WASHINGTON
LEGISLATIVE OFFICE

August 19, 2018

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Submitted electronically through www.regulations.gov

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-A-01

Dear Sir or Madame,

On behalf of the American Civil Liberties Union (ACLU), we write to offer comments in response to the above docketed notice ("Notice") concerning the disparate impact standard as interpreted by the U.S. Department of Housing and Urban Development (HUD).

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country. The ACLU advances equality through litigation and policy advocacy, including by challenging housing discrimination experienced by people of color; survivors of domestic violence and sexual assault; and lesbian, gay, bisexual, transgender, and queer (LGBTQ) people.

The ACLU has staunchly supported the Fair Housing Act (FHA)[1] since its passage in 1968, and we continue to believe it must play a vital role in opening the doors of opportunity to all. In particular, we have supported robust enforcement of the FHA's disparate impact standard as a crucial tool for securing opportunity for members of groups still struggling under the weight of historical and present-day discrimination. We filed amicus briefs in the Supreme Court supporting the cognizability of disparate impact in both *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507,[2] and *Texas Department of Housing and Community Affairs v. The*

[1] 42 U.S.C. §§ 3601 – 3619.

[2] https://www.aclu.org/legal-document/township-mt-holly-v-mt-holly-gardens-citizens-action-inc-amicus-brief

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

Inclusive Communities Project, Inc., No. 13-1371,[3] as well as a brief supporting the standing of cities to bring FHA claims in *Bank of America Corp. v. City of Miami*, No. 15-1111.[4] We have also filed briefs amici curiae in both currently pending insurance industry challenges to the Disparate Impact Rule (the "Rule"), 24 CFR 100.500.[5]

We continue to strongly support the current Disparate Impact Rule as vital to "our Nation's continuing struggle against racial isolation." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc*. ("*Inclusive Communties*"), 135 S. Ct. 2507, 2525 (2015). The Rule has the additional benefit of creating national uniformity and regulatory certainty for the real estate, lending, and insurance industries. Accordingly, we strenuously oppose any amendment to the Rule that would weaken its utility as a tool to fulfill the promise of truly fair housing.

I. As HUD Has Recognized, *Inclusive Communities* Does Not Undermine the Disparate Impact Rule.

This Advanced Notice of Proposed Rulemaking (ANPRM) begins from the flawed premise that there is some tension between the Disparate Impact Rule and the Supreme Court's decision in *Inclusive Communities*. As HUD itself has repeatedly made clear, no such tension exists, and the regulated industries' attempt to argue must fail.

In June 2016, a year after the *Inclusive Communities* decision was issued, the American Insurance Association (AIA) sought summary judgment in its case challenging the Disparate Impact Rule and its application to homeowners' insurance, claiming among other things that the Rule was inconsistent with *Inclusive Communities*. *See* Mem. of L. in Supp. of Pls.' Mot. for Summ. J., ECF No. 60, *AIA v. Dep't of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C). In response, HUD wrote that *"Inclusive Communities* is fully consistent with the standard that HUD promulgated relying on" preexisting Title VII and FHA law. Defs.' Mem. in Supp. of Their Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J., ECF No. 65, at 33, *AIA v. Dep't of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C). HUD then spent ten pages in its brief explaining how *Inclusive Communities* and the Rule are consistent.

Then, in late March of 2017, the Property Casualty Insurers Association of America (PCIA) sought leave to amend its complaint in its separate litigation challenging the Disparate Impact Rule and its application to homeowners' insurance, claiming among other things that *Inclusive Communities* gave it new arguments that the Disparate Impact Rule was arbitrary, capricious, or contrary to law. *See* Mem. of L. in Supp. of Mot. for Leave to Amend Compl.,

---

[3] https://www.aclu.org/legal-document/texas-department-housing-community-affairs-v-inclusive-communities-project-amicus

[4] https://www.aclu.org/legal-document/bank-america-v-city-miami-amicus-brief (2014 brief in *AIA v. Dep't of Hous. & Urb. Dev.*, No. 1:13-cv-00966-RJL (D.D.C)); https://www.aclu.org/legal-document/aia-v-hud-amicus-brief (2016 brief *AIA v. Dep't of Hous. & Urb. Dev.*); https://lawyerscommittee.org/wp-content/uploads/2015/06/0219.pdf (brief in *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.)).

