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August 17, 2018

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard; Docket No. FR-6111-A-01

To Whom It May Concern:

On behalf of America's credit unions, I am writing the Department of Housing and Urban Development (HUD) on its advance notice of proposed rulemaking (ANPR) regarding *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*. The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members.

The Fair Housing Act (FHA) prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. Given credit unions' history and unique structure as member-owned, not-for-profit financial cooperatives that operate for the purpose of promoting thrift, providing credit at competitive rates, and providing other financial services to their member-owners, it is unsurprising that CUNA and our member credit unions support the goals of the FHA, as well as regulatory initiatives that promote the availability of credit to all creditworthy applicants.

Advance Notice of Proposed Rulemaking

HUD is seeking input through an ANPR regarding possible amendments to HUD's 2013 final rule implementing the FHA's disparate impact standard (2013 Disparate Impact Rule).¹ HUD is reviewing the final rule to determine if any changes are appropriate following the United States Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities)*, which was decided subsequent to issuance of the 2013 Disparate Impact Rule.²

¹ 78 Fed. Reg. 11460 (Feb. 15, 2013).

² *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

Before we address more substantive issues regarding the ANPR, we would like to note our appreciation for HUD's decision to seek initial input on changes to the rule via an ANPR, as opposed to simply a notice of proposed rulemaking (NPRM) under the Administrative Procedure Act. We believe use of the ANPR process is often superior to that of the NPRM, as it provides credit unions and other interested parties the opportunity to more effectively shape future regulatory requirements. CUNA encourages HUD and its fellow federal regulatory agencies to utilize ANPRs where appropriate.

2013 Disparate Impact Rule

The 2013 Disparate Impact Rule codified HUD's interpretation that the FHA creates liability for practices with an unjustified discriminatory effect, even if those practices were not motivated by discriminatory intent.

Specifically, the 2013 Disparate Impact Rule established a three-part burden-shifting test for determining when a practice with a discriminatory effect violates the FHA. Under this test, the plaintiff first bears the burden of proving that a practice results in a discriminatory effect on the basis of a protected characteristic. If the plaintiff proves its prima facie case, the burden of proof shifts to the defendant to prove that the challenged practice is necessary to achieve its "substantial, legitimate, nondiscriminatory interests." If the defendant satisfies this burden, then the plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

The burden-shifting test articulated in the 2013 Disparate Impact Rule has been in place since it became effective in March 2013.

Inclusive Communities

In 2015, in *Inclusive Communities*, the Supreme Court held that disparate impact claims are cognizable under the FHA. The Court's opinion referenced HUD's 2013 Disparate Impact Rule, but the Court did not extensively review the rule or rely on it for its holding. Rather, the Court undertook its own analysis of the FHA and discussed the standards for, and constitutional limitations on, disparate impact claims. The Court's ruling in *Inclusive Communities* recognized the availability of disparate impact claims under the FHA independent of HUD's 2013 Disparate Impact Rule.

Impact of Inclusive Communities on HUD's 2013 Disparate Impact Rule

In light of *Inclusive Communities*, we believe it is necessary for HUD to revisit the 2013 Disparate Impact Rule. It is critical that the requirements of HUD's rule conform to the findings of the Court in *Inclusive Communities*.

While in *Inclusive Communities* the Court did not extensively review the 2013 Disparate Impact Rule, the Court did address several aspects of a disparate impact analysis explicitly included in HUD's rule. The Court's characterization of some of the aspects of a disparate

impact analysis differ from that of HUD in the 2013 Disparate Impact Rule. For example, under *Inclusive Communities*, claims for disparate impact must establish “robust causality” between an impermissible disparity and a policy that is “artificial, arbitrary, and unnecessary.” This sentiment is not articulated in the 2013 Disparate Impact Rule.

As part of its review, HUD may determine that provisions of the 2013 Disparate Impact Rule’s burden-shifting test, though not in direct contradiction to the language of the decision, are in fact inconsistent with Court’s ruling.

Further, we are concerned that inconsistencies between the 2013 Disparate Impact Rule and *Inclusive Communities* create uncertainty on business decision making that may lead to negative, unintended consequences. Thus, we encourage HUD to ensure the principle made clear in *Inclusive Communities* that valid business priorities set by lenders are legal is expressly conveyed through revisions to the 2013 Disparate Impact Rule.

We urge HUD to thoroughly scrutinize the specific requirements of the 2013 Disparate Impact Rule against the expansive language in *Inclusive Communities* to determine all changes necessary to bring parity between the rule and the ruling. Following that review, it is critical that HUD work with credit unions and other interested stakeholders through both the formal NPRM process and direct outreach to the financial services community. While this ANPR is a great opportunity for HUD to obtain general input, it is imperative that HUD fully utilize the NPRM process to ensure the comments and concerns received are ultimately incorporated through revisions to the 2013 Disparate Impact Rule.

Conclusion

On behalf of America’s credit unions and their 110 million members, thank you for the opportunity to share our views with HUD on its ANPR regarding the 2013 Disparate Impact Rule. We look forward to working with HUD as it develops proposed changes to the 2013 Disparate Impact Rule to conform it to the Court’s ruling in *Inclusive Communities*. If you have questions about our comments, please do not hesitate to contact me at (202) 508-6743.

Sincerely,

A handwritten signature in blue ink that reads "Luke Martone". The signature is written in a cursive, flowing style.

Luke Martone
Senior Director of Advocacy & Counsel