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National Association of Federally-Insured Credit Unions

August 24, 2021

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

RE: Reinstatement of HUD's Discriminatory Effects Standard
Docket No. FR-6251-P-01

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in regard to the Department of Housing and Urban Development's (HUD) proposal to reinstate the agency's 2013 discriminatory effects standard ("2013 Rule"). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 125 million consumers with personal and small business financial service products. History demonstrates that credit unions have served as sources of affordable credit in communities neglected by other lenders, and this tradition informs our industry's longstanding commitment to fair lending principles. Credit unions strongly support laws and regulations aimed at detecting and preventing discrimination, as well as the legal mechanisms used to protect fundamental consumer interests. As cooperatives that are directly accountable to their member-owners, credit unions are focused on developing long-lasting, trusted relationships with their communities—an interest that is best served by adhering to core principles of equality and fairness.

Title VIII of the *Civil Rights Act of 1968* — commonly referred to as the *Fair Housing Act* (FHA) (42 U.S.C. § 3601 et seq)—prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. The FHA also makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," because of those same protected characteristics.

HUD's 2013 Rule requires covered entities, such as financial institution lenders, to assess whether adverse fair housing consequences result from any business practice, even if the practice has no explicit discriminatory features. The 2013 Rule utilizes a burden shifting framework for analyzing such claims and the lender bears the burden of showing that the challenged policy or practice serves a legitimate business purpose.

While HUD's decision to reinstate its 2013 Rule does not alter credit unions' day-to-day compliance with fair lending laws, it does not address significant interpretive clarifications that have emerged from the Supreme Court's 2015 decision in *Texas Department of Housing and*

Community Affairs v. Inclusive Communities Project, Inc., (*Inclusive Communities*).[1] HUD's 2020 final rule attempted to clarify the elements of a prima facia case to reflect *Inclusive Communities'* framing of artificial, arbitrary, and unnecessary practices as the true targets of disparate impact liability. While the 2013 Rule is not per se incompatible with the Court's reasoning in *Inclusive Communities*, it does little to illuminate the legal contours of a "robust causality" requirement aimed at preventing interpretations of disparate impact liability that could displace "valid governmental and private priorities" or result in second-guessing between two reasonable approaches.[2]

Although HUD regards the legal guardrails espoused in *Inclusive Communities* "as maintaining existing law, not profoundly changing it," HUD should more clearly recognize limits on disparate impact claims acknowledged by the Court, such as circumstances where a defendant's policy or practice is bound by federal law.[3] As the National Credit Union Administration commented to HUD in 2012, it would be helpful if HUD's discriminatory effects standard included a safe haven for compliance with a statute so as not to burden credit unions with the costs of defending practices based on clear legal limitations, such as membership requirements found in the *Federal Credit Union Act* or state credit union laws.[4] Providing clarity in this respect would spare credit unions and their member-owners the burden of having to defend against unproductive litigation with limited legal resources.

HUD should also consider how its burden-shifting framework might be applied in cases where new technology strains the boundaries of what constitutes a plausible pleading of a disparate impact. In HUD's 2019 proposal to amend the 2013 Rule (2019 Proposal), the agency contemplated new defenses specifically aimed at underwriting models that rely on algorithms to inform human decision making.[5] While the proposed defenses for algorithmic underwriting practices were not fully developed, they recognized limits on lender discretion in using proprietary underwriting models (e.g., the automated underwriting systems used by Fannie Mae and Freddie Mac), as well as evidentiary challenges that are likely to arise as artificial intelligence and machine learning technologies gain acceptance. Specifically, the proposal acknowledged the difficulty an individual lender might face when having to defend third-party, industry standard underwriting software that it has no power to modify.