[5] https://www.aclu.org/legal-document/american-insurance-association-v-hud-amicus-brief;

ECF No. 108, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.). HUD, now led by Secretary Carson, squarely rejected that claim, writing:

> "[T]he Supreme Court's holding in *Inclusive Communities* is entirely consistent with the Rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims. 135 S. Ct. at 2516-22. And the portions of the Court's opinion cited by [PCIA]—which discuss limitations on the application of disparate impact liability that have long been part of the standard—do not give rise to new causes of action, nor do they conflict with the Rule. *See id.* at 2522-25 ("[D]isparate-impact liability has always been properly limited in key respects . . . ."). Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice in support of its analysis. *See* 135 S. Ct. at 2522-23."

Defs.' Opp'n to Pls.' Mot. for Leave to Amend Compl., ECF. No. 122, at 9, *PCIA v. Carson*, No. 1:13-cv-08564 (N.D. Ill.). HUD went on to note that a number of courts had found the Rule to be consistent with *Inclusive Communities*. *Id.* at 9-10.[6] Judge Amy St. Eve agreed in the *PCIA* matter, holding that "the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." *PCIA v. Carson*, 2017 WL 2653069, *9 (N.D. Ill. June 20, 2017).

We can make this argument no more persuasively than HUD under Secretary Carson already has. *Inclusive Communities* cannot reasonably be interpreted to undermine the Disparate Impact Rule. Moreover, while many additional courts have relied upon both the Rule and *Inclusive Communities* without noting any tension between them,[7] no court has found that *Inclusive Communities* renders any aspect of the Disparate Impact Rule invalid. HUD could not now justifiably reverse course and claim that changes to the Disparate Impact Rule are somehow *required* by the *Inclusive Communities* decision.

---

[6] Citing *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs.*, No. 3:08-CV-0546-D, 2015 WL 5916220, *1, *3 (N.D. Tex. Oct. 8, 2015) ("[T]he [Supreme] Court did not disturb the Fifth Circuit's adoption of the HUD burdenshifting regimen."); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court [in Inclusive Communities] implicitly adopted HUD's approach."); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 513 (9th Cir. 2016) (citing Rule's burden-shifting framework as in accord with Inclusive Communities).

[7] *Ave. 6E Invs., LLC*, 818 F.3d at, 512-13 (; *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, No. 3:17-CV-206-K, 2017 WL 2984048, at *8 (N.D. Tex. July 13, 2017); *Borum v. Brentwood Vill.*, LLC 218 F. Supp. 3d 1 (D.D.C. 2016); *Azam v. City of Columbia Heights*, No. CV 14-1044 (JRT/BRT), 2016 WL 424966, at *10 (D. Minn. Feb. 3, 2016), aff'd, 865 F.3d 980 (8th Cir. 2017); *Paige v. N.Y.C. City Hous. Auth.*, No. 17-CV-7481, 2018 WL 1226024, at *3 (S.D.N.Y. Mar. 9, 2018); *Nat'l Fair Hous. All. v. Fed. Nat'l Mortg. Ass'n ("Fannie Mae")*, 294 F. Supp. 3d 940 (N.D. Cal. 2018); *Oviedo Town Ctr. II v. City of Oviedo, Fla.*, 2017 WL 3621940 (M.D. Fla.); *Nat'l Fair Hous. All. v. Travelers Indemnity Co.*, 261 F. Supp.3d 20 (D. D.C. 2017).

II. The Disparate Impact Rule clearly and appropriately assigns burdens of proof.

The Disparate Impact Rule's clear and straightforward burden-shifting test is modelled on decades of Title VII and FHA precedent. Industry has argued that HUD should instead model the test on the one set forth by the Supreme Court for Title VII in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and rejected by Congress just two years later. This argument ignores that *Wards Cove* nowhere mentions the FHA, and no subsequent decision has held that the *Wards Cove* disparate impact test would apply in the FHA context.

Applying the *Wards Cove* standards, however, would significantly undermine the purpose of the Disparate Impact Rule, which was to "provid[e] greater clarity and predictability for all parties engaged in housing transactions as to how the discriminatory effects standard applies" after minor variations had developed among the various courts' tests for evaluating FHA disparate impact. 78 Fed. Reg. at 11460-01. To do this, HUD adopted a uniform framework "largely consistent with the framework courts have developed on their own for analyzing disparate impact claims." *See Prop. Cas. Insurers Ass' of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 (N.D. Ill. 2014). Because *Wards Cove* was so quickly superseded by Congress with the Civil Rights Act of 1991,105 Stat. 1071, courts have virtually no experience applying its standards to Title VII cases or in any other area. Thus, to impose *Wards Cove* standards on FHA disparate impact claims now, rather than following the now decades long experience of the judiciary in applying the post-1991 Title VII cases, would launch a new era of uncertainty and confusion. *See also Inclusive Cmtys.*, 135 S.Ct. at 2523 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, (1971), and not *Wards Cove*, to suggest that the comparison between step two of the FHA and Title VII frameworks, while inexact, "suffices for present purposes").

