



February 13, 2026

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

Re: HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (Docket No. FR-6540-P-01)

To Whom It May Concern:

The National Council of State Housing Agencies (NCSHA) appreciates this opportunity to provide comments on HUD's proposal to remove its discriminatory effects regulations and leave to courts questions related to interpretations of disparate impact liability under the Fair Housing Act.

NCSHA represents the nation's state housing finance agencies (HFAs).¹ HFAs deliver roughly \$50 billion in financing to make affordable homeownership and rental housing opportunities a reality for hundreds of thousands of families and individuals every year. In addition, HFAs administer and otherwise interact with a wide array of federal programs and policies, including many under the purview at the federal level of the U.S. Department of Housing and Urban Development.

The Supreme Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. (Texas DHCA vs. ICP)*, found disparate impact claims to be cognizable under the Fair Housing Act. It is our view that HUD's 2013 regulation implementing the Fair Housing Act's discriminatory effects standard (the 2013 rule), while preceding the Supreme Court decision in this case, was generally consistent with that decision, but needed improvements to be workable.

In 2018, during President Trump's first term in office, HUD sought to modify the 2013 rule to ensure its consistency with *Texas DHCA vs. ICP*. At that time, NCSHA provided [comments](#) suggesting HUD clarify the criteria for establishing both a prima facie case in step one and a legally sufficient justification of policies in step two of the burden-shifting framework in a manner consistent with the nuances of the majority opinion in the case.

¹ NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

We encourage HUD to consider the adjustments NCSHA recommended in response to HUD's 2018 proposed rule. Specifically, we recommend HUD make the following clarifying alterations to the 2013 rule:

- Explicitly state that, to be successful in establishing a prima facie case for step one of the burden-shifting process, plaintiffs must demonstrate a robust causality between the challenged policy or policies and the disparity, and
- Acknowledge that policies meet the legally sufficient justification for step two of the burden-shifting process if they are not artificial, arbitrary, or unnecessary barriers.

These proposals are consistent with Justice Kennedy's majority opinion, which states:

"A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing the disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas.... Policies, whether governmental or private, are not contrary to the disparate impact requirements unless they are artificial, arbitrary and unnecessary barriers."

Should HUD determine it necessary to adjust the regulation, NCSHA again stands ready to provide additional comments.

Thank you again for the opportunity to provide comments on the proposed rule.

Sincerely,



Jennifer Schwartz
Director of Tax and Housing Advocacy