epic.org

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

24 CFR 100

October 18, 2019

Published on August 19, 2019, the Department of Housing and Urban Development ("HUD") gives notice to a proposed rule that implements a change in the Fair Housing Act's Disparate Impact Standard.[1]

As the agency notes, Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act or Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin. Congress gave the authority and responsibility for administering the Fair Housing Act and the power to make rules to carry out the Act to HUD. HUD has implemented prohibitions on discriminatory conduct under the Fair Housing Act at 24 CFR part 100, most recently to include the disparate impact standard in 2013.[2]

The agency further states, in 2013, pursuant to its authority to administer the Fair Housing Act, HUD published a final rule, entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard" (final disparate impact rule). The final disparate impact rule codified HUD's

---

[1] Dep't of Housing and Urban Development, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 84 Fed.Reg. 42854 (August 18, 2019), https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard.
[2] Id.

interpretation that the Fair Housing Act creates liability for practices with an unjustified discriminatory effect and responded to public comments on the proposed rule. Specifically, the final rule provides that liability may be established under the Fair Housing Act when a challenged practice actually or predictably results in a disparate impact on a protected class of persons, even if the practice was not motivated by a discriminatory intent. The rule states that a practice that has a discriminatory effect may still be lawful if supported by a legally sufficient justification. Such a justification exists under the rule where the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant and those interests could not be served by another practice that has a less discriminatory effect. The rule also requires that the legally sufficient justification be supported by evidence and may not be hypothetical or speculative.[3]

Following the decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015),* public comments submitted in response to HUD's May 15, 2017, Federal Register notice, and the recommendation from the Secretary of the Treasury, on June 20, 2018, HUD published in the Federal Register an advance notice of proposed rulemaking (ANPR) inviting comments on possible amendments to HUD's Disparate Impact Rule. The agency reported that HUD received 1,923 comments on the ANPR, and the comments have been considered during the drafting of this new rule. According to the agency, some commenters wrote in support of disparate impact liability more broadly, citing the important part it has played in monitoring exclusionary housing practices for at least 30 years, while others described the disparate impact standard as inconsistent with the constitutional presumption against race-based decision-making.[4]

---

[3] *Id.*
[4] *Id.*

The agency now proposes to revise HUD's current discriminatory effects standard at § 100.500 with a revised standard and to incorporate amendments to §§ 100.5, 100.7, 100.70, and 100.120. The agency states that these amendments are intended to bring HUD's disparate impact rule into closer alignment with the analysis and guidance provided in *Inclusive Communities* as understood by HUD and to codify HUD's position that its rule is not intended to infringe upon any State law for the purpose of regulating the business of insurance. HUD intends these regulations as an update to HUD's existing framework for evaluating administrative actions alleging a claim of disparate impact and to provide guidance to members of the public seeking to comply with the Fair Housing Act or in bringing a claim for disparate impact that meets the prima facie requirements outlined in Inclusive Communities.[5]

Significantly for EPIC, the proposed rule makes several references regarding reliance on algorithmic models to achieve legitimate objectives that may have a discriminatory impact.

Paragraph (c)(2) provides that, where a plaintiff identifies an offending policy or practice that relies on an algorithmic model, a defending party may defeat the claim by:

> (i) Identifying the inputs used in the model and showing that these inputs are not substitutes for a protected characteristic and that the model is predictive of risk or other valid objective; (ii) showing that a recognized third party, not the defendant, is responsible for creating or maintaining the model; or (iii) showing that a neutral third party has analyzed the model in question and determined it was empirically derived, its inputs are not substitutes for a protected characteristic, the model is predictive of risk or other valid objective, and is a demonstrably and statistically sound algorithm.[6]

EPIC submits these comments to HUD to (1) express support for the publication of models used by parties subject to the Civil Rights Act that make transparent the basis of automated decision-making, including the factors considered, the weights assigned, and such elements that may

---

[5] *Id.*
[6] *Id*.

contribute to a determination; (2) recommend that independent audits be required to determine the accuracy and reliability of all such algorithmic-based determination; and (3) oppose, at this time, proposals that such algorithmic-based decision-making provide a safe harbor in litigation, pending the establishment of baseline standards in accordance with the OECD AI Principles and the Universal Guidelines for AI.

