APPENDIX A: Past Industry Comments on Disparate Impact

CFPB Rulemaking ECOA December 2020

- Lending Club, Request for Information on the Equal Credit Opportunity Act, December 1, 2020

HUD Rulemakings on the Fair Housing Act's Disparate Impact Standard, 2019 and 2020

- Zest Finance, Notice of Proposed Rulemaking, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, October 18, 2019
- Letter to HUD, Bank of America, Implementation of the Fair Housing Act's Disparate Impact Standard, June 29, 2020
- Letter to HUD, Wells Fargo, Fair Housing Act Disparate Impact Rule, July 14, 2020
- Letter to HUD, Quicken Loans, Pending Implementation of the Fair Housing Act's Disparate Impact Standard, July 10, 2020
- Letter to HUD, National Association of Realtors, Implementation of the Fair Housing Act's Disparate Impact Standard, July 13, 2020
- Letter to HUD, National Association of Affordable Housing Lenders, Notice of Proposed Rulemaking, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, October 18, 2019

December 1, 2020

Office of Regulations
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Docket No. CFPB-2020-0026

RE: Request for Information on the Equal Credit Opportunity Act

Dear CFPB Senior Counsel,

Thank you for this opportunity to comment on regulation under the Equal Credit Opportunity Act ("ECOA"), one of the laws most central to establishing a financial system that treats consumers and small businesses fairly.

The goals of ECOA are also central to LendingClub's mission to empower our members on their path to financial health. LendingClub is America's largest online credit marketplace, facilitating personal loans, auto loans, and small business loans. We operate fully online and use technology to lower the cost of credit, helping people reduce the cost of their debt, build a path to savings, and achieve their financial goals every day. To date, LendingClub has facilitated over $60 Billion in loans, and has been the largest provider of unsecured personal loans in the country.

This request for information comes at an important time. We are in the midst of a pandemic and an economic crisis that are causing disproportionate suffering for communities of color, the elderly, and other groups protected under ECOA. This is exacerbating a longstanding racial wealth gap and other inequalities.

The country is also engaged in an overdue deepening of our conversation about racial justice. Many companies, including LendingClub, have responded by looking harder for opportunities to be part of the solution and to better serve Black customers, employees, and partners. Many of the initiatives that make up LendingClub's new Racial Justice Plan are directly related to ECOA, including the ongoing advocacy for pro-consumer, pro-innovation fair lending regulation reflected in this letter.[1]

The pandemic has also accelerated trends towards the use of online services, often because they are accessible safely from home. As technology takes an ever-greater role in financial services, we commend

[1] Other elements of the LendingClub Racial Justice Plan include applying a lens of "bridging racial and economic inequality" to our existing and future products, naming racial equity as a specific community need we will address in the Community Reinvestment Act Strategic Plan of LendingClub Bank (currently in formation and pending regulatory review), and enhancing partnerships with community development financial institutions ("CDFIs") to serve underserved borrowers. Internal to LendingClub, we are establishing recruiting channels focused on Black professionals, setting new supplier diversity goals with minority-owned businesses, enhancing leadership development and allyship programs for employees in underrepresented minority groups, conducting anti-racism training, and increasing our HR diversity goals.

the CFPB for targeting this request for information on "cutting-edge issues at the intersection of fair lending and innovation, including how innovation can increase access to credit for all consumers."[2]

Indeed, many of LendingClub's successes as a business are due to harnessing market incentives to serve people that other financial services companies may overlook or overprice. About 70% of personal loan borrowers come to LendingClub to refinance expensive credit card debt, often because LendingClub can provide lower interest rates than they are being charged on their credit cards. In studying LendingClub's personal loan data, Federal Reserve researchers found that the approach used by LendingClub, "has allowed some borrowers who would have been classified as subprime by traditional criteria to be slotted into 'better' loan grades, which allowed them to get lower-priced credit. In addition, for the same risk of default, consumers pay smaller spreads on loans from LendingClub than from credit card borrowing."[3] This expanded access to lower-cost credit for some consumers who might be treated as subprime speaks to the potential of technology-based lending to advance the goals behind ECOA.

