

COMMENTS
to the
U.S. Department of Housing and Urban Development
on
Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

83 Fed. Reg. 28560 (June 20, 2018)

Docket No. FR-6111-A-01

By the
National Consumer Law Center
On behalf of its low-income clients

August 20, 2018

The National Consumer Law Center¹ (NCLC) respectfully submits the following comments on behalf of its low-income clients in response to the Advance Notice of Proposed Rulemaking on *Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard* issued by the U.S. Department of Housing and Urban Development (HUD). The Disparate Impact Rule serves to remedy severe, systemic discrimination that denies individuals access to credit, affordable housing, insurance and other financial products. The cumulative weight of these practices strips wealth from communities of color, trapping these communities in a cycle of disinvestment. The Disparate Impact Rule, in its current form, has been used effectively and consistently to challenge discriminatory practices. HUD should reaffirm the Rule and step up enforcement under the Fair Housing Act to dismantle discriminatory policies and practices that deny all people access to economic opportunity.

Dr. King's campaign for racial and economic justice culminated with the passage of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, which prohibits discrimination in the sale, rental or financing of dwellings and other housing-related activities on the basis of race, color, religion, national origin, sex, disability or familial status.² HUD has long interpreted the Act to prohibit practices that have an unjustified discriminatory effect, regardless of intent, in keeping

¹ The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys, and provided extensive oral and written testimony to numerous Congressional committees on various topics. In addition NCLC attorneys regularly provide comprehensive comments to federal agencies, including HUD, on the regulations under consumer laws that affect low-income consumers. These comments were written by NCLC attorneys Odette Williamson and Jeremiah Battle.

² 42 U.S.C. §§ 3601 et seq.

with the Act's broad remedial mandate to combat and prevent segregation and discrimination in housing, and promote integrated and inclusive communities.³ HUD's 2013 final rule "Implementation of the Fair Housing Act's Discriminatory Effects Standard" (Disparate Impact Rule)⁴ and 2016 supplement, adopted the Act's disparate impact standard, long-recognized by the agency and federal circuit courts. The Supreme Court, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities)*,⁵ reaffirmed this understanding when it ruled that disparate impact claims are cognizable under the Fair Housing Act. Even prior to HUD's Rule and *Inclusive Communities*, civil rights and fair housing advocates, consumer attorneys and government officials used the Act's disparate impact standard to challenge a wide variety of discriminatory practices in consumer finance, insurance, and housing. These comments will survey and highlight the use of the Disparate Impact Rule and standard as applied in consumer financing cases. The Center also supports comments submitted by the National Fair Housing Alliance on behalf of civil rights, consumer advocacy, housing, and community development organizations.

The National Consumer Law Center has a long history of engagement in litigation, advocacy, research and training regarding disparate impact liability under the Fair Housing Act. The Center's litigation initiative makes full use of the disparate impact standard to bring about justice for consumers trapped in predatory financial transactions, especially older adults, veterans and people of color.⁶ In partnership with the Federal Reserve Bank of Richmond, NCLC convened a symposium on *The Color of Credit: Combating Disparate Impact in Consumer Finance* in September 2010. Annually, NCLC educates hundreds of lawyers regarding the disparate impact standard under the Act and other civil rights statutes at its Consumer Rights Litigation Conference, and other conferences and online trainings. The Center's treatise on credit discrimination examines the Fair Housing Act, and other civil rights statutes in detail, and its reports call for strengthening civil rights statutes.⁷ NCLC also promotes the disparate impact standard by co-authoring amicus briefs in the Supreme Court and lower courts, submitting comments to regulatory agencies, including HUD, and through op-eds and other media appearances.

³ See 78 Fed. Reg. 11460, 11461 (Feb. 15, 2013).

⁴ 78 Fed. Reg. 11460, (Feb. 15, 2013). See also 81 Fed. Reg. 69012 (Oct. 5, 2016). Collectively Disparate Impact Rule.

⁵ 135 S. Ct. 2507 (2015).

