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

Re: Rescission of Discriminatory Effect Regulations
Docket No. FR–6540–P–01

To Whom It May Concern:

Please accept this letter as the comments of the Citizens' Housing and Planning Association ("CHAPA") and Klein Hornig LLP ("Klein Hornig"), in opposition to the proposed rule issued by the U.S. Department of Housing and Urban Development ("HUD") on January 14, 2026 entitled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (the "Proposed Rule").[1]

HUD must withdraw the Proposed Rule and retain its current regulations on discriminatory effect liability under the Fair Housing Act (the "Disparate Impact Regulations"). A failure to do so will violate HUD's mandatory responsibilities to enforce Title VIII and affirmatively to further fair housing.

The notice of proposed rulemaking for the Proposed Rule attempts to justify repeal of the Disparate Impact Regulations by claiming that, because a reviewing court does not owe said Regulations "judicial deference," interpreting disparate impact liability under Title VIII should be the exclusive ambit of "courts, not a Federal agency."[2] However, as discussed in the comments that follow, HUD's purported justification directly conflicts with and deliberately mischaracterizes the 2024 Supreme Court case *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) ("Loper Bright"). The Proposed Rule ignores HUD's obligation to enforce all manner of complaints under Title VIII, including disparate impact claims. This approach is fundamentally incompatible with HUD's duty to affirmatively advance the policies of the Fair Housing Act.

[1] 91 Fed. Reg. 1475 (June 16, 2026) ("*Proposed Rule*").
[2] Proposed Rule at 1476.

KH 1286999.7

1. Interests of the Commenters.

CHAPA is a Massachusetts not-for-profit organization with more than 1,200 individual and organizational members. CHAPA's mission is to encourage the production and preservation of housing that is affordable to low- and moderate- income households, and to foster diverse and sustainable communities through planning and community development. One of CHAPA's highest priorities is to advocate for, and ensure the implementation of, strong fair housing and civil rights protections.

Klein Hornig is a leading law firm centered on affordable housing and community development. In collaboration with our clients, we are a mission-driven firm focused on creating vibrant inclusive communities.

2. Proposed Changes to Disparate Impact Regulations.

The Proposed Rule would eliminate the regulations currently codified in 24 C.F.R. part 100, subpart G.[3] This subpart:

i. Affirms that Fair Housing Act liability may be established based on a practice's discriminatory effects, regardless of discriminatory intent;

ii. Defines the standard by which a practice may be lawful despite its discriminatory effects, if it is supported by legally sufficient justification; and

iii. Establishes the burden of proof for discriminatory effect cases.

The Proposed Rule would also revise 24 C.F.R. § 100.5(b), which states that the scope of 24 C.F.R. Part 100 is to "[provide HUD's] interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions."[4] The Proposed Rule seeks to remove a reference to unlawful housing discrimination being established based on a practice's discriminatory effects.

3. Loper Bright Confirms That HUD's Interpretation of the Fair Housing Act is Valuable to Courts.

HUD's proposed recission of the Disparate Impact Regulations turns on the argument that Loper Bright rendered the agency's role in interpreting discriminatory effect liability under Title VIII superfluous, given that a "reviewing court . . . may vacate or set aside HUD's rules."[5] That conclusion does not follow from the Supreme Court's decision.

The Court held in Loper Bright that Article III courts may "exercise independent judgment in determining the meaning of statutory provisions" and are not obligated to defer to "agency resolutions of questions of law."[6] Yet in so holding, the Court affirmed that judges should still seek persuasive direction from the conclusions of executive agencies, whose interpretations "constitute a body of experience and informed

[3] Id.
[4] 24 C.F.R. § 100.5(b).

[5] Proposed Rule at 1476.
[6] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 394, 370 (2024) ("Loper Bright").

judgment to which courts and litigants may properly resort for guidance."[7] HUD now proposes to deprive reviewing courts of the same agency expertise that Loper Bright contemplated being "at [courts'] disposal," even if it does not bind their rulings.[8]

The agency's justification for rescinding the Disparate Impact Regulations fundamentally misinterprets the instructions of the Court in Loper Bright. HUD's stated logic would support the retreat of virtually any executive agency from regulating virtually any topic subject to judicial review, a result facially at odds with the Supreme Court's expectation in Loper Bright that agencies would develop "specialized experience" and "opinions" in pursuit of official duty.[9]

Indeed, when the present version of the Disparate Impact Regulations was published in 2023, HUD explained that they are a faithful reflection of the standard for processing disparate impact claims under Title VIII, based on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) ("TDHCA v. ICP"), and the judicial decisions that both preceded and followed that decision.[10] Unlike the position now articulated by HUD in the Proposed Rule, that conclusion is supported by the text of TDHCA v. ICP, which cited a near identical earlier version of the current rules with approval.[11]

4. Repeal of the Disparate Impact Rule is an Unlawful Effort to Evade HUD's Obligation to Enforce the Fair Housing Act and Process Disparate Impact Claims.

