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February 13, 2026

Scott Knittle
Principal Deputy General Counsel
Regulations Division
Office of General Counsel
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

Dear Mr. Knittle:

I write on behalf of MALDEF (Mexican American Legal Defense and Educational Fund), in response to the request for comment on the Implementation of the Fair Housing Act's Disparate Impact Standard from the U.S. Housing and Urban Development Department (HUD) that was published in the Federal Register on January 14, 2026. 91 Fed. Reg. 1475 (Jan. 14, 2026) (to be codified at 24 C.F.R. pt. 100) (Docket No. FR-6540-P-01). Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Often described as the "law firm of the Latino community," MALDEF promotes social change through legislative and regulatory advocacy, community education, and high-impact litigation in the areas of voting rights, education, immigrant rights, employment, and freedom from open bias.

On January 14, 2026, the U.S. Department of Housing and Urban Development (HUD) published a notice of proposed rulemaking (NPRM) in the Federal Register to rescind certain regulations that implement Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA).[1] Throughout its history, MALDEF has advocated for the civil rights of all Latinos living in the United States, including by using theories of disparate-impact liability. The administration's current effort to end disparate-impact liability as a pathway to recovery for civil rights violations concerns MALDEF because of its core principles and work.

[1] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1475 (Jan. 14, 2026) (to be codified at 24 C.F.R. pt. 100).

I. Disparate impact liability under the FHA has a robust history recognized by the U.S. Supreme Court

The Fair Housing Act (FHA) states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[2] Section 3604 of the FHA prohibits discrimination in the sale or rental of "a dwelling to any person because of race, color, religion, sex, familial status[,]…national origin" or disability.[3] The FHA likewise prohibits such discrimination in residential real estate–related transactions[4] and brokerage services.[5] The FHA designates the Secretary of HUD with the authority and responsibility to administer the FHA and requires that the HUD Secretary "annually report to the Congress[] and make available to the public" demographic data about its program applicants, participants, and beneficiaries.[6]

Housing discrimination is insidious and does not always present itself as facially discriminatory. However, lack of overt discriminatory intent neither precludes nor assuages the harm that discrimination causes. Indeed, recognizing liability even in cases where evidence of overt discriminatory intent may be absent comports with theories of strict liability in tort law. In some cases, whether in housing, employment, or education, the discrimination at issue becomes apparent from patterns of harm that result from discriminatory policies and practices.

To that end, in 2015, the Supreme Court held that the FHA recognizes disparate impact claims.[7] The Court reasoned that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[8] To provide limits to disparate impact-liability, the Court stated that a prima facie showing of disparate impact requires "robust causality" between the allegedly discriminatory policy or practice and the resulting statistical racial disparity.[9]

Even before *Inclusive Communities*, HUD had "formalize[d] its long-held recognition of discriminatory effects liability" under the FHA, codifying a burden-shifting test nationwide "for determining whether a given practice has an unjustified discriminatory effect[.]"[10] Under the first Trump administration, HUD then sought to revise that burden-shifting test,[11] "weaken[ing]…disparate impact liability[,]" and the

[2] Fair Housing Act, 42 U.S.C. § 3601 (1988).
[3] *Id.* § 3604.
[4] *Id.* § 3605.
[5] *Id.* § 3606.
[6] *Id.* § 3608.
[7] *Tex. Dep't Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 534 (2015).
[8] *Id.* at 533.
[9] *Id.* at 542.
[10] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).
[11] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) (codified at 24 C.F.R. pt. 100).

U.S. District Court for the District of Massachusetts enjoined HUD from implementing the 2020 rule.[12] The Biden administration then reinstated the 2013 rule, effective May 1, 2023.[13]

On April 23, 2025, President Trump issued an executive order, "Restoring the Equality of Opportunity and Meritocracy", which purports "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals."[14] The executive order instructed federal agencies to "deprioritize enforcement of all statutes and regulations to the extent [that] they include disparate-impact liability[.]"[15] The proposed regulations, issued in purported furtherance of the 2025 executive order, seek merely to rescind without replacement the existing regulations governing disparate impact and cannot upend Supreme Court precedent.[16]

