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Office of General Counsel
Rule Docket Clerk
United States Department of Housing and Urban Development
451 7th Street SW., Room 10276
Washington, D.C. 20410-0001

Via electronic submission

Re: **HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**
Docket Number FR-6111-P-02

Dear Sir or Madam:

The New York Bankers Association (NYBA) appreciates the opportunity to comment on the above referenced proposed rule (PR) of the U.S. Department of Housing and Urban Development (HUD or the "Department") regarding the Fair Housing Act's disparate impact standard and the Department's intent to more closely align with the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (135 S. Ct. 2507 (2015)). NYBA supports this proposal and applauds the Department for issuing a fair proposed rule. NYBA is comprised of banks of all sizes across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans. We thank you for the opportunity to provide our views.

As noted in our previous letter in support of the Department's ANPR, *Inclusive Communities* upheld the legal theory of disparate impact (discrimination claims based upon the effect of an action not upon the intent of the action) but shifted the burden of proof to reduce the number of frivolous claims brought under that legal theory. Specifically, though the Court validated claims of disparate impact in *Inclusive*

Communities, it significantly limited the *application* of disparate impact, in order to prevent misuse of this principle and limit frivolous claims. In this regard the Court held that a statistical imbalance is not enough to establish a *prima facie* case; rather a plaintiff must satisfy a "robust causality requirement" between a specific policy or practice and the statistical disparity. The PR would more cohesively align with *Inclusive Communities* by requiring that a plaintiff do more than show mere statistical disparity. Instead, a plaintiff would have to meet a five-step threshold to bring a case of disparate impact under the Fair Housing Act. To be clear, NYBA opposes discrimination in any form, and yet we believe the guardrails proposed in *Inclusive Communities* are necessary and serve to balance the need to protect against discrimination while preventing frivolous claims. We therefore support this PR in its overall intent.

While NYBA is supportive of the PR's general goals, there are some areas where greater clarity would be helpful in implementation. NYBA respectfully requests that the Department consider the following clarifications to the PR:

First, regarding the definition of "disparate treatment," it would be helpful to further demarcate between treatment that is intentional versus unintentional. Though the *Inclusive Communities* Court did not directly address and/or differentiate between "disparate impact" and "disparate treatment", all parties would be better served with a well-defined delineation. By way of example, the Department could look to Labor Law (namely, Title VII of the Civil Rights Act) to further define intentional disparate treatment as opposed to unintentional disparate impact. This will serve to dissuade from claim shopping, as plaintiffs who wish to avoid proving *Inclusive Communities'* "rigorous causality" standard in a disparate impact case may attempt to file claims for "disparate treatment" instead. In the interest of providing greater clarity for all parties and limiting frivolous and inefficient use of the judicial process, it would be useful for HUD to further clarify the line between disparate treatment and disparate impact. Furthermore, with regard to damages, NYBA respectfully requests that for those disparate impact claims that are found to be unintentional, remedial damages, rather than punitive damages, would be more appropriate.

Second, NYBA requests that the Department provide further clarity regarding the tolling period for the statute of limitations on claims. The PR does not specifically include a definitive start date or triggering event from which the time to bring a claim can be calculated, and thus could subject a claim to indefinite extension through the application of equitable tolling doctrines, such as the "discovery rule" and the "continuing violations" doctrine. Such indefinite application will create uncertainty for lenders, who could effectively be subject to a claim in perpetuity. NYBA suggests that the Department clarify that such doctrines do not apply to disparate impact claims, thus limiting the claim to actions that occur within two years of occurrence of a practice giving rise to a disparate impact claim. The two-year period allows for a time period for plaintiffs to diligently bring a claim within a reasonable time frame.

Finally, there appears to be uncertainty as to how cases filed in the interim period—that time period between the Department's 2013 Rule, the subsequent Supreme Court decisions and the final rule—will be handled once the final rule is

promulgated. NYBA suggests that the PR clarify that there will be retroactive application of the final rule to cases that had been filed in this interim period. Allowing retroactive application of the final rule will ensure a consistent guideline for future courts to follow.

In conclusion, NYBA strongly supports the Department's efforts to bring the PR in alignment with existing Supreme Court rulings, which will make the application of the disparate impact theory more rational and impartial to all parties. With the clarifications outlined above, we believe the PR could be made even stronger, and we urge HUD to move to finalize the proposal as soon as possible. We thank you for the opportunity to comment on this important Proposed Rule.

Sincerely,

Michael P. Smith