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## Industry U-turns on Disparate Impact, Calls for Rule Withdrawal

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[Maria Volkova](#)

After hankering for the disparate-impact rule to be rewritten for years, the mortgage industry now wants the Department of Housing and Urban Development to maintain status quo.

Several mortgage-related trade associations have called on HUD to withdraw the revision of the Fair Housing Act's disparate-impact standard.

In a recent letter to HUD Secretary Ben Carson, the Mortgage Bankers Association lauded the agency's efforts to provide guidance that aligns prior agency rules with Supreme Court precedent, but said the proposed rule will contribute to the erosion of protections needed to combat systemic inequality.

The MBA encouraged HUD to "bring the housing, lending and civil rights communities together for renewed discussions about how to address the stubbornly wide housing and wealth gaps faced by communities of color that still exist — and by some measures have grown worse."

The National Association of Realtors called on HUD to suspend the rule for now. NAR acknowledged the need for more clarity on the subject, but warned that this is not the opportune time to have this discussion.

Bank of America, Wells Fargo and Quicken Loans also expressed disapproval of the new rule, voicing the need for equity and inclusion in the housing system.

According to former Ginnie Mae President Ted Tozer, during the previous administration, lenders faced aggressive disparate-impact litigation, resulting in their initial support of new standards.

"The initial reaction was [lenders] looking at their own companies and saying what does it mean to me to be possibly open to litigation and criticism because under disparate impact I could possibly be sued," Tozer said. "Now, people see that disparate impact is a symptom of underlying problems, so let's try to resolve as many as we can, as quickly as we can."

The framework of the Fair Housing Act's disparate-impact rule was created in 2013 to prevent certain policies and practices from disproportionately impacting minorities.

In 2015, in a Fair Housing Act case, the Supreme Court endorsed disparate-impact claims, allowing plaintiffs to use statistics and other evidence to show a lender's decisions and practices had discriminatory effects — without having to actually prove that they were the result of discriminatory intentions.

In October of last year, HUD released a proposed rule — which rewrites its interpretation of the disparate-impact standard — for comment.

The new outline sets a higher bar for proving unintentional discrimination, requiring plaintiffs to meet a five-step checklist to bring a case to court. Civil rights advocates argue that changes to this rule will make the burden of proof too high.

According to Tori Shinohara, partner at Mayer Brown, the pushback against the revised rule has been spurred by the civil unrest across the country and a legal concern.

"There is potential concern that if HUD implements a final rule that is viewed as exceeding its authority that there could be a challenge under the Administrative Procedure Act," said Shinohara.

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