

**SUBMITTED VIA REGULATIONS.GOV**

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**

Dear Sir or Madam,

Public Knowledge submits these comments as a consumer advocacy group in opposition to the proposed rule. The proposed rule makes the already difficult process of proving a disparate impact claim even more challenging when certain technologies are used. The rule would put up an even higher bar to consumers challenging decisionmaking that affects housing, credit, or other important matters. This proposed rule would have a profound negative impact on consumers, particularly consumers from protected classes. The proposed rule is also in tension with the growing legal precedent that people should be able to challenge the accuracy of technological systems used to their detriment. For example, the Ohio Supreme Court held that the results from breathalyzers is able to be challenged, giving the defendant the means to ensure the accuracy and fairness of the technology. We believe that this level of disclosure for algorithmic decisionmaking systems is necessary for there to be true transparency and fairness in the housing process.

As companies increase their use of automated decisionmaking systems and AI in housing and credit processes, consumers are risk of not knowing what information is being used against them and not being able to challenge the results of these systems. The proposed rule would place consumers at a significant disadvantage, and would allow housing providers to create or use

biased algorithmic decisionmaking systems that could accept or deny candidates based on the results of a black box model. Consumers would have little recourse when challenging decisions made in this way, of understanding how the system made its decision, or of finding out what data sets the system was trained on. Consumers should have the right to challenge the decisions that algorithmic systems make, particularly those that deal with protected activity such as looking for housing or insurance.

### **I. Consumers need to have access to all of the data and code that influences a decisionmaking algorithm**

Consumers should be able to have access to the data and underlying code that the decisionmaking system is using. The proposed rule states that a housing provider using these algorithmic decision making tools would be able to defend against a disparate impact claim by “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.”<sup>1</sup> The proposed rule claims that this would allow the users of these technologies to provide evidence that the model or decisionmaking system is not the actual cause of the disparate impact.<sup>2</sup> While there may be inputs that do not correlate directly with a protected class, studies have shown that data driven systems can inherit discriminatory biases from its training data.<sup>3</sup> By not allowing access to the underlying training data, the source code, or which data points the decisionmaking system prioritizes, the proposed rule allows housing providers to create or use potentially discriminatory algorithmic systems for which they would not be accountable. The proposed rule should instead allow unrestricted access to the data and code behind technologies.

Some courts have already looked at the question of how much access should be granted to new technologies and found that there should be more access given not less. In *The City of Cincinnati v. ILG*, the Ohio Supreme Court held that the defendant could challenge the accuracy,

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<sup>1</sup> 84 Fed. Reg. 42854, 42862 (2019).

<sup>2</sup> Id.

<sup>3</sup> See Anupam Datta et al., *Proxy Discrimination in Data-Driven Systems: Theory and Experiments with Machine Learnt Programs*, arXiv (2017) <https://arxiv.org/pdf/1707.08120.pdf>.

competence, admissibility, relevance, authenticity, or credibility of specific test result even if the device was approved by the Ohio Department of Health.<sup>4</sup> The court found that since the state did not give the defendant access to all requested information on the breathalyzer results that the breath test then had to be excluded from evidence.<sup>5</sup> Of note, the court did not grant an exception to the City of Cincinnati because the breathalyzer machine was created by a third party, unlike the proposed rule. Rather, the court found that it was still the defendant's right to challenge the results and the underlying data behind it.

There are other cases, as well, where a private party's desire to keep details of its technology secret conflicts with the demands of justice. For example, agreements between the FBI, local law enforcement, and the Harris Corporation led to a situation where law enforcement would prefer to drop charges rather than comply with discovery requests.<sup>6</sup> In other cases prosecutors are alleged to have engaged in "deliberate and wilful misrepresentation" regarding technology used to put people in jail.<sup>7</sup> Fairness in criminal prosecutions demands that defendants have full access to the devices, source code, data, and other material that may have bearing on whether they are being falsely accused. Neither non-disclosure agreements, copyright, patent, trade secret law, or other legal theories should prevent defendants having the access they need (nor should protective orders or other mechanisms prevent them from sharing what they uncover with outside experts or other criminal defendants).

Similar transparency requirements should apply for plaintiffs who wish to challenge the results of algorithmic decisionmaking systems that impact the availability and cost of housing (or other sensitive areas, such as employment or school admissions). The range of social outcomes affected by matters such as these are too important to allow various secrecy claims to stand in the

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<sup>4</sup> *Cincinnati v. Ilg*, 141 Ohio St.3d 22, 2014-Ohio-4258.