Inclusive Communities further undermines the argument for incorporating *Wards Cove* as the appropriate guide to steps two and three of the burden-shifting test. *Wards Cove* stated that the "ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 490 U.S. at 659. This standard conflicts with step two of the Disparate Impact Rule, which assigns to the respondent or defendant "the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." 24 C.F.R. § 100.500(c)(2). However, the *Inclusive Communities* discussion of step two aligns with the Rule, and not with *Wards Cove.* The Court wrote, "Just as [in *Griggs*] so too must housing authorities and private developers be allowed to maintain a policy *if they can prove it is necessary* to achieve a valid interest." 135 S.Ct. at 2523 (emphasis added). That language makes clear that the FHA defendant should have the burden of persuasion, as well as the burden of production, at step two—in sharp contrast to the *Wards Cove* standard for step two.

Inclusive Communities cites *Wards Cove* a single time, in connection with a discussion of the prima facie case, where plaintiffs bear the burden of persuasion under both the Rule and *Wards Cove*. *See* 135 S.Ct. at 2523. *Inclusive Communities* never cites *Wards Cove* in its discussion of steps two or three. In contrast, *Inclusive Communities* is peppered with citations to *Griggs*, 401 U.S. 424, repeatedly relying explicitly on its logic and holdings. *See, e.g., Inclusive Communities*, 135 S.Ct. at 2518, 2521, 2522, 2523, 2524. *Griggs*, of course, makes clear that, at step two, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

III. The Disparate Impact Rule is carefully crafted to ensure that only challenged practices that are artificial, arbitrary, and unnecessary result in disparate impact liability.

The ANPRM seeks comments on whether "the second and third steps of the Disparate Impact Rule's burden-shifting framework [are] sufficient to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability." This "artificial, arbitrary, and unnecessary barriers" language, cited in *Inclusive Communities*, is drawn from *Griggs v. Duke Power Co.*, 401 U.S. 424, 431(1971), a disparate impact decision that pre-dates the Disparate Impact Rule by more than forty years. Over that period, burden-shifting standards developed to effectuate these limits articulated by *Griggs*, which *Inclusive Communities* repeated. *See Abril-Rivera v. Johnson*, 806 F.3d 599, 606-07 (1st Cir. 2015) (treating the burden-shifting standards applied to a Title VII claim as consistent with the limitations explained in *Inclusive Communities*). HUD was fully aware of *Griggs* when it promulgated the Disparate Impact Rule, citing that decision several times. *See, e.g.*, 78 Fed. Reg. at 11,466, 11,474.

Inclusive Communities itself noted in introducing the *Griggs* language that "disparate-impact liability ha[d] always been properly limited in key respects." 135 S. Ct. at 2522. *Inclusive Communities* explained that a standard that impermissibly went beyond weeding out artificial, arbitrary, and unnecessary practices would be one that became "simply . . . an attempt to second-guess which of two reasonable approaches" a covered entity should choose. *Id.* at 2522. The second and third steps of the Rule ensure that it does not create this outcome.

Step two of the disparate impact rule provides that liability can only be finally established after the respondent has the opportunity to prove that the practice is "necessary to achieve one or more substantial, legitimate interests." 24 C.F.R. § 100.500(b)(1)(i); (c)(2). In the *PCIA* decision, Judge St. Eve noted that step two thus gives respondents the "leeway to state and explain the valid interest served by their policies," as required by *Inclusive Communities*. 2017 WL 2653069, at *8 (quoting *Inclusive Communities*, 135 S. Ct. at 2522).

At step three, the respondent receives additional protection: it is the charging party's burden to prove that those interests could be served "by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(b)(1)(ii); (c)(3). In proving the less discriminatory alternative, the plaintiff or charging party must show it "serve[s] the respondent's or defendant's substantial, legitimate nondiscriminatory interest." 78 Fed. Reg. at 11,473. Moreover, the alternative "must be supported by evidence, and may not be hypothetical or speculative." *Id.*; *see also* 24 C.F.R. § 100.500(b)(2).

To the extent that industry has argued, or will argue, that the absence of the phrase "equally effective" in § 100.500(c)(3) means that the Rule goes beyond addressing artificial, arbitrary, and unnecessary barriers, this contention also fails. As the Rule's preface states, HUD decided not to use the term "equally effective" for two reasons: first, Congress disapproved this standard in the Civil Rights Act of 1991; and second, it "is even less appropriate in the housing context than in the employment area," to which it momentarily applied before the corrective

legislation passed, "in light of the wider range and variety of practices covered by the [FHA] that are not readily quantifiable." 31 78 Fed. Reg. at 11,473. *Inclusive Communities* never uses the phrase "equally effective" or a similar one, and it thus cannot undermine this rationale. Instead, citing the Rule, the Supreme Court noted that Title VII "business necessity" defenses, which also do not use this phrase, are analogous to the safeguards it identified as part of FHA disparate impact claims. 135 S. Ct. at 2522 (citing 78 Fed. Reg. at 11,470).

