Comments of the National Apartment Association (NAA) and National Multifamily Housing Council (NMHC)

February 9, 2026

Submitted via regulations.gov

The Honorable Scott Turner, Secretary
Department of Housing and Urban Development
Washington, DC 20410

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6540-P-01 (91 Fed. Reg. 1475, Jan. 14, 2026)

Dear Secretary Turner:

We are writing on behalf of the members of the National Apartment Association (NAA) and National Multifamily Housing Council (NMHC) who represent the $3.9 trillion apartment industry and its more than 40 million residents. NAA and NMHC appreciate the opportunity to comment on U.S. Department of Housing and Urban Development's (HUD) proposed rule revising the agency's implementation of the Fair Housing Act's (FHA) disparate impact standard.

NAA and NMHC commend your and the Administration's efforts to improve the federal regulatory landscape, strengthen our communities, and create opportunities for innovation and growth for American businesses of all types.

For too long, costly, impractical and inconsistent regulations have stifled housing production and increased operating expenses at a time when our nation faces a severe housing supply shortage.

The rental housing industry strongly supports fair housing laws, but we have long-raised concerns that an overly expansive view of disparate impact theory could create liability for basic housing development and operational practices. Moreover, we have stressed that uncertainty created by changing and conflicting disparate impact standards creates unnecessary burdens in the housing sector. We have therefore long urged HUD to align its interpretation of disparate impact liability with Supreme Court decisions.

NAA and NMHC appreciate President Trump and this Administration's efforts to curtail federal reliance on disparate impact liability and to resolve the inconsistencies between HUD's disparate impact standards and legal outcomes. Reducing unnecessary regulatory burdens, like those caused by disparate impact regulations, unleashes the potential for more abundant and affordable homes to meet the nation's housing needs.

We offer these comments to recommend some suggestions to further the Administration's interpretation of the law and to further strengthen our shared goals.

I. Background

As set forth in NAA and NMHC's May 12, 2025 response to OMB's Request for Information: Deregulation,[1] We previously asked this Administration to rescind and replace HUD's Discriminatory Effects Standard (commonly referred to as the "Disparate Impact Rule").

Federal courts have held that the FHA prohibits both (1) discriminatory treatment (intentional discrimination) and (2) discriminatory effects – when a facially neutral policy or action results in an adverse effect on a protected group (such as a race) and cannot be justified as serving a legitimate business purpose (also known as "disparate impact"). However, the FHA does not include or codify a disparate impact framework.

In 2013, HUD issued its first disparate impact rule establishing the agency's concept of liability for seemingly neutral housing policies that nonetheless have discriminatory effects on a protected class. This Rule formalized a framework for assessing whether a given practice violates the FHA even when there is no intent to discriminate and can put limitations on necessary business practices like resident screening.

In 2020, the Trump Administration revised the Rule to acknowledge the limitations of disparate impact liability imposed by courts subsequent to the development of the 2013 Rule – namely the Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (*Inclusive Communities*), which established important guardrails around disparate impact liability. Specifically, while the Supreme Court has recognized the availability of disparate impact claims, it has also emphasized the need for meaningful limits to avoid constitutional concerns and to prevent the imposition of liability based solely on statistical disparities.

HUD's prior regulations (24 C.F.R. §100.500) went beyond the statute by formalizing a rigid burden-shifting framework and creating a presumption of unlawful conduct even in the absence of discriminatory intent or facially discriminatory policies. This approach risked chilling lawful, neutral decision-making in housing-related activities.

In 2023, the Biden Administration abandoned the 2020 Trump Rule and reinstated the 2013 Disparate Impact Rule. The reinstated Rule failed to acknowledge superseding

[1] Docket No. OMB-2025-0003, FR Doc. 2025-06316,

legal outcomes, undermines the use of necessary business practices and imposes new obstacles to reducing housing costs and addressing the country's housing supply shortage.

II. Importance of Clear Standards and Safe Harbors Consistent With *Inclusive Communities*

NAA and NMHC support HUD's proposal to remove 24 C.F.R. §100.500 as currently written, which propped up inconsistent and onerous interpretations of disparate impact doctrine and failed to align with the Supreme Court's *Inclusive Communities* decision. Building upon that decision, we urge HUD to consider efforts to provide courts, housing providers and other stakeholders with a clear vision of appropriate compliance practices in light of the *Inclusive Communities* decision. Interpretative information from HUD would help ensure that judges across the country consistently apply the same standards following *Inclusive Communities* and would reduce the risk of conflicting rulings that could potentially impose unpredictable compliance obligations on housing providers operating across various jurisdictions.