II. The NPRM violates the APA on both procedural and substantive grounds

A. The NPRM violates the APA substantively by falling short of a statutory right recognized by the Supreme Court

Under the Administrative Procedure Act (APA), a court must "hold unlawful and set aside agency action…found to be…arbitrary" and "capricious," "short of statutory right," or "without observance of procedure required by law[.]"[17] The purpose of disparate-impact liability under the FHA is to provide a remedy for individuals and families when covered entities violate their civil rights in the context of housing, and to provide an essential tool for families to recover when unjustly denied the opportunity to obtain housing. An executive order cannot eliminate a form of liability provided for by federal law and recognized by the Supreme Court. Even if, for the sake of argument, the NPRM succeeded in merely rescinding the regulations at issue without replacing them, *Inclusive Communities* still stands: disparate-impact claims are cognizable under the FHA.[18]

Furthermore, HUD claims that the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* means that "federal agency interpretations of statutes and agency actions that rely on them do not receive any judicial deference" and that prior HUD actions seeking to implement the FHA thus "do not carry deferential weight" because a court must make determinations about disparate-impact liability rather than deferring to agency determinations.[19] This is a misleading interpretation of *Loper Bright*—while it is true that the Supreme Court in *Loper Bright* overturned the doctrine known as *Chevron* deference, the Court's holding merely states that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[20] Here, the Supreme Court

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[12] Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev., 496 F. Supp. 3d 600, 606, 611–12 (D. Mass. 2020).

[13] Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450 (Mar. 31, 2023) (codified at 24 C.F.R. pt. 100).

[14] Exec. Order No. 14281, 90 Fed. Reg. 17537, 17537–17538 (Apr. 23, 2025).

[15] *Id.* at 17538.

[16] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. at 1476.

[17] Administrative Procedure Act, 5 U.S.C. § 706(2) (1966).

[18] Tex. Dep't Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015).

[19] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. at 1476.

[20] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024).

has already determined that the FHA recognizes disparate-impact claims.[21] That is, the Court has already made a determination regarding statutory interpretation of the FHA and resolved any supposed ambiguity, a statutory interpretation that this NPRM seeks to disregard. Additionally, by HUD's own logic, its current attempted rescission of existing regulations is also due no judicial deference, especially because it directly contradicts the Supreme Court's interpretation of the FHA.

B. HUD has impermissibly and unjustifiably curtailed the comment period for this NPRM in violation of the APA

For reasons inadequately explained, HUD has, by its own admission, shortened the comment period for this NPRM from the usual sixty (60) days to a mere thirty (30) days.[22] HUD claims that its "general statement of policy now is that" discriminatory-effects liability "is best left to the courts" and that its NPRM "does not change any requirements or affect any rights or obligations."[23] This is untrue on its face: the NPRM is attempting to curtail a pathway to remedy that the Supreme Court has already held cognizable under a federal civil rights statute and thus very much seeks to "affect…rights [and] obligations."[24]

HUD also claims that curtailing the comment period is justified because HUD has already sought public comments on issues relating to disparate impact on a few occasions over the past fifteen (15) years, implying that HUD need not consider further public comments because it has collected comments in the past.[25] This reasoning falls flat for a variety of reasons, not least of which is that some of the rulemaking processes HUD references predate the 2015 Supreme Court case recognizing disparate-impact claims under the FHA.[26] Additionally, previous rulemakings sought to codify or implement disparate-impact liability guidelines, not to strike those regulations wholesale: this NPRM presents a novel issue and requires a comment period of at least sixty (60) days so that stakeholders can make their voices heard.[27] A court could reasonably consider HUD's denying stakeholders this crucial opportunity to be arbitrary and capricious or "an abuse of discretion" under the APA.[28]

III. Conclusion

Even facially neutral housing policies and practices can have discriminatory effects on minority groups like Latinos, and disparate-impact liability offers a crucial path to recovery when those policies and practices cause harm. Seeking to limit that pathway runs contrary to the FHA itself, and doing so while improperly and unjustifiably curtailing the period for public participation in the rulemaking process runs afoul of the APA. Implementing this NPRM will only serve to facilitate harm to Latino households and to make recovery from that harm more difficult.

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[21] *Inclusive Cmtys. Project*, 576 U.S. at 534.
[22] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. at 1476-77.
[23] *Id.* at 1476.
[24] *Id.*
[25] *Id.* at 1476-77.
[26] *Id.* at 1475-76.
[27] *Id.* at 1475-76.
[28] Administrative Procedure Act, 5 U.S.C. § 706(2) (1966).

For the foregoing reasons, MALDEF respectfully requests that HUD rescind this NPRM in its entirety. Please feel free to contact us with any questions or concerns about these comments at (202) 293-2828 or efindley@maldef.org.

Thank you.

Sincerely,

Ellen E. Findley
Legislative Staff Attorney