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Industry Trade Groups Urge HUD to Make Significant Changes to its Disparate Impact Rule; State Attorneys General Oppose Changes

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- Real Estate
- Financial Institutions & Banking

- All Federal

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The American Bankers Association jointly with state bankers associations, the American Financial Services Association, and the Mortgage Bankers Associationare urging the U.S. Department of Housing and Urban Development (HUD) to make significant changes to its 2013 Disparate Impact Rule (Rule) in light of the 2015 U.S. Supreme Court ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* The trade groups' views are set forth in comment letters submitted to HUD in response to its advance notice of proposed rulemaking seeking comment on the need for revisions to the Rule following Inclusive Communities. The ANPR's comment period ended on August 20.

The Rule provides that liability may be established under the Fair Housing Act (FHA) based on a practice's discriminatory effect (i.e., disparate impact) even if the practice was not motivated by a discriminatory intent, and that a challenged practice may still be lawful if supported by a legally sufficient justification. Under the Rule, a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin. The Rule also addresses what constitutes a legally sufficient justification for a practice, and the burdens of proof of the parties in a case asserting that a practice has a discriminatory effect under

the FHA.

While the Supreme Court held in *Inclusive Communities* that disparate impact claims may be brought under the FHA, it also set forth standards, safeguards, and limitations on such claims that "are necessary to protect potential defendants against abusive disparate impact claims." In particular, the Supreme Court indicated that a disparate impact claim based upon a statistical disparity "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity" and that a "robust causality requirement" ensures that a mere racial imbalance, standing alone, does not establish a prima facie case of disparate impact, thereby protecting defendants "from being held liable for racial disparities they did not create."

The trade groups assert that in promulgating the Rule, HUD had improperly rejected the U.S. Supreme Court's 1989 *Wards Cove* disparate impact standard in favor of the standard that applies to claims under Title VII of the Civil Rights Act of 1964. The trade groups argue that in Inclusive Communities, the Supreme Court confirmed the continuing applicability of *Wards Cove* to disparate impact claims brought under statutes other than Title VII. They further argue that the Rule needs to be amended to reflect the standards, safeguards, and limitations on disparate impact claims articulated by the Supreme Court in *Inclusive Communities*.

In contrast, a group of 16 state Attorneys General and the AG for the District of Columbia sent a comment letter to HUD urging it not to make any changes to the Rule, arguing that it is "fully consistent" with *Inclusive Communities* and that any changes would be "susceptible to meritorious legal challenge." The states whose AGs signed the comment letter were North Carolina, California, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

Although *Inclusive Communities* did not resolve the question of whether disparate impact claims are cognizable under the Equal Credit Opportunity Act (ECOA), HUD's approach to the Rule could have significance for ECOA disparate impact claims. CFPB Acting Director Mick Mulvaney has indicated that the CFPB plans to reexamine ECOA requirements in light of *Inclusive Communities*.