



October 16, 2019

SUBMITTED ELECTRONICALLY

Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

Re: **HUD's Implementation of the Fair Housing Act's Disparate Impact Standard**  
**Docket Number: FR-6111-P-02, RIN 2529-AA98**

Dear Sir or Madam:

[LeadingAge](#) appreciates the opportunity to comment on the Proposed Rule, **HUD's Implementation of the Fair Housing Act's Disparate Impact Standard** (the "Proposed Rule"). We oppose the Proposed Rule and respectfully request that HUD withdraw it.

The mission of LeadingAge is to be the trusted voice for aging. Our over 6,000 members and partners include nonprofit organizations representing the entire field of aging services, 38 state associations, hundreds of businesses, consumer groups, foundations and research centers. LeadingAge is also a part of the Global Ageing Network, whose membership spans 30 countries. LeadingAge is a 501(c)(3) tax-exempt charitable organization focused on education, advocacy and applied research.

Dedicated to expanding the world of possibilities for aging, LeadingAge advances policies, promotes practices and conducts research that supports, enables and empowers people to live fully as they age.

The Fair Housing Act (FHA) is critical to give aging service providers a level playing field when they seek to build and preserve affordable housing for older adults and run into policies and restrictions biased against certain land uses. Meanwhile, all people, including older adults, rely on a transparent and clear FHA to enforce their right to live free from discrimination in their housing of choice.

## **The Proposed Rule Undermines The Fair Housing Act, Established Practices, and Legal Precedent**

The Proposed Rule contradicts the central tenets of the FHA. Moreover, the Proposed Rule is unnecessary because HUD's 2013 Final Rule formally established a workable three-part burden shifting test in analyzing disparate impact claims and the Supreme Court upheld the validity of disparate impact claims under the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, (2015) 135 S. Ct. 2507.

The FHA prohibits intentional discriminatory acts and facially neutral policies that limit housing opportunities based on race, color, national origin, religion, sex, familial status, and disability. The current disparate impact rule and three-part burden-shifting test is a reasonable tool to combat housing discrimination.

The current disparate impact rule has proven practical and effective as well as consistent with the *Inclusive Communities* decision. HUD's 2013 final rule formally established a reasonable three-part balancing test for determining when a practice with a discriminatory effect violates the FHA. The 2013 rule did not establish a new disparate impact standard, but rather just clarified a regulation following years of HUD policy and practice and case law. These standards are well accepted and businesses have been able to operate under this framework for years.

Although HUD asserts that it is only updating the disparate impact standard, it is in fact proposing drastic changes that would severely weaken a long-standing enforcement tool. HUD's proposed burdensome and confusing balancing test would make it nearly impossible to establish disparate impact liability under the FHA. This directly contradicts HUD responsibility to enforce the FHA.

## **The Current Disparate Impact Rule is Critical for Fair Housing Enforcement**

The current disparate impact rule is critical to enforcing the FHA. Without an effective disparate impact tool, many discriminatory practices will go unchallenged and uncorrected, weakening fair housing protections and widening our nation's inequities.

Our members witness how policies and practices may be unintentionally discriminatory, yet exacerbate fair housing issues through exclusionary zoning practices, eligibility and house rules, or residency preferences that limit affordable housing choice for older adults and those with disabilities. The disparate impact rule allows these practices to be challenged and helps

eliminate housing policies that discriminate or limit choice for older adults and those with disabilities.

Thus, HUD's existing rule should not be revised. Instead, HUD should focus on rigorous enforcement of the current rule to remove unnecessary barriers to housing choice throughout America's housing markets rather than weaken established and accepted regulations.

### **Conclusion**

Rather than support HUD's ability to uphold the Fair Housing Act, HUD's Proposed Rule operates to effectively eliminate disparate impact liability, directly contradicting HUD's own mission, the FHA, decades of legal decisions, and recent Supreme Court precedent. Therefore, we oppose the Proposed Rule for the reasons stated above and respectfully request that HUD withdraw it.

If you wish to discuss any of these comments further, please do not hesitate to contact us.

Sincerely,

Cory Kallheim

VP, Legal Affairs and Social Accountability