⁶ Between 2008 And 2012 the Center brought a series of national class action cases under the Fair Housing Act and the Equal Credit Opportunity Act (ECOA) against subprime mortgage lenders for engaging in racially discriminatory mortgage lending practices. Many of these cases alleged that discriminatory pricing policies led to minority borrowers paying more, often thousands of dollars more, than white borrowers for a loan. Discretionary mark up in rates, points and fees, and the addition of other unfavorable terms, unrelated to a consumer's credit profile, created unaffordable and unsustainable loans that resulted in foreclosure.

⁷ National Consumer Law Center, *Credit Discrimination* (6th Ed. 2013). See also Daniel Lindsey, *Why Responsible Lending is a Fair Housing Issue* (Feb. 2013) available at https://www.nclc.org/images/pdf/credit_discrimination/fair-housing-brief.pdf.

Consumer and Civil Rights Advocates and Governments Have Used the Disparate Impact Rule and Standard for Decades to Challenge Predatory Lending Policies and Practices that Deny Equal Access to Credit

Civil rights and consumer advocates have long used the Disparate Impact Rule or standard to challenge and redress housing discrimination, redlining, reverse redlining and other discriminatory lending practices.

During the subprime lending boom that led to the Great Recession of 2008, communities of color were targeted for high-risk, high interest rate loans. The former Director of the Consumer Financial Protection Bureau (CFPB), Richard Cordray, noted that communities of color were hit especially hard by the financial crisis: African-American households saw their median wealth decline by 53 percent between 2005 and 2009, and Hispanic households saw an even steeper decline of 66 percent.⁸ These findings are consistent with the conclusion of research reports from that period that examined the fallout of the foreclosure crisis.⁹ Dozens of lawsuits bringing disparate impact claims were filed in an attempt to alter this toxic reality and bring relief to individual consumers.

These lawsuits unmasked widespread discriminatory lending practices. The manner in which loans were financed meant that ordinary consumers had no knowledge of the policies and practices that had a disparately negative effect on their loans. Individual borrowers, in protected classes, did not know that the loan terms they were offered were different or more burdensome than that offered to similarly situated white borrowers. Disparate impact claims, coupled with the use of statistics and data provided under the Home Mortgage Disclosure Act, leveled the playing field for many of these plaintiffs. Disparate impact claims allowed consumers to challenge discriminatory policies that would otherwise, even when identified, go unaddressed.

Lawsuits bringing disparate impact claims have not only exposed and remedied longstanding patterns of discrimination, but also resulted in compensation for impacted consumers. A sample of the cases brought by civil rights and consumer advocates follow. That these cases had merit is shown by the fact that each case was resolved by an agreement favorable to the plaintiff, often providing both for compensation to consumers and substantial changes in the defendants' practices. If the Disparate Impact Rule and standard are weakened, many of the practices that were ended by these cases would likely continue today.

Examples of the cases brought by civil rights and consumer advocates on behalf of impacted consumers include:

- *Saint-Jean et al. v. Emigrant Mortg. Co.*, 11-cv-2122 (E.D.N.Y.): Legal services and civil rights advocates brought a class action lawsuit against Emigrant Savings Bank for violation of the Fair Housing Act, the City's Human Rights Law and other laws after minority homeowners were targeted for high-cost loans that the bank knew would likely

⁸ "Prepared Remarks by Richard Cordray at the National Community Reinvestment Coalition," April 18, 2012, available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-by-richard-cordray/>.

⁹ See National Consumer Law Center, *Mortgage Lending*, §1.3 (2d 2014).

result in default. In June 2016, after a month-long trial, a jury awarded six of the plaintiffs a total of \$950,000 in damages.¹⁰

- *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 08-cv-0369 (N.D. Cal.): This class action alleged that Greenpoint's practices had a disparate impact on minority applicants for home mortgage loans in violation of the FHA and Equal Credit Opportunity Act (ECOA). Specifically, the bank's discretionary pricing policy resulted in African-American and Hispanic borrowers receiving less favorable loan pricing than similarly situated white borrowers. In April 2011, the parties settled for \$14.75 million.¹¹
- *Allen v. Decision One Mortg. Co.*, 07-cv-11669 (D. Mass.) alleged that private banks and lenders maintained a policy that had a discriminatory impact on African-American applicants because the policy allowed a discretionary surcharge of additional points and fees to an otherwise objective risk-based financing rate. In May 2010, the class members settled for \$6.5 million, financial education, quarterly reporting, and loan restructuring for class members.¹²
- *Puello v. Citifinancial Servs., Inc.*, 08-cv-10417 (D. Mass.): Class action alleging that Citifinancial Services and Citigroup's lending practices had a discriminatory impact on minority applicants in their home financing policies and practices. In August 2012, the parties settled with Defendants paying compensation to class members who obtained their loans through mortgage brokers, housing counseling services for class members, a non-discretionary pricing policy, training, and Class Counsel's attorney fees.¹³

