

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER  
to  
OFFICE OF THE ASSISTANT SECRETARY FOR FAIR HOUSING AND EQUAL  
OPPORTUNITY

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)  
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

[Docket No. FR-6540-P-01, RIN 2529-AB09]

February 13, 2026

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By notice published on January 14, 2026, the Office of the Assistant Secretary for Fair Housing and Equal Opportunity, a component of the Department of Housing and Urban Development (HUD), proposes amendments to its regulations governing discriminatory conduct under the Fair Housing Act (FHA).<sup>1</sup> Through this proposal (what HUD calls “a general statement of policy”), HUD purports to entirely remove its discriminatory effects regulation and leave questions related to interpretation of disparate impact liability under the Fair Housing Act to courts.

The Electronic Privacy Information Center (EPIC) submits the following comments to urge HUD to not rescind its disparate impact rule, “Reinstatement of HUD’s Discriminatory Effects Standard.”<sup>2</sup> The proposed rule would undermine longstanding protections by abandoning established legal tests, enabling HUD to apply ad hoc interpretations of disparate impact liability all while removing a crucial source of guidance for the public. The Disparate Impact rule is critical to address

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<sup>1</sup> *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, 91 Fed. Reg. 1475 (Jan. 14, 2026) [hereinafter Proposed Rule], <https://www.federalregister.gov/documents/2026/01/14/2026-00590/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

<sup>2</sup> 88 Fed. Reg. 19450 (Mar. 31, 2023) [hereinafter Disparate Impact Rule].

policies and practices that appear facially neutral but have a discriminatory effect on protected classes. New technologies like tenant screening algorithms can operate as black boxes with no explicit “discriminatory intent” but nonetheless impact affect housing availability and affordability for millions of Americans. Too often, the negative impacts of these technologies fall onto low-income minority communities. HUD’s retreat from providing *any* guidance on disparate impact liability abandons both its statutory responsibilities as well as millions of Americans striving for secure, affordable housing.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values. EPIC has a particular interest in addressing opaque, inaccurate, and biased decisions made by automated decision-making tools or systems, including those that affect housing decisions.<sup>3</sup>

### **I. HUD’s abbreviated comment period is unjustified.**

HUD’s allowance of only a thirty-day comment period is wholly inadequate for the public to conduct a full and meaningful analysis of the proposed rule. HUD claims that a shorter comment public comment period is appropriate because it has already thoroughly solicited and reviewed public comments on disparate impact liability in prior proposals for discriminatory effects regulation and the new rule is a mere “general statement of policy.”<sup>4</sup> But HUD can only omit or abbreviate notice or comment if it has good cause that the process would be “impracticable, unnecessary, or

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<sup>3</sup> See e.g., *Screening & Scoring*, EPIC, <https://epic.org/issues/ai/screening-scoring/>; Comments from EPIC to the Office of Science and Technology Policy’s Request for Information on Regulatory Reform on Artificial Intelligence, 90 Fed. Reg. 46422 (Sept. 26, 2025), <https://epic.org/documents/comments-from-the-electronic-privacy-information-center-epic-responding-to-the-request-for-information-for-regulatory-reform-on-artificial-intelligence/>; EPIC, *Screened and Scored in D.C.*, EPIC (2022), <https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf>.

<sup>4</sup> Proposed Rule, 91 Fed. Reg. at 1476.

contrary to the public interest.”<sup>5</sup> And HUD must clearly articulate the reasons underpinning that “good cause” in the rulemaking itself.<sup>6</sup> HUD fails on all counts.

**1. HUD cannot rely on prior notice and comment rulemaking to abbreviate the comment period.**

The reliance on prior notice and comment rulemakings to abbreviate the notice and comment period for the Proposed Rule is misplaced. In none of the prior rulemakings did the HUD attempt to entirely remove its disparate impact liability regulations. Rather, HUD proposed alternative burden-shifting disparate impact liability frameworks that nonetheless provided *guidance* on HUD’s implementation of the disparate impact liability framework. Comments that were aimed at evaluating an alternative disparate impact liability framework have no bearing on the effects of a regulation that strips the framework entirely. The fact that voluminous comments were submitted in prior rulemakings in no way establishes “good cause” to abbreviate the notice and comment process for the current rulemaking, especially when it is a rescission rather than a rule change.

**2. HUD’s rescission of the Disparate Impact Rule is arbitrary and not a mere “general statement of policy.”**

HUD understates the effects of eliminating the Disparate Impact rule by claiming it is a mere “general statement of policy.” HUD’s rescission of the Disparate Impact rule abdicates the agency’s statutory mandate to administer the programs and activities relating to housing and urban development “in a manner affirmatively to further the policies” of the FHA.<sup>7</sup> HUD thus has a statutory obligation to interpret and enforce the Act, including the disparate impact standard that was promulgated by the Supreme Court in *Inclusive Communities*.<sup>8</sup> HUD’s codification of the three-part burden shifting test in 2013 set out a clear, workable legal standard that could be consistently applied

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<sup>5</sup> 5 U.S.C. § 553(b)(B).

