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HUD Moves to Dismantle Its Disparate Impact Framework Under the Fair Housing Act

The U.S. Department of Housing and Urban Development has proposed eliminating its disparate impact regulation under the Fair Housing Act (FHA), continuing a broader shift away from agency-driven interpretations of fair housing liability and the Trump administration's broader rollback of disparate impact regulations across the government. Comments on the proposal are due by February 13, 2026.

If finalized, the proposal would rescind HUD's disparate impact regulation, ending the agency's effort to define disparate impact liability through regulation and leaving further development of the doctrine to the courts. It also would dovetail with HUD deprioritizing fair lending enforcement.

A Rule Defined by Instability

HUD's disparate impact regulation has experienced repeated revisions and reversals since it was first adopted in 2013. Although the U.S. Supreme Court recognized disparate impact claims under the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), the scope and mechanics of disparate impact claims under the FHA have remained the subject of ongoing litigation and regulatory debate. Subsequent efforts by HUD to revise or reinstate the rule across multiple administrations resulted in injunctions, stays, and continued uncertainty for regulated parties.

Rather than attempting yet another recalibration of the standard, HUD has now proposed a more fundamental change: removing the regulation altogether, and deferring entirely to the courts to determine the parameters of disparate impact

liability under the FHA.

What the Proposal Would Do

HUD's proposal would:

1. Eliminate 24 CFR part 100, subpart G, including § 100.500, which sets forth HUD's disparate impact standard; and
2. Remove language in § 100.5(b) stating that discriminatory effects may establish a FHA violation even in the absence of discriminatory intent.

HUD emphasizes that repeal of the regulation would not alter the text of the FHA itself or foreclose disparate impact claims recognized by courts. Instead, HUD's stated objective is to step back from maintaining a regulatory interpretation of a doctrine that continues to evolve through case law. HUD also stated that the proposal "does not change any requirements or affect any rights or obligations," which seems difficult to square with the fact that HUD has proposed to repeal regulatory text that sets forth the parameters for when regulated parties are subject to legal liability under the FHA.

Executive Policy and Judicial Interpretation

The proposal is grounded in current administration policy, including Executive Order 14281, which directs federal agencies to eliminate disparate-impact liability "to the maximum degree possible" consistent with applicable law. HUD states that this directive required a reassessment of existing regulations that impose or expand disparate impact theories of liability.

HUD also relies heavily on the Supreme Court's 2025 decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which overturned *Chevron* deference. Without *Chevron*, courts are no longer required to defer to agency interpretations of ambiguous statutes. HUD concludes that its prior disparate impact rulemakings no longer provide the clarity or predictability once claimed and that courts – not agencies – should determine the contours of disparate impact liability under the FHA. HUD, however, does not address how *Loper Bright* left in place the longstanding "*Skidmore* deference" doctrine where agency expertise is given the "power to

persuade." As the agency entrusted by Congress to enforce the FHA for nearly 60 years, HUD continues to possess relevant expertise for resolving the legal questions.

The 2025 Guidance Withdrawal: Reducing Reliance on Sub-Regulatory Interpretation

The proposed repeal follows broader actions taken by HUD in 2025 to curtail reliance on sub-regulatory guidance. In September 2025, HUD's Office of Fair Housing and Equal Opportunity (FHEO) issued a memorandum withdrawing numerous previously issued fair housing guidance documents. HUD instructed staff and external stakeholders that the withdrawn guidance should no longer be relied upon, explaining that many of the documents extended beyond statutory text or reflected policy judgments not grounded in binding law.

HUD indicated that guidance would be reevaluated and potentially reissued only where it clearly aligns with statutory authority and reduces compliance burdens. Pending that review, the agency made clear that enforcement would not be driven by legacy guidance materials.

Enforcement Prioritization and Disparate Impact

HUD's proposal also should be viewed in the context of other recent deliverables effecting de-prioritization of fair lending enforcement. Last September, HUD also issued a separate Fair Housing Act Enforcement and Prioritization of Resources memorandum outlining how FHEO would allocate enforcement efforts going forward. That memorandum directs staff to focus limited enforcement resources on cases involving strong evidence of intentional discrimination and clear statutory violations.

While HUD did not state that disparate impact claims are unavailable, the memorandum makes clear that such claims are not an enforcement priority – particularly where liability depends on expansive interpretations or withdrawn guidance rather than statutory text or controlling judicial precedent. HUD explained that prior enforcement approaches dispersed limited resources and, in some instances, relied on theories that lacked firm grounding in law.

A Consistent Policy Trajectory

Taken together, HUD's 2025 guidance withdrawal, its enforcement prioritization memorandum, and the current proposal to rescind the disparate impact regulation reflect a consistent policy trajectory. HUD is reducing reliance on guidance documents, narrowing enforcement priorities, and retreating from maintaining regulatory interpretations of contested legal standards. The agency's stated position is that disparate impact liability under the FHA should develop through judicial decisions rather than administrative rulemaking.

Comparison to CFPB's ECOA Proposal

We also note that HUD's policy trajectory accords with the Consumer Financial Protection Bureau (CFPB), which in November proposed major changes to its Regulation B implementing the Equal Credit Opportunity Act (ECOA). Among those proposed revisions was the elimination of disparate impact liability from Regulation B. The authors, along with two colleagues, wrote about that proposal on a prior blog.

While similar in policy outcome, the CFPB proposal, unlike HUD's proposal, was not framed as a mere statement of policy with no change in rights or obligations, and it closely analyzed the legislative history and case law associated with the ECOA and disparate impact theory. As part of that analysis, the CFPB contrasted the text of ECOA with FHA, noted the lack of "effects" language in the ECOA compared with FHA, and discussed the *Inclusive Communities* decision in some detail, all of which implied that the CFPB views the FHA as providing a stronger basis for disparate impact liability than the ECOA. The lack of consistency in approaches to the respective rule proposals, while not atypical across agencies, is noteworthy and potentially could be fodder for comments to the proposal or litigation once the rule is finalized.

What Comes Next

HUD provided a 30-day comment period (less than its standard 60-day period) for the proposal. If HUD finalizes the proposal, we believe that litigation is likely. Parties that favor a regulatory disparate impact framework may challenge the agency's decision, arguing that HUD has abdicated its enforcement and rulemaking

responsibilities and is misreading *Loper Bright* to require wholesale delegation of disparate impact liability's parameters to the courts. At the same time, disparate impact claims themselves will not disappear. Courts will continue to adjudicate such claims under existing precedent, albeit without HUD's regulatory overlay.

For now, HUD's proposal signals an intent to play a more limited role in shaping disparate impact doctrine – leaving its future largely in the hands of the judiciary. And it reinforces the Trump administration's whole-of-government approach to rolling back fair lending enforcement and disparate impact theory as a legal doctrine.

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