IV. The Disparate Impact Rule's definition of "discriminatory effect" in conjunction with the burden of proof for stating a prima facie case strikes the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims.

It is quite difficult for a party claiming discrimination to establish a prima facie case under the Disparate Impact Rule. In addition to identifying a discriminatory effect and "the specific practice that caused the alleged discriminatory effect," 78 Fed. Reg. at 11,469, the party must "prov[e] that a challenged practice caused or predictably will cause a discriminatory effect." 24 C.F.R. § 100.500(c)(1). In litigation, a party must provide factual content sufficient to plausibly plead each of these elements without the benefit of discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Consistent with the Supreme Court decision and the over forty years of disparate impact jurisprudence under the Fair Housing Act, the Disparate Impact Rule does not set forth a specific methodology for establishing effect because the appropriate manner or method in which a victim of discrimination may prove discriminatory effect may vary from case to case. *See* 78 Fed. Reg. at 11,468-69 ("Given the numerous and varied practices and wide variety of private and governmental entities covered by the Act, it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts.").

Moreover, in promulgating the Rule, HUD responded to industry's concern that the Rule would somehow allow claims based only statistics to proceed. 78 Fed. Reg. at 11478. HUD stated that the Rule explicitly indicates that statistical analysis "does not end the inquiry," but that under the Rule a housing provider or servicer then has "the opportunity to refute the existence of the alleged impact and establish a substantial, legitimate, nondiscriminatory interest for the challenged practice," followed by an assessment of any less discriminatory alternative. *Id.* HUD also refuted the assertion that, once a disparity is shown, "the policy at issue is per se illegal" in the specific context of homeowner's insurance. 78 Fed. Reg. at 11,475. Instead, even where a statistical disparate effect is shown, an insurer "has a full opportunity to defend the business justifications for its policies." *Id.*

V. The Rule's causality standard for stating a prima facie case is in accord with *Inclusive Communities* and *Bank of America* and should not be amended.

Inclusive Communities notes that "disparate-impact liability has always been properly limited in key respects." 135 S. Ct. 2507, 2512. Among these is the requirement 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." *Id.* This "robust causality requirement" helps avoid the use of racial quotas by defendants. *Id.* Although these cautionary standards do not substantively diverge from how causality has generally been treated in past disparate impact claims—plaintiffs have always been required to identify a facially neutral policy causing a statistical disparity—the Court's language has caused lower courts to examine causation issues more closely.

The Disparate Impact Rule comports with the *Inclusive Communities* language on causation. It makes clear that a practice has a discriminatory effect only if "*it actually or predictably results* in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns . . . because of [protected class status]." 24 C.F.R.§100.500(a) (emphasis added). Moreover, it does not allow for claims based only on statistics to proceed. *See* 78 Fed. Reg. at 11475, 11478.

The recent *Bank of America Corp. v. City of Miami* decision dealt with the very different question of proximate cause under the Fair Housing Act. *See* 137 S. Ct. 1296 (2017). That question is not specific to disparate impact liability. It would thus not be appropriate for treatment as part of the Disparate Impact Rule, lest the proximate cause standards under the two theories of liability unjustifiably diverge. Moreover, when the Disparate Impact Rule was promulgated, it was already clear that demonstrating proximate cause was among the requirements for making out an FHA claim, such that *Bank of America* does not represent a change in the governing law. As *Bank of America* notes, it has long been clear that FHA claims are akin to any other tort action. *See id.* at 1305 (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003)). Like any other tort action it thus contains a proximate cause requirement. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) ("For centuries, '[i]t has been a well-established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.' *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223, 9 L.Ed. 691 (1837).").

VI. The Disparate Impact Rule need not provide additional defenses or particular safe harbors to claims of disparate impact liability.

HUD has already considered the creation of safe harbors and rejected it. 78 Fed. Reg. 11,460; 81 Fed. Reg. 69,012. There is no reason to reconsider its position in light of *Inclusive Communities*, which in fact discussed at length the safe harbors from disparate impact liability created by the statutory text of the FHA. 135 S. Ct. 2507, 2520-2522. Because Congress specifically created particular safe harbors in the law, that list is exclusive and exhaustive; Congress did not leave a gap with respect to safe harbors from liability for HUD to fill, and *Inclusive Communities* did not suggest that any other federal statutes could operate to limit the reach or applicability of the Rule.