Further research from the Federal Reserve Bank of St. Louis, largely drawing on LendingClub data, found that, "on average and for every risk level, fintech lenders offer lower annual percentage rates (APRs) when compared to those of credit card firms."[4] A third study, also by researchers at the Federal Reserve, found that, "LendingClub's consumer lending activities have penetrated areas that may be underserved by traditional banks, such as in highly concentrated markets and in areas that have fewer bank branches per capita."[5]

More recently, LendingClub has begun helping members refinance their auto loans, reducing the APRs they pay by an average of over five percentage points and saving an average of about $2,750 over the life of the loan.[6] Much of this savings may be the result of reducing the impact of markups added by auto dealers when a consumer finances the purchase of a vehicle at a dealership. According to research by the National Consumer Law Center, auto dealers are twice as likely to add these markups to loans of Black borrowers than to White borrowers, and those markups are routinely two-to-four times higher for Black people.[7] Again, LendingClub has found a business incentive to provide fair access to lower the cost of credit for borrowers who may be unfairly overpriced.

Our small business lending program also provides affordable loans to borrowers underserved by traditional banks, aligned with the goals of ECOA raised here by the CFPB. Our program is operated in close partnership with Accion Opportunity Fund, the largest the nonprofit CDFI small business lender. It

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[2] Consumer Financial Protection Bureau, "Request for Information on the Equal Credit Opportunity Act and Regulation B," Docket No. CFPB-2020-0026, August 3, 2020. https://files.consumerfinance.gov/f/documents/cfpb_rfi_equal-credit-opportunity-act-regulation-b.pdf.

[3] Jagtiani, J. and C. Lemieux, "The Roles of Alternative Data and Machine Learning in Fintech Lending: Evidence from the LendingClub Consumer Platform," Federal Reserve Bank of Philadelphia, Working Paper 18-15. April 2018. https://onlinelibrary.wiley.com/doi/full/10.1111/fima.12295.

[4] Bieseitov, E. "Unsecured Personal Loans Get a Boost from Fintech Lenders," Federal Reserve Bank of St. Louis, July 2019. https://www.stlouisfed.org/publications/regional-economist/second-quarter-2019/unsecured-personal-loans-fintech#1

[5] Jagtiani, J. and C. Lemieux, "Do Fintech Lenders Penetrate Areas that are Underserved by Traditional Banks," Federal Reserve Bank of Philadelphia, Working Paper No. 18-13, Mar. 2018, https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2018/wp18-13.pdf.

[6] Analysis as of October 2020

[7] Rossman, Stuart, "The Data Is Clear: Auto Lenders Discriminate," US News & World Report, Nov. 2015, http://www.usnews.com/opinion/economic-intelligence/2015/11/17/dont-let-congress-weaken-oversight-of-discriminatory-auto-financing.

has seen five times the representation of minority-owned businesses, and four times the representation of women-owned businesses, as compared to bank conventional lending, with APRs often a fraction of what small businesses may pay other online lenders.[8]

In the following comment, we offer suggestions to help improve the efficacy of ECOA regulation with respect to the disparate impact fair lending framework, special purpose credit programs, small business lending, sexual orientation and gender identity, and adverse action notices.

Disparate Impact

The disparate impact framework is one of the most important ECOA issues of the day because it addresses a central fair lending question posed by technology: the risk of algorithmic discrimination. As one of the leading technology innovators in financial services, perhaps the most frequent question we are asked in policy settings is, "How can you ensure that lending innovation in alternative data, machine learning, and artificial intelligence will not result in discrimination?" This question speaks to the concern that new data or algorithms could include proxies for protected classes or treat protected classes at a disadvantage, perhaps without the humans employing those algorithms intending or even realizing it.

ECOA's disparate impact framework addresses these concerns of algorithmic discrimination by requiring lenders to address discriminatory *outcomes* in their lending practices, regardless of whether those outcomes are the result of new algorithms or traditional credit models, or any other reason. Whatever the cause, and whether or not there was any discriminatory intent, the outcomes-based disparate impact framework requires lenders to identify and prevent discriminatory outcomes.

Because of ECOA's disparate impact framework, consumers and small businesses have protection from algorithmic discrimination in financial services that they do not enjoy elsewhere in the economy, online or offline.