The fallout from the foreclosure crisis and decades-old discriminatory housing and lending policies resulted in a resurgence of predatory land installment contracts. NCLC filed a reverse redlining lawsuit with legal services in Atlanta against a Wall-Street backed company that offered this form of predatory financing to African-American buyers. Disparate impact claims were brought under the Fair Housing Act and other federal and state statutes. Recently this case survived a motion to dismiss with the court noting that the plaintiffs had alleged facts that, if true, would show that the company's marketing practices had a disparate impact on African-Americans.¹⁴

¹⁰ Alan Feuer, *Emigrant Savings Bank Discriminated Against Minorities, Brooklyn Jury Says*, N.Y. Times, June 27, 2016, available at https://www.nytimes.com/2016/06/28/nyregion/emigrant-savings-bank-discriminated-against-minorities-brooklyn-jury-says.html?_r=0. Emigrant moved for a directed verdict in October 2016 and the Court has not yet decided that motion.

¹¹ See NCLC Case Index at <https://www.nclc.org/litigation/case-index-closed-cases.html>. See also *Case Profile: Ramirez v. Greenpoint Mortgage Funding, Inc.*, Civil Rights Litigation Clearinghouse, <https://www.clearinghouse.net/detail.php?id=12537>.

¹² *Case Profile: Allen v. One Decision Mortgage Company*, Civil Rights Litigation Clearinghouse, <https://www.clearinghouse.net/detail.php?id=12531&search=source%7Cgeneral%3BsearchIssues%7C390%2C284%3BsearchCauses%7C49%2C29%3Borderby%7CfilingYear%3B>.

¹³ *Final Approval Order and Judgment, Puello v. v. Citifinancial Servs., Inc.*, 08-cv-10417 (D. Mass.), Aug. 10, 2012, Dkt. No. 128; see also *Case Profile: Puello v. Citifinancial Services, Inc.*, Civil Rights Litigation Clearinghouse,

<https://www.clearinghouse.net/detail.php?id=12449&search=source%7Cgeneral%3BsearchIssues%7C390%2C284%3BsearchCauses%7C49%2C29%3Borderby%7CfilingYear%3B>.

¹⁴ *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1337 (N.D. Ga. 2018).

The Disparate Impact Rule and standard is essential to the enforcement of fair housing and credit discrimination statutes. Without disparate impact claims governments have fewer tools to address systemic discrimination that puts citizens in harm's way. A survey of mortgage lending related cases brought by the federal government demonstrates the effectiveness of the disparate impact standard in addressing systemic discrimination in residential lending policies and practices. Most of the cases settled with a civil penalty and establishment of a settlement fund, often coupled with loan subsidy programs and outreach to impacted community members. The effective and consistent use of disparate impact claims by the government has bought relief to thousands of consumers in a manner that is not equally available to private litigants.

- *United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.): United States and CFPB alleged that BancorpSouth failed to provide its home mortgage lending services to majority-minority neighborhoods on an equal basis as it provided those services to predominantly white neighborhoods in the Memphis metropolitan area. In July 2016, the parties settled for a \$3 million civil penalty, a \$4 million loan subsidy program, at least \$800,000 in advertising, outreach, and community partnership, and a \$2.78 million settlement fund.¹⁵
- *United States v. Sage Bank*, 15-cv-13969 (D. Mass.): United States alleged that Sage Bank engaged in discrimination on the basis of race and national origin in the pricing of its residential mortgage loans. In December 2015, the parties settled for monitoring, training, and a settlement fund of \$1.175 million.¹⁶
- *CFPB v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.): CFPB alleged that from 2009 to 2013, Hudson City failed to provide its home mortgage lending services to majority Black and Hispanic neighborhoods on an equal basis. In November 2015, the parties settled for a \$25 million loan-subsidy fund, \$2.25 million for advertising, outreach, financial education, and community partnership, opening two full-service branches in affected neighborhoods, and paying a further civil monetary penalty of \$5.5 million.¹⁷
- *CFPB and United States v. Nat'l City Bank*, 13-cv-1817 (W.D. Pa.): CFPB and United States alleged that between 2002 and 2008 National City Bank violated the FHA and ECOA by charging more than 75,000 African-American and Hispanic borrowers higher loan prices not based on borrower risk, but because of their race or national origin. In December 2013, the parties settled for \$35 million.¹⁸

