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Affordable Housing Alert

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HUD rescinds disparate impact regulations

By Harry J. Kelly

HUD has announced plans to rescind its disparate impact regulations under the Fair Housing Act, continuing a broader rollback of fair housing policies.

What's the impact?

- HUD's proposed rescission of the disparate impact rule would remove a formal regulatory standard for evaluating disparate impact claims under the Fair Housing Act.
- Disparate impact liability remains recognized under the Fair Housing Act through judicial precedent, notwithstanding the proposed withdrawal of HUD's regulation.
- Housing providers must continue to assess policies and practices for potential discriminatory effects even if HUD ultimately withdraws its disparate impact regulations.

Continuing its initiative to eliminate fair housing-related policies concerning crime screening, limited English proficiency, and assistance animals, among other topics, HUD last week announced plans to rescind its regulations addressing disparate impact discrimination under the Fair Housing Act (FHAct). 91 Fed. Reg. 1475 (Jan. 14, 2026). Like these earlier changes, the

elimination of the disparate impact rule is unlikely to significantly ease burdens on housing providers. In fact, it may increase uncertainties about the rights and obligations of housing providers, tenants, and other persons subject to the FHAct.

Background

Disparate impact liability is one of the longest established principles of fair housing law. For decades, courts have recognized that policies and practices that have a disproportionately harmful effect on persons in a protected class may violate the FHAct and other federal anti-discrimination laws, even if, on their face, those policies and practices are neutral toward persons in those protected classes and do not on their face discriminate against them. For example, the plaintiff in *Noel v. City of New York*, a recently settled disparate impact case, claimed that a New York City policy of providing a preference for new affordable housing to residents of local neighborhoods where the housing was built resulted in diminished housing opportunities for minorities who lived outside those neighborhoods and therefore did not qualify for the preference. Although the preference was neutral on its face concerning race, the plaintiffs claimed that the policy tended to reenforce existing patterns of housing segregation. Any number of factual situations can trigger disparate impact claims, but they commonly involve claims that a policy or practice that is neutral on its face nevertheless discriminates against persons in a protected class.

Typically, in disparate impact cases, courts impose a burden-shifting approach, asking plaintiffs initially to show that the challenged policy or practice has a disproportionate impact on persons in a protected class. If the plaintiff meets that burden, the defendant is required to show that the challenged policy is necessary to support some sort of otherwise non-discriminatory policy. Depending on the court, the burden then shifts back to the plaintiff to show that another, less discriminatory policy could achieve the same or similar goals.

In 2013, HUD released disparate impact regulations that sought to codify these concepts. 78 Fed. Reg. 11460 (Feb. 15, 2013), codifying 24 CFR § 100.500. In 2015, the Supreme Court, in its *Inclusive Communities* decision, 576 U.S. 519 (2015), confirmed that the FHAct incorporated disparate impact liability, but identified a number of "safeguards" intended to prevent "abusive" disparate impact cases. Subsequently, during the first Trump administration, HUD adopted a final rule that attempted to incorporate those safeguards into the HUD regulations. 84 Fed. Reg. 42854 (Sept. 24, 2020). The revised regulation was swiftly struck down by a federal court, and the Biden administration reinstituted the 2013 version of HUD's disparate impact rule. 88 Fed. Reg.19450 (March 31, 2023).

The 2026 recission of HUD's disparate impact rule

The new rule announced by HUD proposing to rescind its disparate impact rule is a more sweeping attempt to revise the scope of the HUD's FHAct regulations. Rather than readopt its

2020 regulation to reflect the safeguards identified by the *Inclusive Communities* decision, as HUD attempted to do during the first Trump administration, the proposed rule would essentially eliminate HUD's disparate-impact regulation entirely. According to HUD (91 Fed. Reg. at 1476), this is consistent with Executive Order 14281, issued by President Trump on April 23, 2025, which sought "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." *Id*. at 1478. In addition, HUD relies upon the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which limited the deference that federal courts provide to agency interpretations of laws, including HUD's interpretation of the FHAct. Essentially, HUD argued, since courts no longer are required to defer to agency interpretations of the FHAct, HUD should eliminate its regulations codifying disparate impact liability under the FHAct.

Consequences

As with HUD's earlier attempts to eliminate fair housing guidance, the proposed elimination of the disparate-impact rule may offer less than meets the eye, for several reasons:

- In its *Inclusive Communities* decision, the Supreme Court confirmed that disparate-impact liability exists under the FHAct. While HUD may rescind its disparate impact regulation, the concept remains recognized via judicial precedent.
- As a result, parties in private FHAct litigation are free to assert disparate impact liability claims, regardless of what HUD may do. In the absence of HUD regulations, courts are likely to revert to the decades-old legal standards they identified before HUD established its regulations. At the same time, many states have their own fair housing acts, and state courts have adopted disparate impact liability consistent with federal courts' then-existing interpretations of the FHAct. Even if HUD withdraws its disparate impact regulations, state courts are likely to continue to enforce their own disparate impact liability rules.
- While HUD has proposed to withdraw its disparate impact regulations, HUD remains legally obligated to enforce the FHAct. The Supreme Court's *Inclusive Communities* decision has confirmed disparate impact liability exists under the FHAct. In adjudicating complaints filed under the FHAct, there appears to be no legal basis for HUD to ignore disparate impact liability that, according to the Supreme Court, is embedded in the FHAct. The failure to consider disparate impact liability would appear to violate HUD's legal responsibilities under the FHAct and the Administrative Procedure Act, among other things.
- HUD is correct that the Loper Bright decision limited federal courts' duty to defer to federal agency interpretations of law. As a practical matter, however, it is likely that many federal courts will continue to defer to agency interpretations, at least to the extent that they reflect neutral, well-considered interpretations of statutes and case law. So, while HUD may rescind

its regulations, courts may continue to consider HUD's disparate impact rule as influential, if not dispositive.

- Likewise, to the extent that HUD bases its decision to rescind its disparate impact regulation on the grounds that the *Loper Bright* decision eliminates judicial deference to agency interpretations, that same principle applies to HUD's decision to rescind its disparate impact regulation. Federal courts may ignore HUD's decision to rescind its disparate impact regulation, just as they are free to ignore the regulation itself.

Regulatory repeal increases uncertainty without changing the law

Most housing providers are focused on what changes in federal regulations mean to them on a practical basis. As with other attempts to eliminate key fair housing regulations, HUD's decision to eliminate its disparate impact regulations does not change the law itself. Disparate-impact liability exists under the FHAct, regardless of what HUD may say. Withdrawing the regulation does little more than eliminate carefully defined agency interpretations of the law, upon which housing providers, tenants, and HUD can rely. In the absence of formal regulation, disparate-impact liability does not disappear. Rather, it persists, but becomes far less defined and predictable, and subject to the whims of individual judicial decisions. While on its face, withdrawing the current disparate impact regulation may seem to reduce housing providers' exposure to fair housing claims, it actually may make it more, not less, difficult to know what they need to do to comply with fair housing laws and to avoid disparate impact claims in the future.

Comments on the proposed rule are due by February 13, 2026.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Harry J. Kelly
202.585.8712
hkelly@nixonpeabody.com