

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

August 20, 2018

Re: Comment from the Attorneys General of North Carolina, California, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington Regarding the Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Docket No. FR-6111-A-01)

The undersigned state attorneys general appreciate HUD’s solicitation of comments on whether amendments are appropriate to HUD’s 2013 final rule (“the Rule”) implementing the Fair Housing Act’s (“FHA”) disparate impact standard¹ or the 2016 supplement concerning comments made by the insurance industry.² Based on our experience enforcing fair housing laws and addressing discrimination in housing and lending, we firmly advise that no amendments are warranted. The Rule strikes the proper balance between promoting an integrated society and protecting housing providers from unmeritorious discrimination claims. Indeed, the Rule is entirely consistent with the United States Supreme Court’s 2015 ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,³ which HUD has no power to alter, and other developments since 2013 only reinforce the need for it to remain unchanged.

After explaining why state attorneys general possess expertise that HUD should consider in deciding whether to propose amendments, we then explain why neither *Inclusive Communities* nor other developments warrant any amendments. Where to find our answers to each of the six specific questions posed by HUD is noted by the subsection headers.

I. The Expertise of State Attorneys General on Disparate Impact

Enforcement actions under the FHA and similar state laws⁴ based on disparate impact theories are a critical component of states’ efforts to combat discrimination and ensure greater equality of opportunity. The mortgage lending industry provides many of the most recent examples of state enforcement efforts based on disparate impact theories.

¹ 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500).

² 81 Fed. Reg. 69,012 (Oct. 5, 2016).

³ 135 S. Ct. 2507 (2015).

⁴ See, e.g., N.C. Gen. Stat. § 41A-5(a)(2) (prohibiting housing discrimination if a “person’s act or failure to act has the effect, regardless of intent, of discriminating”).

The history of discrimination in the lending industry is well documented.⁵ During the boom of the subprime market in the last decade, discretionary pricing systems allowed both the intentional and unconscious bias of individual loan officers and brokers to operate unchecked. As a result, African-American and other minority borrowers were more likely to receive subprime loans, pay higher rates, and incur more charges than white borrowers—even after controlling for income and neighborhood characteristics.⁶ Even today, borrowers of color are substantially more likely than white borrowers to be denied conventional loans.⁷

The nature of the lending process make the meaningful potential for disparate impact liability essential to preventing discrimination. Mortgage lending is a complicated multistep process involving numerous decision-makers making discretionary judgments.⁸ The discretionary decision-making scheme obscures the factors that defendants use to make decisions. And because the ultimate result is the cumulative product of multiple actors, it is difficult, if not impossible, to isolate where the taint of discriminatory motive infects the decisional chain. Further compounding the challenge of enforcement, the victims of lending discrimination typically do not have any means of comparing themselves to similarly situated counterparts. And because federal law prohibits false statements on mortgage applications, “testers” cannot submit hypothetical applications to probe for discriminatory intent in the mortgage context as they can in the rental context.⁹

In 2011, Massachusetts resolved by consent judgment an enforcement action against Option One Mortgage Corp., a subsidiary of H&R Block, Inc.¹⁰ The Massachusetts Attorney General alleged that Option One’s discretionary pricing policy—the manner by which its independent mortgage brokers were compensated—caused African-American and Hispanic borrowers to pay, on average, hundreds of dollars more for their loans than similarly-situated white borrowers. New York also resolved an investigation involving similar allegations against Countrywide Home Loans through an Assurance of Discontinuance.¹¹ Underlying that matter was the New York Attorney General’s finding of statistically significant disparities in “discretionary components of pricing, principally [p]ricing [e]xceptions in the retail sector and [b]roker [c]ompensation in the wholesale sector.” In addition, Illinois filed discriminatory lending lawsuits against Countrywide and Wells Fargo Bank alleging that African-American and Hispanic borrowers were disproportionately placed in high-cost loans and paid more for their loans. Those lawsuits were resolved in connection with a \$335 million settlement entered into

⁵ See, e.g., Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev 375, 385-402 (2010).

⁶ See, e.g., Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 Colum. J. Race & L. 63, 80-83 (2011).