In making these recommendations, EPIC notes that HUD, as well as other government agencies are now subject to the OECD AI Principles, which the United States has endorsed. EPIC recommends that HUD incorporate the tenants for AI policy-making expressed in the Universal Guidelines for AI ("UGAI").

EPIC is a public interest research center in Washington, D.C. EPIC that was established in 1994 to focus public attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values.[7] EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the release of reports, validation studies, and use of the Universal Guidelines for AI to guide requirements for trustworthy algorithms.[8] As EPIC President Marc Rotenberg has explained, "Algorithmic accountability is a complex topic, but the impact cuts broadly across life in America, from jobs and credit to housing and criminal justice."[9] EPIC has litigated cases against the Department of Justice to compel production of documents regarding "evidence-based risk assessment tools"[10] and the Department of Homeland Security to produce documents about a program to assess the probability that an individual commits

---

[7] EPIC, *About EPIC* (2019), https://epic.org/epic/about.html.
[8] *See* e.g. EPIC v. DOJ (D.C. Cir.) (18-5307), EPIC v CPB, EPIC v. DHS, FOIA requests, https://epic.org/foia/doj/criminal-justice-algorithms/.
[9] Marc Rotenberg, Editorial, *Bias by Computer*, N.Y. Times, Aug. 11, 2016, at A22, https://www.nytimes.com/2016/08/11/opinion/bias-by-computer.html.
[10] EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)* https://epic.org/foia/doj/criminal-justice-algorithms/.

a crime.[11] EPIC has also recently published the *AI Policy Sourcebook*, the first reference book on AI policy.[12]

The United States is a signatory to the Organization for Economic Co-Operation and Development's Principles on Artificial Intelligence ("OECD AI Principles"), adopted in May 2019 by 42 member countries.[13] The third of five OECD AI Principles is that AI systems should have *"transparency and responsible disclosure…to ensure that people understand AI-based outcomes and can challenge them."*

In the UGAI, principles endorsed by over 250 individuals and 64 organizations worldwide that should govern automated decision-making are set out. The proposed regulations do not comply with the first principle of UGAI, which holds that "All individuals have the right to know the basis of an AI decision that concerns them. This includes access to the factors, the logic, and techniques that produced the outcome."[14]

HUD is for the first time proposing rules that allow algorithmic-based decisions to provide a safe harbor in disparate impact claims. However, the proposed rule fails to comply with the OECD AI Principles as well as the UGAI.

It is important that transparency and other forms of algorithmic accountability be required at in the rule. In practice, the people impacted by algorithms are unable to examine them and determine whether determinations were fair, accurate, transparent, replicable, and provable. Moreover, at trial "trade secrecy effectively creates a property right in many algorithms whose creators do not want to

---

[11] *See Id.* and EPIC, *EPIC v. DHS (FAST Program)* https://epic.org/foia/dhs/fast/.
[12] *EPIC AI Policy Sourcebook 2019* (EPIC 2019), https://epic.org/bookstore/ai2019/.
[13] Organisation for Economic Co-operation and Development, *OECD Principles on AI* (May 2019) https://www.oecd.org/going-digital/ai/principles/.
[14] The Public Voice, *Universal Guidelines for Artificial Intelligence*, (Oct. 23, 2018) https://thepublicvoice.org/AI-universal-guidelines/.

disclose in patent applications."[15] This will make enforcement of the Civil Rights Act more difficult

and assessments about disparate impact more difficult unless HUD takes steps now to improve the

accountability of algorithms.

I. **The Proposed Defenses allow algorithms to be unacceptably opaque.**

HUD is proposing to create three defenses for defendants of disparate impact claims that are

using algorithms to make lending or renting decisions.

