

John Smaby  
2019 President

Bob Goldberg  
Chief Executive Officer

**ADVOCACY GROUP**  
William E. Malkasian  
Chief Advocacy Officer/Senior Vice President

Shannon McGahn  
Senior Vice President Government Affairs

500 New Jersey Avenue, NW  
Washington, DC 20001-2020  
Phone 202-383-1194  
WWW.NAR.REALTOR

October 18, 2019

The Honorable Anna Maria Fariás  
Assistant Secretary, Fair Housing and Equal Opportunity  
U.S. Department of Housing and Urban Development  
451 Seventh Street SW  
Washington, DC 20410

*Submitted via: <https://www.federalregister.gov/documents/2019/08/19/2019-17542/buds-implementation-of-the-fair-housing-acts-disparate-impact-standard>*

RE: FR-6111-P-02 HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

On behalf of the more than 1.3 million members of the National Association of REALTORS® (NAR), I thank you for the opportunity to comment on the proposed changes to the Department of Housing and Urban Development's (HUD) proposed rule on its implementation of the Fair Housing Act's Disparate Impact Standard. REALTORS® are deeply engaged in ensuring that a fair and equal housing market is able to flourish and provide safe and secure homeownership opportunities across our nation. NAR appreciates the ways the proposed rule is consistent with the Supreme Court decision in *Inclusive Communities*, providing needed clarity to the issue of disparate impact claims. However, NAR has concern that some of HUD's revisions place too heavy a burden on the ability of parties to bring an initial disparate impact claim.

### **REALTORS® Interest in Fair Housing**

Fair and free housing choice is a key component of a healthy and functional housing market. Neighborhoods benefit from a wide range of diversity, translating to educational and commercial benefits for the greater community. Unfortunately, de facto segregation still exists in this country, some the result of policies of the past, and some still reinforced by existing practices. NAR research found that Hispanic, Asian, and white focus group participants recounted fewer instances of direct and intentional forms of steering in real estate transactions – compared to more subtle forms – while African-American participants strongly felt discrimination remained a problem and provided concrete examples of discrimination in real estate transactions.<sup>1</sup> Those subtle forms of steering are exactly the type of actions the disparate impact standard is meant to address. This discrimination is likely a factor in the lower rates of homeownership seen among African-American (41.6%), Hispanic (46.2%), and Asian and Native Hawaiian/Pacific Islander (57.2%) populations compared to non-Hispanic, white populations (72.3%).<sup>2</sup> Of particular concern is that even when accounting for similar credit scores and income, discrepancies still exists among these groups.

Over the last 100 years, NAR has evolved from an organization in the 1920s that mistakenly supported an ethical code prohibiting integration to one that is a leading advocate for strong fair housing rights. As evidenced by Article 10 of our Code of



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<sup>1</sup> "Fair Housing at 50: Expanding Access to Opportunity." (p.5) National Association of REALTORS®, May 2018.

<sup>2</sup> "Fair Housing at 50: Expanding Access to Opportunity." (p.7) National Association of REALTORS®, May 2018.

Ethics, REALTORS® are committed to preventing discrimination and advancing fair housing everywhere. REALTORS® worked hard to become some of the strongest advocates for a fair and impartial housing market, one that would allow any financially sound borrower the ability to achieve the American Dream of home ownership.

By the 1970s, NAR was working directly with HUD to develop active programs and policies designed to promote and protect fair housing rights. Today, NAR has surpassed the federal government in some of its views on fair housing, including in its assessment of protected classes of sexual orientation and gender identity, and plays a significant role in advocating for improved fair housing policies. For instance, in 1988, NAR took a leading role in the housing industry to secure passage of the Fair Housing Act Amendments, strengthening enforcement of the law and adding protections for families with children and people with disabilities. In 1996, NAR entered into the historical NAR/HUD Fair Housing Partnership with the goal to identify and eradicate the causes of housing discrimination. A year later, in partnership with HUD, NAR trained tens of thousands of real estate professionals to identify and implement proactive steps to increase the diversity of America's real estate markets. In 2007, NAR joined the civil rights community in a call for HUD to implement its obligation to affirmatively further fair housing.

Today, REALTORS® continue to advocate for systematic reforms to our nation's credit score models, which historically have locked countless potential buyers out of homeownership. Additionally, NAR is working closely with state and local REALTOR® associations to collaborate and support specific referenda, policy recommendations, and residential projects that support NAR's commitment to fair housing and housing opportunity. NAR recently hired its first director of fair housing policy as a way to further expand efforts to promote housing opportunity.

Ultimately, NAR supports disparate impact as a legal theory to address the unfair housing practices that inhibit fair housing and unfairly target members of protected classes, while still protecting the ability of REALTORS® and other stakeholders to run their businesses in a free and functional real estate market.

