



October 18, 2019

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

RE: FR-6111-P-02 Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Secretary Carson:

The Massachusetts Mortgage Bankers Association is writing in response to HUD's Notice of Proposed Rulemaking FR-6111-P-02 "Implementation of the Fair Housing Act's Disparate Impact Standard" (the Proposed Rule). We support HUD's revisions to the burden of proof necessary to prove a prima facie case of disparate impact to conform its rules to the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"). We urge HUD to finalize the Proposed Rule's changes to the burden of proof for a claim in light of the standards articulated by the Supreme Court in *Inclusive Communities*.

Our members are committed to providing fair and equitable access to credit. The mortgage industry expends substantial resources to try to meet the credit needs of all populations. A key driver of innovation in our industry is the imperative to develop new products and strategies to reach all markets. Our members also take very seriously the responsibility of understanding the evolving nature of the law in this area and complying with legal or regulatory requirements.

To that end, we appreciate that the Proposed Rule articulates an appropriately calibrated burden shifting standard to prevent disparate impact liability from unfairly penalizing practical business choices or holding plaintiffs liable for "disparities that they did not create."<sup>1</sup> Under *Inclusive Communities*, disparate impact claims should establish robust causality between an impermissible disparity and a specific policy that is artificial, arbitrary, and unnecessary.<sup>2</sup>

We support the Proposed Rule's revisions to the standards for proving a prima facie claim of disparate impact in light of the Supreme Court's guidance. The Court noted "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."<sup>3</sup> The Proposed Rule's burden shifting standards accomplishes this goal and provides clarity and uniformity for those who seek to comply with their legal responsibilities and those that bring disparate impact claims under the Fair Housing Act.

Thank you.

A handwritten signature in black ink that reads "Deborah J. Sousa".

Deborah J. Sousa, Executive Director

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<sup>1</sup> *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)

<sup>2</sup> *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015).

<sup>3</sup> *Inclusive Cmty.*, 132 S. Ct. at 2518 (internal quotations and alterations omitted).