NYBA
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Regulations Division
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: **Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Advance Notice of Proposed Rulemaking Docket Number FR-6111-A-01 RIN 2529-ZA01**

Dear Sir or Madam:

The New York Bankers Association (NYBA) appreciates the opportunity to comment on the above referenced advance notice of proposed rulemaking (ANPR) of the U.S. Department of Housing and Urban Development (HUD or the "Department"). In the ANPR, HUD seeks comments regarding possible amendments to HUD's 2013 final rule implementing the Fair Housing Act's disparate impact standard (the "Rule") to assist the Department in "reviewing the final rule and supplement to determine what changes, if any, are appropriate following the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which held that disparate impact claims were cognizable under the Fair Housing Act and discussed standards for, and the constitutional limitations on, such claims." NYBA is comprised of the community, regional and money center commercial banks and thrift institutions doing business in New York State and employing approximately 200,000 New Yorkers.

The Rule, set forth in 2013, stands in contrast to the standards set forth in *Inclusive Communities,* (135 S. Ct. 2507 (2015)), specifically in its allocation of burden of proof. As interpreted, the Rule provides, in essence, that if a practice has a "discriminatory effect," HUD or a private plaintiff can establish liability under the FHA, regardless of whether there was discriminatory intent. The Rule states that a practice found to have a discriminatory effect can be legal if it is necessary for the defendant to achieve a "substantial, legitimate, nondiscriminatory" interest, which "could not be served by another practice that has a less discriminatory effect." The Rule allocates the burdens of proof such that once HUD or a private plaintiff establishes that a practice "caused or predictably will cause a discriminatory effect," the burden is on the defendant

to prove that the interest is necessary to achieve a "substantial, legitimate, nondiscriminatory" interest. If defendant does prove such an interest, plaintiff must prove that such interest "could be served by another practice that has a less discriminatory effect."

Though the Court validated claims of disparate impact under the FHA in *Inclusive Communities,* it significantly limited the application of disparate impact, in order to prevent misuse of this principle. In this regard, for example, 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. Moreover, a valid business or policy purpose rebuts a *prima facie* case, which can only be rejected if the court finds that the plaintiff has demonstrated that there is an "available alternative…practice that has less disparate impact and serves the [entity's] legitimate needs." The court also said that only "artificial, arbitrary and unnecessary" practices should trigger liability. More recently, in the 2017 case of *Bank of America Corp. et al v. City of Miami, Florida*, 137 S. Ct. 1296, 1305-06 (2017), the Court further refined its criteria to support a claim for damages under the FHA, by reiterating what it called the "well-established principle" that a claim for damages under the FHA is subject to the requirement that a plaintiff's claimed loss is attributable to "the proximate cause, and not to any remote cause." The Court also said that for purposes of the FHA, foreseeability alone does not satisfy the proximate cause test. Rather, the Court held that proximate cause under the FHA requires "some direct relationship between the injury asserted and the injurious conduct alleged" (although the Court declined to draw the precise boundaries of proximate cause under the FHA.)

The mandates, set forth in these two Court cases for supporting a claim of disparate impact, differ in key respects to those set forth in the Rule. For example, the existing Rule states that once the charging party or plaintiff establishes that a practice caused or predictably would cause a discriminatory effect, the "respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." *Inclusive Communities*, however, places that burden on the plaintiff. Additionally, the Rule requires that a legally sufficient justification for a questioned practice "must be supported by evidence and may not be hypothetical or speculative." This is far different and far more onerous than *Inclusive Communities*, which calls for a rationale, not the extra burden on the defendant of evidentiary proof. The Rule's mandates also do not include *Bank of America v. Miami's* charge that the practice in question be the proximate cause of the alleged harm, thereby requiring a direct relationship between the injury asserted and the conduct alleged.

For all these reasons, NYBA respectfully requests that the Rule be amended to adopt the Supreme Court's causality and burden of proof standards as set forth in *Inclusive Communities* and *Bank of America v. Miami*.

Sincerely,

Michael P. Smith