⁷ See Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, Reveal (Feb. 15, 2018), <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.

⁸ See, e.g., Schwemm & Taren, *supra* note 5, at 395-98.

⁹ *Id.* at 386.

¹⁰ See *Commonwealth v. H&R Block, Inc.*, Civ. No. 08-2474-BLS1 (Suffolk Sup. Ct. 2011).

¹¹ See *In re Countrywide Home Loans*, Assurance of Discontinuance Pursuant to N.Y. Exec. § 63(15) (Nov. 22, 2006).

by the United States Department of Justice with Countrywide in 2011 and a \$175 million settlement between the United States Department of Justice and Wells Fargo in 2012.¹²

Though the allegations in each of these cases differ slightly, they all concern discretionary decision-making aggregated over large groups of borrowers. While direct proof of overt bias was unavailable, there were substantial and statistically significant disparities that state attorneys general did not believe could be justified by legitimate, nondiscriminatory business needs. Accordingly, the state attorneys general have first-hand experience confirming the Supreme Court's conclusion in *Inclusive Communities* that disparate impact liability "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping."¹³

States' use of disparate impact claims in the housing context is not limited to cases involving either lending or racial discrimination. States have also used disparate impact claims to challenge zoning ordinances, occupancy restrictions, and English-only policies.¹⁴

States also rely on the United States Department of Justice and a variety of private organizations to assist and supplement our efforts to combat discrimination and its resulting social and economic costs. Like the states, these groups have used disparate impact theories increasingly in recent years to address contemporary manifestations of discrimination, particularly in the mortgage lending context. Between 2010 and 2016, the United States Department of Justice obtained over \$1.6 billion in monetary relief for individual borrowers and impacted communities through its fair lending enforcement, the bulk of which came through settlement of cases that included FHA disparate impact claims.¹⁵ Several of these cases were substantially similar to the cases brought by Massachusetts, New York, and Illinois, in that they challenged the discriminatory effects of discretionary decision-making across large groups of actors.

The United States Department of Justice and private organizations also bring cases, like those brought by states challenging zoning and occupancy restrictions, involving policies outside

¹² See *United States v. Countrywide Fin. Corp.*, No. 2:11-cv-10540 (C.D. Cal. 2011); *United States v. Wells Fargo Bank, NA*, No. 12-cv-1150 (D.D.C. 2012).

¹³ 135 S. Ct. at 2522.

¹⁴ See, e.g., *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110 (D.R.I. 2015) (landlord's policy of limiting occupancy had disparate impact based on familial status); *Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford*, 808 F. Supp. 120 (N.D.N.Y. 1992) (city's interpretation and application of a local zoning ordinance had disparate impact on basis of disability); *Conn. Comm'n on Human Rights & Opportunities ("CHRO") ex rel. Hurtado*, CHRO No. 8230394 (landlord's English-only policy had disparate impact based on national origin and ancestry); *CHRO ex rel. Schifini*, CHRO No. 8520090 (landlord's policy of limiting occupancy had disparate impact based on familial status); *In re-Accusation of the Dep't of Fair Employment & Hous. v. Merrbrook Apartments, James C. Beard, Owner*, FEHC Dec. No. 88-19, 1988 WL 242651, at *12-13 (Cal. F.E.H.C. Nov. 9, 1988) (facially neutral occupancy limit had adverse disparate impact on prospective renters with children).

¹⁵ See Justice Department Reaches Settlement with Ohio-Based Banks to Resolve Allegations of Lending Discrimination (Dec. 28, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-ohio-based-banks-resolve-allegations-lending>.

of the lending context that were not expressly discriminatory, but nonetheless had a direct impact on residential housing patterns in ways that perpetuated segregation and, in many instances, indicated discriminatory intent. The Supreme Court favorably described these cases as “the heartland of disparate-impact liability.”¹⁶ Had disparate impact claims not been realistically available, the victims of the discriminatory policies and practices likely would have been left without a meaningful remedy.