As the Center for Responsible Lending's President explained in testimony to the Senate Committee on Banking, Housing and Urban Affairs:

> "Machine learning holds much promise, but it also can bring in discriminatory and unnecessary factors. Disparate impact analysis encourages creative approaches that both increase effectiveness and inclusiveness. This process and the value of disparate impact analysis was recently pointed out, and endorsed by, the largest personal loan company in the country, LendingClub, in its responses to requests for input by the CFPB."[9]

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[8] Benchmarked by dollar to bank conventional loan programs cited in "21st Century Barriers to Women's Entrepreneurship" by the U.S. Senate Committee on Small Business and Entrepreneurship (July 2014) and Competitive and Special Competitive Opportunity Gap Analysis of the 7(a) and 504 Programs by Kenneth Temkin of the Urban Institute (Jan. 2008). Although this may be the most relevant data available, it is aged. Analysis draws on SSBF data from 2003. Implementation of Section 1071, discussed below, would provide more current data.

[9] Calhoun, Michael, Testimony before the United States Senate Committee on Banking, Housing, and Urban Affairs, March 2019. https://www.banking.senate.gov/imo/media/doc/Calhoun%20Testimony%203-27-19.pdf

Indeed, LendingClub described the value we find in disparate impact regulation in a June 2018 comment letter to the CFPB,[10] during a period when the CFPB was considering changes to disparate impact policy.[11] As we shared then, we appreciate the disparate impact regime for addressing potential unintended or algorithmic discrimination while *also* being able to accommodate innovations in alternative data, machine learning, and artificial intelligence. In this sense, it is a pro-innovation policy. It can protect borrowers *and* allow technology innovations to create powerful credit models that can deliver the lowest prices and greater financial inclusion—some of the ultimate goals of ECOA.

We view disparate impact as a potential model for pro-innovation regulation because of this outcomes-based approach. Now that data is widely available and measurable, regulation based on measuring whether companies accomplish defined outcomes could become a compelling approach to pro-consumer, pro-innovation regulation. Defined, measurable outcomes can bring greater certainty to principles-based regulations that are sometimes seen as unclear for industry, resulting in criticism of regulation through enforcement. Outcomes-based regulation is also an alternative to rules-based regulation, which may inhibit innovations that could produce better outcomes for consumers while not conforming to the defined rules.

LendingClub also shared our views on the value of disparate impact with the Department of Housing and Urban Development ("HUD") in 2019, in response to HUD's proposed rules that would limit disparate impact regulation.[12] While HUD's revision of their proposal did not fully address LendingClub's concerns, we are heartened that HUD appeared to take LendingClub's comments into account by eliminating an aspect of their proposal which would have shifted disparate impact analysis from outcomes-based regulation towards an inputs-based analysis defining a limited set of acceptable variables.

While LendingClub was one of the only companies speaking to the importance of disparate impact to the CFPB and HUD during those periods, other industry innovators have come to share this point of view. Indeed, the Marketplace Lending Association, founded by LendingClub and other fintech lenders, shared its concerns about HUD's disparate impact rule in an March 2020 American Banker Op-Ed entitled, "Don't Ditch Disparate Impact."[13] Since the killing of George Floyd in May 2020, several large banks have also expressed concerns about HUD's proposal to limit disparate impact regulation.

Because of the importance of disparate impact regulation to both underserved communities and to innovation, we encourage the CFPB to publish guidance clarifying regulatory expectations on five topics:

(a) The applicability of disparate impact analysis to discriminatory outcomes produced by models employing alternative data, machine learning, or artificial intelligence.

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[10] LendingClub comment to the Consumer Financial Protection Bureau, "Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities; Maintain Disparate Impact Policy," June 2018. https://www.regulations.gov/document?D=CFPB-2018-0012-0075.

[11] See e.g. Mishkin, Barbara, "Mulvaney Comments on Enforcement Approach, Use of Disparate Impact," Ballard Spahr Consumer Finance Monitor, May 30, 2018. https://www.consumerfinancemonitor.com/2018/05/30/mulvaney-comments-on-enforcement-approach-use-of-disparate-impact/

[12] LendingClub comment to the Dept. of Housing and Urban Development, "Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02," Oct 2019. https://www.regulations.gov/document?D=HUD-2019-0067-2911

[13] Hoops, N, "Don't Ditch Disparate Impact," American Banker, March 2020. https://www.americanbanker.com/opinion/dont-ditch-disparate-impact

(b) Greater specificity about what may constitute a "legitimate business need."

(c) Good practices for lenders searching for less-discriminatory alternatives.

(d) Risks, and protection from risks, that lenders may incur in collecting demographic data outside of mortgage lending for use in fair lending self-testing under Regulation B.[14]

(e) What the CFPB may consider acceptable standards of practical significance in statistical analysis.

