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June 14, 2017

Department of Housing and Urban Development  
Regulations Division  
Office of General Counsel  
451 7<sup>th</sup> Street SW  
Room 10276  
Washington, DC 20410-0500

Re: Reducing Regulatory Burden: Enforcing the Regulatory Reform Agenda  
Under Executive Order 13777; Docket No. FR-6030-N-01

Dear Sir or Madam,

The Independent Community Bankers of America<sup>1</sup> (ICBA) appreciates the opportunity to provide comments to the Department of Housing and Urban Development (“HUD”) on its Notice and Request for Comment on its review of existing regulations to assess compliance costs and reduce regulatory burden. HUD’s review of its regulations is in accordance with Executive Orders 13771, “Reducing Regulation and Controlling Regulatory Costs,” and 13777, “Enforcing the Regulatory Reform Agenda, Improving Regulation and Regulatory Review.” ICBA’s comments are focused on HUD’s regulations on the application of disparate impact under the Fair Housing Act<sup>2</sup>.

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<sup>1</sup> The Independent Community Bankers of America®, the nation’s voice for more than 5,800 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.7 trillion in assets, \$3.7 trillion in deposits, and \$3.2 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).

<sup>2</sup> 24 CFR 100.500 et. seq.

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Earlier this year, President Trump issued Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs” and Executive Order 13777, entitled “Enforcing the Regulatory Reform Agenda.” The purpose of these Executive Orders is to manage the costs and alleviate unnecessary regulatory burdens associated with Federal regulations. As a result of these Executive Orders, HUD is reviewing its existing regulations and is seeking suggestions for specific current regulations that may be outdated, ineffective, or excessively burdensome, and therefore, warranting repeal, replacement, or modification.

ICBA requests that HUD amend its disparate impact rule to comport with the limitations that the Supreme Court of the United States (“Supreme Court” or “Court”) imposed on the disparate impact application in its decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*<sup>3</sup> (Inclusive Communities).

### Background

On February 18, 2013, HUD issued a final rule which established liability under the Fair Housing Act for conduct that is otherwise lawful, but which has a disparate adverse impact on certain protected classes. Additionally, a three-part burden-shifting test was established for determining when a practice with a discriminatory effect violates the Fair Housing Act. Under this test, the charging party or plaintiff first bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the charging party proves a prima facie case, the burden of proof shifts to the defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the defendant satisfies this burden, then the charging party may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.

In 2015, the Supreme Court upheld the application of disparate impact under the Fair Housing Act in its ruling in *Inclusive Communities*; however, significantly narrowed its scope. In its opinion, the Court imposed a robust causality requirement and held 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”<sup>4</sup>. The Court also established a burden-shifting framework for courts and government adjudicating disparate-impact claims.

Specifically, the Court ruled that a charging party or plaintiff bringing a disparate impact claim must first demonstrate a causal connection between challenged practice and the statistical disparity affecting a protected class. This protects defendants from being held liable for racial disparities they did not create. The

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<sup>3</sup> *Tex. Dep’t of Housing and Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>4</sup> *Id.*

Court reiterated that a plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.

If the charging party or plaintiff proves a prima facie case, the defendant can then show a business rationale for the challenged practice to rebut the disparate impact claim. Finally, the burden shifts back to the charging party or plaintiff to show that an available alternative exists that has less disparate impact and serves the entity's legitimate needs.

### The Burdens and Costs of HUD's Disparate Impact Rule

As currently written, the application of HUD's disparate impact rule has particularly deleterious effects on community bank mortgage lending. Having inconsistent burden shifting frameworks with the Supreme Court ruling creates uncertainty for community banks and continues to subject lenders to legal challenges without appropriate safeguards in place.

Under the existing HUD rules, private or governmental plaintiffs can challenge lending practices that results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. On the contrary, the Supreme Court decision would require a charging party or plaintiff to demonstrate a causal connection before successfully making a prima facie case. Similarly, the use of statistical evidence showing disparity could give rise to a disparate impact challenge under the HUD's disparate impact rule, but may not establish a prima facie case under the Court's ruling. Community bankers must determine how to reconcile these different standards so that they are able to meet their fair lending responsibilities.

In addition to the uncertainty that these differing standards cause, maintaining the existing frameworks unnecessarily harm community banks that receive banking agency enforcement actions or a fair lending complaint. Currently, the use of statistical disparities could trigger banking agency citations or referrals to the Department of Justice for alleged fair lending violations or at least the initial stages of a legal claim. Not only are community banks particularly vulnerable to reputational damage, they simply cannot afford to withstand protracted litigation.

Defending against these types of claims raises significant challenges to community bank mortgage lenders. A community bank may successfully argue that a claim failed to make a prima facie claim, or that a certain practice is necessary to maintain a certain level of loan performance, which is a legitimate business interest. However, even if lenders prevail at this stage, community banks would have to expend substantial amounts of money, and suffer the reputational consequences of a discrimination charge.

## Conclusion

Thank you for the opportunity to respond to this notice. Given the significant amount of uncertainty created by the inconsistency of the current disparate impact rule and the Supreme Court decision, ICBA strongly urges HUD to amend and align the burden-shifting framework with the Court to halt the expansion of abusive disparate impact claims and reduce confusion for community banks. Please contact me at Lilly.Thomas@icba.org or (202) 659-8111 with any questions regarding our comments.

Sincerely,

/s/

Lilly Thomas  
Senior Vice President and Senior Regulatory Counsel