Based on this experience of state attorneys general regularly relying on disparate impact liability to combat housing and lending discrimination, HUD and the judiciary have regularly relied on our views concerning disparate impact liability under the FHA. As HUD acknowledged in issuing the Rule, it considered the comments submitted by a group of six state attorneys general supporting the proposed version of the Rule.¹⁷ The Supreme Court in *Inclusive Communities* favorably cited an amicus brief submitted by a group of 17 state attorneys general in concluding that “residents and policymakers have come to rely on the availability of disparate-impact claims.”¹⁸ Additionally, Congress established a system of enforcing the FHA in which the federal government shares responsibility with state and local governments.¹⁹ Accordingly, HUD should closely consider the comments that we offer below.

II. The Rule Is Fully Consistent with *Inclusive Communities* and HUD May Not Alter the Supreme Court’s Ruling

Inclusive Communities endorsed the continued importance of the FHA, and its disparate impact theory of liability, in advancing the nation’s efforts to advance justice and equality:

Much progress remains to be made in our Nation’s continuing struggle against racial isolation. In striving to achieve our “historic commitment to creating an integrated society,” we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the . . . grim prophecy that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.” The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.²⁰

Consistent with this conclusion by the Supreme Court, the Rule adopted a framework for proving disparate impact claims reflecting the FHA’s “broad remedial intent.”²¹

¹⁶ 135 S. Ct. at 2522.

¹⁷ 78 Fed. Reg. at 11,465.

¹⁸ 135 S. Ct. at 2525.

¹⁹ See 42 U.S.C. § 3610(f); see also *id.* § 3616 (providing for cooperation between HUD and state and local governments); H.R. Rep. No. 100-711, at 35 (1988) (House Committee Report to the Fair Housing Amendments Act of 1988 noting “the valuable role state and local agencies play in the [FHA] enforcement process”).

²⁰ *Inclusive Cmty.*, 135 S. Ct. at 2525-26 (citations omitted) (brackets in original).

²¹ 78 Fed. Reg. at 11,461, 11,466.

A. *The Rule Adopted a Clear and Appropriate Burden-Shifting Framework Consistent with Inclusive Communities (Question #1)*

In promulgating the Rule, HUD relied on existing law under the FHA and Title VII to specify the framework for proving a disparate impact claim.²² In so doing, the Rule provides for a three-step framework that clearly and appropriately assigned burdens at each step.²³

The standard that HUD promulgated relying on these preexisting sources of law is fully consistent with *Inclusive Communities*. The Supreme Court explicitly drew on Title VII in discussing the standards applicable to an FHA disparate impact claim.²⁴ The Court heavily relied on *Griggs v. Duke Power Co.*, which is the foundation of Title VII disparate impact proof standards, to articulate the limits of FHA disparate impact.²⁵ Moreover, the Court's observation that "disparate-impact liability *has always been* properly limited in key respects,"²⁶ further evidences that it was not calling for a significant departure from preexisting FHA and Title VII law. Indeed, in the portion of the *Inclusive Communities* opinion discussing the standards of proving a disparate impact claim, the Supreme Court cited the Rule twice in support of its analysis.²⁷

Accordingly, two federal courts of appeals and a state supreme court have held after *Inclusive Communities* that the Rule is "adopted" by, or consistent with, the Supreme Court's decision.²⁸ District courts have ruled similarly. Most directly on point, then-District (now-Circuit) Judge Amy St. Eve ruled last year that "the Supreme Court in *Inclusive Communities* . . . did not identify any aspect of HUD's burden-shifting approach that required correction."²⁹ We are aware of no court that has held that the Rule is inconsistent with *Inclusive Communities* in the three years since the Supreme Court's decision. Accordingly, the Rule clearly and appropriately assigns burdens of production and persuasion.

²² *See id.* at 11,462 ("[T]his final rule embodies law that has been in place for almost four decades . . ."); 76 Fed. Reg. 70,921, 70,924 (Nov. 16, 2011) (explaining the framework set out in the proposed rule is consistent with Title VII's framework).

²³ 24 C.F.R. § 100.500(c)(1)-(3).

²⁴ *See Inclusive Cmty's.*, 135 S. Ct. at 2522 (giving covered entities "leeway to state and explain the valid interest served by their policies . . . analogous to the business necessity standard under Title VII").