NAR continues to view HUD as a valued partner in empowering additional Americans to achieve home ownership. It is with this view that NAR submits its comments to HUD's proposed rules. While there are elements that NAR believes are steps in the right direction, NAR is concerned that some aspects of the rule could limit the ability of a party to bring up a reasonable claim of disparate impact. HUD should also reconsider the standards for reasonable defenses to entities' legitimate business needs. The ultimate goal should be to ensure a healthy and functional housing market that is also free from unfair discriminatory practices.

### **NAR Positions on Proposed Disparate Impact Rule**

NAR supports a burden-shifting framework similar to the approach articulated by the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, (June 25, 2015). HUD's proposed rule would require a claimant to demonstrate that the business goals of the entity whose practice or policy is being questioned are "arbitrary, artificial, or unnecessary," to achieve those goals. It is unreasonable to expect a claimant, especially a vulnerable, injured party, to know the specifics of a defendant's business so as to be able to make this assertion of "arbitrary, artificial, or unnecessary." It is both fair and logical that showing that there is a legitimate business purpose to the policy or practice is an affirmative defense to a claim of disparate impact. The defendant is in the best place to know why a policy or practice is legitimate in terms of their business needs. HUD itself recognizes in the preface to the proposed rule that claimants "will not always know what legitimate objective the defendant will assert" in response to the disparate impact claim. NAR would support a change requiring a practice be "legitimate," rather than "substantial" as in the current rule, or "artificial, arbitrary, and unnecessary" as in the proposed rule. Using "legitimate" as the standard for an allowable business purpose is neither onerous nor beyond achievement. It would prevent any egregious practice that is causing a disparate impact to continue.

Additionally, NAR has some concerns regarding HUD's proposed changes to defenses available against a disparate impact claim. Where the compliance with state and local laws could lead to conflicts with fair housing rules, NAR urges coordination among HUD and other federal, state, or local entities to ensure that all levels of government have equivalent fair housing rules in place. In particular, NAR opposes discrimination related to property hazard insurance and would not support the additional

defense for insurance law compliance. Preventing discrimination in housing is key to healthy communities and this goal should not be undervalued at any level of government.

Without question, the growing reliance on data and technology by real estate stakeholders, including brokerages and independent REALTORS®, in regular business operations raises questions of reasonable accountability with regards to disparate impact claims. While NAR does not dictate whether a business should or should not be reliant on certain new technologies, there is concern under the proposed rule regarding the wide deference that HUD would give to an entity that uses an algorithm-based product that is causing a disparate impact. Although reasonableness is required in terms of what is available to a real estate business to meet their modern business and technology needs, there should be some sort of accountability if the algorithm is causing a true disparate impact against a protected class of individuals. Under the existing framework, a claimant would have no recourse for an algorithm that caused a disparate impact, as the algorithm creator did not cause direct harm. The rule could be amended to allow claims to be made against the creator of an algorithm which caused a disparate impact.

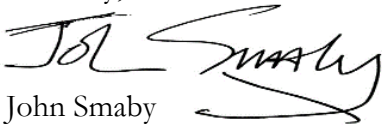
NAR believes that unless a party knew or reasonably should have known of the discriminatory effect of a policy or practice, the only remedy for such a discriminatory practice should be correcting the action to remove the discriminatory effect and only if there is a readily achievable, less discriminatory alternative to achieving the legitimate business purpose of the policy or practice without being unduly burdensome. In that case, NAR supports a change promoting remedies that correct an ongoing disparity over those that punish a past action. The real estate market as a whole functions best when it has the ability to change with the times and incorporate new and better practices that benefit growth in housing. The fear of overly punitive damages can restrict that much needed ability to change, to the detriment of the American consumer.

NAR supports HUD's proposed language change to clearly state that a lack of data collection on the part of any party regarding protected classes will not be held against either party. Unreasonable research expectations for REALTORS® and other parties with respect to disparate impact concerns would inhibit the ability of real estate partners to serve potential homeowners. Overly burdensome data maintenance requirements can stifle a healthy real estate market, limiting the ability of both small and large real estate entities and practitioners to serve consumers.

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NAR looks forward to working with HUD on evaluating the aforementioned elements of the proposed rule. Changes to the disparate impact rule are welcome, but must be done with appropriate regard for promoting fair housing rights while also protecting the ability to conduct day-to-day real estate business transactions. Thank for you the opportunity to comment on this matter. If you have any questions regarding this letter, please contact me or NAR's Senior Policy Representative, Sehar Siddiqi, at 202-383-1176 or [SSiddiqi@NAR.REALTOR](mailto:SSiddiqi@NAR.REALTOR).

Sincerely,



John Smaby  
2019 President, National Association of REALTORS®