<sup>6</sup> *Id.*

<sup>7</sup> 42 U.S.C. §§ 3608 (d),(e)(5).

<sup>8</sup> *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) [hereinafter *Inclusive Communities*].

by state and local housing agencies, housing providers, lenders, developers, and other regulated entities that affect housing decisions. Removing that clear standard creates tremendous uncertainty and confusion that will increase rather than obviate regulatory burden.

Despite HUD's apparent belief to the contrary, disparate impact liability still exists under the FHA. In the absence of HUD's guidance, disparate impact liability would still persist; it would simply be less clearly defined. Claiming the matter is "best left to the courts"<sup>9</sup> ignores that courts *rely* on HUD's promulgation of the disparate impact standard. *Inclusive Communities* itself upheld disparate impact liability based on a challenge to HUD's 2013 Disparate Impact rule.<sup>10</sup> Courts, interpreting both state and federal housing laws, may also rely on the Disparate Impact rule promulgated by HUD.<sup>11</sup>

In addition, HUD's "general statement of policy," reliant on Executive Orders that have no force of law, is contrary to case law as well as the FHA itself. HUD cites to EO 14281, whose policy includes "eliminat[ing] the use of disparate-impact liability in all contexts to the maximum degree possible..."<sup>12</sup> But that ignores judicial precedent as well as the dictates of Congress itself. By 1988, all nine Courts of Appeals had addressed and affirmatively ruled that the Fair Housing Act encompassed disparate impact liability.<sup>13</sup> Congress, when it amended the FHA in 1988, endorsed disparate impact liability when it (1) rejected a proposed amendment that would have eliminated disparate impact liability for certain zoning decisions, and (2) amended the FHA with provisions that *assumed* disparate impact liability.<sup>14</sup> Thus, HUD's "general statement of policy" tries to wholesale

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<sup>9</sup> Proposed Rule, 91 Fed. Reg. at 1476.

<sup>10</sup> *Inclusive Communities*, 576 U.S. at 527.

<sup>11</sup> *See, e.g., Martinez v. City of Clovis*, 90 Cal.App.5th 193, 256 (2023) (relying in part on HUD's burden shifting framework to determine liability); *Hare v. David S. Brown Enterprises, Ltd.*, 340 A.3d 698, 714 (2025) (using the Supreme Court's analysis of HUD's disparate impact rule to analyze Maryland's HOME Act).

<sup>12</sup> "Restoring Equality of Opportunity and Meritocracy," 90 Fed. Reg. 17537, 17537 (Apr. 28, 2025).

<sup>13</sup> *Inclusive Communities*, 576 U.S. at 535.

<sup>14</sup> *Id.* at 536.

undermine disparate impact liability despite no legal basis to do so. HUD alludes to an inadequate “up-to-date picture of the legal landscape” as justification for the rescission but does not cite a single case or statute that shows how the legal landscape has changed.<sup>15</sup>

Finally, a rescission in of itself requires a full notice and comment period and cannot be hidden away as a “general statement of policy.” In *Motor Vehicles Manufacturers Association v. State Farm*, the Supreme Court concluded that it was arbitrary and capricious for an agency to rescind a rule without promulgating new regulation and that a rescission was subject to the same standard of review as adopting new regulations.<sup>16</sup> Even in a rescission, HUD must make an accounting of “engendered serious reliance interests.”<sup>17</sup> But it fails to do so. Thus, HUD’s stated rationale for an abbreviated comment period is entirely insufficient.

## **II. Disparate impact liability is necessary to combat discrimination amid the rise of automated-decision making tools and systems.**

The rise of automated-decision making tools has led to the wrongful denial of people’s access to housing,<sup>18</sup> health care,<sup>19</sup> job opportunities,<sup>20</sup> public benefits,<sup>21</sup> and more. The ability to obtain housing, especially rental housing, is increasingly mediated by black-box algorithms that make housing and lending decisions based on factors such as credit history, employment history, and

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<sup>15</sup> Proposed Rule, 91 Fed. Reg. at 1476.

<sup>16</sup> 463 U.S. 29, 41-43 (1983).

<sup>17</sup> See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

<sup>18</sup> Johana Bhuiyan, *She Didn’t Get an Apartment Because of an AI-Generated Score – and Sued to Help Others Avoid the Same Fate*, Guardian (Dec. 14, 2024), <https://www.theguardian.com/technology/2024/dec/14/saferent-ai-tenant-screening-lawsuit>.

