



MORTGAGE BANKERS ASSOCIATION

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FR-6111-P-02 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") proposed amendments to its disparate impact rule. MBA applauds HUD's efforts to align its rule with the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* We appreciate the opportunity to comment on this important topic for our members.

MBA strongly supports HUD's mission to ensure the housing market is free from discrimination. Our members are committed to fair lending and actively seek to develop new products and strategies to reach underserved markets or communities. We fully endorse HUD's efforts to eliminate unlawful discrimination and recognize the importance of the Fair Housing Act's ("FHA") "discriminatory effects standard" in achieving that end.

Given its function as a valuable tool to uncover and remedy discrimination in housing, it is crucial that HUD's disparate impact regulations conform with the FHA as interpreted by the Court. For this reason, MBA supports HUD's decision to amend its disparate impact standard to "better reflect the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*" ("*Inclusive Communities*").² As the Court noted, liability for disparate impact must be 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."³ HUD's

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 FR-6111-P-02 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard.

³ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015)

existing regulation (the “2013 Rule”), issued well before the *Inclusive Communities* decision, is not appropriately limited. Specifically, the 2013 Rule sets forth pleading standards that do not reflect the important requirements identified by the Supreme Court, including among others the “robust causality” requirement, as “necessary to protect potential defendants against abusive disparate-impact claims.”⁴

MBA applauds the process through which HUD has sought to align its rule with the Supreme Court’s *Inclusive Communities* decision. The Department’s efforts in undertaking this challenging task have been consistent with the technical requirements and spirit of the Administrative Procedures Act. Through its rulemaking process, HUD facilitated robust public involvement, resulting in a proposal that appropriately reflects the standards of proof established by the Supreme Court.

The Secretary of HUD has the “authority and responsibility for administering” the FHA.⁵ As part of this authority, HUD has the ability to issue regulations implementing the FHA’s provisions.⁶ In 2013, HUD relied on this authority to codify a burden shifting framework for assessing claims of disparate impact.⁷ In the current rulemaking, HUD seeks to bring that framework into conformity with the standards articulated by the Supreme Court.

HUD has the authority to implement the FHA through reasonable interpretations “unless the intent of Congress is clear.”⁸ With respect to pleading standards for plaintiffs alleging disparate impact, the FHA is silent. As pleading standards are not addressed in the FHA, courts should defer to HUD’s interpretation provided it is reasonable under the statute and associated precedent. For the reasons outlined below, we believe the Proposed Rule is both reasonable under the statute and consistent with *Inclusive Communities*.

Responses to Specific Questions posed by HUD in the Proposed Rule:

I. How well do HUD’s proposed changes to its disparate impact standard align with the decision and analysis in *Inclusive Communities* with respect to the proposed prima facie burden, including:

While the Court in *Inclusive Communities* found that disparate impact claims were cognizable under the FHA, it cautioned against an expansive interpretation of disparate impact liability. According to the Court, an expansive interpretation would “inject racial considerations into every housing decision” and create the potential for “abusive disparate-impact claims.”⁹ To protect against such outcomes, the Court articulated certain “safeguards at the prima facie stage[.]”¹⁰ We believe the plaintiff’s prima facie case under the Proposed Rule appropriately reflects these safeguards. Specifically—

a. Each of the five elements in the new burden-shifting framework outlined in paragraph (b) of § 100.500.

⁴ *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2524.

⁵ 42 U.S.C. § 3608(a).

⁶ 42 U.S.C. § 3614a.

⁷ See “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” 78 FR 11460 (Feb. 15, 2013).

⁸ *Chevron v. U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, (1984).

⁹ 135 S. Ct. at 2524.

¹⁰ *Id.* at 2523.

- i. § 100.500(b)(1): (“That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law”)

The first element requires that the challenged policy or practice be “arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective,” including “a practical business, profit, policy consideration, or requirement of law[.]” This requirement is consistent with the Court’s holding in *Inclusive Communities*, which made clear that disparate impact liability was intended to address policies that “arbitrarily [create] discriminatory effects[.]”¹¹ Quoting from the earlier decision in *Griggs v. Duke Power Co.* that first elucidated a disparate impact or “effects” claim under federal anti-discrimination statutes, the Court explained that “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers.’”¹² The Court made the same point later in the decision, again highlighting the *Griggs* decision, by stating “[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”¹³ The Court’s repeated emphasis on the need to limit disparate impact liability to policies or practices that are “artificial, arbitrary, and unnecessary” to achieve a legitimate purpose supports HUD’s decision to incorporate this requirement, using identical language, in the Proposed Rule.

