

May 2, 2025

Mr. Scott Turner
Secretary
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Re: Request for the Department of Housing and Urban Development (HUD) to Update the Disparate Impact Rule to Align with the Supreme Court’s Decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* and Executive Order “Restoring Equality of Opportunity and Meritocracy”

Dear Secretary Turner,

The Independent Community Bankers of America (ICBA)¹ congratulates you on your appointment as HUD Secretary. As you begin to set the priorities for the agency, we strongly encourage you to revisit the Fair Housing Act’s 2013 Disparate Impact Rule, which was modified during the first Trump administration but reinstated during the Biden administration.² The 2013 rule is not consistent with the binding precedent of the Supreme Court’s 2015 decision in *Texas Department of Housing & Community Affairs vs. Inclusive Communities Project, Inc. (Inclusive Communities)* and conflicts with the policy objectives of President Trump’s Executive Order titled “Restoring Equality of Opportunity and Meritocracy,” signed on April 23, 2025.³ Revising the rule to align with both the Supreme Court’s ruling and the Executive Order will ensure fair enforcement of the Fair Housing Act (“FHA”), reduce regulatory burdens on community banks, and promote a merit-based approach to housing policy.

As a threshold matter, ICBA and all community banks oppose discrimination in all forms and support efforts to expand credit to all eligible borrowers irrespective of their race, sex, ethnicity, or any other immutable traits. Community banks strengthen their communities and

¹ The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation’s community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America’s community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers’ financial goals and dreams. For more information, visit ICBA’s website at icba.org.

² 24 CFR Part 100.

³ Exec. Order No. 14281, “Restoring Equality of Opportunity and Meritocracy, 80 Fed. Reg. 17537, available at: <https://www.govinfo.gov/content/pkg/FR-2025-04-28/pdf/2025-07378.pdf>.

take pride in helping all people purchase homes and start businesses. However, the unfortunate reality is that community banks have seen their share of the home mortgage business decline in recent years because of burdensome regulations and competition from less regulated non-bank lenders. Among the regulations that make mortgage lending increasingly difficult for community banks is HUD's Disparate Impact Rule, which is misaligned with judicial precedent and the administration's commitment to eliminating disparate-impact liability as articulated in the Executive Order.

The industry is harmed by the current rule's non-compliance with binding Supreme Court precedent. As HUD Secretary, you have an opportunity to bring certainty to the industry by promulgating a disparate impact rule that fairly enforces the Fair Housing Act in a way that is compliant with the *Inclusive Communities* decision.

Background on *Inclusive Communities*

The Supreme Court's decision in *Inclusive Communities* represents a landmark ruling that shapes the application of disparate impact liability under the FHA. The case arose when the Inclusive Communities Project, a Texas-based nonprofit, challenged the Texas Department of Housing and Community Affairs' methodology for allocating low-income housing tax credits. The plaintiff alleged that the state's approach disproportionately directed affordable housing projects into predominantly minority neighborhoods while limiting their development in more affluent, predominantly white areas. This allocation pattern, the Inclusive Communities Project argued, perpetuated racial segregation and violated the FHA by creating a disparate impact on minority communities.

In its decision, the Supreme Court affirmed that disparate impact claims—those based on the unintentional discriminatory effects of a policy rather than overt discriminatory intent—are cognizable under the FHA. However, the Court imposed critical limitations to ensure that such claims do not unduly burden regulated entities or stifle legitimate business practices. The Court emphasized that recognizing disparate impact liability serves the FHA's goal of eliminating housing discrimination but cautioned against overly broad interpretations that could penalize entities for disparities beyond their control.

Central to the ruling is the requirement of a "robust causality" standard. The Court held that a disparate impact claim relying solely on statistical disparities must fail unless the plaintiff can clearly identify a specific policy or practice of the defendant that directly causes the disparity. This causality requirement is designed to shield defendants—including lenders, housing authorities, and other regulated entities—from liability for racial or demographic imbalances they did not create or contribute to through their actions. The Court held that, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a

defendant’s policy or policies causing that disparity. A robust causality requirement ... protects defendants from being held liable for racial disparities they did not create.”⁴

The Inclusive Communities decision also reflects a careful balance between enforcing fair housing principles and preserving the flexibility of private and public entities to operate effectively. The Court explicitly noted that disparate impact liability should not undermine the ability of businesses and government agencies to make practical, profit-driven, or market-based decisions. The ruling further clarified that only policies deemed “artificial, arbitrary, and unnecessary”⁵ should trigger liability—i.e. policies that lack a legitimate justification or serve no rational purpose. Even when liability is established, the Court stressed that remedies should focus narrowly on eliminating the offending practice rather than imposing broad punitive measures, ensuring compliance with constitutional limits.

