

Congress of the United States
Washington, DC 20515

October 18, 2019

The Honorable Ben Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th Street S.W.,
Washington, D.C. 20410

Dear Secretary Carson,

We write to oppose the U.S. Department of Housing and Urban Development's (HUD) release of a proposed rule, "Implementation of the Fair Housing Act's Disparate Impact Standard" (84 Fed. Reg. 42854 (August 19, 2019)), which seeks to amend HUD's 2013 "Disparate Impact Rule" (*Implementation of the Fair Housing Act's Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (February 15, 2013)). Considering Florida's growing affordable housing crisis, we are particularly concerned that the proposal significantly increases the burden on homeowners and renters to establish a disparate impact claim at the beginning stages of litigation when these individuals are already struggling to find housing.

As amended, the Fair Housing Act of 1968 was established to prohibit discrimination in housing-related activities based on race, color, religion, sex, disability, familial status, or national origin. Importantly, the law not only prohibits intentionally discriminatory policies and practices, but also prohibits facially "neutral" policies and practices that have a discriminatory result and unnecessarily limit housing opportunities for certain groups of people. The principals behind the 2013 Disparate Impact Rule was supported and upheld by the U.S. Supreme Court in the *Inclusive Communities* decision (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. __ (2015)).

HUD's 2019 proposed changes to the disparate impact standard would create a new burden-shifting framework that requires plaintiffs who initiate a disparate impact claim under the Fair Housing Act to identify a specific policy or practice that caused the discriminatory impact, by requiring plaintiffs to meet an onerous five factor standard to establish a prima facie disparate impact claim at the beginning stages of litigation. This new framework will make it significantly harder for plaintiffs to meet all of the requirements, threatening years of progress towards equal access to housing and credit for people of color, women, families with children, and people with disabilities.

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In addition to making it more difficult and complex for a plaintiff to prove disparate impact, the burden-shifting framework also benefits the defendants by incorporating special defenses for use of statistics and algorithms, including claims that a “third party, not the defendant, is responsible for creating or maintaining” the algorithm used. While we applaud HUD’s attempts to modernize the framework used protect against housing discrimination, current research shows that algorithmic bias is increasingly prevalent and that algorithms are not yet fully developed to ensure protection against bias.¹

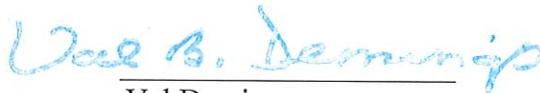
The proposed rule also provides immunity for practices or policies that are more profitable than reasonable non-discriminatory alternatives. Although the proposed rule will likely be a relief to businesses that have been sensitive to disparate impact claims in the past, it is unlikely to decrease the number of fair housing claims and could increase the cost to defend those claims.

We urge you to reconsider the proposed changes to the rule. We look forward to working with you to ensure that every American has access to fair and equal housing, lending, and insurance opportunities.

Sincerely,



Al Lawson
Member of Congress



Val Demings
Member of Congress

¹ <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>