HUD has appropriately required that a plaintiff “plausibly allege” that the challenged practice is arbitrary, artificial or unnecessary.¹⁴ The HUD rule properly notes that “plausibly alleging that a policy or practice advances no obvious legitimate objective would be sufficient to meet [the plaintiff’s] pleading requirement” but that “in cases where a policy or practice has a facially legitimate objective, the plaintiff must allege facts at the pleading stage sufficient to support a plausible allegation that the policy is arbitrary, artificial, and unnecessary.”^{15,16}

It is important to note that any inferences from the Court at this point will favor the plaintiff and that there are numerous ways a plaintiff might be able to broadly support this allegation. Such a requirement is also not unduly burdensome considering the rule’s requirement—again based on the Supreme Court’s instruction in *Inclusive Communities*—to identify a *specific* policy and robust causality. This process of

¹¹ *Id.* at 2522 (“The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”).

¹² *Id.* at 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

¹³ *Id.* at 2524 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

¹⁴ See *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1112-14 (8th Cir. 2017); *Bank of America v. Cobb*, 183 F.Supp.3d 1332, 1347 (N.D. Ga. 2016); *Montgomery Cty., Maryland v. Bank of Am. Corp.*, No. PWG-18-3575, 2019 WL 4805678, at *10 (D. Md. Sept. 30, 2019); *Cty. of Cook, Illinois v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 991 (N.D. Ill. 2018).

¹⁵ HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 84 FR 42854-01; *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (stating that a plaintiff’s complaint must set forth more than a recital “of the elements of a cause of action, supported by mere conclusory statements”).

¹⁶ See *Cook County v. HSBC*, 314 F.Supp.3d 950, 967 (N.D. Ill. 2018). This case adopts the inclusion of arbitrary, artificial and unnecessary standard in the prima facie case from *Inclusive Communities*, applying it at the summary judgement stage, and distinguishing the pleading requirements from *Bank of America v. Cobb*, 183 F.Supp.3d 1332 (N.D. Ga. 2016). We note the court in *Cook County* cites *Winfield v. City of New York*, No. 15 C 5236, 2016 WL 6208564, at *5-6 (S.D.N.Y. Oct. 24, 2016) for support, which in turn relies on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) for the proposition that “a *prima facie* case is an evidentiary standard, and not a pleading requirement.” But this reliance is misplaced. *Swierkiewicz* is distinguishable because it was an intentional discrimination case. In that type of case, the Supreme Court held that “if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.” 534 U.S. 506. In contrast, there is only one way to state a plausible disparate impact claim, namely by pleading facts to support each of the elements of a prima facie case of disparate impact as described in *Inclusive Communities*.

doing so before filing a complaint will necessarily require the plaintiff to have some understanding of the challenged policy, its potential utility or lack thereof, and the manner of its adoption—or lack of adoption—in the rest of the industry.

- ii. § 100.500(b)(2): (“That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect”)

This element requires that the plaintiff allege facts sufficient to establish “a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class[.]” With this element, HUD’s Proposed Rule incorporates the foundational safeguard of the *Inclusive Communities* disparate impact standard, namely “robust causality”. *Inclusive Communities* is clear, “[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.”¹⁷

According to the Court, requiring the plaintiff to plausibly allege facts showing a causal connection at the pleading stage is a necessary safeguard that prevents “defendants from being held liable for racial disparities they did not create.”¹⁸ Without such 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

To satisfy “robust causality” under *Inclusive Communities*, the plaintiff must allege facts sufficient to show a “causal connection”²⁰ between the defendant’s “policy or policies” and a disparate impact.²¹ The Court stressed the need for the plaintiff to identify the “specific” policy or policies causing the disparity, describing two scenarios where this could be difficult—e.g., where a one-time decision is alleged to have caused a disparity (“a one-time decision may not be a policy at all”)²² and where multiple factors contribute to decisions that are alleged to have caused a disparity.²³ In either case, should the plaintiff fail to identify the specific policy or policies causing the disparity, the claim must be dismissed.

- iii. § 100.500(b)(3): (“That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class”)

Under the third element, the plaintiff must explain how the challenged practice negatively impacts members of a protected class. It is well-settled that disparate impact liability requires a showing that members of a protected class are disproportionately burdened by the challenged practice or policy. This requirement is faithful to the Court’s instructions in *Inclusive Communities*.

¹⁷ 135 S. Ct. at 2523.

¹⁸ *Id.* at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653).

¹⁹ *Id.*

²⁰ By requiring the plaintiff allege facts showing a specific policy or policies actually caused the disparity, the Court in *Inclusive Communities* adopted a narrower standard than that reflected in HUD’s 2013 rule, which allowed claims alleging a “challenged practice caused or predictably will cause a discriminatory effect” 24 CFR § 100.500(c)(1).

²¹ *Id.* at 2523.

²² *Id.*

²³ *Id.* at 2524.