Inclusive Communities reaffirmed the availability of disparate impact liability while also emphasizing the need for "robust causality," safeguards against abusive litigation, and protection for "valid interests" and "practical business choices" of housing providers. Under *Inclusive Communities*, policies and practices that may cause a disparate impact are permissible when they are "necessary to achieve a valid interest."

HUD's acknowledgment that prior disparate impact regulations formalized legal tests not required by statute, created presumptions of unlawful discrimination, and generated uncertainty for housing providers is an important step toward restoring clarity and legal stability.

NAA and NMHC also appreciate HUD's recent Fair Housing Act Enforcement and Prioritization memorandum, which realigns the agency's enforcement resources toward cases with strong evidence of intentional discrimination and withdraws unnecessary guidance that contributed to burdensome compliance expectations.

These actions address concerns housing providers have raised repeatedly—that overly complex and expansive regulatory obligations inhibit housing production, increase operational costs, and harm affordability for renters nationwide.

Moreover, the *Inclusive Communities* Court was explicit in its reasoning that disparate impact liability should be "properly limited" and focused on rooting out "artificial barriers to housing." We therefore urge HUD—consistent with its stated goals—to explicitly recognize those legitimate business interests central to the housing sector, including:

- **Housing development feasibility**, given rising construction, insurance, labor, and tax costs.

- **Risk-based operational policies**, including resident screening, occupancy standards, crime prevention measures, and management practices that support resident safety and financial stability.

- **Compliance with state and local laws**, including zoning, building codes, and insurance requirements, which may materially shape providers' policies.

- **Financial and underwriting considerations** necessary to secure capital for multifamily housing development and operation.

Clear recognition of these business necessities will help ensure that the removal of HUD's regulatory test does not create new ambiguities or compliance risk for owners, operators, and developers.

The *Inclusive Communities* decision further recognizes that housing providers must retain the ability to engage in fundamental business practices and establish policies necessary to operate and invest in rental housing. To reduce future litigation risk and ensure courts have proper context when interpreting the FHA without HUD's former regulatory framework, we urge HUD to establish safe harbors or otherwise explicitly identify policies and practices that constitute legitimate interests including:

- **Resident screening policies** used to protect residents and property, provided they are applied consistently and in compliance with other laws.

- **Financial viability considerations**, such as debt-service coverage, insurance underwriting requirements, and capital investment constraints.

- **Policies tied to statutory or regulatory mandates**, including occupancy limits, building code requirements, and safety standards.

- **Operational necessity**, including ensuring efficient management, minimizing default risk, and preserving the affordability and quality of rental communities.

- **Offering discounted rates or on-site programming based on facially neutral criteria**.

Recognizing these interests will help courts that must apply disparate impact principles while providing clear expectations to responsible housing providers.

III. Need for Continued Regulatory Burden Reduction

NAA and NMHC strongly support HUD's efforts to remove unnecessary and duplicative disparate impact regulatory layers, as the proposed rescission of Subpart G would do. This step is consistent with the concerns raised in our previous comments and other efforts urging the federal government to reform regulations that stifle housing affordability and limit the industry's ability to meet urgent demand.

When finalizing the proposed rule, NAA and NMHC ask HUD to consider:

- Adding language to the final rule that reflects the HUD enforcement priorities outlined in guidance, so housing providers can rely on a single, predictable framework. HUD's 2025 guidance shifting enforcement priorities to intentional discrimination is helpful and should be reinforced in regulatory text where appropriate.

- Clarifying that housing providers are not required to conduct statistical disparate impact analyses as part of routine operations.

- Review additional FHA related guidance for withdrawal or modernization, consistent with HUD's September 2025 withdrawal of prior materials that no longer reflect the agency's enforcement priorities.

V. Conclusion

NAA and NMHC appreciate HUD's careful reconsideration of its disparate impact regulations and the agency's commitment to reducing unnecessary compliance burdens on the multifamily housing sector. We encourage HUD to take the additional steps described above to ensure that removal of the existing regulatory framework results in greater clarity, reduced litigation risk, and recognition of legitimate business interests across the industry.

NAA and NMHC remain committed to fair housing compliance and stands ready to collaborate with HUD on practical policies that advance housing opportunities for all.

Sincerely,

National Apartment Association National Multifamily Housing Council