Moreover, there are no known federal statutes that "require adherence to state statutes," per the phrasing of the question, when it comes to housing issues. To the extent the question means to reference the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, that Act does not "require adherence" to state statutes. Rather, it prohibits construing another federal statute, such as the FHA, to "invalidate, impair, or supersede" a specific state insurance law regulation. 15

U.S.C. § 1012. There is a difference between affirmatively "requiring adherence" to a state law—which McCarran-Ferguson does not—and a requirement not to conflict with a state law. Further, given that a number of states provide for disparate impact liability under their own civil rights statutes,[8] it would make no sense to suggest that McCarran-Ferguson's deference to state statutes in the insurance field justifies a nationwide safe harbor from disparate impact liability for homeowner's insurance. *See especially Toledo Fair Hous. Ctr. v. Nationwide Ins.*, 704 N.E. 2d 667, 705 N.E. 2d 1 (Ohio 1998) (Ohio state law permits disparate impact claims against insurers).

Finally, the vast majority of courts have held that the FHA does not "interfere or conflict with" state insurance regulation under McCarran-Ferguson. *See, e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995); *Nat'l Fair Hous. All. v. Prudential Prop. and Cas. Co.*, 208 F. Supp. 2d 46 (D.D.C. 2002). State insurance laws typically prohibit "unfair" discrimination, including race discrimination. Because the FHA and these laws are usually considered to be consistent with one another, the FHA is still applicable. *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1209-10 (9th Cir. 2010) (recognizing that the McCarran-Ferguson Act would not reverse-preempt the FHA where the FHA "complement[s]—rather than displace[s] and impair[s]" state law); *Viens v. Am. Empire Surplus Lines Ins. Co.* , 113 F. Supp. 3d 555, 572 (D. Conn. 2015) ("the majority of the federal courts of appeals have held that enforcement of federal civil rights laws does not interfere with and frustrate the abilities of states to regulate insurance rate making") (citing cases). As a result, HUD could not justify a safe harbor for homeowner's insurance.

VII. Retaining the Disparate Impact Rule in its current form is the best way to ensure a clear and certain regulatory standard.

As discussed above, the entire purpose of the Disparate Impact Rule was to "provid[e] greater clarity and predictability for all parties engaged in housing transactions as to how the discriminatory effects standard applies" after minor variations had developed among the various courts' tests for evaluating FHA disparate impact. 78 Fed. Reg. at 11,460. As a result, the existing HUD Rule represents a uniform framework "largely consistent with the framework courts have developed on their own for analyzing disparate impact claims." *Prop. Cas. Insurers Ass'n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 (N.D. Ill. 2014). To alter the Rule and the standards it creates at this juncture would inevitably create confusion not only in the courts, but for victims of discrimination, fair housing organizations, and housing providers attempting to understand their own legal responsibilities. HUD should preserve the rule intact.

---

[8] California, North Carolina, and the District of Columbia expressly provide by statute for disparate impact fair housing claims without exemptions for any particular type of business, including homeowner's insurers. *See* Cal. Gov't Code § 12955.8; N.C. Gen. Stat. § 41A-5(a)(2); D.C. Code § 2-1401.03. Additionally, several states' supreme courts have interpreted their state fair housing laws to encompass disparate impact claims, even if their statutes do not explicitly use that term. *See, e.g., Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 255-56 (Conn. 1999); *Saville v. Quaker Hill Place*, 531 A.2d 201, 205-06 (Del. 1987); *Bowman v. City of Des Moines Mun. Hous. Agency*, 805 N.W.2d 790,798-99 (Iowa 2011); *Malibu Inv. Co. v. Sparks*, 996 P.2d 1043, 1050-51 (Utah 2000); *St. of Ind., Civ. Rts. Comm'n v. Cnty. Line Park, Inc*., 738 N.E.2d 1044, 1049 (Ind. 2000).

* * * *

Thank you for this opportunity to comment. In conclusion, the ACLU staunchly supports the Disparate Impact Rule in its current form and reminds HUD that a deregulatory agenda does not alter its statutory obligations under the FHA or the Administrative Procedure Act. Please contact Rachel Goodman at 212.549.2663 or rgoodman@aclu.org with any questions.

Sincerely,

Dennis Parker
Director
Racial Justice Program

Rachel Goodman
Staff Attorney
Racial Justice Program

Lenora Lapidus
Director
Women's Rights Project

Sandra Park
Senior Staff Attorney
Women's Rights Project