

## PRELIMINARY SUMMARY OF PROPOSED DISPARATE IMPACT RULE

National Low Income Housing Coalition

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HUD is proposing drastic changes to the fair housing Disparate Impact rule that would make it far more difficult for people experiencing various forms of discrimination to challenge the practices of businesses, governments, and other large entities. As proposed, the current three-part “burden-shifting” standard to show disparate impact would be radically changed to a five-component set of tests placing virtually all of the burden on people who are in “protected classes” as defined by the Fair Housing Act – people of color, women, immigrants, families with children, people with disabilities, LGBTQ persons, and people of faith.

The [proposed changes to the rule](#) were cleared by the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) on July 19 (see *Memo*, [7/29](#)). Copies were provided to the media on July 31, and media reports indicate that the proposed rule was presented to the appropriate congressional committees on Monday, July 29 for a 15-day review period. The proposed rule has not yet been published in the *Federal Register*.

“Now HUD wants to create a new and much higher bar for proving discriminatory outcomes. These changes are designed to make it much more difficult, if not impossible, for communities of color to challenge discriminatory effects in housing,” [said Diane Yentel](#), NLIHC president and CEO. “With this harmful proposal, the Trump administration continues its pattern of attempts to weaken and disrupt the federal government’s responsibility to uphold its fair housing obligations under the law.”

### Background

For more than 40 years, HUD has interpreted the Fair Housing Act to prohibit housing policies or practices that have a discriminatory effect even if there was no apparent intent to discriminate. There are 13 U.S. Courts of Appeals, 11 of which have had disparate-impact cases before them and all of which have upheld disparate impact and applied a burden-shifting standard. Because there were minor variations in how the courts and HUD applied the concept of discriminatory effects over the years, a proposed rule in 2011 offered a standard for comment, culminating in a final Disparate Impact rule on February 15, 2013. That final regulation established uniform standards for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act. It is the February 15, 2013 final rule that HUD is now proposing to drastically overhaul.

The three-step burden-shifting standard in the current rule is very simple:

1. The plaintiff (the party alleging disparate impact) has the burden of proving that a policy or practice caused or predictably will cause a discriminatory effect.
2. If the plaintiff satisfies that burden of proof, the burden shifts to the defendant (the business, government, or other entity) to prove that the challenged policy or practice is necessary to achieve one or more of the defendant’s substantial, legitimate, nondiscriminatory interests.
3. If the defendant satisfies the above burden of proof, then the burden shifts again to the plaintiff to prove that the defendant’s substantial, legitimate, nondiscriminatory interests could be served by another policy or practice that has a less discriminatory effect.

The U.S. Supreme Court upheld the use of disparate-impact theory to establish liability under the Fair Housing Act on June 25, 2015 in *Texas Department of Housing and Community Affairs v. Inclusive Communities (ICP)*. The current HUD administration issued an advance notice of proposed rulemaking (ANPR) in the *Federal Register* on June 20, 2018 (see *Memo*, [6/25/18](#)). HUD acknowledged then that the Supreme Court upheld the use of disparate-impact theory, but HUD asserts that the Court “did not directly rule upon it [the 2013 disparate impact rule].” The preamble to the proposed rule states: “The Court’s opinion referenced HUD’s Disparate Impact Rule, but the Court did not rely on it for its holding.” Advocates argue that the Court implicitly endorsed the rule by not questioning it or challenging it. HUD claims that the intent of the proposed rule is simply to better reflect the Supreme Court’s 2015 *ICP* decision.

### **Preliminary Summary of Key Features of the Proposed Changes**

Additional features and greater analysis will likely follow upon further study and conversations with other advocates. NLIHC has also prepared a side-by-side comparison of a key section (§100.500) of the current rule and HUD’s proposed changes to it.

Prohibitions on discriminatory conduct under the Fair Housing Act have long been in federal regulations at 24 CFR part 100, including since 2013 provisions pertaining to the disparate-impact standard. The most significant changes HUD proposes to make to the disparate-impact standard are at §100.500 “Discriminatory effect prohibited.”

