



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: Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Docket No. FR-6111-P-02

Submitted via regulations.gov

The National Association of Consumer Advocates (NACA) submits this comment on the U.S. Department of Housing and Urban Development’s (HUD) proposed changes to the disparate impact standard. NACA is a national nonprofit organization actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. Because the disparate impact standard is crucial to the continued and strengthened access to fair credit and homeownership, we strongly oppose any changes to HUD’s current Disparate Impact Rule.

The Fair Housing Act’s (FHA) stated purpose is “to provide...for fair housing throughout the United States.” It makes it illegal to refuse or limit housing opportunities based on a person’s race, color, national origin, religion, sex, disability, or familial status. Fully realizing the promises of the FHA is central to HUD’s mission. To effectively enforce the protections guaranteed by the FHA, disparate impact is an essential tool. Some consumers face not only overt discriminatory policies, but also facially “neutral” policies that exclude members of particular communities from housing opportunities. The disparate impact standard has been widely effective in addressing discriminatory practices in mortgage lending, rental housing, and property insurance.

Proposal Creates Obstacles for Consumers, Gifts for Discriminating Entities

The present proposal would create likely insurmountable barriers for consumers alleging disparate impact. The five-point evidentiary test that HUD is proposing inappropriately places excessive responsibility to consumers to prove that a facially neutral program or practice results in disparate impact. It is unreasonable to expect that a consumer will be able to demonstrate a “robust causal link” between a practice and potential discriminatory effects before the discovery process takes place.

HUD is also proposing additional defenses for financial institutions, landlords, and others accused of using discriminatory models and algorithms. Most worryingly, the new defenses would allow a lender to escape liability if it can show that the algorithm it uses is maintained

by a third party. This allows lenders to shift responsibility from themselves to third-party vendors who develop algorithms without any industry standards to rely on. As a result, lenders are discouraged from scrutinizing third-party algorithms for potential disparate impact. Lenders should not have any incentives to subject borrowers to this kind of reckless treatment.

These changes would drastically weaken an important enforcement tool and undermine HUD's ability to meet its critical obligation to achieve the FHA's central purpose. If this proposal is finalized, the negative effects on consumers will be immense. It is all but guaranteed that many consumers who have suffered discrimination will not be able to move forward with their cases and many lenders will be able to discriminate with impunity. If private enforcement is so hindered, even more consumers around the country will be vulnerable to harm from discriminatory practices by financial institutions, insurance companies, and other corporations involved in the housing market.

Discrimination in Housing Remains a Real and Pervasive Problem

Numerous studies and reports show that discrimination in the housing and lending markets is a real and pervasive problem that causes serious economic harm to American consumers. A 2012 study by HUD and the Urban Institute found that minority home seekers were less likely to be told about and shown homes when compared to equally qualified white home seekers.¹ A 2018 white paper from the Center for Investigative Reporting shows that borrowers of color were more likely to be denied mortgages compared to similar white borrowers.² Further, according to a 2017 report by the Consumer Financial Protection Bureau (CFPB), over \$400 million have been returned to victims of fair lending violations since 2011.³

The effect of the proposed revisions could have ramifications that extend past mortgages and insurance to other industries. Attacks on civil protections in this sector may weaken civil protections in others. Erecting high barriers to proving discriminatory impact here may act as a dangerous precedent to support higher barriers in the auto financing and credit card industries among others. As evidenced by the CFPB's annual Fair Lending Report detailing enforcement and supervisory actions undertaken against lending discrimination, consumers are already facing an unsafe marketplace. Efforts like this one that would shield market actors from claims of discrimination would put consumers at an even greater disadvantage.

We strongly urge HUD not to go forward with this proposed rule. HUD should withdraw this proposal immediately and return to its mission of enforcing our country's fair housing and fair lending laws.

Thank you for this opportunity to comment.

Sincerely,

Sophia Huang
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