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Founded in 1974 by
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August 20, 2018

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: Docket No. FR-6111-A-01
Reconsideration of HUD's Implementation of the Fair Housing Act's
Disparate Impact Standard**

Submitted via regulations.gov

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local affordable housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, faith-based organizations, public housing agencies, private developers and property owners, local and state government agencies, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on what is in the best interests of people who receive and those who are in need of federal housing assistance, especially extremely low income people and people who are homeless.

NLIHC writes to express great support for the Disparate Impact regulation finalized on February 15, 2013. We urge HUD to not amend the current rule because, despite HUD's claim, there is nothing in the U.S. Supreme Court decision *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* that warrants a reconsideration of the Disparate Impact rule. Rather than weaken an essential fair housing tool, HUD should begin to vigorously enforce the Disparate Impact rule.

NLIHC submitted comments on January 17, 2012 generally supporting the November 16, 2011 proposed Disparate Impact rule. In response to HUD's May 15, 2017 *Federal Register* notice requesting comments about regulatory burden, NLIHC wrote that HUD must preserve the Disparate Impact rule.

NLIHC also joined an amicus brief filed on February 14, 2014 supporting a motion for summary judgement filed by HUD in response to an Administrative Procedures Act claim against HUD by the American Insurance Association and the National Association of Mutual Insurance Companies. The brief pointed out that over the previous two decades, virtually all of the major homeowner insurance carriers had been the subject of Fair Housing Act enforcement actions based on claims of race discrimination in the underwriting, marketing, advertising, and sale of their products. As a result, many homeowner insurance underwriting and pricing policies, such as using dwelling unit age and minimum market value, had been successfully challenged under the Fair Housing Act on disparate impact grounds. In addition, insurers had abandoned explicitly race-based and geographically-based marketing plans.

For decades HUD had interpreted the Fair Housing Act to prohibit housing practices that have a discriminatory effect, even if there was no obvious intent to discriminate. Eleven U.S. Courts of Appeals agreed. However, there were minor variations in how the courts and HUD applied the discriminatory impact concept. Therefore, complying with the Administrative Procedure Act process to draft a proposed rule that would establish a uniform standard, HUD took into account decades of federal court jurisprudence, resulting in the November 16, 2011 proposed rule. After fifteen months of careful consideration of all public comments, HUD published the final Disparate Impact regulation on February 15, 2013, establishing uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

As fair housing experts have noted, the *Inclusive Communities* Supreme Court decision implicitly adopted the Disparate Impact rule's burden-shifting framework. Fair housing experts also cite court cases decided subsequent to *Inclusive Communities*. Those cases have found that the Disparate Impact regulation is consistent with the *Inclusive Communities* ruling. For example, the Second Circuit concluded that "[the Supreme Court] implicitly adopted HUD's approach" in *MHANY Management v. County of Nassau*. The Northern District of Illinois held that, "in short, the Supreme Court in *Inclusive Communities* expressly approved of disparate impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that requires correction." In *Property Casualty Insurers Association of America v Carson*, a federal district court wrote, "In short, the Supreme Court in *Inclusive Communities* expressly approved of disparate impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." And, on remand from the Supreme Court and the Fifth Circuit, the district court that originally addressed *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* commented that the Supreme Court had affirmed "the Fifth Circuit's decision adopting the HUD regulations."

Regarding *AIA v Department of Housing and Urban Development*, in March 2017, HUD responded to the insurance trade group's motion to file an amended complaint against the Disparate Impact rule writing, "The Supreme Court's holding in *Inclusive Communities* is entirely consistent with the rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims...Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the rule."

The above cited court cases, and indeed HUD itself as recently as March 2017, run counter to HUD's present thinking that *Inclusive Communities* suggests that the Disparate Impact rule warrants amending.

NLIHC supports the expert comments in response to the six specific questions HUD posed in the Advance Notice of Proposed Rulemaking, filed by the National Fair Housing Alliance, the National Housing Law Project, and the Lawyers' Committee for Civil Rights, and the Poverty & Race Research Action Council.

The Disparate Impact rule represents, in a uniform fashion, decades of extensive federal jurisprudence and HUD administrative practice. It is a critical tool that people in protected classes use to attempt to secure changes to policies and procedures that subtly discriminate them. NLIHC urges HUD to not amend the Disparate Impact rule, and to instead engage in robust enforcement.

Sincerely,

A handwritten signature in cursive script that reads "Diane Yentel".

Diane Yentel
President and CEO