

**Comments to
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Regulations Division
Office of the General Counsel
451 7th Street SW, Room 10276
Washington, DC 20410**

In the Matter of)
)
Reinstatement of HUD’s) **Docket No. FR-6251-P-01**
Discriminatory Effects)
Standard)

**COMMENTS OF THE AMERICAN BANKERS ASSOCIATION,
CONSUMER BANKERS ASSOCIATION, INDEPENDENT COMMUNITY
BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION
REGARDING THE PROPOSAL TO RECODIFY THE 2013 REGULATION
TITLED IMPLEMENTATION OF THE FAIR HOUSING ACT’S
DISCRIMINATORY EFFECTS STANDARD**

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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: *Reinstatement of HUD's Discriminatory Effects Standard*
Docket No. FR-6251-P-01
RIN 2529-AB02

Ladies and Gentlemen:

This comment is submitted by the American Bankers Association (ABA), the Consumer Bankers Association (CBA), the Independent Community Bankers of America (ICBA) and the Mortgage Bankers Association (MBA) (together, the Associations)¹ in response to the June 25, 2021, proposed rule of the U.S. Department of Housing and Urban Development (the Department or HUD).² The Associations appreciate the opportunity to comment on this important rulemaking.

The Associations and their members oppose housing discrimination and support efforts to expand credit to all eligible borrowers irrespective of personal characteristics. The Associations and their 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 bases. Unacceptable and persistent racial disparities in health, wealth, income, education, and other measures of opportunity continue to have harmful effects throughout our nation, and the issues faced by the Department in promulgating rules and enforcing the Fair Housing Act are highly complex. This comment is intended to help ensure that HUD codifies a standard of disparate impact that is fully consistent with Supreme Court precedent and implements the Fair Housing Act's requirements with a clear legal framework to address unlawful discrimination.

In 2013, HUD issued a disparate-impact rule.³ Two years later, the United States Supreme Court issued a decision in *Texas Department of Housing & Community Affairs vs. Inclusive Communities Project, Inc.*, recognizing disparate-impact liability under the Fair Housing Act and articulating legal requirements applicable to such claims.⁴ In 2020, after reviewing comments submitted in connection with a 2018 advance notice of proposed

¹ Descriptions of the Associations are provided in Attachment A to this comment letter.

² 86 Fed. Reg. 33,590 (June 25, 2021) [hereafter 2021 Proposed Rule].

³ 78 Fed. Reg. 11,460 (Feb. 15, 2013) [hereafter 2013 Rule].

⁴ See *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

rulemaking and a 2019 proposed rule, HUD amended the 2013 Rule in response to *Inclusive Communities* to bring the disparate-impact standard into alignment with the binding Supreme Court precedent established in that case, which did not exist in 2013 when HUD first promulgated its regulation.⁵ In the 2021 Proposed Rule, “HUD is proposing to recodify its previously promulgated rule titled, ‘Implementation of the Fair Housing Act’s Discriminatory Effects Standard.’”⁶

Recodifying the 2013 Rule would reinstate a standard that predates and is inconsistent with binding Supreme Court precedent. *Inclusive Communities* is the law of the land, and all stakeholders need a durable disparate-impact rule that is aligned with the decision. Each new administration’s initiation of rule changes creates uncertainty for industry members and fair housing advocates alike, and undermines the fundamental statutory goal of expanding credit opportunity and availability.

Areas of tension between *Inclusive Communities* and the 2021 Proposed Rule that would reinstate the 2013 Rule include the following,⁷ and they should be resolved by including standards in any new rule that are consistent with the Supreme Court's framework:

1. The disparate-impact standard endorsed by *Inclusive Communities* applies to Fair Housing Act cases.

In *Inclusive Communities*, the Supreme Court relied on *Wards Cove Packing Co. v. Atonio*,⁸ as supplying the disparate-impact standard applicable in the Fair Housing Act context, noting only that *Wards Cove* was “superseded by statute on other grounds”—i.e., superseded by the 1991 congressional amendments to Title VII for disparate-impact claims arising under that separate statute.⁹ Yet two years before the Supreme Court recognized the continued application

⁵ 85 Fed. Reg. 60,288 (Sept. 24, 2020).

