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National Association of Federally-Insured Credit Unions

August 17, 2018

Anna Maria Farías,
Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Docket No. FR-6111-A-01) (RIN: 2529-ZA01)

Dear Ms. Farías:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in regard to the Department of Housing and Urban Development's (HUD) advance notice of proposed rulemaking (ANPR) on its implementation of the *Fair Housing Act's* disparate impact standard.

General Comments

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) — was enacted to "provide, within constitutional limitations, for fair housing throughout the United States." The FHA 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.

Credit unions are examined for compliance with the FHA and other fair lending laws, such as the *Equal Credit Opportunity Act* (ECOA) and the *Home Mortgage Disclosure Act* (HMDA). NAFCU believes that fair lending examinations are an essential part of financial institution supervision and we support agency efforts to detect and eliminate discriminatory practices. Some discriminatory practices may be obvious while others may be more difficult to detect. In cases involving disparate impact, evidence of discriminatory intent is not required, and neutral policies or practices may still be considered discriminatory if they are shown to have a disproportionately negative effect on a protected class. In such cases, the lender bears the burden of showing that the challenged policy or practice serves a legitimate business purpose.[1]

Given the inherent difficulty of applying HUD's burden shifting approach in disparate impact cases, which often involve complex statistical analysis, NAFCU believes that it is essential for

[1] *See generally*, 12 CFR 100.500.

HUD to ensure that its Disparate Impact Rule is not inconsistent with the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* (*Inclusive Communities*). [2] Aligning HUD's regulations with the Supreme Court's recommended safeguards will ensure that only "artificial, arbitrary, and unnecessary" practices are targets of disparate impact liability, and preserve the "vibrant and dynamic free-enterprise system"[3] that credit unions and their members enable.

HUD's Disparate Impact Rule requires covered entities, such as financial institution lenders, to assess whether adverse fair housing consequences result from any business practice, even if such practices have no explicit discriminatory features. The Disparate Impact Rule also uses a burden-shifting framework for analyzing claims of disparate impact under the FHA.

In its current form, the burden shifting framework consists of three steps. When a plaintiff alleges a violation of the FHA under the disparate impact standard, the plaintiff first has the burden of proving that the challenged practice caused or predictably will cause a discriminatory effect (i.e., step one).[4] Once the charging party or plaintiff satisfies this initial burden of proof, the defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the defendant (i.e., step two).[5] If the defendant satisfies step two, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect (i.e., step three).[6]

In *Inclusive Communities*, the Supreme Court considered whether the statutory text of the FHA established liability in cases involving disparate impact but did not explicitly reference HUD's Disparate Impact Rule. *Inclusive Communities* recognized that disparate impact claims are in fact cognizable under the FHA, but also described standards to ensure that statistical disparities *alone* do not give rise to liability.

In light of the *Inclusive Communities* decision, HUD should revise or clarify application of the burden shifting framework in the Disparate Impact Rule. In *Inclusive Communities*, the Supreme Court placed limits on disparate impact claims and articulated a "robust causality requirement." Specifically, 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." In addition, the Court held that "before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs."[7]

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[2] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc*., 135 S. Ct. 2507 (2015).
[3] *Id*. at 2518.
[4] 24 CFR 100.500(c)(1).
[5] 24 CFR 100.500(c)(2).
[6] 24 CFR 100.500(c)(3).
[7] *Inclusive Communities* 135 S. Ct. at 2518 (quoting Ricci v. DeStefano, 557 U. S. 557, 579 (2009)) (internal quotation marks omitted).

The Court's emphasis on a "robust causality requirement" underscores the current lack of clarity in the Disparate Impact Rule, which may invite abuse of the burden shifting framework and unnecessarily increase litigation risk.[8] While all credit unions maintain fair lending policies and procedures, which are regularly examined and audited, NAFCU believes that conforming the burden shifting framework to the legal guardrails articulated in *Inclusive Communities* will ensure that disparate impact liability does not cause distortion in lending practices or undermine broader public policy goals.[9]

NAFCU is concerned that step one in the burden shifting framework may not clearly recognize the causality requirement described in *Inclusive Communities*. Accordingly, NAFCU recommends that HUD promulgate new guidance to ensure that its supervisory practices are aligned with the Court's view that a plaintiff must demonstrate a link between the observed disparity and the defendant's "policy or policies causing that disparity." In its current form, step one of the burden shifting framework does not clearly state this required element of proof.

HUD should also clarify that a legally sufficient business justification, offered by the defendant in step two, may not be rejected before a plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the defendant's legitimate needs, consistent with the Court's reasoning in *Inclusive Communities*.[10] NAFCU believes that a more explicit description of the plaintiff's requirement in step two will help guard against the potential abuses of the burden shifting framework.

Conclusion

NAFCU appreciates the opportunity to provide comments on HUD's ANPR regarding the Disparate Impact Rule. NAFCU supports robust and effective fair lending rules for credit unions and is encouraged by the agency's reconsideration of its current regulation in light of the Supreme Court's decision in *Inclusive Communities*. NAFCU believes that to properly administer fair lending rules, HUD must ensure that its burden shifting framework reflects the strong causality requirement articulated by the Supreme Court. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely,

Andrew Morris
Regulatory Affairs Counsel

[8] *Id*. at 2524 ("The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims.").
[9] *Id*. at 2523 (discussing the need for adequate safeguards at the prima facie stage to prevent defendants from adopting quotas in an attempt to mitigate litigation risk).
[10] *See id*. at 2518.