Special Purpose Credit Programs

We believe that special purpose credit programs, designed to specifically serve borrowers from disadvantaged groups, represent a valuable opportunity for financial services providers like ours to grow and deliver value to customers, while addressing historical discrimination and closing demographic gaps. The CFPB can encourage firms to explore development of special purpose credit programs by publishing examples that may inform new programs in development and provide comfort for lenders about appropriate uses of the regulatory exemptions granted through these programs.

Small Business Lending

We deeply appreciate the CFPB's question about ways it might "support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned."[15] This goal has animated much of LendingClub's busines and public policy activities since we launched our small business lending program in 2013, which has seen five-times the representation of minority-owned businesses, and four-times the representation of women-owned businesses, when compared with traditional bank conventional business lending.[16] Based on this experience , we hope to share suggestions for how the CFPB can encourage similar lending to reach women and minority entrepreneurs.

In 2014, our goal of growing a market of fair, affordable, and transparent financing for underserved small businesses brought us together with a group of nonprofit CDFIs, advocacy nonprofits, and other fintechs who shared our values. Together we founded the Responsible Business Lending Coalition to address the rise of irresponsible small business lending we have observed over the past decade and to promote innovative and responsible lending practices.[17]

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[14] Fair lending self-testing is addressed in a Federal Reserve rule amending Regulation B, published in 2003. As far as we understand, few lenders have taken advantage of this opportunity to potentially improve accuracy in fair lending testing, perhaps because of uncertainty about associated risks. The Federal Reserve's discussion of the rule can be found in Federal Register Vol. 68 No. 52, March 18, 2003. https://www.govinfo.gov/content/pkg/FR-2003-03-18/pdf/03-5666.pdf

[15] See note 2

[16] See note 8

[17] The mission of the RBLC is to drive responsible practice in the small business lending sector. The RBLC's members are the Aspen Institute, a nonpartisan policy studies organization and the facilitator of the coalition; Opportunity Finance Network, the national association of community development financial institutions (CDFIs), Funding Circle and LendingClub, two leading FinTech innovators in marketplace lending; Accion Opportunity Fund, the largest nonprofit CDFI small business

With our Responsible Business Lending Coalition partners, LendingClub has helped drive a wave of small business financial protection legislation across the country, beginning with the passage of the first small business financial protection law of the modern era, California's SB 1235 in 2018.[18] Since then, we have worked with coalitions of CDFIs, fintechs, civil rights groups, and small business organizations to pass New York's *Small Business Truth in Lending Act*,[19] to include small business financial protections in the powers of California's new Department of Financial Protection and Innovation, to support bans on abusive collections practices at the state and federal level, and to support the introduction of the federal *Small Business Disclosure and Broker Regulation Act*.[20]

Today the CFPB has an extremely consequential opportunity to promote fair and responsible lending to women- and minority-owned small business. Implementing Dodd-Frank Section 1071, which establishes HMDA-like data collection for small business lending, could be an effective, market-based, pro-innovation approach to increasing lending to underserved groups.

We have advocated for the prompt enactment of Dodd-Frank Act section 1071 in comment to the CFPB in 2017 as part of the Responsible Business Lending Coalition, and in LendingClub testimony at the CFPB's 2019 symposium on section 1071.[21] In doing so, LendingClub became one of the few for-profit providers of small business loans offering support for this policy because of our conviction that Section 1071 has the potential to be another pro-borrower, pro-innovation regulation.

If it is implemented well, Section 1071 will spur innovation in small business lending, especially to women- and minority-owned small businesses, by creating the first market transparency as to what models of lending effectively reach these businesses. This will create market incentives to invest in the models of lending that the data shows are effective. It will also inform ECOA regulation for small business lending, which is one of the statutory goals of Section 1071.

For enactment of Section 1071 rules to be successful, the CFPB must ensure that the data collection established in those rules provides sufficient information on financing to minority-owned and women-owned businesses to inform ECOA enforcement, future rulemaking considerations, and market behavior. We highlight two specific aspects of a successful rulemaking for Section 1071, to compliment the recommendations offered in comments provided by the Responsible Business Lending Coalition.

