February 13, 2026

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: *[Docket No. FR-6540-P-01, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard: Proposed Rule]*

The City of New York (City) welcomes the opportunity to submit comments to the Department of Housing and Urban Development (HUD) on its proposal to rescind its rule implementing the disparate impact standard in the Fair Housing Act (FHA). The proposal is unsupported and undermines the goals of the FHA. It should be withdrawn in full.

The FHA was enacted to promote "open, integrated residential housing patterns and to prevent the increase in segregation." *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973). To advance this goal, the FHA prohibits discrimination on the basis of race, color, religion, disability, familial status, and national origin in certain public and private housing-related activities. *See* 42 U.S.C. § 3601 *et seq*. HUD and the federal courts have long been aligned in recognizing disparate impact as a legally cognizable theory of liability under the Fair Housing Act, and courts have consistently applied this framework since the 1970s.[1]

This principle was articulated early on in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977), *cert. denied*, 434 U.S. 1205 (1978), where the Seventh Circuit recognized that housing discrimination can occur absent a judicial record of intent to discriminate. Noting that "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry," the court held that a party acts "because of race" when the natural and foreseeable consequences of its actions result in racial discrimination, regardless of intent. *Id.* at 1288-1290. While adopting a broad view, the Seventh Circuit also articulated that disparate impact analysis is fact-specific and does not render unlawful every action that produces differential effects. *Id.* at 1290.

[1] See Congressional Research Service Report, R44203 , *Disparate Impact Claims Under the Fair Housing Act* (Updated Sept. 2015), https://www.congress.gov/crs-product/R44203#ifn4 (confirming that all eleven federal appeals courts that ruled on the issue found that the disparate impact claims were cognizable under the Fair Housing Act, though they applied varied disparate impact tests.)

The Supreme Court reaffirmed this broad view of discrimination in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519 (2015), which explicitly confirmed that disparate impact liability is firmly grounded in the FHA and plays a critical role in addressing systemic and structural discrimination. In reaching this conclusion, the Supreme Court also identified important limitations on such liability to avoid constitutional concerns and infringing on legitimate housing objectives, including a "robust causality requirement" and the ability for housing authorities and developers to "explain the valid interest served by their policies." 576 U.S. at 540-546.

Consistent with this jurisprudence, HUD in 2023 reinstated verbatim its 2013 rule codifying the disparate impact liability standard in the FHA. 88 Fed. Reg. 19450 (Mar. 31, 2023); 78 Fed. Reg. 11460 (Feb. 15, 2013).[2] Notably, the standard set forth in the rule was discussed without disfavor in *Inclusive Communities* and has subsequently been found to be consistent with that decision. *See Inclusive Communities,* 576 U.S. at 527, 542; *Nat'l Ass'n of Mut. Ins. Co. v. United States HUD*, 693 F.Supp.3d 20, 39 (D.D.C. 2023). It is this 2023 rule that HUD now seeks to rescind.

Equal opportunity in housing cannot be achieved without addressing discriminatory effects. Policies and decisions that appear neutral on their face but disadvantage protected classes undermine the core purpose of the FHA and perpetuate the very inequities the law was enacted to eliminate. Ignoring outcomes while focusing solely on intent allows multiple forms of discrimination to continue unchecked.

In its proposed rule, HUD asserts that the recission of the disparate impact rule is necessitated by the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). That decision, however, addresses standards of judicial review and clarifies that courts are not bound by agency interpretations of statutes. It does not instruct agencies to abandon their responsibility to implement statutes consistent with settled law. In any event, there is no uncertainty here: courts have interpreted the FHA to permit disparate impact claims for decades, and the Supreme Court has expressly endorsed that interpretation.

HUD further suggests that the proposed rule is necessary because the "case law continues to develop" and thus the existing rule does not offer an "up-to-date picture of the legal landscape." 91 Fed. Reg. 1476. Yet, HUD does not reference any case law or any aspect of the rule that is purportedly out of date to support these statements. The Department does not even attempt to explain why rescission is more appropriate than a more modest action that could presumably bring the rule up to date with a legal landscape that clearly recognizes the disparate impact standard.