¹⁵ *Consent Order, United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.), July 25, 2016, <https://www.justice.gov/crt/file/879006/download>.

¹⁶ *Consent Order, United States v. Sage Bank*, 15-cv-13969 (D. Mass.), Dec. 1, 2015, <https://www.justice.gov/crt/file/796671/download>.

¹⁷ *Consent Order, CFPB and United States v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.), Nov. 4, 2015, <https://www.justice.gov/crt/file/791046/download>.

¹⁸ *Justice Department and Consumer Financial Protection Bureau Reach \$35 Million Settlement to Resolve Allegations of Lending Discrimination by National City Bank*, Dec. 23, 2013, <https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-35-million-settlement>.

- *United States v. Southport Bank*, 13-cv-1086 (E.D. Wis.): United States alleged that from 2007 to 2008 Southport charged higher broker fees on wholesale mortgage loans made to African-American and Hispanic borrowers as compared to non-Hispanic white borrowers. In October 2013, the parties settled for \$687,000.¹⁹
- *United States v. Chevy Chase Bank, F.S.B.*, 13-cv-1214 (E.D. Va.): United States alleged that Chevy Chase Bank charged elevated prices on mortgage loans made to African-American and Hispanic borrowers in violation of the FHA and ECOA. In September 2013, the parties settled for \$2.85 million.²⁰
- *United States v. Plaza Home Mortg.*, 13-cv-2327 (S.D. Cal.): United States alleged that Plaza Home Mortgage charged African-American and Hispanic borrowers higher fees than white borrowers on wholesale mortgage loans in violation of the FHA and ECOA. In September 2013, the parties settled for \$3 million, monitoring, fair lending training, and a community enrichment program.²¹
- *United States v. Cmty. State Bank*, 13-cv-10142 (E.D. Mich.): United States alleged that Community State Bank of St. Charles Michigan served the credit needs of the residents of predominantly white neighborhoods in the Saginaw and Flint metropolitan areas to a significantly greater extent than it served the credit needs of majority African-American neighborhoods. In January 2013, the parties settled for \$165,000 and a nondiscrimination injunction.²²
- *United States v. Luther Burbank Savings*, 12-cv-7809 (C.D. Cal.): United States alleged that from 2006 to 2011 Luther Burbank Savings enforced a \$400,000 minimum loan amount policy for its wholesale single-family residential mortgage loan program and originated very few single-family residential mortgage loans to African-American or Hispanic borrowers throughout California. In September 2012, the parties settled for \$2 million and a prohibition on establishing or implementing a \$400,000 minimum loan amount policy.²³
- *United States v. GFI Mortg. Bankers*, 12-cv-2502 (S.D.N.Y.): United States alleged that GFI charged African-American and Hispanic borrowers higher interest rates and fees on

¹⁹ *Consent Order, United States v. Southport Bank*, 13-cv-1086 (E.D. Wis.), Oct. 11, 2013, https://www.justice.gov/sites/default/files/crt/legacy/2013/10/18/sp_settle.pdf.

²⁰ *Justice Department Reaches Fair Lending Settlement with Chevy Chase Bank Resulting in \$2.85 Million in Relief for Homeowners*, Sept. 30, 2013, <https://www.justice.gov/opa/pr/justice-department-reaches-fair-lending-settlement-chevy-chase-bank-resulting-285-million>.

²¹ *Justice Department Reaches Settlement with Plaza Home Mortgage Inc. to Resolve Allegations of Mortgage Lending Discrimination*, Sept. 27, 2013, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-plaza-home-mortgage-inc-resolve-allegations-mortgage>.

