

# Proposed Federal Rule is Detrimental to Housing Protection

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A new proposed rule from the U.S. Department of Housing and Urban Development (HUD) includes substantial changes to a legal tool used in defending fair housing rights and offers protections to the insurance and lending industries for the use of big-data algorithms in housing decisions. Specifically, the proposed rule makes changes to the legal principle of disparate impact. Fair housing advocates should understand the proposed rule and what it means for fair housing in Florida.

The 1968 Fair Housing Act outlaws intentional and unintentional housing discrimination across the United States. This protection is as important today as it was in 1968 as the country continues to grapple with systemic discrimination brought by exclusionary zoning practices, persistent segregation, and inequities in credit access.

## Disparate impact and the existing framework

The legal principle of disparate impact is at the core of the proposed rule. The disparate impact standard allows plaintiffs to challenge housing discrimination without proving explicit discriminatory intent. Disparate impact says the ultimate outcome is what matters most, not the intent. The protections offered by disparate impact are important because intentional discrimination – a property manager telling a woman she cannot rent on the property because her children would be too noisy or a lender saying his bank does not lend to Black people - is increasingly rare.

In 2013 HUD issued an important rule (Disparate Impact Standard) on the use of disparate impact to address policies and practices that ultimately discriminate against protected classes under the FHA, even if those impacts are unintentional. This 2013 rule, still in place today, serves the public by providing an incentive for policymakers and housing providers to modify policies that hurt the objectives of the Fair Housing Act and unnecessarily present barriers to accessing housing opportunities. In its current form, the Disparate Impact Standard has proven both practical and effective. It represents a fair balance between the needs of protected classes under the Fair Housing Act and the legitimate business interests of housing providers and policymakers. It also aligns with decades of judicial precedent, including the 2015

Supreme Court decision *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

The existing rule includes a three-step burden shifting framework as described below:

1. The plaintiff must prove the action, “actually or predictably results in a disparate impact,” which means it has a discriminatory effect based on protected class status.
2. If the plaintiff satisfies this test, the defendant must demonstrate a legally sufficient justification by demonstrating the practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”
3. The final step offers the plaintiff an opportunity to still win by showing an alternative practice that has “a less discriminatory effect.”

## Damaging changes to the burden-shifting framework

The proposed rule fundamentally alters the three-step burden shifting framework by requiring the plaintiff demonstrate all of the following:

1. The policy or practice is “arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective”;
2. A “robust causal link” showing the policy or practice is the direct cause of the discriminatory effect;
3. The alleged disparity has an “adverse effect” on members of a protected class;
4. The alleged disparity is “significant”; and
5. A “direct link” between the disparate impact and the complaining party’s alleged injury.

The proposed framework places an inordinate burden on plaintiffs to argue their case and inserts extreme barriers that would make it significantly harder to bring housing

discrimination cases with the potential to impact the decision-making calculus for housing providers and policymakers.

### Protections for Algorithmic Models Pose a Threat to Fair Housing

The proposed rule change gives immunity to algorithms that, although found to have a discriminatory impact on a protected class, have been reviewed and recognized by a third party or are seen as an “industry standard.”

Legal immunity for algorithmic housing decisions based on an “industry standard” is both arbitrary and willfully ignorant of the rapidly evolving use of big data in the insurance, lending, and housing industries at large.

Disparate impact has been vital in cases that involve discrimination using algorithms such as automated underwriting systems and credit scoring. Algorithms can reproduce existing patterns of discrimination that result from implicit biases. By providing an exception for defendants who use algorithms created by a third party, this proposed rule change encourages adoption and dissemination of systems, databases, and models based on often opaque and inscrutable algorithms. Doing so offers legal protections to major institutions using data-based models with implicit biases. Relying on an “industry standard” without understanding the

deep implications of what these standards may mean for housing discrimination will serve as a detriment to the communities that desperately rely on disparate impact liability.

As stated by Justice Kennedy in *Inclusive Communities*, disparate impact liability under the FHA “permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” Granting immunity to algorithms that have been reviewed by a third

party or are seen as industry standards lends itself to the disguised animus that the Fair Housing Act and Justice Kennedy sought to weed out.

Instead of relying on an unnamed “neutral” third party or a potentially problematic industry standard, we propose an alternative solution. A possible solution is that HUD should create an office dedicated to auditing the algorithms in which housing providers rely upon. This would increase the transparency and accountability of the algorithms that shape the housing market. With HUD as the focal point of analyzing algorithmic models, less deference will be given to an industry that may devise

the models in a way that skirts liability and harms vulnerable communities.

The text of the proposed rule can be viewed here: <https://tinyurl.com/FHAproposedRule>.



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