²⁵ *See id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

²⁶ *Id.* (emphasis added).

²⁷ *See id.* at 2522-23.

²⁸ *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("Supreme Court implicitly adopted HUD's approach"); *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512-13 (9th Cir. 2016) (describing what the Supreme Court "made clear" in *Inclusive Communities* followed by a "see also" cite to the Rule); *Burbank Apartment Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) ("framework laid out by HUD and adopted by the Supreme Court").

²⁹ *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-cv-8564, 2017 U.S. Dist. LEXIS 94502, at *29 (N.D. Ill. June 20, 2017).

B. *The Rule Already Limits Liability to “Artificial, Arbitrary, and Unnecessary Barriers” (Question #2)*

The Supreme Court observed in *Inclusive Communities* that “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”³⁰ The Supreme Court specified that this means disparate impact liability will not be found when a claim is “simply . . . an attempt to second-guess which of two reasonable approaches” a covered entity should follow.³¹

This limitation is found in the Rule. A burden-shifting standard has been developed and refined as part of Title VII over the past half century to effectuate the limitation articulated by *Griggs*, which *Inclusive Communities* repeated.³² As noted above, the Rule relied on the Title VII burden-shifting standard.

In promulgating the Rule, HUD sought to fairly allocate, consistent with Title VII, the burdens of proof among the parties and the showing the parties must make at each stage.³³ Specifically, the second and third steps of the Rule’s burden-shifting standard protect a covered entity from liability based on “second-guess[ing]” of a policy choice between “reasonable approaches.”³⁴ At the second step, a defendant has the opportunity to prove that the policy or policies at issue “is necessary to achieve one or more substantial, legitimate nondiscriminatory interest.”³⁵ In the third step, a plaintiff prevails if it proves that interest could be served by a less discriminatory alternative to the challenged practice.³⁶ In proving the less discriminatory alternative, the plaintiff must show it “serve[s] the . . . defendant’s substantial, legitimate nondiscriminatory interest.”³⁷ The alternative “must be supported by evidence, and may not be

³⁰ 135 S. Ct. at 2522 (quoting *Griggs*, 401 U.S. at 431); *see also id.* at 2524 (cautioning against proof standards that “displace valid governmental and private priorities, rather than solely ‘remov[ing] . . . artificial, arbitrary, and unnecessary barriers’”) (alterations in original).

³¹ *Id.* at 2522.

³² *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 to be consistent with the limitations explained in *Inclusive Communities*).

³³ 78 Fed. Reg. at 11,472 (noting the definition of “legally sufficient justification” “fairly balances the interests of all parties”); *id.* at 11,473-74 (“HUD believes that the burden of proof allocation in § 100.500(c) is the fairest and most reasonable approach to resolving the claims. . . . [T]his framework makes the most sense because it does not require either party to prove a negative.”).

³⁴ *Inclusive Cmty.*, 135 S. Ct. at 2522; *see Johnson v. City of Memphis*, 770 F.3d 464, 472 (6th Cir. 2014) (noting under the Title VII burden-shifting standard analogous to the Rule that “the purpose of step three is not to second guess the employer’s business decisions”) (brackets omitted).

³⁵ 24 C.F.R. § 100.500(c)(2).

³⁶ *Id.* § 100.500(c)(3). HUD’s decision not to include the term “equally effective” in Section 100.500(c)(3), 78 Fed. Reg. at 11,473, is consistent with *Inclusive Communities*’ failure to use that phrase. *See Ave. 6E Inv.*, 818 F.3d at 512-13 (recognizing the Rule’s burden-shifting standard provides the limits to liability specified in *Inclusive Communities* and that Section 100.500(c)(3) means that “an adjustment or accommodation can still be made that will allow both interests to be satisfied”).

³⁷ 78 Fed. Reg. at 11,473.

hypothetical or speculative.”³⁸ Based these elements, the second and third steps of the Rule’s burden-shifting framework already limit liability to artificial, arbitrary, and unnecessary barriers.