²² *Justice Department Reaches Settlement with Community State Bank Regarding Alleged Lending Discrimination in Michigan*, Jan. 15, 2013, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-community-state-bank-regarding-alleged-lending>.

²³ *Justice Department Reaches Settlement with Luther Burbank Savings to Resolve Allegations of Lending Discrimination in California*, Sept. 12, 2012, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-luther-burbank-savings-resolve-allegations-lending>.

home mortgage loans because of their race or national origin, not based on their creditworthiness. In August 2012, the parties settled for \$3.55 million, compliance monitoring, revised lending, monitoring, and training policies, and a nondiscrimination injunction.²⁴

- *United States v. Wells Fargo Bank, N.A.*, 12-cv-1150 (D.D.C.): United States alleged that Wells Fargo engaged in pattern or practice of discrimination against qualified African-American and Hispanic borrowers from 2004 to 2009. In July 2012, the parties settled for \$184.3 million and an internal review of Wells Fargo's retail mortgage lending.²⁵
- *United States v. SunTrust Mortg.*, 12-cv-0397 (E.D. Va.): United States alleged that SunTrust engaged in a pattern or practice of discrimination that increased loan prices for many of the qualified African-American and Hispanic borrowers who obtained loans between 2005 and 2009. In May 2012, the parties settled for \$21 million.²⁶
- *United States v. Midwest BankCentre*, 11-cv-1086 (E.D. Mo.): United States alleged that Midwest BankCentre served the credit needs of the residents of predominantly white neighborhoods in the Missouri portion of the St. Louis metropolitan area to a significantly greater extent than it served the credit needs of majority African-American neighborhoods. In April 2012, the parties settled for \$1.45 million, the bank opening a full-service branch in a majority African-American area, and fair lending training for its employees.²⁷
- *United States v. Countrywide Fin. Corp.*, 11-cv-10540 (C.D. Cal.): United States alleged that between 2004 and 2008 Countrywide discriminated by charging more than 200,000 African-American and Hispanic borrowers higher fees and interest rates because of their race or national origin, and not because of the borrowers' creditworthiness or other objective criteria related to borrower risk. In December 2011, the parties settled for \$335 million.²⁸
- *United States v. C&F Mortg. Corp.*, 11-cv-0653 (E.D. Va.): United States claimed that in 2007 C&F obtained higher prices on certain home-mortgage loans to black and

²⁴ *Consent Order, United States v. GFI Mortg. Bankers*, 12-cv-2502 (S.D.N.Y.), Aug. 27, 2012, <https://www.justice.gov/sites/default/files/crt/legacy/2012/08/28/gfisettle.pdf>.

²⁵ *Justice Department Reaches Settlement with Wells Fargo Resulting in More than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims*, July 12, 2012, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>.

²⁶ *Justice Department Reaches \$21 Million Settlement to Resolve Allegations of Lending Discrimination by SunTrust Mortgage*, May 31, 2012, <https://www.justice.gov/opa/pr/justice-department-reaches-21-million-settlement-resolve-allegations-lending-discrimination>.

²⁷ *Justice Department Reaches Settlement with Midwest BankCentre Regarding Alleged Lending Discrimination in St. Louis*, June 16, 2011, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-midwest-bankcentre-regarding-alleged-lending>.

²⁸ *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, Dec. 21, 2011, <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>.

Hispanic borrowers than on loans to certain non-Hispanic white borrowers. In October 2011, the parties settled for \$140,000, a nondiscrimination injunction, and monitoring.²⁹