The 2013 Disparate Impact Rule, promulgated by HUD prior to the Inclusive Communities decision, does not fully incorporate these judicially mandated constraints. As a result, the rule risks subjecting community banks and other lenders to liability in ways that conflict with the Supreme Court’s intent. For example, the current framework lacks explicit acknowledgment of the robust causality standard and fails to adequately protect lenders from being held accountable for disparities arising from market dynamics or random statistical variations rather than discriminatory policies. This misalignment creates uncertainty and exposes well-intentioned institutions to legal risks, undermining their ability to serve their communities effectively.

Recommended Changes to the Disparate Impact Rule

- **Incorporate a Robust Causality Requirement into the Disparate Impact Rule:** HUD should amend the 2013 Disparate Impact Rule to explicitly require a “robust causality” standard, as mandated by the Supreme Court in *Inclusive Communities*. HUD should clarify that a disparate impact claim must fail unless the plaintiff can identify a specific policy or practice of the defendant that directly causes a statistical disparity. By embedding this requirement, HUD would protect lenders, including community banks, from liability for disparities arising from statistical anomalies or market conditions beyond their control. For example, in small towns and rural areas where loan volumes are low, minor variations in lending patterns—such as who applies for a mortgage in a given year—should not expose banks to liability unless a clear causal link to a discriminatory policy is proven. This change would align the rule with the Court’s intent to shield defendants from unjust accountability for disparities they did not create.

⁴ *Inclusive Communities*, 576 U.S. at 542.

⁵ *Inclusive Communities*, 576 U.S. at 543.

- Recognize Profit and Market Factors as Legitimate Business Interests:** The Disparate Impact Rule should explicitly acknowledge that profit-driven and market-based decisions constitute legitimate, non-discriminatory business interests. This change is consistent with the Court’s opinion that that “disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system” and “[e]ntrepreneurs must be given latitude to consider market factors.”⁶ HUD could amend the rule to include language in the rule stating that policies tied to reasonable economic objectives are permissible unless proven to be discriminatory in intent or directly responsible for a discriminatory effect.
- Limit Liability to Artificial, Arbitrary, and Unnecessary Policies:** In *Inclusive Communities*, the Court held that “private policies are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’”⁷ HUD should update the Disparate Impact Rule to specify that liability only applies to policies deemed “artificial, arbitrary, and unnecessary.” Disparate Impact liability is intended to eliminate unjustifiable barriers, not to penalize policies with legitimate business or operational rationales. To reflect this, HUD could establish a framework within the rule that requires plaintiffs to demonstrate that a challenged policy lacks a rational basis or serves no legitimate purpose before liability can be imposed.
- Provide Clear Guidance on Remedies Favoring Injunctive Relief Over Punitive Damages:** Finally, the Court held that, “even when courts do find liability under a disparate impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that ‘arbitrarily operates invidiously to discriminate on the basis of race.’”⁸ HUD should revise the Disparate Impact Rule to include explicit remedial guidance that prioritizes injunctive relief over monetary damages, in line with the Supreme Court’s directive. The Disparate Impact Rule should specify that remedies should target the specific policy or practice causing the disparity—such as requiring its modification or removal—rather than defaulting to significant financial penalties.

Statute of Limitations in Fair Housing Act Cases

In addition to ensuring that the Disparate Impact Rule complies with *Inclusive Communities*, HUD should also provide further guidance about the statute of limitations for disparate impact claims. The Fair Housing Act’s Statute of Limitations is two years, but courts have applied the doctrine of equitable tolling to extend this statute of limitations because plaintiffs are not

⁶ *Inclusive Communities*, 576 U.S. at 533, 541-42.

⁷ *Inclusive Communities*, 576 U.S. at 543.

⁸ *Inclusive Communities*, 576 U.S. at 545 (internal citations omitted)

injured when a challenged loan is made, but rather when they “discover” the disparate outcome.⁹

If this precedent stands, it may reduce liquidity in the crucial secondary market for mortgage loans. Purchasers of mortgages could never be sure that mortgages they buy would be free of potentially creating disparate impact liability that is not discovered for years or even decades after the loans were made. This would be a boon for enterprising plaintiffs’ lawyers, allowing them to comb through years of mortgage data, attempting to identify a disparity. HUD should take a proactive approach, providing additional guidance that the statute of limitations in disparate impact cases should not be extended beyond two years.

Conclusion

In conclusion, ICBA urges you to prioritize updating HUD’s Disparate Impact Rule to align with the Supreme Court’s decision in *Inclusive Communities*. The rule should incorporate a robust causality requirement, recognize legitimate business interests, limit liability to artificial and arbitrary policies, and clarify remedial guidance, while also addressing the statute of limitations to provide certainty and stability to the mortgage lending industry. These changes support the Executive Order’s mandate to eliminate disparate-impact liability, protect community banks from unjust liability, and foster a regulatory environment that promotes equitable access to credit without undermining merit-based principles.

Please contact me at Mickey.Marshall@icba.org if you have any questions about the positions stated in this letter.

Sincerely,



Mickey Marshall
AVP and Regulatory Counsel

⁹ See e.g. *Saint-Jean v. Emigrant Mortgage Co.*, 129 F.4th 124, 141 (2d Cir. 2025).