary to the standard adopted by the Rule, *Inclusive Communities* holds that a "[r]acial imbalance … does not, without more, establish a prima facie case of disparate impact."[13] The Supreme Court stressed the importance of "adequate safeguards" and an examination "with care" at early stages of disparate impact claims to ensure that they are not abusive. The Rule does not contain similar safeguards.

- ***Policy of discretion***. *Inclusive Communities* casts serious doubt on the Department's pronouncement that the Supreme Court's decision in *Wal-Mart v. Dukes* has no application to disparate-impact claims under the Fair Housing Act. After *Inclusive Communities* was remanded to the district court for further consistent proceedings, the district court found that "[w]here a plaintiff establishes that a subjective policy, such as the use of discretion, has been used to achieve a racial disparity, the plaintiff has shown disparate treatment"—not disparate impact.[14] Accordingly, the district court entered summary judgment for the defendant, holding that the *Inclusive Communities* plaintiff's challenge to *discretion* "is

[11] *Id.* at 11,476.
[12] *Id.* at 11,474.
[13] 135 S. Ct. at 2523.
[14] *The Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, No. 3:08-00546 (Aug. 26, 2016).

actually complaining about disparate treatment, not disparate impact." Also, *Wal-Mart* resulted in the dismissal of multiple Fair Housing Act class actions alleging disparate-impact claims challenging an alleged policy of *discretion* in loan-pricing decisions.[15] In other words, the federal judiciary has concluded that disparate-impact Fair Housing Act challenges to a policy of *discretion* must fail in most instances. The Rule, however, provides contrary advice and suggests no limitations on the use of disparate impact to challenge the common and nondiscriminatory business practice of allowing employees some discretion in performing their duties.

- ***Third-party policies***. Contrary to the Rule, *Inclusive Communities* holds that the policies of third parties can provide a valid defense to a disparate-impact claim. The Supreme Court held that "if the [plaintiff] cannot show a causal connection between the [defendant's] policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of th[e] case."[16]

- ***Robust causality***. *Inclusive Communities* directs 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" and explains that this "robust causality requirement" serves to "protect[] defendants from being held liable for racial disparities they did not create."[17] The Rule makes no attempt to articulate a similar burden that a plaintiff must meet.

- ***Valid justifications***. *Inclusive Communities* confirms that "disparate impact liability must be limited so … regulated entities are able to make practical business choices and profited-related decisions that sustain a vibrant and dynamic free-enterprise system" and "[e]ntrepreneurs must be given latitude to consider market factors."[18] The Rule refused to adopt a commenter's suggestion making virtually the same point.

- ***Quotas***. *Inclusive Communities* requires the application of "adequate safeguards at the prima facie stage," warning that without these safeguards, "disparate-impact liability might cause race to be used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."[19] The Department dismissed similar concerns expressed by a commenter, refusing to even acknowledge the types of concerns that the Supreme Court determined to be most important.

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[15] *See In re: Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, Master File No. 3:08-md-1974, ECF No. 111; *Rodriguez v. National City Bank*, 726 F. 3d 372 (3rd Cir. 2013) ("This [Fair Housing Act] case bears a striking resemblance to *Dukes*. . . Here, as in *Dukes*, the exercise of broad discretion by an untold number of unique decision-makers in the making of thousands upon thousands of individual decisions undermines the attempt to claim, on the basis of statistics alone, that the decisions are bound together by a common discriminatory mode").
[16] 135 S. Ct. at 2524.
[17] *Id.* at 2523.
[18] *Id.* at 2511, 2523.
[19] *Id.* at 2523 (quoting *Wards Cove*, 490 U.S. at 653).

- ***Remedies***. *Inclusive Communities* emphasizes that "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that arbitrarily operates to discriminate on the basis of race."[20] Again, the Department rejected the suggestion of a commenter that recommended virtually the same limitation. Additionally, while the Rule's approach to disparate impact is supposedly patterned upon the standard for employment discrimination as set forth in the 1991 amendments to Title VII, Congress determined that the disparate-impact standard is applicable ***only*** in lawsuits that ***do not*** seek monetary relief. Yet, the Department refused to impose a similar limitation on disparate-impact claims under the Fair Housing Act. Thus, the Rule not only expanded the use of disparate impact far beyond Title VII—which statute supposedly was the guidepost for HUD's approach—but it also ignored important limitations on liability established by Congress.

In sum, in rejecting the standards for Fair Housing Act disparate-impact claims that *Inclusive Communities* adopted two years later, the Rule is both outdated and legally wrong.

## IV. The Rule is Ineffective Because It Provides No Guidance to Promote Compliance with the Fair Housing Act or Predictable Application of Disparate Impact

In addition to its improper adoption of an outdated disparate-impact standard that is out-of-step with binding Supreme Court precedent, the Rule has another fatal flaw: it is ineffective because it fails to provide real-world guidance to regulated entities. Thus, the Rule fails to meet its stated purpose to "provide[] for consistent and predictable application" of disparate-impact analysis or "offer[] clarity to persons … engaged in housing transactions as to how to assess potential claims involving discriminatory legal effects."[21]

An overarching purpose of a rule is to inform entities that must comply with a statute of the obligations and expectations of the federal agency with the authority to enforce the statute. Thus, the Rule should serve the important role of promoting voluntary compliance, avoiding frivolous or unnecessary complaints, and providing certainty and clarity regarding the application of the law. Despite these objectives for rulemaking, the Disparate-Impact Rule provides virtually no limitations on disparate impact or guidance on factors to consider in the context of compliance or litigation.