- *United States v. Primelending*, 10-cv-2494 (N.D. Tex.): United States claimed that Primelending charged African-American borrowers higher annual percentage rates of interest for certain fixed rate loans and loans guaranteed by the FHA. In January 2011, the parties settled for \$2 million, a nondiscrimination injunction, and monitoring.³⁰
- *United States v. AIG Fed. Savings Bank and Wilmington Fin.*, 10-cv-0178 (D. Del.): United States alleged that AIG and Wilmington Finance violated the FHA and ECOA when they charged higher fees on wholesale loans to African-American borrowers nationwide between July 2003 and May 2006. In March 2010, the parties settled for \$6.1 million, an investment of at least \$1 million in consumer financial education efforts, and nondiscrimination injunction.³¹
- *United States v. First United Sec. Bank*, 09-cv-0644 (S.D. Ala.): United States alleged discriminatory pricing and redlining in violation of FHA and ECOA. In November 2009, the parties settled for First United opening one new branch, investing \$500,000 in a special financing program, and spending more than \$110,000 for outreach, promotion, and education.³²
- *United States v. Centier Bank*, 06-cv-0344 (N.D. Ind.): United States alleged that Centier Bank avoided serving the lending and credit needs of majority minority neighborhoods in Gary, East Chicago, and Hammond. In October 2006, the parties settled for a minimum \$3.5 million investment in special financing program, at least \$375,000 in targeted advertising, a \$500,000 investment to provide credit counseling, financial literacy, business planning, and other related education program, training, and reporting.³³
- *United States v. First Am. Bank*, 04-cv-4585 (N.D. Ill.): United States alleged that First American violated FHA and ECOA by redlining in the Chicago and Kankakee metropolitan neighborhoods. In July 2004, the parties settled for First American Bank opening four full-service branch offices, investing at least \$300,000 for consumer education programs, spending at least \$400,000 to advertise its products to minority communities, and investing \$5 million in a special financing program for residents.³⁴

²⁹ *Consent Order, United States v. C&F Mortg. Corp.*, 11-cv-653 (E.D. Va.), Oct. 4, 2011, <https://www.justice.gov/sites/default/files/crt/legacy/2011/10/05/candfsettle.pdf>.

³⁰ *Consent Order, United States v. Primelending Inc.*, 10-cv-2494 (N.D. Tex.), Jan. 11, 2011, <https://www.justice.gov/sites/default/files/crt/legacy/2011/02/08/primelendsettle.pdf>.

³¹ *Consent Order, United States v. AIG Fed. Savings Bank & Wilmington Fin., Inc.*, 10-cv-0178 (D. Del.), Mar. 19, 2010, <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/aigsettle.pdf>.

³² *Consent Order, United States v. First United Sec. Bank*, 09-cv-0644 (S.D. Ala.), Nov. 18, 2009, <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/fusbsettle.pdf>.

³³ *Consent Order, United States v. Centier Bank*, 06-cv-0344 (N.D. Ind.), Oct. 16, 2006, <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-164>.

³⁴ *Consent Order, United States v. First Am. Bank*, 04-cv-4585 (N.D. Ill.), July 19, 2004, <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-209>.

- *United States v. Huntington Mortg. Co.*, 95-cv-2211 (N.D. Ohio): United States alleged that Huntington Mortgage Co. charged African Americans higher upfront fees on home mortgages. In October 1995, the company agreed to create a \$420,000 fund to compensate victims and change its policies.³⁵

Moreover, state, cities and local governments brought cases using disparate impact to redress the severe economic consequences of lending discrimination on their communities. Most recently the Supreme Court, in *Bank of Am. Corp. v. City of Miami, Fla.*, affirmed that a city has standing to sue as an “aggrieved person” under the FHA.³⁶ Like many major American cities, Miami bore the brunt of the fallout from the foreclosure crisis and sought to remedy the racially discriminatory lending practices that caused harm to its vulnerable communities, and drained public resources. Currently, municipalities and counties including, among others, Cook County, Oakland, Philadelphia, and Sacramento, are pressing FHA claims against various banks for economic and non-economic harm to the cities and counties springing from the banks’ alleged discriminatory lending. According to the lawsuits, the cities are harmed in their efforts to secure fair lending, and have had to expend monies for anti-blight and other measures due to the devastating number of foreclosures in the recent past.

The settlements below highlight some of the holistic solutions local governments sought or are seeking to help citizens. The ability to bring disparate claims is critical for holding lenders accountable and for restoring some of the wealth that has been drained from these communities and city coffers.