- iv. § 100.500(b)(4): (“That the alleged disparity caused by the policy or practice is significant”)

The fourth element requires the plaintiff to plead that the disparity caused by the policy or practice is “significant.” While not directly addressed by the Court in *Inclusive Communities*, courts have consistently held that a disparate impact claim under the FHA, like a similar claim under Title VII, requires a “significant” disparity.²⁴ Further, HUD’s decision to incorporate a materiality element is consistent with the Court’s direction to “avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”²⁵

- v. § 100.500(b)(5): (“That there is a direct link between the disparate impact and the complaining party’s alleged injury”)

Finally, HUD’s proposed rule would require the plaintiff allege a “direct link” between the disparity and the plaintiff’s injury. As explained by the Court in *Bank of America Corp. v. City of Miami, Fla.* (“*City of Miami*”), the extent of liability under the FHA disparate impact cause of action, like common law tort actions, must be limited to the proximate cause of the harm.²⁶ According to the Court, “proximate cause under the FHA requires some direct relation between the injury asserted and the injurious conduct alleged.”²⁷ While the Court in *City of Miami* declined to “draw the precise boundaries of proximate cause under the FHA[,]” it noted “foreseeability alone does not ensure the close connection that proximate cause requires.”²⁸ By requiring a “direct link” between “the disparate impact and the complaining party’s injury[,]” the fifth element of the Proposed Rule’s pleading standard reflects the appropriate common law proximate cause requirement as articulated by the Court in *City of Miami*.

b. The three methods described in paragraph (c) of § 100.500 through which defendants may establish that plaintiffs have failed to allege a prima facie case.

In paragraph (c), the Proposed Rule describes three methods through which a defendant can rebut the plaintiff’s prima facie case. One method is where a defendant can show that its discretion is materially limited by a third party.

²⁴ See, e.g., *Reinhart v. Lincoln Cty.*, 482 F.3d 1225, 1229 (10th Cir. 2007) (quoting *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1251 (10th Cir. 1995)) (“To establish a prima facie case of disparate impact discrimination, plaintiffs must show that a specific policy caused a significant disparate effect on a protected group.”); *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 883 (8th Cir. 2003) (“To prove discrimination under a disparate impact analysis [plaintiff] must show a facially neutral policy has a significant adverse impact on members of a protected minority group.”); *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 745 (9th Cir. 1996) (“To make out a prima facie case of discrimination under the disparate impact theory the plaintiff must show ... a significantly adverse or disproportionate impact[.]”); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (“The relevant question in a discriminatory effects claim against a private defendant, however, is not whether a single act or decision by that defendant has a significantly greater impact on members of a protected class, but instead the question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class.”)

²⁵ 135 S. Ct. at 2524.

²⁶ *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1305 (2017).

²⁷ *City of Miami, Fla.*, 137 S. Ct. at 1306 (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)).

²⁸ 137 S. Ct. at 1306.

- i. § 100.500(c)(1): (The defendant can show that its “discretion is materially limited by a third party”)

As *Inclusive Communities* established, a plaintiff must show “robust causality” to maintain a prima facie case of disparate impact.²⁹ If the plaintiff “cannot show a causal connection between the [challenged policy] and a disparate impact—for instance, because federal law substantially limits the [defendant’s] discretion—that should result in dismissal of this case.”³⁰ The defense found in (c)(1) of the Proposed Rule is supported by the Court’s “robust causality” requirement. This articulates a circumstance where “robust causality” cannot be established because something other than the defendant’s practice or policy is the true cause of the alleged disparate impact.

For the (c)(1) defense, the challenged practice or policy is imposed on the defendant by a third party with greater authority. Under such circumstances, where the defendant’s discretion is materially limited by that third party, the defendant’s action is not the true cause of the disparate impact. Rather, the disparate impact is more appropriately attributable to the actions of a third party, for example through “a Federal, state, or local law; or a binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement[.]”

This defense is important in light of the practical working of the mortgage market. The vast majority of mortgage loans today are originated with the expectation that the loan will be sold to a government sponsored enterprise such as Fannie Mae or Freddie Mac, or insured or guaranteed by the Federal Housing Administration or the Department of Veterans Affairs. These sales and credit enhancements bring substantial benefits to the residential mortgage borrowers in the form of lower rates and the ability to obtain a long-term fixed rate loan. However, these third parties regularly set standards for their purchases or credit enhancements as requirements for participation in their programs. This defense allows a mortgage lender to make these favorable loans without having to investigate the potential impact of the myriad secondary market requirements—over which they have little control or discretion—imposed on the lender by these government and quasi-governmental entities.

This defense also strikes the appropriate balance sought in the *Inclusive Communities* decision between eliminating the offending practice and ensuring that there is not litigation against those without direct responsibility for the disparity or the ability to provide change necessary to prevent a reoccurrence of the offending policy or practice.³¹

- ii. § 100.500(c)(3): defendant shows that plaintiff failed to allege sufficient facts to meet one or more of the five elements in § 100.500(b).