The Proposed Rule, which abandons HUD's Disparate Impact Regulations and related agency actions, violates HUD's obligation to enforce Title VIII. If HUD adopts the Proposed Rule in a final rule, HUD will breach this duty.

Congress has directed HUD to adjudicate housing discrimination complaints under the Fair Housing Act, a family of complaints that necessarily encompasses filings alleging disparate impact liability.[12] The Supreme Court affirmed said theory of Fair Housing Act liability in TDHCA v. ICP.

The plain text of 42 U.S.C. § 3610 and § 3612 make clear that HUD's obligation to act on Title VIII complaints is mandatory, not discretionary.[13] In fact, the Administrative Procedure Act ("APA") requires courts to enforce the statutory responsibilities of agencies like HUD by "compel[ling] agency action" where it has been "unlawfully withheld."[14] HUD violates the APA "where "the agency has 'consciously and expressly adopted a general policy'" of refusing to enforce civil rights laws "that is so extreme as to amount to an abdication of its statutory responsibilities."[15] That is precisely what HUD would be doing should it adopt the proposal. The law therefore precludes HUD from effectively disclaiming adjudication

[7] *Id.* at 394 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("*Skidmore*")).
[8] *Id.* at 402.
[9] *Loper Bright* at 388 (quoting *Skidmore* at 139-140).
[10] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015). *See also,* 88 Fed. Reg. 19453 (March 31, 2023) ("in HUD's experience" that version of the rules "provided a workable and balanced framework for investigating and litigating discriminatory effects claims that is consistent with the Act, HUD's own guidance, *Inclusive Communities,* and other jurisprudence").
[11] TDHCA v. ICP, 576 U.S. 527, 538 and 541.
[12] *See* 42 U.S.C. § 3610 and § 3612.
[13] *See, e.g.*, 42 U.S.C. § 3610(a)(B)(iv) ("[T]he Secretary *shall* make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint") (emphasis added).
[14] Norton v. Southern Utah Wilderness Alliance, 54.2 U.S. 55, 62–63 (2004).
[15] N.A.A.C.P. v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 159 (1st Cir. 1987), citing Heckler v. Cheney, 470 U.S. 821, 833 n. 4 (1985).

of disparate impact matters, just as the agency would violate its statutory mandates by attempting to effectively decline all familial status complaints, discriminatory advertising complaints, or any other subcategory of complaints under the Fair Housing Act.

HUD's justification for the Proposed Rule relies on Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," issued on April 23, 2025 ("EO 14281"). EO 14281 expresses explicit hostility to any recognition of disparate impact claims, stating that it "is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree."[16] HUD's Office of Fair Housing and Equal Opportunity ("FHEO") has fully embraced the policy expressed in EO 14281 by both repealing a large volume of guidance material explaining the appropriate procedures for investigating and charging disparate impact claims and putting forth new guidance memoranda placing an enforcement priority only on "cases involving facially discriminatory conduct."[17] In repealing the Disparate Impact Regulations and abdicating its legal responsibility to accept and investigate complaints alleging disparate impact under Title VIII, HUD unlawfully undermines the Fair Housing Act and the agency's obligation to enforce it based on all viable theories of liability.

To go further, it is impossible for HUD to adjudicate disparate impact complaints absent its own regulation on the topic. As the Proposed Rule itself acknowledges, certain "agency actions . . . rely" on "agency interpretations of statutes."[18] In some instances, Supreme Court precedent or the text of Title VIII itself may supply a clear standard, yet it is equally possible for a complaint to implicate a question of law subject to competing circuit court standards, or for which no circuit court guidance exists at all. In these circumstances, HUD must exercise independent judgment about how to apply the Fair Housing Act through its own regulations. Rescinding the Disparate Impact Regulations introduces uncertainty and confusion for all parties, which again undermines the Fair Housing Act and HUD's obligation to enforce it.