- *The People of the State of New York v. Evans Bancorp*, 14-cv-0726 (W.D.N.Y.): New York State alleged that Evans systematically denied its mortgages and services to African-Americans in the Buffalo metro area by redlining from at least 2009 the date of the filing of the suit. In September 2015, the parties settled for Evans establishing an \$825,000 settlement fund and a revision of its lending area to include areas previously excluded.³⁷
- *Baltimore v. Wells Fargo Bank, N.A.*, 1:08-cv-00062-JFM: Baltimore alleged that Wells Fargo intentionally targeted the City's minority communities for predatory mortgage loans with discriminatory and unfair terms. Under its agreement with the City, Wells Fargo will provide \$4.5 million in direct down payment assistance to qualifying Baltimore homebuyers. Wells Fargo will provide an additional \$3 million for the City to use for priority housing and foreclosure-related initiatives, and committed to making \$425 million in prime mortgage loans in Baltimore over several years, \$125 million of which will be in low and moderate income neighborhoods.

Discrimination based on race, national origin and other factors in violation of the Fair Housing Act in mortgage financing persists and is widespread. The ability of governments to bring

³⁵ *Settlement Agreement, United States v. The Huntington Mortg. Co.*, 95-cv-2211 (N.D. Ohio), Oct. 18, 1995, <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-50>.

³⁶ 137 S. Ct. 1296 (2017). The court vacated and remanded to the case to the Eleventh Circuit to determine the contours of the FHA’s proximate cause requirement.

³⁷ *A.G. Schneiderman Secures Agreement with Evans Bank Ending Discriminatory Mortgage Redlining in Buffalo*, Sept. 10, 2015, <https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining>.

enforcement actions against banks that engage in a pattern or practice of discrimination with disparate impact claims is essential to obtaining redress for victims, restoring community resources used to support impacted citizens, and maintaining a competitive and fair financing market.

Safe Harbors From Disparate Impact Liability are Unnecessary

In its *Federal Register* notice, HUD asks whether the rule should be amended to provide safe harbors. Adding safe harbors to the rule is unnecessary. A safe harbor statutory defense provides an avenue by which a lender can avoid liability for violating a statute by complying with certain established requirements. Since the inception of disparate impact jurisprudence, lenders have been able to avoid liability by presenting evidence demonstrating that their actions were supported by a legitimate business interest. In other words, the Disparate Impact Rule already provides lenders a means to avoid liability and the Rule is being effectively used by litigants throughout the country. Thus, safe harbors for claims of disparate impact liability are unnecessary.

Moreover, Federal agencies have taken care to interpret their requirements to avoid conflicts between federal anti-discrimination laws and other federal laws. For example, Congress passed the Dodd-Frank Wall Street and Consumer Protection Act to ensure that borrowers throughout most of the mortgage market were offered affordable loans, based on verified income, suitable to the consumer's credit history. As a result, the Bureau established the Ability-to-Repay and Qualified Mortgage Standards Rule. A major feature of the ability-to-repay requirement was the establishment of a category of safer loans defined as "qualified mortgages." Mortgages meeting the "qualified mortgage" standard have a presumption of compliance with the ability-to-repay requirement.

Following promulgation of the Ability to Repay Rule, creditors raised concerns about being held liable for violating the disparate impact doctrine of the Equal Credit Opportunity Act (ECOA) if they chose to only originate qualified mortgages. In response, several federal agencies issued an interagency statement stating that a creditor's decision to offer only Qualified Mortgages would not, absent other factors, elevate a supervised institution's fair lending risk.³⁸ Specifically, the agencies stated that the Ability-to-Repay Rule and the ECOA were compatible because the ECOA in fact promotes creditors acting on the basis of their legitimate business needs. There have been no reported cases where disparate impact claims have been brought against lenders who chose to only originate qualified mortgages.

³⁸ Consumer Fin. Prot. Bureau, Office of the Comptroller of the Currency, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., & Nat'l Credit Union Admin., Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule [1] 2-3 (Oct. 22, 2013), available at www.federalreserve.gov.

Conclusion

The Fair Housing Act's mandate to eliminate housing discrimination, end residential segregation, and promote integrated and inclusive communities is vital in today's marketplace. HUD has the authority and responsibility for administering and enforcing the Act. The Disparate Impact Rule, in its current form, has been used fairly, effectively and consistently by advocates and governments to challenge discriminatory practices. HUD should not amend the Rule. No changes are required or needed at this time. Now is the time for HUD to affirm the Rule, and aggressively enforce the Act's provisions.