<sup>19</sup> Ziad Obermeyer, Brian Powers, Christine Vogeli & Sendhil Mullainathan, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, Science (Oct. 25, 2019), <https://www.science.org/doi/10.1126/science.aax2342>.

<sup>20</sup> Charlotte Lytton, *AI Hiring Tools May Be Filtering out the Best Job Applicants*, BBC (Feb. 16, 2024), <https://www.bbc.com/worklife/article/20240214-ai-recruiting-hiring-software-bias-discrimination>.

<sup>21</sup> Rachana Pradhan, Samantha Liss & KFF Health News, *A Tennessee Mom Lost Medicaid After the State Launched a Deloitte-Run System that Managed Eligibility. Then Her Life Turned Upside Down*, Fortune (June 24, 2024), <https://fortune.com/2024/06/24/a-tennessee-mom-lost-medicaid-after-the-state-launched-a-deloitte-run-system-that-managed-eligibility-then-her-life-turned-upside-down/>.

eviction history. But not only do ADMs rely on data that is error-prone at best,<sup>22</sup> they have a disproportionate impact on low-income minority communities. Credit reports vary dramatically based on racial, income, and a whole host of other disparities.<sup>23</sup> Eviction records reflect “striking racial disparities,” with eviction rates and filings for Black renters that are on average “significantly higher” than white renters.<sup>24</sup> Technologies that adopt and rely on such biased data adopt and perpetuate bias, leading to discriminatory housing outcomes due to what is effectively “digital redlining.”<sup>25</sup> Every year, millions of potential renters face these sorts of tools and algorithms.<sup>26</sup>

Disparate impact liability is crucial to enforce fair housing laws in the face of these barriers. Such technologies are often “black boxes,” making it exceedingly difficult to parse any “intent” despite clear effects on housing outcomes. Industry actors who sell “AI” and other ADM products explicitly argue that because such tools do not have “intent” they ought not to be held liable for discrimination. HUD’s rescission of the Disparate Impact Rule turns a willful blind eye to the problem, leaving millions to continue to face obstacles in obtaining housing. This should be no surprise. In its prior rulemaking, HUD at least explicitly sided with industry and attempted to create affirmative defenses for algorithmic disparate impact claims.<sup>27</sup> This time, HUD chooses to abandon

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<sup>22</sup> Fed. Trade Comm’n, *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports that Could Result in Less Favorable Terms for Loans* (Feb. 11, 2013), <https://www.ftc.gov/news-events/news/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports-could-result-less-favorable-terms>; Syed Ejaz, Consumer Reports, *A Broken System: How The Credit Reporting System Fails Consumers And What To Do About It*, 15 (June 2021), <https://advocacy.consumerreports.org/wp-content/uploads/2021/06/A-Broken-System-How-the-Credit-Reporting-System-Fails-Consumers-and-What-to-Do-About-It.pdf>.

<sup>23</sup> See National Consumer Law Center, Racial Justice & Equal Economic Justice Opportunity Project, *Past Imperfect: How Credit Scores and Other Analytics “Bake In” and Perpetuate Past Discrimination* (updated Feb. 2024), [https://www.nclc.org/wp-content/uploads/2016/05/20240227\\_Issue-Brief\\_Past-Imperfect.pdf](https://www.nclc.org/wp-content/uploads/2016/05/20240227_Issue-Brief_Past-Imperfect.pdf).

<sup>24</sup> Peter Hepburn, Renee Louis & Matthew Desmond, *Racial & Gender Disparities Among Evicted Americans*, Eviction Lab (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>.

<sup>25</sup> See, e.g., National Fair Housing Alliance, *NFHA Files Federal Discrimination Lawsuit to Stop RedFin’s Real Estate Redlining*, (Oct. 29, 2020), <https://nationalfairhousing.org/nfha-files-federal-discrimination-lawsuit-to-stop-redfins-real-estate-redlining-2/>.

<sup>26</sup> CFPB, *Tenant Background Checks Market*, 2 (Nov. 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_tenant-background-checks-market\\_report\\_2022-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf).

<sup>27</sup> 84 Fed. Reg. 42854, 42862 (2019).

millions of Americans by slinking away from its statutory obligations in the dead of night. People who attempt to fight against discrimination caused by such tools will be face massive regulatory uncertainty in the absence of a promulgated disparate impact standard.

### **III. Conclusion**

For the above reasons, HUD should promptly withdraw its Notice, rescind the Proposed Rule and preserve the prior Disparate Impact Rule. Disparate impact liability is a core provision of the FHA and HUD's recission is contrary to both the mandates of the FHA as well as judicial precedent. For any questions, please contact [azhar@epic.org](mailto:azhar@epic.org).

Respectfully submitted,

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