

# APARTMENTS

## WE LIVE HERE

### FAIR HOUSING

## DISPARATE IMPACT LIABILITY

### NMHC/NAA VIEWPOINT

The apartment industry is committed to equal housing opportunity for all without regard to race, religion, color, sex, national origin, handicap or familial status. However, more clarity is needed on the applicability of disparate impact liability, as it could be used to undermine apartment providers' otherwise valid policies to ensure safe and decent housing for residents.

**DISPARATE IMPACT LIABILITY IS A JUDGE-MADE RULE NOT SUPPORTED BY THE TEXT OF THE FAIR HOUSING ACT.**

Forty-five years have passed since President Johnson signed the Fair Housing Act into law, putting a symbolic end to systematic and intentional housing discrimination. Since that time, instances of overt, intentional discrimination are far less common and more likely to be identified and remedied, thanks in part to continued federal support, education and outreach.

However, on Feb. 8, 2013, the U.S. Department of Housing and Urban Development (HUD) issued a final rule that marked a significant expansion of the Fair Housing Act. The rule implemented the act's Discriminatory Effects Standard, which established uniform standards for determining when a real estate practice or policy violates the act. More important, the final rule also recognized that, as part of the act, liability exists under the "disparate impact" theory.

Disparate impact is when a business practice or policy statistically demonstrates a discriminatory effect, regardless of whether the discrimination was intentional. HUD's rule establishes a three part burden-shifting test to determine liability for discrimination:

1. The charging party has the burden of proving a challenged practice caused or predictably will cause a discriminatory effect.
2. The respondent then has the burden of proving that the challenged practice can be supported by a legally sufficient justification.
3. The burden shifts back to the plaintiff to prove there are other practices that can be employed that have a less discriminatory effect.

At issue for apartment owners and managers is that under the new rule, seemingly neutral and common business policies, such as occupancy limitations, criminal background screening and Section 8 voucher policies, among others, could trigger discrimination claims despite no intention of singling out a particular group for adverse treatment.

Given the controversial nature of the rule, it has been challenged a number of times in court. The U.S. Supreme Court is scheduled to hear the case *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* to determine whether disparate impact is covered under the Fair Housing Act.

Learn more at [nmhc.org](http://nmhc.org) and [naahq.org](http://naahq.org)