Indeed, rather than looking to the Rule, courts around the country considering disparate-impact claims under the Fair Housing Act have relied upon *Inclusive Communities* in adjudicating them. For instance, less than three weeks ago, the U.S. Court of Appeals for the Ninth Circuit relied upon *Inclusive Communities* in dismissing two Fair Housing Act lawsuits brought by the City of Los Angeles under a disparate-impact theory.[22] The Ninth Circuit cited *Inclusive Communities* for the proposition that "[t]o make out a prima facie case of disparate impact under the [Fair Housing Act], the City must show both a statistical disparity and a policy or policies that caused the disparity" and that the "causal link between the policy and the disparity must be 'robust.'"

[20] *Id.* at 2524 (internal quotations omitted).
[21] Disparate-Impact Rule at 11,460.
[22] *See City of Los Angeles v. Wells Fargo & Co., et al.*, 15-56157 (May 26, 2017), and *City of Los Angeles v. Bank of Am. Corp., et al.*, 15-55897 (May 26, 2017).

Applying this standard to the City's disparate-impact claim, the Ninth Circuit held that "the City failed to show a 'robust' causal connection between any disparity and a facially-neutral [] policy" and therefore determined that "summary judgment on the [Fair Housing Act] claim was warranted."

## V. Recommendation to Reduce Regulatory Burden

The direct conflict between the Rule and *Inclusive Communities* deprives regulated entities of certainty as to how disparate impact will be defined and applied under the Fair Housing Act. Consider the quandary faced by ABA, the SBAs and our members: Even though the Supreme Court has held that a case premised on statistics alone is a prime example of an abuse of disparate impact, will the Department maintain the supervisory view that statistics alone can establish a prima facie case, as stated in the Rule? A rule that creates, rather than eliminates, confusion undermines its own purpose and is entirely ineffective.

Obviously, the Rule is invalid to the extent that it conflicts with the subsequent decision of the Supreme Court. The proper action in these circumstances could be to eliminate the outdated Rule in its entirety. An argument in favor of rulemaking in 2013 was that a rule establishing the standard for disparate impact under the Fair Housing Act was appropriate because the Supreme Court had not had the opportunity to provide meaningful guidance as to how to apply the theory. But now that the Supreme Court has provided guidance, the Rule is unnecessary.

Additionally, the Rule incorporated none of the suggestions that would cabin the use of the disparate-impact theory to appropriate claims. As noted previously, the Department repeatedly rejected suggestions to limit the circumstances in which disparate impact could be used, instead maintaining that each situation needs to be decided on a "case-by-case" basis. But a fundamental purpose of a rule is to provide meaningful guidance that minimizes the number of decisions that must be made on a case-by-case basis. In stark contrast to the Rule's approach, the Supreme Court found it necessary to place strict limitations on the use of disparate impact. These limitations were required, in part, to avoid injecting the consideration of race into decision making and to address important constitutional concerns—concerns that HUD refused to even acknowledge. Thus, *Inclusive Communities* provides meaningful guidance, superseding the outdated and ineffective Disparate-Impact Rule, and the Rule simply can be eliminated.

At the same time, there is an opportunity for the Department to provide actual guidance on the application of disparate impact under the Fair Housing Act. Businesses that are subject to the Act, as well as those involved in its enforcement, would benefit significantly from a thoughtful and reasoned rule that contains meaningful guidance. ABA and the SBAs would be willing to engage in reasoned, collaborative discussions to reach a consensus as to the proper use—and limitations—of disparate impact, which discussions might lead to a revised Rule. Thus, another option for the Department's consideration would be to reopen comment on the existing Rule in light of *Inclusive Communities* and to begin the process of obtaining views of all interested persons as a prerequisite for promulgating a revised Rule.

ABA and a representative group of SBAs would welcome the opportunity to meet with the Department to discuss the issues raised in this comment letter.

Sincerely,

American Bankers Association
Alabama Bankers Association
Alaska Bankers Association
Arizona Bankers Association
Arkansas Bankers Association
California Bankers Association
Colorado Bankers Association
Connecticut Bankers Association
Delaware Bankers Association
Florida Bankers Association
Georgia Bankers Association
Hawaii Bankers Association
Idaho Bankers Association
Illinois Bankers Association
Illinois League of Financial Institutions
Indiana Bankers Association
Iowa Bankers Association
Kansas Bankers Association
Kentucky Bankers Association
Louisiana Bankers Association
Maine Bankers Association
Maryland Bankers Association
Massachusetts Bankers Association
Michigan Bankers Association
Minnesota Bankers Association
Mississippi Bankers Association
Missouri Bankers Association
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Nebraska Bankers Association
Nevada Bankers Association
New Hampshire Bankers Association
New Jersey Bankers Association
New Mexico Bankers Association
New York Bankers Association
North Carolina Bankers Association
North Dakota Bankers Association
Ohio Bankers League
Oklahoma Bankers Association
Oregon Bankers Association
Pennsylvania Bankers Association
Rhode Island Bankers Association
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