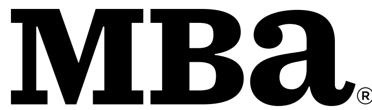

MORTGAGE BANKERS ASSOCIATION

February 13, 2026

Scott Knittle, Principal Deputy General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

RE: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Mr. Knittle:

The Mortgage Bankers Association (MBA)[1] respectfully submits comments on the proposed rule from the Department of Housing and Urban Development (HUD) regarding the Fair Housing Act (the FHA). The proposed rule would remove all references to discriminatory impact liability from the 2013 rules promulgated under the FHA and leave it to the courts to determine the scope of liability.[2]

MBA has long supported lending equality and regulatory efforts to prevent housing discrimination. Promoting equitable access to housing and reducing homeownership disparities across communities remains a key priority for our organization, regardless of federal regulatory mandates. Providing quality service and access to credit to all Americans is not just a regulatory responsibility, it is a business imperative for our members. HUD emphasizes and we concur that removing references to disparate impact liability from HUD regulations does not mean lenders are not potentially liable for policies with an unlawful disparate impact.

MBA agrees with HUD's analysis that removal of the current form of the disparate impact regulations is appropriate in light of Supreme Court precedent and other recent legal developments. MBA has consistently criticized the current disparate impact rule due to its

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.
[2] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1475, 1476 (Jan. 14, 2026).

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incompatibility with recent judicial precedent.[3] The Supreme Court in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Inclusive Communities)* determined that disparate impact liability is cognizable under the FHA.[4] However, the current rule, while promulgated after *Inclusive Communities*, simply restates the 2013 Rule that was promulgated *before* the decision. The current rule thus does not incorporate the constitutional safeguards that the Court found were necessary, and which are discussed in the following paragraph. Overall, HUD's proposal to no longer prescribe a specific burden-shifting test or define "discriminatory effect" and "legally sufficient justification" by regulation will also help address the inconsistencies between the current rule and *Inclusive Communities* that were raised by MBA previously.

Support for the Proposed Rule

MBA supports a disparate impact standard that is fully consistent with Supreme Court precedent and implements the Fair Housing Act's requirements with a clear legal framework to address unlawful discrimination. The Supreme Court in *Inclusive Communities* limited the scope of the Fair Housing Act.[5] Specifically, disparate impact liability must be applied more narrowly so that, "regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[6] The Court further specified that there must be robust causality between the actions of the creditor and the discriminatory conduct that "protects defendants from being held liable for racial disparities they did not create."[7] The Court specified that policies do not create disparate impact liability unless they are "artificial, arbitrary, and unnecessary barriers."[8] Ultimately, the Supreme Court avoided a situation where creditors are forced to "…adopt racial quotas – a circumstance that itself raises serious constitutional concerns."[9] The proposed rule allows the Supreme Court precedent to clearly control, ensuring that anti-discrimination standards preserve the ability of regulated entities to make practical and profit-driven business decisions essential to a functioning market.

At this critical juncture, stakeholders need a durable disparate-impact standard that is aligned with the *Inclusive Communities* decision. Deferring to the courts in this situation, where there is a nationally articulated judicial standard, will provide consistency for creditors. Each new administration's initiation of rule changes creates uncertainty for industry and fair housing advocates alike and undermines the fundamental statutory goal of expanding credit opportunity and availability. These dramatic changes every four to eight years leave creditors without clear rules of the road for navigating compliance and

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[3] Mortgage Bankers Association et. al., In the Matter of Reinstatement of HUD's Discriminatory Effects Standard (Aug. 24, 2021) available here.
[4] Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. 576 U.S. 519 (2015).
[5] The fact that Supreme Court has already ruled with respect to disparate impact under the FHA is especially salient in light of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024), which dramatically curtails the deference given to federal agency interpretations. Given this—and the uncertainty created by constantly shifting HUD rules—the better course is to rely on the Supreme Court and appellate precedent in this area.
[6] Inclusive Communities at 533.
[7] *Id.* at 542.
[8] *Id.* at 543 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).
[9] *Id.*

determining their potential liability. This issue is magnified where – as is the case currently – regulations clearly conflict with judicial precedent.

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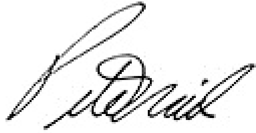
MBA greatly appreciates the opportunity to comment on the proposed rule. Should you have questions or wish to discuss this issue further, please contact Justin Wiseman at jwiseman@mba.org or Alisha Sears at asears@mba.org.

Sincerely,



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