⁶ 2021 Proposed Rule at 33,590.

⁷ For a detailed discussion of the issues, we reference prior public comment letters submitted to HUD. See, e.g., Reply Comments of the American Bankers Association and State Bankers Associations in Support of Reopening Rulemaking Regarding the Implementation of the Fair Housing Act’s Disparate Impact Standard (Aug. 20, 2018); Comments of the American Bankers Association, Consumer Bankers Association, and Housing Policy Council in Support of the Proposed Amendments to the Fair Housing Act’s Disparate Impact Standard to Reflect United States Supreme Court Precedent (Oct. 18, 2019); Comments of the Independent Community Bankers of America re: Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Aug. 20, 2018); Comments of the Mortgage Bankers Association re: Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Aug. 20, 2018); Comments of the Mortgage Bankers Association re: Implementation of the Fair Housing Act’s Disparate Impact Standard (Oct. 18, 2019).

⁸ *Ward’s Cove*, 490 U.S. 642 (1989).

⁹ *Inclusive Communities*, 576 U.S. at 542 (quoting *Wards Cove*, 490 U.S. at 653); see also *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (“While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the [Age Discrimination in Employment Act] or speak to the subject of

of *Wards Cove* in *Inclusive Communities*, the 2013 Rule rejected the decision, stating that “HUD does not agree ... that *Wards Cove* even governs Fair Housing Act claims.”¹⁰

2. The Supreme Court held that businesses must be permitted to make profit-related decisions and to consider market factors.

Inclusive Communities held 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” and “[e]ntrepreneurs must be given latitude to consider market factors.”¹¹ However, in 2013 HUD declined a commenter’s request that the rule recognize “profits,” loss, “market share” and competition as legitimate nondiscriminatory interests, stating that the issue “must be determined on a case-by-case basis.”¹²

3. The Supreme Court requires Fair Housing Act plaintiffs to demonstrate “robust causality” and “direct” proximate cause.

Inclusive Communities held 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. A robust causality requirement ... protects defendants from being held liable for racial disparities they did not create.”¹³ Two years later, the Supreme Court addressed causation in the Fair Housing Act context for the second time, and held that all claims under the Act require “direct” proximate cause between the defendant’s challenged conduct and the plaintiff’s asserted injury.¹⁴

The 2013 Rule predates both of these Fair Housing Act decisions from the Supreme Court, and makes no reference to causation, robust causality, or proximate cause.¹⁵ In 2013, HUD stated only “the final rule changes ‘proving that a challenged practice causes a discriminatory effect’ to ‘proving that a challenged practice caused or predictably will cause a discriminatory effect.’”¹⁶

age discrimination. Hence, *Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA”); *see also* 85 Fed. Reg. at 60,320.

¹⁰ 78 Fed. Reg. at 11,473.

¹¹ *Inclusive Communities*, 576 U.S. at 533, 541-42; *see also* 85 Fed. Reg. at 60,322.

¹² 78 Fed. Reg. at 11,471.

¹³ *Inclusive Communities*, 576 U.S. at 542; *see also* 85 Fed. Reg. at 60,308.

¹⁴ *See Bank of Am. Corp. v. City of Miami, Florida*, 127 S. Ct. 1296, 1305-06 (2017).

¹⁵ *See* 85 Fed. Reg. at 60,315.

¹⁶ 78 Fed. Reg. at 11,464.

4. *Inclusive Communities* held that claims based on third-party policies limiting a defendant’s discretion should be dismissed.

