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The Honorable Anna Maria Farías
Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

Submitted via: https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Assistant Secretary Farías:

The NATIONAL ASSOCIATION OF REALTORS® (NAR) appreciates this opportunity to comment on the "Implementation of the Fair Housing Act's Discriminatory Effects Standard" (Discriminatory Effects Rule) published by the U.S. Department of Housing and Urban Development (HUD) on February 15, 2013. NAR believes the 2015 decision of the Supreme Court of the United States (the Court) in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* (*Inclusive Communities*[1]) provides needed clarity to this issue while affirming that disparate impact claims are cognizable under the Fair Housing Act.

In 2013, an NAR Working Group examined the HUD Discriminatory Effects rule and existing NAR policy, and then drafted new NAR policy on disparate impact or discriminatory effects. That policy is as follows:

> We believe in a housing market free from discrimination. We oppose policies and practices which are known to have a disparate impact on any demographic group defined by race, color, religion, national origin, sex, handicap, familial status, sexual orientation or gender identity. We support the right to continue a policy or practice that has or could have a known disparate impact if there is a legitimate business purpose for the practice or policy and that purpose cannot be accomplished in a readily identifiable and not unduly burdensome means with a less discriminatory impact. We oppose actions by governments, groups, or individuals which require unreasonable research by REALTORS® into whether policies or practices do indeed have such a disparate impact, or which inhibit the implementation of otherwise sound business practices.
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> We believe the burden for proving that a policy or practice has a discriminatory effect lies with the party alleging discrimination. We

[1] 135 S.Ct. 2507 (2015)

believe that once a policy or practice has been shown to have a discriminatory effect, or that it will likely have a discriminatory effect, the REALTOR® or other practitioner implementing the policy or practice need only demonstrate a legitimate business purpose for the policy or practice. We believe that the party alleging discrimination has the obligation to demonstrate that there is a readily achievable, less discriminatory alternative to achieving the legitimate business purpose of the policy or practice without being unduly burdensome to the REALTOR® or other practitioner.

We believe that unless a REALTOR® or other practitioner knew or reasonably should have known of the discriminatory effect of a policy or practice, the only remedy for such a discriminatory practice should be correcting the action to remove the discriminatory effect and only if there is a readily achievable, less discriminatory alternative to achieving the legitimate business purpose of the policy or practice without being unduly burdensome to the REALTOR® or other practitioner. We believe that whether or not a housing market is free from discrimination should be measured the by the impact of actions, policies and practices and not solely by the demographics of people living in particular neighborhoods of buildings.

The burden of proof standards in the current HUD Discriminatory Effects rule closely align with NAR's beliefs and those outlined in the *Inclusive Communities* decision.

Causality should be a consideration in the establishment of a prima facie case. NAR believes, as stated by the Court in *Inclusive Communities*, that liability should not be imposed solely on a showing of statistical disparity. The current HUD rule mirrors that policy by stating that "a charging party or plaintiff has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect" (emphasis added).

By shifting the burden to a responding party or defendant to show that the challenged policies or practices are necessary to achieve one or more substantial, legitimate, non-discriminatory interests, the current rule goes too far. A legitimate business purpose is a defense to prima facie evidence of discriminatory effects. The Court discusses this requirement in the *Inclusive Communities* decision, and that discussion addresses whether the non-discriminatory interests need to be substantial. The Court uses the term "valid" in describing an interest. Later the Court states *"Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary and unnecessary barriers"*. The Association suggests that the word "substantial" be removed from part two of the burden shifting analysis in the HUD rule.

Lastly, NAR concurs with the HUD rule that the party or plaintiff challenging a practice has the burden to show that there is another less discriminatory policy or practice that achieves the same legitimate business purpose. However, NAR believes that the analysis of that alternate practice should consider any undue burdens that the alternative will place on the responding party or defendant.

Rather than provide defenses or safe harbors when other laws place requirements on a business that have discriminatory effects, HUD should make clear that compliance with other legal requirements is a legitimate business reason for a policy or practice. If another law has a disparate impact, action against that law would be appropriate rather than against the entities who are bound by that law.

The NATIONAL ASSOCIAITON OF REALTORS® has within its membership both large and small businesses. Many of these businesses would be crippled if there was an expectation that they had to conduct a discriminatory effects analysis for every business policy or practice. While NAR agrees that such discriminatory policies and practices should be addressed, a real estate business should first have the opportunity to correct that practice upon

notice unless the business knew or should have known of its discriminatory effects. The regulations should incorporate the Court's statement in *Inclusive Communities* that *"Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice."*

The purpose of the Fair Housing Act is to provide for fair housing. REALTORS® of every race and national origin, all genders, with and without disabilities, with and without children, regardless of sexual orientation or religion rely on a market free from discrimination. Whether that discrimination is intentional or by effect, it adversely impacts the ability of REALTORS® to serve their clients and communities. NAR supports the Fair Housing Act and its applicability to cases involving disparate impact. That purpose is best served when REALTORS® can conduct their business and correct policies and practices without being punished when they reasonably could not be expected to know that a practice or policy had discriminatory effects.

NAR stands ready to work with HUD to educate REALTORS® and our industry on fair housing issues including education on the subject of discriminatory effects.

Sincerely,

Elizabeth Mendenhall
2018 President, National Association of REALTORS®