ABA
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Secretary Marcia L. Fudge
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

RE: ABA urges Withdrawal of the Department of Housing and Urban Development (HUD)'s
2020 update of the Fair Housing Act's Disparate Impact Standard

Dear Secretary Fudge:

I write on behalf of the American Bar Association (ABA), the largest voluntary association of
lawyers and legal professionals in the world, to express our concerns about the potential
discriminatory impact of algorithms that cause unjustified disparities regarding access to
mortgage lending for communities of color, particularly members of Black and Hispanic
communities.

As you know, an algorithm is a sequence of defined, computer-implementable instructions
designed to generate results based upon specified data inputs. Algorithmic decision-making is
being used with increasing frequency by financial institutions, including in deciding whether
loans should be approved and what rates of interest will be offered to borrowers.

Many algorithms are not neutral because they often incorporate or magnify the biases and
prejudices of their human creators or the flaws in their relied-upon datasets. Many algorithmic
decision-making systems have been shown to cause disproportionate and devastating real-life
impacts on minority groups. Studies have shown that the increased use of algorithms in the
mortgage lending sector could lead to a disparate impact on minority communities and thus
violate the principles enshrined in the Fair Housing Act (FHA). For example, a 2019 analysis of
nearly seven million 30-year mortgages by The University of California, Berkeley found that
Black and Hispanic applicants were charged higher interest—an average of nearly 0.08%—and
heavier refinance fees when compared with white borrowers. The report highlighted that the size
of this market makes even a single basis point of discrimination material in aggregate.[1]

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[1] Bartlett et al, *Consumer Lending and Discrimination in the FinTech Era* University of California, Berkley
Research Paper), November 2019, available at: https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.
*See also*, John Villasenor & Virginia Foggo, *Why a proposed HUD rule could worsen algorithm-driven housing
discrimination*, BROOKINGS INSTITUTE, April 16, 2020, https://www.brookings.edu/blog/techtank/2020/04/16/why-
a-proposed-hud-rule-could-worsen-algorithm-driven-housing-discrimination/. The proposed rule also received
extensive comments raising concerns about algorithm discrimination, *see, e.g.,* Letter from Rohit Chopra
Commissioner of the Federal Trade Commission (Oct. 16, 2019),
https://www.ftc.gov/system/files/documents/public_statements/1549212/chopra_-
_letter_to_hud_on_disparate_impact_proposed_rulemaking_10-16-2019.pdf.

On September 24, 2020, the HUD issued an update to an interpretive rule concerning section 100.500(d)(2)(i) of the FHA ("the 2020 FHA Rule") that potentially permits hidden discrimination to occur against millions of Black and Hispanic families seeking access to mortgage loans on fair terms. Specifically, the 2020 FHA Rule creates a defense to a discrimination claim under the FHA where the "predictive analysis" tools used were not "overly restrictive on a protected class" or where they "accurately assessed risk." By creating these threshold defenses, the Rule would make it all but impossible to challenge discriminatory algorithms. Any algorithm has the potential to perpetuate biases. Therefore, the question should not be whether it "accurately assessed risk," but whether it reliably prevents the systemic violation of an applicant's legal rights. Instead of creating a legal defense based on accuracy in predicting risk, the agency should instead subject lenders to a legal presumption of violation any time its algorithm produces disparities involving protected classes of Americans. That presumption can be overcome by the lender's ability to demonstrate that every exclusion of an individual was based on factors already recognized as permissible. That is a high bar, and it should be given what is at stake.

Lenders should not be empowered to use mathematical models that have the effect of discriminating on prohibited bases and in ways that humans would not be permitted to under the Disparate Impact Standard of the FHA. While algorithms can be designed in ways to account for and counteract existing biases, many of the systems are not designed to do so. Indeed, many algorithmic decision-making systems have been shown to replicate, intensify, or create new biases at key decision-making points in the lending process. These systems threaten to amplify already widespread and pernicious practices of racial and ethnic discrimination in mortgage lending.

