NATIONAL ASSOCIATION OF REALTORS®

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Regulations Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410

RE: FR-6251-P-01 Reinstatement of HUD's Discriminatory Effects Standard

On behalf of its 1.4 million members, the National Association of REALTORS® (NAR) submits these comments in support of the U.S. Department of Housing and Urban Development's (HUD) Proposed Rule titled, "Reinstatement of HUD's Discriminatory Effects Standard." 86 Fed. Reg. 33590 (June 25, 2021) ("Proposed Rule"). The Proposed Rule would reinstate HUD's 2013 rule, titled "Implementation of the Fair Housing Act's Discriminatory Effects Standard" ("2013 Rule"), which recognized that the Fair Housing Act prohibits disparate impact discrimination.

NAR believes that every American has the right to buy, sell, rent, and finance homes free from discrimination and is deeply committed to cultivating a fair and equal housing market. Today, as the nation's largest trade organization, NAR is a leading advocate for inclusive housing. We believe that the only way to achieve a healthy, equitable housing market is to proactively root out and remedy discrimination. Enforcement of the Fair Housing Act is an indispensable tool towards that end.

To achieve the Fair Housing Act's goal of fair and diverse housing markets and communities, the Act's prohibition against disparate impact discrimination—as defined by HUD in the 2013 Rule and, in 2015, by the Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*—must be enforced. NAR opposes policies and practices that have a disproportionately adverse effect on a demographic group defined by race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity, unless such policies or practices are justified by a legitimate business necessity and there is no less-discriminatory alternative. Eliminating disparate impact discrimination helps protect both the legitimate business interests of real estate professionals and the fair housing rights of consumers. We, therefore, support issuance of the Proposed Rule.

The 2013 Rule, which the Proposed Rule would reinstate, codified the consensus on disparate impact liability, setting out a clear and effective framework for evaluating disparate impact claims. That framework proceeds in three parts:

- *First*, the claimant must prove that a challenged policy or practice has caused or predictably will cause a discriminatory effect on a protected class.

- *Second*, if the claimant makes that showing, the respondent may defeat the claim by showing that the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory business interest.

- *Third*, the claimant may prevail by proving that the respondent's interest could be achieved by a less discriminatory alternative.

Two years later, in 2015, the Supreme Court affirmed four decades of jurisprudence recognizing the critical role of disparate impact doctrine in achieving the goals of the Fair Housing Act. The decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, confirmed that the Fair Housing Act imposes disparate impact liability and largely endorsed the three-part legal framework set forth in the 2013 Rule. The Court further emphasized that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation [and our] historic commitment to creating an integrated society."

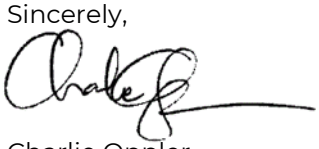
Failing to heed this cautionary note, HUD in 2020 published a rule ("2020 Rule") that effectively altered the accepted standard for proving disparate impact claims under the Fair Housing Act. The 2020 Rule imposed more onerous pleading requirements for claimants and recognized new defenses that would have enabled respondents to defeat meritorious claims. NAR opposed many of those changes and continues to believe that they were unfaithful to the Fair Housing Act and ill-advised as a matter of federal housing policy. The 2020 Rule was enjoined before it could take effect.

NAR welcomes HUD's intended return to the 2013 Rule. That approach strikes the proper balance between combatting discrimination and ensuring that real estate professionals and housing providers have appropriate latitude to make legitimate business decisions in the pursuit of nondiscriminatory objectives. As the Proposed Rule notes, there are "long-standing limitations on the scope of disparate-impact liability," including leeway for respondents to justify an incidental discriminatory effect by reference to the valid interest served by the challenged practice or policy.[1]

Because the 2020 Rule never took effect, NAR agrees with HUD that no further analysis is needed on the impact of the Proposed Rule. The reaffirmation of the familiar and well-considered 2013 standards, which are based on decades of prior case law, represents a commendable step towards improving the health of our housing market by fostering both fairness and sound business practices.

NAR welcomes the opportunity to work with HUD, advocates, consumers, and other industry partners as this promising development unfolds.

Sincerely,



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[1] Several weeks after HUD issued the Proposed Rule, HUD's Office of Fair Housing & Equal Opportunity issued a memorandum indicating that it would fund FHIP testing of disparate impact cases based on the effects of a housing provider's or lender's decision to consider an applicant's source of income. We appreciate that many policies or practices may have adverse effects on protected classes, but also note that few courts have interpreted the Fair Housing Act to prohibit a housing provider's refusal to accept Housing Choice Vouchers. NAR also understands HUD has not generally accepted as jurisdictional complaints alleging refusal of Housing Choice Vouchers in its Fair Housing Act administrative process. NAR expects that HUD will continue to follow the courts in its administrative enforcement of the Fair Housing Act.