The first defense allows a defendant to "break down the model piece-by-piece" and show how

each part "could not be the cause" of disparate impact and that each piece advances a valid

objective.[16] Specifically:

> The first defense allows a defendant to provide analysis showing that the model is not
> the actual cause of the disparate impact alleged by the plaintiff. It allows the defendant
> to break down the model piece-by-piece and demonstrate how each factor considered
> could not be the cause of the disparate impact and to show how each factor advances a
> valid objective. This defense simply lays out the steps that a defendant would take in
> defending its actions[17]

EPIC does not believe that this provision provides a sufficient basis to provide a safe harbor

defense to a disparate impact claim. However EPIC favors greater transparency in algorithmic-

based decision-making and recommends that HUD change the word "allows" to "requires" in the

first and second sentences of this provision. This change would bring text more closely in alignment

with the OECD AI Principle on transparency as well as the UGAI principle on transparency.

The second and third defense are as follows:

> The second defense provides that a defendant can show that use of the model is
> standard in the industry, it is being used for the intended purpose of the third party,

---

[15] Frank Pasquale, *Restoring Transparency to Automated Authority*, 9 Journal on Telecommunications & High Technology Law 235 (2011). https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2357&context=fac_pubs.
[16] Dep't of Housing and Urban Development, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 84 Fed.Reg. 42854 at 42859 (August 18, 2019), https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard.
[17] *Id.*

and that the model is the responsibility of a third party…[The defense] recognizes that there are situations in which standard practice is so clearly established that the proper party responsible for the challenged conduct is not the defendant, but the party who establishes the industry standard.

…

The third defense is similar to the first and provides defendants with another method of showing that the model is not the actual cause of the disparate impact. This defense allows defendants to prove through the use of a qualified expert that the model is not the cause of a disparate impact. A plaintiff may rebut this defense by showing that the party is not neutral, that the analysis is incomplete, or that there is some other reason why the third party's analysis is insufficient evidence that the defendant's use of the model is justified.[18]

The second defense creates a safe harbor if a defendant "can show that use of the model is standard in the industry, it is being used for the intended purpose of the third party, and that the model is the responsibility of a third party."[19] HUD, in explaining this defense, suggests the plaintiff would be better able to improve the industry by directly suing the party "establish[ing] the industry standard" rather than the party that is using it to make decisions about them directly. However, HUD articulates that even "the defendant may not have access to the reasons these factors are used or may not even have access to the factors themselves, and, therefore, may not be able to defends the model itself, even where a perfectly rational reason exists for its use."[20] Although it may be true that challenging the creator of the algorithm rather than one user may be a more significant step toward fairness in the industry, a plaintiff is not in the position to know what algorithms are even being used against them.

The third defense HUD proposes is for a defendant to succeed where they can "prove through the use of a qualified expert that the model is not the cause of a disparate impact." The

---

[18] *Id.* at 42859-42860.

[19] Dep't of Housing and Urban Development, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, 84 Fed.Reg. 42854 at 42859 (August 18, 2019), https://www.federalregister.gov/documents/2019/08/19/2019-17542/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard.

[20] *Id*.

plaintiff can rebut this defense by showing the "third party is not neutral, that the analysis is incomplete, or that there is some other reason why the third party's analysis."[21]

EPIC believes that neither provision provides a sufficient basis for a safe harbor defense. EPIC recommends that HUD adds a required level of transparency for both the second and third defenses to comply with the OECD AI Principles. EPIC proposes that for both, the following language is added:

> The defendant or the developer of the model that the defendant is using must accompany this defense with a disclosure to the plaintiff of both the factors included in the model, the logic of the model, and the weights of each factor included.

The inclusion of this requirement would ensure that transparency cannot be easily avoided by choosing any of the three defenses.

Conclusion

The proposed changes to HUD's disparate impact analysis allow the use of algorithmic-based determination that fail to comply with either the OECD AI Principles or the UGAI. EPIC recommends that the regulation be revised to fully reflect all of the obligations for algorithmic-based decision-making set out in these two policy frameworks. Once these baseline standards are in place it will then be possible to make an evidence-based assessment and determine whether a change in the allocation of burden for demonstrating disparate impact is necessary or justified.

Respectfully submitted,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Christine Bannan
Christine Bannan
EPIC Consumer Protection Counsel

/s/ Ben Winters
Ben Winters
EPIC Equal Justice Works Fellow

---

[21] *Id.*