If implemented, the proposed rule would increase legal uncertainty and weaken fair housing enforcement nationwide. Without HUD's clear guidance, courts are more likely to adopt

[2] Purportedly to implement *Inclusive Communities*, HUD amended the 2013 rule in 2020. 91 Fed. Reg. 1475. A federal district court stayed implementation of the 2020 amendment. *Id.*

inconsistent interpretations, creating confusion for housing providers and diminishing federal protections for impacted communities. This uncertainty undermines compliance efforts and weakens the federal government's ability to fulfill its statutory obligation to affirmatively further fair housing. Moreover, without the clear ability to draw from patterns and trends in housing outcomes, repeat and systemic discriminatory practices and decisions are far less likely to be identified or amended, allowing ongoing violations of fair housing laws to continue without accountability. The risk is compounded by the reality that the decisions that shape housing opportunities increasingly rely on automated decision-making trained on historic—and potentially biased—data.[3] The proposed rule would also undermine HUD's unique ability to enforce disparate impact discrimination against corporate landlords who operate in multiple states.[4] In short, the proposed rule would make it substantially more difficult for individuals and communities facing housing barriers to pursue and adjudicate valid claims.

Civil rights protections should not be treated as superfluous or burdensome regulation. The discriminatory effects rule is narrowly tailored, legally sound, and critical to identifying barriers to housing opportunities and rooting out policies and practices that perpetuate segregation or other harms. The disparate impact standard provides a measured framework that balances the interests of housing providers with the rights of protected classes, while advancing the FHA's mandate to promote fair and inclusive communities.

Moreover, HUD's assertion that disparate impact liability creates a "near insurmountable presumption of discrimination" based solely on statistical disparities is inaccurate and inconsistent with established law. 91 Fed. Reg. 1476. HUD's regulatory framework, including the 2023 rule, establishes a clear, step-by-step analytical process that reflects the decade long efforts of courts to effectuate the Fair Housing Act. Plaintiffs must demonstrate a strong causal connection between a specific policy or practice and the alleged disparate impact. 24 C.F.R. § 100.500(c). Defendants may then demonstrate that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest, and plaintiffs must finally show that a less discriminatory alternative exists. *Id*. As the Supreme Court recognized in *Inclusive Communities*, these limitations are critical safeguards and are fully incorporated into HUD's rule. 576 U.S. at 540–46. Properly understood, disparate impact liability neither mandates nor encourages discrimination; it ensures that unjustified barriers to equal opportunity are identified and addressed in a manner consistent with constitutional and statutory principles.

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[3] *See, e.g.*, *When Machines Discriminate: The Critical Role of Disparate Impact Liability in AI Accountability: A Snapshot by Chiraag Bains,* https://civilrights.org/wp-content/uploads/2026/01/SNAPSHOT-When-Machines-Discriminate_The-Critical-Role-of-Disparate-Impact-in-AI-Accountability.pdf (discussing tenant screening algorithms and automated value models to assess property values, am among other examples).

[4] Katharine W.H. Harwood et al., *The Rise of Corporate Landlords: An Examination of Behavioral Differences in the Multifamily Market* (2025), https://furmancenter.org/files/The_Rise_of_Corporate_Landlords_in_NYC_Rev_Spring_2025.pdf. *See also The Rise of the Corporate Landlord: How Wall Street Bought Main Street*, DIPLOTIC, Nov. 18, 2025, https://www.diplotic.com/wall-street-corporate-landlord/.

HUD's proposed rule is also notably unsupported by evidence. Nowhere does the Department cite or present data to substantiate its claims that the disparate impact standard creates undue burdens, promotes uncertainty, or results in unjustified liability. This omission is particularly striking given the extensive availability of housing and enforcement data—especially in jurisdictions that conduct vigorous reporting and analysis, such as New York City. An agency may not reverse a long-standing policy or reinterpret its statutory obligations without a reasoned explanation grounded in evidence. By failing to meaningfully engage with empirical data or demonstrate that the existing framework is unworkable, HUD risks advancing a position that is arbitrary and capricious under the Administrative Procedure Act.

The City appreciates the opportunity to share these comments with HUD and respectfully urges the Department to reconsider its proposal to rescind the disparate impact standard. Maintaining this long-standing and legally sound framework is essential to effective Fair Housing Act enforcement, consistent judicial interpretation, and the prevention of systemic discrimination in housing markets. The City remains committed to partnering with HUD to advance evidence-based policies that promote fairness, accountability, and equal access to housing for all.