C. The Rule Already Requires “Robust Causality” (Question #4)

Again drawing on Title VII, the Supreme Court stated that FHA disparate impact claims must satisfy a “robust causality requirement” that means “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”³⁹ This “robust causality requirement” reiterates the causal connection required by FHA disparate impact case law from which the Rule drew, which mandated disparate impact claims to be linked to a “specific policy [that] caused [the] significant disparate effect.”⁴⁰ Notably, these preexisting FHA cases remain “sound” pursuant to *Inclusive Communities*’ “robust causality requirement.”⁴¹

Consistent with this “robust causality requirement,” the Rule specifies that a plaintiff must prove that “a challenged practice caused or predictably will cause a discriminatory effect.”⁴² Moreover, the Rule recognizes that the plaintiff “on a case-by-case basis” will need to “identify[] the specific practice that caused the alleged discriminatory effect.”⁴³ Also in accord with the Supreme Court drawing of the causality standard from Title VII law, HUD specified that the Rule’s standard of liability “is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII.”⁴⁴ Adopting that standard was equally sound before and after *Inclusive Communities*, and there is no reason to amend the Rule to clarify the causality standard based on *Inclusive Communities* or any other Supreme Court ruling.

D. Inclusive Communities Does Not Suggest the Need for Additional Defenses or Safe Harbors (Question #5)

Nothing in *Inclusive Communities* suggests that HUD should create additional defenses or non-statutory safe harbors to liability, such as treating compliance with another law as a per se defense to disparate impact liability. Massachusetts’ highest court rejected just such an argument after *Inclusive Communities* because “concluding that an action need be otherwise violative of the law before facing a disparate impact claim [would] ignore the legislative policies behind the fair housing regime.”⁴⁵ Moreover categorical defenses and safe harbors would provide no additional benefit over the mechanisms in the Rule that limit liability to “artificial, arbitrary, and unnecessary barriers,” as discussed earlier, because parties would dispute application of any

³⁸ *Id.*; see also 24 C.F.R. § 100.500(b)(2).

³⁹ *Inclusive Cmty.*, 135 S. Ct. at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

⁴⁰ *E.g.*, *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243, 1251 (10th Cir. 1995).

⁴¹ *Nat’l Fair Hous. Alliance v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 30 (D.D.C. 2017).

⁴² 24 C.F.R. § 100.500(c)(1).

⁴³ 78 Fed. Reg. at 11,469.

⁴⁴ 76 Fed. Reg. at 70,924 (citing 42 U.S.C. § 2000e-2(k)). Among the “standard confirmed by Congress” through codification into Title VII in 1991 is a causation requirement. See 42 U.S.C. § 2000e-2(k)(1)(B).

⁴⁵ See *Kargman*, 48 N.E.3d at 408-11 & n.27.

defense or safe harbor on a case-by-case basis just as they dispute the application of the generally applicable burden-shifting framework. Indeed, parties would face increased uncertainty as they would have no precedent to guide their disputes over new defenses and safe harbors unlike their disputes over the burden-shifting framework guided by nearly a half century of established Title VII and FHA case law. HUD should not amend the Rule to provide additional defenses or safe harbors to claims of disparate impact liability.

E. HUD Cannot Reinterpret the Contours of Disparate Impact Liability Established by the Supreme Court

HUD is constrained in considering whether to amend the Rule by the Supreme Court's ruling in *Inclusive Communities*. The Solicitor General of the United States argued before the Supreme Court in *Inclusive Communities* that the Court should hold that the FHA provided for disparate impact liability based on deference to the Rule. Notwithstanding that argument, the Supreme Court neither found the FHA to be ambiguous nor deferred to HUD's interpretation.⁴⁶ This forecloses any ability of HUD to reinterpret the contours of disparate impact liability established by the Supreme Court.⁴⁷

As noted above, the Supreme Court clearly established that FHA disparate impact claims are to be evaluated based on the type of burden-shifting framework used to evaluate Title VII disparate impact claims. HUD, therefore, cannot amend the Rule to introduce concepts that are foreign to the Title VII framework. Troublingly, many of the items on HUD's list of questions for comment suggest defenses or limitations to disparate impact liability that have no parallel in Title VII. Adopting any such defense or limitation would be unlawful usurpation of judicial power by the Executive Branch.