When businesses adopt and use algorithms to achieve ends otherwise prohibited under the FHA, the individuals subject to discriminatory acts should have recourse. Instead, the 2020 FHA rule makes it nearly impossible for victims of algorithm bias to hold companies accountable for demonstrable harm.[2] This lack of accountability, in turn, may incentivize the adoption of tools that potentially threaten the dignity and economic stability of individuals in minority communities who are simply seeking housing security for their families.

The 2020 FHA Rule, if not withdrawn, severely undermines efforts to resolve our nation's fair lending crisis, and it is inconsistent with President Biden's commitment to eliminate racial and ethnic inequity in housing. As algorithms gain widespread adoption for financing and underwriting housing sector activities, it is critical to provide the oversight needed to ensure that automated decision-making in the lending space is fair and to eradicate bias caused or exacerbated by these systems. Studies conclude that of the 2,098 largest mortgage lenders for the period between 2012 and 2018, 45% already offered complete online or app-based mortgage contracting by 2018[3]. In a post-COVID world, this number is likely to increase. Many of these

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[2] Lauren Sarkesian & Spandana Singh, *HUD's New Rule Paves the Way for Rampant Algorithmic Discrimination in Housing Decisions*, NEW AMERICA, Oct. 1, 2020, https://www.newamerica.org/oti/blog/huds-new-rule-paves-the-way-for-rampant-algorithmic-discrimination-in-housing-decisions/.
[3] Bartlett et al, *supra* note 1 at 5.

new systems incorporate algorithmic decision-making features, which underscores the need to act quickly.

The ABA has been a champion of access to fair housing, "urging governments to promote the human right to adequate housing for all through increased funding, development and implementation of affordable housing strategies and to prevent infringement of that right." (ABA Resolution 117 of 2013.) The association has also strongly encouraged proactive and thoughtful use of technology and innovation to help solve our country's most pressing social and economic challenges. Over the years, the ABA has passed several resolutions strengthening these commitments. To name one recent example: ABA Resolution 112 of 2021 urges HUD to void the 2020 FHA Rule in the interest of eliminating barriers to racial and ethnic equality.
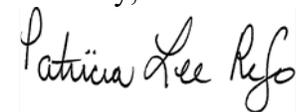
**Urgent Action Required:**

While several studies indicate that automated decision-making can reduce face-to-face discrimination in markets prone to biases, it is also equally the case that the use of algorithms can and has led to discrimination. Any interpretation or application of the FHA must support courts in directing financial actors to ensure that algorithms do not contain, invoke, or further racial and ethnic bias and are only used so long as they uphold the FHA's commitment to fair lending.

The Department should act immediately to withdraw the 2020 FHA Rule and to adopt new guidance and a new rule to ensure the danger of algorithmic bias is adequately tackled. A simple return to the status quo ante will be insufficient to advance the cause of fair and equally accessible mortgage lending. This is because the Rule as issued in 2013 for proving disparate impact claims under the FHA requires that plaintiffs prove a less discriminatory alternative to the challenged practice. In the context of algorithms, proving the existence of less discriminatory alternatives places a substantial (and potentially impossible) burden on plaintiffs, who would be required to find a suitable alternate algorithm function that is supported by evidence and that is not hypothetical or speculative in order to prevail. In the context of algorithms, only mortgage lenders would be in the position to develop and test alternative algorithms.

In sum, the ABA is concerned that the 2020 FHA Rule would not enable the agency to prevent and combat algorithm-based discrimination. Given the rising use of digital technologies and software in the mortgage lending sector, the ABA respectfully requests that HUD withdraw the 2020 FHA Rule and update the 2013 framework to ensure that the algorithms used in the mortgage lender sector (and beyond) serve to reduce disparate impact and encourage greater inclusion and fairness for prospective homeowners.

Thank you for considering the views of the ABA on this critical issue. If you have any questions regarding the ABA's position on the Proposed Rule, please contact ABA Governmental Affairs Director Holly Cook at 202-662-1860 (or Holly.Cook@americanbar.org).

Sincerely,

Patricia Lee Refo