Inclusive Communities held that if a plaintiff “cannot show a causal connection between the [defendant’s] policy and a disparate impact—for instance, because federal law substantially limits the [defendant’s] discretion—that should result in *dismissal*.”¹⁷ In contrast, in 2013 HUD disagreed with a commenter who raised this aspect of robust causation regarding the impact of “contractual obligations set by third parties, including the federal government,” stating that a defendant may “defend against a claim of discriminatory effect by establishing a legally sufficient justification.”¹⁸

5. Disparate impact only mandates the removal of artificial, arbitrary, and unnecessary barriers.

Inclusive Communities held that “[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”¹⁹ The Court also held that “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers’” 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.”²⁰ Immediately before reaching this holding, the Supreme Court pointed to “[s]uits targeting such practices [that] reside at the heartland of disparate-impact liability,” including a “post-Hurricane Katrina ordinance restricting the rental of housing units to only blood relatives in an area of the city that was 88.3% white and 7.6% black”—a restriction on housing that on its face advanced no valid housing priority and would “arbitrarily creat[e] discriminatory effects.”²¹ This holding confirms that “heartland” suits of this type would survive under the *Inclusive Communities* standard mandating only the removal of artificial, arbitrary, and unnecessary barriers to housing. Despite the Supreme Court’s emphasis, however, the 2013 Rule is silent about the artificial, arbitrary, and unnecessary limitation on disparate-impact claims.

6. *Inclusive Communities* addressed pleading-stage requirements and standards.

Inclusive Communities held that a “plaintiff who fails to allege facts *at the pleading stage* ... cannot make out a prima facie case of disparate impact” and directed courts to “examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important.”²² Supreme Court precedent has long required plaintiffs to plead facts supporting their claims. While *Inclusive Communities* did not create a heightened standard of pleading, such as the type required to plead claims of fraud under Federal Rule of

¹⁷ *Inclusive Communities*, 576 U.S. at 543 (emphasis added); *see also* 85 Fed. Reg. 60,290, 60,317-18.

¹⁸ 78 Fed. Reg. at 11,475.

¹⁹ *Inclusive Communities*, 576 U.S. at 543.

²⁰ *Id.* at 540; *see also* 85 Fed. Reg. at 60,311, 60,331.

²¹ *Inclusive Communities*, 576 U.S. at 539-40 (citation and internal quotation marks omitted).

²² *Id.* at 543 (emphasis added).

Civil Procedure 9(b), the Court emphasized that the “limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims” because if defendants “are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.”²³ In contrast to this Supreme Court precedent, the 2013 Rule does not discuss the sufficiency of pleadings in disparate-impact claims. Indeed, in the 2021 Proposed Rule, HUD asserts that the *Inclusive Communities* Court never “intended” to address pleading standards.²⁴

7. Remedies in disparate-impact cases should focus on the elimination of the offending practice.

Inclusive Communities holds that “even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that “arbitrarily operates invidiously to discriminate on the basis of race.”²⁵ In 2013, HUD rejected a commenter’s suggestion “that the most appropriate remedy for a violation of the Act under an effects theory is declaratory or injunctive relief,” and the 2013 Rule provided no guidance on the issue.²⁶

* * * * *

Inclusive Communities was not in place when HUD originally promulgated the disparate-impact rule in 2013. The Department’s disparate-impact regulation must accurately reflect binding Supreme Court precedent, including but not limited to the holdings described above, and recodifying the 2013 Rule would be inconsistent with *Inclusive Communities*.

Thank you again for the opportunity to comment. We look forward to working with HUD and other stakeholders to improve access to housing and credit for all Americans.

Sincerely,

American Bankers Association
Consumer Bankers Association
Independent Community Bankers of America
Mortgage Bankers Association

²³ *Id.*; see also 85 Fed. Reg. 60,307, 60,316.

²⁴ 86 Fed. Reg. at 33,594.

²⁵ *Inclusive Communities*, 576 U.S. at 545 (internal alterations and citations omitted); see also 85 Fed. Reg. at 60,292.

²⁶ 78 Fed. Reg. at 11,474.

Enclosure: Attachment A

ATTACHMENT A

The American Bankers Association (ABA) is the voice of the nation's \$22.5 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$18 trillion in deposits and extend nearly \$11 trillion in loans.

Established in 1919, the Consumer Bankers Association (CBA) is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. CBA's members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country's total depository assets.

The Independent Community Bankers of America (ICBA) creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties.

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 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 more than 1,900 companies includes all elements of real estate finance.