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Regulations Division
General Counsel
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

RE: Docket No. HUD-2021-0033
Docket Name: FR-6251-P-01 Reinstatement of Discriminatory Effects Standard

To whom it may concern:

In response to the above referenced Advanced Notice of Proposed Rulemaking ("ANPR") issued by the Department of Housing and Urban Development (HUD) in the Federal Register on June 25, 2021, the Independent Insurance Agents & Brokers of America, Inc. ("IIABA") respectfully submits the following comments.

Founded in 1896, the IIABA is the nation's oldest and largest association of independent insurance agents and brokers, representing more than 25,000 agency locations under the Trusted Choice brand. Trusted Choice independent agents offer consumers all types of insurance—property, casualty, life, health, employee benefit plans and retirement products—from a variety of insurance companies.

HUD has specifically requested comments on their proposal to recodify their 2013 Rule implementing the Fair Housing Act's disparate impact standard. The Rule in question extends disparate impact liability to the sale and servicing of homeowner's insurance and creates a burden-shifting framework for assigning liability in private lawsuits and government enforcement actions premised on the existence of a disparate impact. IIABA believes that the disparate impact standard set forth in HUD's 2013 Final Rule is not in compliance with the limitations on disparate impact liability following the Supreme Court decision *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507 (2015) in which they ruled that disparate impact claims were subject to certain standards and constitutional limitations. It is therefore IIABA's belief that HUD's 2013 Final Rule should not be reinstated.

IIABA believes that the Rule is not consistent with *Inclusive Communities* for the following reasons:

1. The Rule inserts consideration of race and other protected characteristics into a previously blind process. State insurance laws prohibit rates that are excessive, inadequate, or unfairly discriminatory and state regulators regularly review rates and underwriting guidelines to make sure that insurance companies do not violate this prohibition. Furthermore, state laws prohibit insurers and their salesforce, from considering membership in protected classes when making placement, rating and underwriting decisions.

2. The Rule allows a plaintiff to bring an action based on statistical disparity alone, without requiring identification of any specific policy of the defendant that caused the alleged disparity. *Inclusive Communities* requires an action to be based upon "artificial, arbitrary, and unnecessary barriers" while the Rule does not. The Rule likewise allows a plaintiff to displace a defendant's valid policy choice without demonstrating that the proffered alternative is at least as effective.

Furthermore, IIABA believes that the Rule, as applied to homeowners' insurance, violates the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. McCarran Ferguson leaves regulation of the "business of insurance" to the states, unless preempted by a federal law that "specifically relates to the business of insurance."[1] Insurance is highly regulated at the state level. State regulation has proven time and again that it effectively protects consumers. The Rule directly conflicts with state laws that require rates to be based upon actuarially sound factors that are predicated on risk. As such, IIABA is concerned that the regulation interferes with the ability of insurers to provide homeowner's insurance at a fair price by requiring that insurance placement and underwriting decisions be based on factors that are not risk-predictive.

Finally, IIABA is concerned that the Rule exposes insurance agents and brokers to unwarranted liability risks by requiring insurers and their salesforce to obtain and store personal and potentially sensitive information about an individual's protected class(es) when previously this information was not generally collected. The Rule inserts extra and unnecessary costs on insurance agencies, particularly smaller agencies in having to collect this data. Moreover, some insurance agents and brokers have previously filed comments in response to the Rule in which they state they are uncomfortable asking potential policyholders for information on their race, color, religion, sex, or national origin when they apply for homeowner's insurance, and doing so could serve to discourage people from seeking insurance quotes.

If HUD determines that the Rule should be recodified, it is necessary that every standard and limitation set out by the Supreme Court's decision in *Inclusive Communities* be explicitly acknowledged and adopted in a revised rule, and that HUD ensure that any revised rule does not undermine state-based insurance regulations and consumer protection laws. IIABA appreciates the opportunity to comment and thanks HUD for considering the opinions of independent insurance agents. Please do not hesitate to reach out to our organization should you require further information.

Respectfully submitted,

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[1] See generally, *Barnett Bank of Marion Cnty. v. Nelson,* 517 U.S. 25 (1996).