III. No Other Developments Would Justify a Change in the Rule

Even if *Inclusive Communities* left any room for revision to the Rule, no revision would be warranted. In the five years since the Rule was finalized, the issues of segregation and discrimination in housing and lending have not abated. Among other reasons, many urban centers have seen increasing displacement of communities of color amidst a decreasing supply of affordable housing,⁴⁸ lending standards have remained abnormally restrictive and left persons of

⁴⁶ *Inclusive Cmty.*, 135 S. Ct. at 2542 (Alito, J., dissenting) (“The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation.”) (emphasis added).

⁴⁷ See *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (“In our view, [a prior Supreme Court decision] has already interpreted the statute, and there is no longer any different construction that is consistent with [that decision] and available for adoption by the agency.”).

⁴⁸ See Anne Bellows & Michael Allen, *The Fair Housing Imperative to Address the Displacement Crisis*, *Civil Rights Insider* 5, 5 (Winter 2018), available at <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Civil-Rights/Civil-Rights-Winter-2018.aspx>. A recent report noted that Charlotte and Durham, North Carolina were two of four metropolitan areas with the lowest percentage of homes for sale at the affordable end of the market. Joint Ctr. for Housing Studies of Harvard Univ., *The State of the Nation's Housing: 2018*, at 4, available at http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf.

color to be underserved by the conventional (no government guarantee) mortgage market,⁴⁹ and the de-segregative potential of the Low Income Housing Tax Credit (“LIHTC”) has been reduced as a result of the Tax Cuts and Jobs Act of 2017.⁵⁰ Moreover, the growing role of data analytics and online platforms in the housing sale and rental markets means that risks are greater that segments of society will be steered away from or denied housing in a way that is immune to examination of intent yet results in even more segregated housing patterns.⁵¹ That these developments may be resulting in greater housing discrimination is borne out by data in a recent Harvard University report that found the gap between whites and African Americans in homeownership rate has risen in recent years and now stands at an appalling 29.2 percentage points, with the gap for Hispanics and Asians at nearly as troubling levels—26.1 and 16.5 percentage points.⁵² These gaps are similar, or worse, than were observed in 1983.⁵³

A. *The Rule Still Strikes the Proper Balance Between Encouraging the Pursuit of Legitimate Claims While Avoiding Unmeritorious Ones (Question #3)*

In promulgating the Rule, HUD explained that it was trying to “fairly balance the interests of all parties.”⁵⁴ We are not aware of any credible evidence that the Rule or *Inclusive Communities* have caused a disruptive upswing in unwarranted FHA litigation or unwarranted compliance costs that might suggest HUD struck the wrong balance. To the contrary, courts since 2013 have timely disposed of unmeritorious disparate impact claims⁵⁵ consistent with the Supreme Court’s call for “prompt resolutions of [such] cases.”⁵⁶ Accordingly there is no need to amend the balance that HUD previously struck between encouraging the pursuit of legitimate disparate impact claims while avoiding unmeritorious ones.

In its request for comments, HUD cites to an October 2017 report issued by the United States Department of Treasury as one potential reason for considering revisions to the Rule.

⁴⁹ See Peter Smith & Melissa Stegman, Ctr. Responsible Lending, *Repairing a Two-Tiered System: The Crucial but Complex Role of FHA 6-11* (May 2018), available at <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-repairing-two-tiered-system-fha-may2018.pdf>. According to this report, the conventional mortgage market has “shut out over 6 million creditworthy borrowers” between 2009 and 2015. *Id.* at 6.

⁵⁰ The tax changes caused an estimated loss of 232,000 units of affordable housing that otherwise would be built through LIHTC over the next 10 years. Joint Ctr. for Housing Studies, *supra* note 48, at 34. Increased LIHTC funding in the 2018 federal omnibus spending bill offset 28,000 units of this loss. *Id.*

⁵¹ See *Sandvig v. Sessions*, No. 16-cv-1368, 2018 U.S. Dist. LEXIS 54339, at *4-6 (D.D.C. Mar. 30, 2018) (describing work of researchers looking into the effect of these trends on housing (and employment) discrimination based on the “concern[] that, ‘when algorithms automate decisions, there is a very real risk that those decisions will unintentionally have a prohibited discriminatory effect’”).