In the 2019 proposed rule, HUD offered a framework for streamlining these types of cases (i.e., where a plaintiff identifies an offending policy or practice that relies on an algorithmic model), and permitted a defending party to defeat the claim by showing that the model is "produced,

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[1] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015)
[2] Inclusive Cmtys. Project, Inc., 576 U.S. at 544 (cautioning against proof standards that "displace valid governmental and private priorities, rather than solely `remov[ing] . . . artificial, arbitrary, and unnecessary barriers' ") (quoting *Griggs v. Duke Power Co*., 401 U.S. 424, 431).
[3] *See id*. at 544 ("[I]the ICP cannnot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case.")
[4] *See* National Credit Union Administration, Comment to HUD re: Proposed Rule – Implementation of the Fair Housing Act's Discriminatory Effects Standard, Docket No. FR-5508-P-01 (January 13, 2012), available at https://www.regulations.gov/comment/HUD-2011-0138-0097
[5] HUD, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (August 19, 2019).

maintained, or distributed by a recognized third party that determines industry standards, the inputs and methods within the model are not determined by the defendant, and the defendant is using the model as intended by the third party."[6] The proposed defense was intended to ensure that disparate impact claims are brought against the appropriate party.

The 2013 Rule offers no similar attempt to mitigate the unique evidentiary burdens and relationships that can exist in cases targeting algorithmic models, and this could chill adoption of new underwriting technology that would ultimately benefit underserved and historically disenfranchised communities.[7]

Use of artificial intelligence and machine learning has become more commonplace since HUD finalized the 2013 Rule. Furthermore, while HUD regards the 2013 Rule as maintaining "continuity with longstanding disparate-impact jurisprudence," this jurisprudence has already moved in a direction that more explicitly delimits purely statistical claims of disparity.

In *Inclusive Communities*, the Court held that "[a] disparate impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[8] In addition, the Court observed 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."[9] Given this choice of emphasis in the Court's opinion, HUD might consider clarifying how its standard might be applied in an environment where community institutions rely upon underwriting models developed by government sponsored enterprises, such as Fannie Mae and Freddie Mac. Credit unions may also be reliant on other underwriting software that helps reach underserved or credit-thin applicants but are not themselves the creators of algorithmic models.

NAFCU does not regard the creation of a specific defense addressing algorithmic underwriting practices as limiting a plaintiff's right to assert that an underwriting model has produced a significant disparity and direct injury without knowing all of its specific inputs. However, HUD should avoid the suggestion, implicit in its deletion of the 2020's Rule's requirement that plaintiffs "plead facts to support" their case, that claims targeting algorithmic models need not meet some minimum degree of causal specificity.[10] Not only would this undercut the substance of a robust causality requirement, but it could also invite abuse of the burden shifting framework by threatening defendants with costly and prolonged reviews of software that is outside their control.

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[6] *See id*. at 42859.
[7] The Consumer Financial Protection Bureau (CFPB) has also noted the capacity of algorithmic underwriting models to expand access to credit. *See* CFPB, An update on credit access and the Bureau's first No-Action Letter (August 6, 2019), available at https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/.
[8] Inclusive Cmtys. Project, Inc., 576 U.S. at 543.
[9] *Id*. at 533.
[10] *See* HUD, Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33593 (June 25, 2021); *see also* Inclusive Cmtys. Project, Inc., 576 U.S. at 544 ("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.").

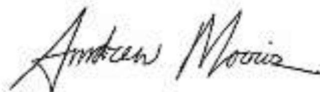
A fair balance is necessary, and HUD's 2020 view that "it is premature at this time to more directly address algorithms" should be revisited for the sake of clarity.[11]

NAFCU appreciates the opportunity to provide comments on HUD's proposed rule reinstating the agency's 2013 Rule. NAFCU supports strong and effective fair lending rules for credit unions that are responsive to technological change. Compliance with fair lending laws, such as the FHA, constitutes an essential part of financial institution supervision and NAFCU supports agency efforts to detect and eliminate discrimination in all forms. Some discriminatory practices may be obvious while others may be more difficult to detect, and disparate impact claims have been used to uncover less obvious instances of prohibited conduct.

As credit unions explore the use of new technology to expand access to credit in communities across America, whether they be rural or urban, we ask that HUD clarify how its 2013 Rule might be applied in cases where the use of algorithmic underwriting models complicates interpretation of the Supreme Court's "robust causality" requirement. We also ask that HUD provide a more explicit safe harbor for conduct that must conform to limits imposed by statute.

If you have any question or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely,



Andrew Morris
Senior Counsel for Research and Policy

[11] 85 Fed. Reg. 60288, 60290