

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 the 2.2 million credit union members we represent, the Heartland Credit Union Association (HCUA) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPR) on the Implementation of the Fair Housing Act's Disparate Impact Standard. HCUA supports HUD's proposed revisions to its existing rules on the burden of proof for disparate-impact claims under the Act.

The Fair Housing Act ("FHA" or the "Act"), originally enacted in 1968, prohibits discrimination in housing based on race, color, religion, sex, disability, familial status, or national origin. In 2013, HUD promulgated a rule setting forth the requirements for a disparate impact claim under the FHA. 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.

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. 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.

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." We believe 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." 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. If the plaintiff makes this prima facie case, the burden would then shift to the defendant to rebut the disparate impact claim. 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."

As always, we appreciate the opportunity to review this issue. We will be happy to respond to any questions regarding these comments.

Sincerely,

A handwritten signature in black ink that reads "Bradley D. Douglas". The signature is written in a cursive, flowing style.

Brad Douglas  
President/CEO