

New federal rule will make it harder to challenge discrimination in the housing industry, lawsuits allege

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Civil rights groups on Thursday filed a pair of lawsuits against the U.S. Department of Housing and Urban Development and HUD Secretary Ben Carson for weakening [an Obama-era rule](#) meant to keep lenders, landlords and insurers from discriminating.

The 2013 rule was aimed at barring the housing industry from enacting policies that, while formally race-neutral, have an adverse effect on Black and Latino Americans. These include requiring tenants to undergo a criminal-background check, prohibiting the construction of multifamily housing and using artificial intelligence to predict [creditworthiness](#).

The rule, codifying a decades-old legal standard known as “disparate impact,” survived a [2015 Supreme Court challenge](#). But the Trump administration, which has consistently [rolled back](#) civil rights protections in [housing](#) and other aspects of [American life](#), finalized a [new rule](#) in September that housing advocates say would make it harder to prove such forms of bias.

Decades of [housing discrimination](#), including in [mortgage lending](#), have suppressed [Black homeownership](#) and perpetuated racial economic inequality, resulting in a White-Black [wealth gap](#) of nearly 10 to 1. Applying the disparate-impact standard has helped reduce systemic inequalities, civil rights attorneys argue, by forcing lenders to originate loans based on objective criteria that do not discriminate — or face penalties.

“Disparate impact is a critical tool to address hidden bias or systemic barriers to opportunity. It’s a way to get the marketplace to be more fair,” said Lisa Rice, president and chief executive of the National Fair Housing Alliance, which has used disparate impact to successfully challenge discriminatory zoning ordinances and insurance policies and is bringing one of the lawsuits.

The new rule, housing advocates say, would allow for covert discriminatory practices by financial institutions, insurance companies and housing providers against groups protected by federal housing law: racial minorities, women, immigrants, families with children, LGBTQ people, people of faith and people with disabilities.

Under the new rule, scheduled to take effect Monday, plaintiffs bringing disparate-impact claims will have to meet a substantially higher threshold. That includes showing that a questionable policy serves no valid purpose. Previously, it was up to the defendant to come up with a justification for the policy. Plaintiffs must now also show that a specific policy or practice is the “direct cause” of any statistical disparity between outcomes for different groups.

The lawsuit filed by the National Fair Housing Alliance and other plaintiffs argued that the new law would embolden the housing industry to continue existing discriminatory practices or implement new ones.

The [home insurance](#) and mortgage industries have long lobbied for the change, and the Trump administration [proposed a rule change](#) in 2019. But over the summer, in the midst of a national reckoning over [systemic racism](#) following the killing of [George Floyd](#), top mortgage lenders

[asked HUD to refrain](#) from issuing a final disparate-impact rule, acknowledging that doing so would make it harder to challenge unlawful discrimination. HUD rewrote the rule anyway.

In addition to making it more difficult to file a federal disparate-impact lawsuit, the rule raises the bar for filing a complaint with HUD, civil rights attorneys say. The agency would now require victims to meet the standards of a federal court complaint to trigger an investigation.

The final rule also allows companies accused of discrimination to defend their practices by producing evidence the policies help them turn a profit and therefore are not wholly irrational, according to the lawsuit.

“It does not matter that the policy excludes people in discriminatory ways and that a less discriminatory alternative could serve the defendant’s legitimate interests,” the lawsuit said. “So long as they maintain some evidence supporting the argument that their policies are meant to further a profit motive or other standard business rationale, they will not face disparate-impact liability and so can maintain discriminatory practices with impunity.”

The changes essentially eviscerate requirements that lenders, insurance companies and landlords comply with federal fair housing laws, civil rights attorneys say. Until now, the prospect of being held liable for disparate-impact claims has prompted the industry to evaluate its policies for discriminatory effect and adopt less discriminatory alternatives.

HUD also created an “enormous loophole” for lenders to assess creditworthiness with machine-learning models that rely on variables beyond those used for conventional loan applications or traditional credit reports — even though some of these have the greatest potential for discrimination, the lawsuit alleged.

“Left to their own devices, machine learning models will find ways to proxy race as a factor through combining other factors — effectively instituting intentional race discrimination,” the lawsuit said.

Civil rights attorneys refer to the loophole as a “virtual get-out-of-jail-free card” against any disparate-impact challenge. An algorithm that rejects Black applicants based on factors closely related to race will pass muster as long as Black consumers approved by the algorithm perform the same as White consumers, regardless of how many Black applicants are unnecessarily excluded, the lawsuit said.

Under the 2013 HUD rule, a practice or policy becomes discriminatory if it “actually or predictably” results in a disparate impact on a protected group or perpetuates segregated housing patterns. But the Trump administration’s final rule no longer recognizes the perpetuation of segregation alone as a violation of federal housing law, civil rights attorneys say. Nor does it recognize that challenges could be brought against policies with “predictable” disparate impact that has not yet occurred.

Thursday’s lawsuits were filed by the National Fair Housing Alliance, Fair Housing Advocates of Northern California and BLDS, a Philadelphia consulting firm, in federal district court in California as well as by Open Communities Alliance in Hartford, Conn., and SouthCoast Fair Housing, serving Rhode Island and Massachusetts, in federal district court in Connecticut.

Both New England fair housing organizations have pending HUD complaints that they fear would be undermined by the new rule, their attorneys said. Open Communities Alliance has challenged a Connecticut law that attorneys say perpetuates racial segregation by limiting where

public housing authorities can operate. SouthCoast Fair Housing has challenged a Providence, R.I., landlord's practices of renting single bedrooms rather than whole apartment units and marketing to college students, which attorneys say discriminate against families with children.

"There's this death-by-a-thousand-cuts approach the Trump administration is taking that will make it virtually impossible to succeed with a claim," said Thomas Silverstein, an attorney with the Lawyers' Committee for Civil Rights Under Law, which is representing the plaintiffs with other firms.

Some conservatives have regarded the disparate-impact claim as an attack on capitalism. Carson, in a 2015 [op-ed](#) in the Washington Times, said that such "government-engineered attempts to legislate racial equality create consequences that often make matters worse." When the agency proposed the new rule last year, Carson said it "permits businesses and local governments to make valid policy choices."

HUD general counsel J. Paul Compton Jr., who called disparate impact a "nebulous, complex doctrine," said at the time that changing the rule would free up businesses to "innovate and take risks without the fear they will be second-guessed through statistics down the line."