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October 18, 2019

Secretary Ben Carson  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

**RE: FR-6111-P-02**  
**Notice of Proposed Rulemaking on the**  
**Implementation of the Fair Housing Act's Disparate Impact Standard**

Dear Secretary Carson:

On behalf of America's credit unions, thank you for the opportunity to respond to the Notice of Proposed Rulemaking (NPR) on the Implementation of the Fair Housing Act's Disparate Impact Standard.

As the largest credit union advocacy organization in this country, the Credit Union National Association's (CUNA) state and federal credit unions currently serve over 115 million members. Because many of those members rely upon their credit union to meet their housing finance needs, ensuring fair and equal access to housing is a key concern for both credit unions and the members they serve. Underlying that concern is our shared cooperative principle that imposes an ongoing responsibility on all credit unions to play a leadership role in building and serving more diverse, equitable, and inclusive communities.<sup>1</sup>

Credit unions firmly believe that illegal discrimination should have no place in the financial services market. Individuals and institutions engaging in discriminatory behavior should and must be penalized. Accordingly, credit unions have long supported the Fair Housing Act and its use as a tool to help eradicate illegal discrimination from this nation's housing markets. As part of those efforts, however, it is essential that both financial institutions and consumers have a clear understanding of the standards imposed by the law and the requirements for demonstrating compliance with its mandates. To that end, CUNA supports HUD's proposed revisions to its existing rules on the burden of proof for disparate-impact claims under the Act in order to conform to the standards outlined by the Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("Inclusive Communities").<sup>2</sup>

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<sup>1</sup> See Jim DuPlessis, "Diversity and Inclusion to Be Eighth Principle," Credit Union Times, 2019, <https://www.cutimes.com/2019/10/11/diversity-and-inclusion-to-be-eighth-principal/> (last visited 10/11/19).

<sup>2</sup> 135 S. Ct. 2507 (2015).

## **1. HUD’s Existing Rule is Inconsistent with the Standards Articulated by the Supreme Court in *Inclusive Communities*.**

The Fair Housing Act (“FHA” or the “Act”), originally enacted in 1968, prohibits discrimination in housing based on race, color, religion, sex, disability, familial status, or national origin.<sup>3</sup> In 2013, HUD promulgated a rule setting forth the requirements for a disparate impact claim under the FHA.<sup>4</sup> The 2013 Rule provided that liability may exist under the FHA when a challenged practice actually or predictably results in a disparate impact on a protected class of persons, even if the practice was not motivated by a discriminatory intent, and then proceeded to create a burden-shifting framework for deciding when a housing policy or practice violates the FHA because of its discriminatory effect.<sup>5</sup> Under HUD’s 2013 regulation, the burden-shifting framework operates as follows:

- (1) the plaintiff must first show that a practice has a disparate effect on a protected class;
- (2) the burden then shifts to the defendant to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; and then
- (3) the plaintiff may still prevail by proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

In *Inclusive Communities*, the Supreme Court upheld the use of disparate impact analysis to establish liability under the FHA, without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain groups of individuals and the practice is not grounded in sound business considerations.<sup>6</sup> The Court’s decision, however, differs from HUD’s 2013 rule by holding that a disparate impact claim cannot be sustained solely by evidence of a statistical disparity and imposes several “cautionary standards” designed to protect against abusive disparate-impact claims.<sup>7</sup> In particular, the decision emphasizes that the plaintiff must bear the burden of initially establishing a “robust” causal connection between the challenged practice and the alleged disparate impact on a protected class.<sup>8</sup>

## **2. The Proposed Revisions to the Burden of Proof for Prima Facie Claims Will Bring the Agency’s Rules in Line with the Court’s *Inclusive Communities* Decision.**

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<sup>3</sup> The FHA, as amended, is codified at 42 U.S.C. §§ 3601–3619 (2012).

<sup>4</sup> See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

<sup>5</sup> *Id.* at 11,482 (promulgating regulation—24 C.F.R. § 100.500—recognizing FHA covers disparate-impact claims).

<sup>6</sup> See *Inclusive Cmty.*, 135 S. Ct. at 2519.

<sup>7</sup> *Id.* at 2524.

<sup>8</sup> *Id.* at 2523. The Court also suggested that disparate-impact claims should be limited to challenging a defendant’s policies, rather than its one-time decisions. *Id.*

The *Inclusive Communities* majority reasoned that disparate impact claims must establish robust causality between an impermissible disparity and a specific policy that is artificial, arbitrary, and unnecessary in order to be actionable under the Fair Housing Act. In doing so, the Court noted that “disparate-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.”<sup>9</sup> CUNA believes that HUD’s newly proposed burden shifting framework accomplishes this goal and provides clarity and uniformity for those who seek to comply with their legal responsibilities under the Fair Housing Act.

Specifically, HUD has proposed to replace the 2013 Rule’s disparate impact analytical structure with a revised burden-shifting framework where a plaintiff raising a disparate impact claim would, initially, be required to plead that the policy or practice in question was “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective.”<sup>10</sup> In accordance with this standard, the Proposed Rule requires a plaintiff to show that a specific, identifiable policy or practice caused the discriminatory effect and to allege five elements set forth in the Proposed Rule with respect to the specific policy or practice.<sup>11</sup> If the plaintiff makes this prima facie case, the burden would then shift to the defendant to rebut the disparate impact claim.<sup>12</sup> The proposed amendments are “intended to bring HUD’s disparate impact rule into closer alignment with the analysis and guidance provided in *Inclusive Communities* as understood by HUD.”<sup>13</sup>

## Conclusion

CUNA recognizes and applauds HUD’s efforts to revise the standards for proving a prima facie claim of disparate impact under the FHA in light of the Supreme Court’s guidance. As noted by the Court in *Inclusive Communities*, the FHA plays a “continuing role in moving the Nation toward a more integrated society.”<sup>14</sup> Credit unions support the FHA and its objective of achieving more equitable and integrated communities, and they acknowledge a personal responsibility to act as leaders in the effort to make this objective a reality for both credit union members and the communities that credit unions serve.

On behalf of America’s credit unions and their more than 115 million members, thank you for your consideration of our views.

Sincerely,

Mitria Wilson,  
Sr. Director of Advocacy and Counsel  
CUNA

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<sup>9</sup> *Id.* at 2518.

<sup>10</sup> 84 Fed. Reg. 42,854 (August 19, 2019).

<sup>11</sup> *Id.* at 42,858.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 42,857.

<sup>14</sup> *Inclusive Cmty.*, 135 S. Ct. at 2525–26 (majority opinion).