<sup>5</sup> *Id.*

<sup>6</sup> See Cyrus Farivar, FBI would rather prosecutors drop cases than disclose stingray details, *Ars Technica* (April 7, 2015),

<https://arstechnica.com/tech-policy/2015/04/fbi-would-rather-prosecutors-drop-cases-than-disclose-stingray-details>.

<sup>7</sup> Nicky Woolf, *2,000 cases may be overturned because police used secret Stingray surveillance*, *The Guardian* (Sep. 5, 2015),

<https://www.theguardian.com/us-news/2015/sep/04/baltimore-cases-overturned-police-secret-stingray-surveillance>.

way.<sup>8</sup> By not allowing a full and robust challenge of the accuracy, competence, admissibility, relevance, authenticity, or credibility of specific results, the proposed rule instead facilitates companies to use discriminatory models without any significant recourse. There are many different ways that an algorithmic decisionmaking system could find proxies for race or ethnicity that would not be direct substitutes for a protected class, but would highly correlate with one. “Neutral” algorithms that reach discriminatory conclusions can become self-fulfilling prophecies, as people who have mortgages or credit cards with higher interest rates might be more likely to default for that reason alone, thus giving them lower credit scores, and so on. Disparate impact law is one way to break out of this cycle - by outlawing practices that have a disparate impact on protected classes, members of those classes are more likely to receive individualized consideration, which can lessen, in their cases, the effects of historical and structural bias.

## **II. Housing providers are responsible for the technology they deploy**

Housing providers should be responsible for the technology they use. The proposed rule states, “that [if] a recognized third party, not the defendant, is responsible for creating or maintaining the model” then the defendant would not be liable under disparate impact theory.<sup>9</sup> This theory makes little sense. It is true that a model may be faulty or discriminatory and we do not suggest that the creators of models should be free from liability. But a model may be misused, or may be discriminatory in one context and not another. The facts are too complex for a blanket rule such as HUD proposes.

HUD has already said that housing providers are responsible for the conduct of third parties. As such, the proposed rule is inconsistent with HUD’s existing policies. HUD has already stated

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<sup>8</sup> See generally Veronica Gaitán, *How Housing Affects Children’s Outcomes*, How Housing Matters (January 2, 2019) <https://howhousingmatters.org/articles/housing-affects-childrens-outcomes/>; Lauren Taylor, *Housing And Health: An Overview Of The Literature*, Health Affairs (June 7, 2018) <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>; Edward L. Glaeser and Bruce Sacerdote, *The Social Consequences Of Housing*, Journal of Housing Economics vol. 9 1 (2000) <https://www.nber.org/papers/w8034>.

<sup>9</sup> 84 Fed. Reg. 42854, 42862 (2019).

that housing providers are liable for “[f]ailing to take prompt action to correct and end a discriminatory housing practice by a third party, where it knew or should have known of the conduct and had the power to correct it.”<sup>10</sup> Whether that third party is an employee, agent, or algorithm should be inconsequential. Housing providers have an affirmative legal responsibility to not discriminate on the basis of protected categories no matter what systems or tools they use.

The proposed rule also overlooks certain marketplace realities, such as the fact that these algorithmic systems are protected by trade secrets or other intellectual property law. The housing provider or third party developer would have little to no incentive to let a plaintiff engage in any meaningful discovery relating to the algorithm. As discussed above, to meaningfully audit an algorithmic decisionmaking system, plaintiff would need to access its source code, training data, input and output. Any rule designed to address issues of bias in automated decisionmaking must allow for plaintiffs to have full access and not be inhibited by trade secret or other intellectual property law. Policies that shift and obscure the responsibility for discriminatory outcomes

## **Conclusion**

Consumers deserve a clearer understanding of how the algorithms that affect their lives work, and how they impact important moments in their lives. Adding additional barriers to consumer transparency adds to regulatory uncertainty, consumer distrust, and stifles innovation.

Companies want to know what they are complying with is consistent with the law as it was intended. Consumers want to be able to trust the products or housing providers they apply to. If a housing provider is discriminatory, consumers would more likely than not be less inclined to trust it. This proposed rule threatens to create an environment where the claims of companies cannot be tested or challenged by those seeking housing at a time when affordable housing options are limited. The proposed rule lacks the requisite accountability and transparency to consumers and the public. For the foregoing reasons we oppose the NPRM.

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<sup>10</sup> 24 CFR § 100.7