⁵² Joint Ctr. for Housing Studies, *supra* note 48, at 3.

⁵³ *Id.* at 3 & fig. 3.

⁵⁴ 78 Fed. Reg. at 11,472.

⁵⁵ See, e.g., *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1112 (8th Cir. 2017) (affirming judgment on the pleadings on a disparate impact claim against a city-defendant for enforcing its housing code that required landlords to maintain apartments in a habitable condition); *Kargman*, 48 N.E.3d at 412-14 (applying the Rule and affirming a trial court’s motion to dismiss disparate impact claim based on an apartment complex’s decision not to renew participation in a voluntary HUD subsidy program).

⁵⁶ *Inclusive Cmty.*, 135 S. Ct. at 2523.

Based entirely on two conclusory sentences of discussion, citing two court decisions in lawsuits that insurance trade associations filed against HUD, the report recommends that “HUD reconsider its use of the disparate impact rule” with respect to insurance based on a handful of legal and practical concerns.⁵⁷ But HUD has already conducted just such a reconsideration, resulting in HUD’s 2016 supplement published in the Federal Register, based on one of these decisions that found procedural—but no substantive—fault with HUD’s original consideration of the insurance industry’s concerns.⁵⁸ Moreover, for the reasons that the State of Illinois explained in an amicus brief filed as part of that litigation, the concerns raised by the insurance industry (and repeated by the Treasury Department) concerning state law do not warrant a change in HUD’s determination that the Rule should apply to insurers.⁵⁹

B. Revising the Rule Would Reduce Clarity and Increase Uncertainty (Question #6)

We have identified no developments since 2013 rendering the Rule unclear, uncertain, or burdensome. The Supreme Court’s long-awaited definitive decision that the FHA provides for disparate impact liability and the Rule’s clarification of the proof framework have made the application of disparate impact under the FHA much more clear and certain. With the exception of the above-noted lawsuit filed by insurance trade groups, none of the wide array of entities regulated by the Rule challenged its legality. This lack of reaction suggests that the vast majority of regulated entities understand the obligations created by the Rule and find compliance is not unduly burdensome.

Accordingly, there are no revisions to the Rule that would add clarity, reduce uncertainty, decrease unwarranted regulatory burdens, or otherwise assist in determining lawful conduct. To the contrary, revisions to the Rule would reduce clarity and add uncertainty, especially because any revision would likely fail to rely on the half century of disparate impact case law.

⁵⁷ U.S. Dep’t of Treasury, A Financial System that Creates Economic Opportunities: Asset Management and Insurance 110 (2017).

⁵⁸ See *Prop. Cas. Insurers Ass’n of Am. v. Donovan*, 66 F. Supp. 3d 1018 (N.D. Ill. 2014). The other decision cited by the Treasury Department had been vacated by the United States Court of Appeals for the District of Columbia Circuit two years before the report was issued. *Am. Ins. Ass’n v. HUD*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sept. 23, 2015), *vacating*, 74 F. Supp. 3d 30 (D.D.C. 2014).

⁵⁹ Brief of the State of Illinois as Amicus Curaie, *Prop. Cas. Insurers Ass’n of Am. v. Donovan*, No. 13-cv-8564, Doc. 80 (N.D. Ill. July 7, 2014); see also *Nat’l Fair Hous. Alliance*, 261 F. Supp. 3d at 29 (“There is a large body of case law holding that insurers—including insurers who sell products to landlords—can be held liable under the FHA, and *Inclusive Communities* does not call those cases into question. . . . Numerous courts have applied disparate-impact liability to insurers that provide (or don’t provide) insurance to homeowners or renters.”).

IV. Conclusion

For all the reasons stated above, the undersigned state attorneys general respectfully advise HUD that no changes are appropriate to the Rule and that any changes would be susceptible to meritorious legal challenge.

Sincerely,

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Peter F. Kilmartin
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Thomas J. Donovan, Jr.
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Brian Frosh
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Maura Healey
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Bob Ferguson
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Lori Swanson
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