**First**, HUD would eliminate the opening preface outlining the current rule’s three components.

**Second**, HUD would eliminate the definition of “discriminatory effect” as presented in the 2013 rule, which includes a clause explicitly defining “discriminatory effect” to include a practice that “creates, increases, reinforces, or perpetuates *segregated* housing patterns.” (emphasis added)

**Third**, the proposed rule would eliminate the notion in the current rule’s paragraph (b) that a policy or practice might have “legally sufficient justification” if it is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” and that “those interests could not be served by another practice that has a less discriminatory effect.” A variant of this is, however, in proposed paragraph (d) that places the burden on the plaintiff to provide alternative policies or practices that would not result in costs to a defendant (discussed further below).

**Fourth**, in place of the current rule’s simple “legally sufficient justification,” HUD is proposing to erect multiple hurdles for plaintiffs to clear while introducing multiple defensive options for defendants.

Specifically, HUD is proposing an entirely new paragraph (b) called “Prima facie burden” that requires a plaintiff to state facts for five elements:

1. The policy or practice is *arbitrary, artificial, and unnecessary* to achieve a valid interest such as a “practical business” or profit.
2. There is a *robust causal link* between the policy or practice and a disparate impact on members of a protected class.
3. There is an adverse effect on *members of a protected class*.
4. The disparity is *significant*.
5. There is a *direct link* between the disparate impact and the injury.

(HUD’s preamble emphasizes the words in italics.)

**Fifth,** HUD proposes a new paragraph (c) designed to enable a defendant to challenge a plaintiff's prima facie case.

1. A defendant can demonstrate that the plaintiff failed to present sufficient facts for the five elements of paragraph (b).
2. A defendant can show that it has little or no discretion because the policy or practice is imposed by federal, state, or local law, or by some court requirement.
3. If a defendant uses a model based on algorithms in its practices, the proposed rule offers three methods to show that it is not responsible for any disparate impact.

**Sixth,** HUD proposes a new paragraph (d), "Burdens of proof for discriminatory effect."

1. Plaintiffs have two hurdles:
  - i. A plaintiff must prove by the "preponderance" of evidence, the prima facie burden elements (b)(2) through (b)(5).
  - ii. If a defendant rebuts a plaintiff's assertion under (b)(1) that a policy or practice is arbitrary, artificial, and unnecessary, by producing evidence showing that the policy or practice advances a valid interest, then the plaintiff must prove by the "preponderance" of evidence that a less discriminatory policy or practice exists that would serve the defendant's interest in an equally effective manner without imposing materially greater costs or creating other material burdens.

This paragraph places the "preponderance" of proof on the back of the plaintiff. A word like "preponderance" is never applied to a defendant's obligation.

2. Defendants have three ways to knock down plaintiffs' claims:
  - i. A defendant can repeat excuses offered by (c)(1) or (c)(2);
  - ii. A defendant can repeat that the plaintiff has not proven "by the preponderance of evidence" one of the prima facie elements in (b)(2) through (b)(5); or
  - iii. A defendant can demonstrate that the alternative policy or practice identified by the plaintiff under (d)(1)(ii) would not serve the defendant's interest in an equally effective manner without imposing materially greater costs or creating other material burdens.

Note that the current rule's burden-shifting standard at (c)(3) calls for the plaintiff to identify alternative policies or practices that the defendant could use that would still meet the defendant's interests, but in a less discriminatory manner. The proposed rule would require the plaintiff to prove "by the preponderance of evidence" that a less discriminatory policy or practice works just as well as the discriminatory practice and does not cost much or entail much effort on the part of the defendant. In other words, preventing or eliminating discrimination against people protected by the Fair Housing Act should be virtually cost-free.

The proposed rule is at: <https://bit.ly/2yxRy2F>

NLIHC's Side-by-Side of §100.500 is at: <https://bit.ly/2yzdevq>

A media statement by Diane Yentel, NLIHC president and CEO is at: <https://bit.ly/2OBUw18>

More about disparate impact is on [page 7-8](#) of NLIHC's *2019 Advocates' Guide*