The defense listed in (c)(3) would allow the defendant to defeat a disparate impact claim if the plaintiff fails to satisfy each of the five elements of the prima facie case. This defense is appropriate under the *Inclusive Communities* standard. It reinforces the importance of the “safeguards” the Court placed on the prima facie case and pleading requirements for disparate impact under the Fair Housing Act and,

²⁹ 135 S. Ct. at 2523.

³⁰ *Id.* at 2524.

³¹ *Id.* at 2512.

consistent with the Court's instructions, provide a means through which courts can quickly resolve non-actionable disparate impact claims.³²

II. What impact, using specific court cases as reference, did *Inclusive Communities* have on the number, type, and likelihood of success of disparate impact claims brought since the 2015 decision? How might this proposed rule further impact the number, type, and likelihood of success of disparate impact claims brought in the future?

While we appreciate HUD's interest in thoroughly assessing the potential implications of the proposed changes to its FHA disparate impact rule, we do not believe that such considerations are relevant to the current rulemaking. Rather, the appropriate assessment framework is whether the proposed rule faithfully reflects the standard expressed in *Inclusive Communities*. It is well-settled under separation of powers principles that it is the responsibility of Congress rather than an Executive agency to liberalize the cause of action following a Supreme Court decision if they believe it is inappropriately narrow.³³

One additional axis that HUD should consider is the use of disparate impact claims by bank regulators that enforce the FHA with respect to federally-insured depositories. Federal bank examiners rely on the standards that other agencies promulgate, including HUD's standard for bringing disparate impact claims. While the standards set forth in the 2015 *Inclusive Communities* decision have been applied to a number of private civil claims, bank examiners have continued to look to the standards set in HUD's 2013 Rule, and this rulemaking will be helpful in channeling those examination efforts into challenges to practices that meet the standards set forth by the Court.

III. How might a decision not to amend HUD's 2013 final disparate impact rule affect the status quo since *Inclusive Communities*?

In *Inclusive Communities*, the Court articulated a disparate impact pleading standard that differs in key respects from the standard found in HUD's 2013 final disparate impact rule.³⁴ The Court adopted heightened pleading and prima facie requirements to serve as safeguards to filter out non-actionable disparate impact claims in the preliminary stages of litigation. The 2013 final disparate impact rule lacks these safeguards.

While *Inclusive Communities* did not expressly consider the 2013 rule, the decision does explain why safeguards at the pleading stage are necessary. Absent the "cautionary standards" described by the Court, the threat of disparate impact liability "would almost inexorably lead governmental or private entities to use numerical quotas," leading to "serious constitutional questions[.]"³⁵ Businesses may attempt to insulate themselves from the risk of disparate impact liability by avoiding legitimate business priorities.

³² *Id.* at 2523; see also *Meyer v. Holley*, 537 U.S. 280, 286-89 (2003) (limiting vicarious liability under the Fair Housing Act to agency relationships).

³³ See, e.g., CIVIL RIGHTS ACT OF 1991, PL 102-166, November 21, 1991, 105 Stat 1071.

³⁴ See *Inclusive Communities Project Inc., v. Lincoln Property*, 920 F.3d 890, 902 (5th Cir. 2019) ("We read the Supreme Court's opinion in [*Inclusive Communities*] to undoubtedly announce a more demanding test than that set forth in the HUD regulation.") But see *Mhany Mgmt Inc. v. City of Nassau*, 819 F.3d 581, 618 (2d. Cir. 2016). While we note the Circuit split, HUD has the authority to amend its regulations consistent with the Administrative Procedures Act and general principles of agency deference.

³⁵ *Id.* at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653).

The Court explains that such a result is not the FHA's goal. "Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation."³⁶

Along with recognizing the availability of the disparate impact cause of action under the FHA, *Inclusive Communities* announced important cautionary standards that are not reflected in HUD's 2013 Rule. As the Court in *Inclusive Communities* explained, Congress, courts, "residents and policymakers have come to rely on the availability of disparate-impact claims."³⁷ Given this reliance, MBA urges HUD to finalize the Proposed Rule as soon as possible. Once implemented, HUD can pursue additional rulemaking or guidance activities to provide clarity on the definition of terms.

MBA appreciates the opportunity to comment on this proposed rule. For the reasons outlined above, we support HUD's revisions to its 2013 rule to harmonize its rules with the Supreme Court's decision in *Inclusive Communities*. HUD is charged with interpreting and clarifying the provisions of the Fair Housing Act, and we appreciate the effort to ensure its rules remain consistent with current law.

Sincerely,



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³⁶ *Id.* at 2522.

³⁷ *Id.* at 2525.