5. HUD Has a Duty to Affirmatively Further Fair Housing.

In addition to the fact of HUD's Title VIII enforcement responsibilities, 42 U.S.C. §3608(d) instructs the agency to administer its "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of" the Fair Housing Act. Congress charged HUD with affirmatively furthering fair housing ("AFFH") based on an understanding that "mere nondiscrimination cannot by itself overcome the problem of segregation. It will take vigorous positive efforts on the part of government and private citizens to halt, let alone reverse, trends now so firmly entrenched."[19] Yet as described in the previous section, withdrawing the Disparate Impact Regulations undermines HUD's ability to conduct its duties to a degree that is antithetical to the agency's AFFH obligation. Rescinding this agency guidance directly hinders HUD's ability to enforce the Fair Housing Act – which directly contradicts HUD's statutory obligation "affirmatively to further" Title VIII's policies.

By way of illustration, HUD's statutory powers uniquely position the agency to affirmatively further fair housing by means that the judiciary cannot replicate. The HUD Secretary may initiate investigations into alleged discriminatory housing practices and "may also file [a Title VIII] complaint . . . on the Secretary's

[16] Exec. Order No. 14,281, 90 Fed. Reg. 17,537 (Apr. 23, 2025).
[17] See, e.g., Memorandum from U.S. Department of Housing and Urban Development on Fair Housing Act Enforcement and Prioritization of Resources (September 16, 2025).
[18] Proposed Rule at 1476.
[19] 114 Cong. Rec. 2991 (February 14, 1968) (statement of Sen. Edward Brooke).

own initiative."[20] Congress explicitly envisioned a robust enforcement role for HUD in passing the Fair Housing Amendments Act of 1988 (the "1988 Amendments"). Prior to the 1988 Amendments, victims of housing discrimination only had two means of resolving their complaints: voluntary conciliation or "fil[Ing] a private lawsuit in federal district court," a process that legislators decried as "costly," "slow," and a "burden" on private individuals.[21]

The Proposed Rule returns HUD to a posture of non-enforcement—at least as it relates to disparate impact liability—voluntarily reinstating the administrative "weakness" that contemporaries of the 1988 Amendments identified as responsible "for much of the failure to eliminate [discriminatory] policies and practices."[22] This approach is fundamentally incompatible with the agency's duty to affirmatively advance Title VIII.

6. Evolving Case Law is No Barrier to Regulatory Guidance.

Lastly, HUD cannot reasonably rely on the argument that it must withdraw the Disparate Impact Regulations because "case law continues to develop" and the agency's regulations will not be "up-to-date."[23] This rationale is thin gruel. HUD's stated logic would support the retreat of virtually any executive agency from regulating virtually any topic subject to judicial review, a result facially at odds with the Supreme Court's expectation in Loper Bright that agencies would develop "specialized experience" and "opinions" in pursuit of official duty.[24]

In fact, the reality of evolving case law is precisely why agency regulations are necessary. Regulations like the Disparate Impact Regulations help people outside the legal profession understand and interpret rights and obligations under the Fair Housing Act in a complex, shifting landscape. Beyond providing guidance to courts, the Disparate Impact Regulations play a crucial role in providing guidance to those living in or seeking housing and to housing providers. Housing providers often shape their conduct and practices based on agency regulation. Removing the Disparate Impact Regulations will deprive housing providers of appropriate guidance in this area and likely lead to additional unlawful discrimination under the Fair Housing Act.

7. Conclusion

HUD has statutory duties to enforce and affirmatively further the Fair Housing Act. The agency must retain the Disparate Impact Regulations in order to fulfill these obligations. Rescinding the Disparate Impact Regulations will lead to an increase in discrimination under Title VIII, violating the Fair Housing Act and harming the most vulnerable Americans.

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[20] 42 U.S.C. § 3610(a)(i)(A)(i), (iii).

[21] 134 Cong. Rec. 19897 (1988) (statement of Sen. Frank Lautenberg); *id.* at 19895 (statement of Sen. Alan Cranston); *see also id.* at 19889-19890 ("For many years, equal housing opportunity has been a righteous, but somewhat hollow call, lacking an accessible and practical enforcement mechanism. Under current law, aggrieved individuals are required to seek recourse through costly litigation. This prohibitive option is simply out of reach to most, and results in un-redressed discrimination") (statement of Sen. John McCain).

[22] *Id.* at 19899 (statement of Sen. Kent Conrad).

[23] Proposed Rule at 1476.

[24] *Loper Bright* at 388 (quoting *Skidmore* at 139-140).