1) First, a successful rulemaking for Section 1071 would include the full range of financing products used by small businesses, including merchant cash advances. Federal Reserve research shows

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lenders; Community Investment Management, an impact-driven investor in small business financing; and Small Business Majority, a nonprofit trade association and advocate for small businesses. *See* http://www.borrowersbillofrights.org/

[18] *See* e.g. "Responsible Business Lending Coalitions Receives Community Heroes Award," May 3, 2019. https://www.prnewswire.com/news-releases/responsible-business-lending-coalition-receives-community-heroes-award-300843621.html

[19] See e.g. "Responsible Business Lending Coalition Endorses New York Small Business Truth in Lending Act," March 12, 2020. http://www.borrowersbillofrights.org/responsiblebusinesslendingcoalitionendorsesnystatesma.html

[20] *See* e.g. "Responsible Business Lending Coalition Endorses Small Business Lending Disclosure and Broker Regulation Act," July 30, 2020. http://www.borrowersbillofrights.org/rblcendorsessblendingandbrokerdisclosureact.html

[21] Responsible Business Lending Coalition comment to the CFPB, "Re: Section 1071 and the Small Business Lending Market (Docket No. CFPB-2017-0011)," Sept 2017. http://www.borrowersbillofrights.org/uploads/1/0/0/4/100447618/final_rblc_letter_to_cfpb_on_1071.pdf; Neiman, Richard, "Statement of Richard H. Neiman, Head of Public Policy, LendingClub, at the CFPB Symposium on Dodd-Frank Act Section 1071," Nov 2019. https://files.consumerfinance.gov/f/documents/cfpb_nieman-written-statement_symposium-section-1071.pdf

that minority-owned business are twice as affected by "*potentially higher-cost and less transparent credit products*"—a term the Federal Reserve uses to refer specifically to merchant cash advance and factoring financing.[22] A Section 1071 rule would fall short of its purpose of describing how the capital needs of small, women-owned, and minority-owned businesses are being met, if it excludes the financing products that disproportionately affect these businesses.

2) Second, the data elements collected must include the APR of the financing. If Section 1071 regulation does not gather price data, it will create an impression of the market that portrays access to high-cost capital as equal to access to low-cost capital. This would distort market incentives by encouraging lenders to boost the appearance of inclusion by selling higher-cost lending to minority-owned and women-owned small businesses—the opposite of what Congress and the CFPB have intended. This dynamic might resemble subprime mortgage lending before the 2008 crisis, in which now-reviled lenders were praised for their high rates of financial inclusion for minority borrowers.[23] This resulted in a vast destruction of wealth for minority communities because the conversation about financial inclusion did not sufficiently consider the affordability of the products that borrowers were "included" in.

   APR is the appropriate metric to measure price because it is only price metric that enables an apples-to-apples comparison between financing products of different types, amounts, and term lengths. It is familiar to borrowers and financial institutions and is vetted by 50+ years of the Truth in Lending Act. APR can be straightforward to calculate, including for merchant cash advances. In fact, many commercial financing providers already calculate and disclose APR. It is becoming even more widely used in small business lending--all financing providers who operate in CA or NY, including merchant cash advances, will soon be required to disclose APR under state laws. The CFPB can make APR data collection simple by collecting whatever APR is disclosed under the relevant state laws or, where no state law is in place, adopting a similar approach to what is required by these laws.[24]

We are heartened by the CFPB's opportunity to help the market better meet the credit needs of small, minority-owned, and women-owned businesses, by including the full range of small business products and APR data in Section 1071 rulemaking.

<u>Sexual Orientation and Gender</u>

On June 15, 2020, in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court ruled that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses sexual orientation discrimination and gender identity discrimination. The CFPB should formally confirm that the same is true under ECOA and Regulation B. The Court's reasoning in *Bostock* is equally applicable to

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[22] Federal Reserve Bank of Atlanta, "Small Business Credit Survey: Report on Minority-Owned Firms," Dec 2019. https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf

[23] Indeed, the small business financing market has become compared to pre-crisis subprime mortgage lending for a range of reasons related to the rise of an irresponsible lending practices targeting vulnerable borrowers. See, e.g. Forbes, "Why Online Small Business Loans Are Being Compared to Subprime Mortgages." Dec 10, 2015. https://www.forbes.com/sites/laurashin/2015/12/10/why-online-small-business-loans-arebeing-compared-to-subprime-mortgages

[24] This is discussed in greater detail in upcoming comment on Section 1071 by the Responsible Business Lending Coalition.

ECOA, and there is no statutory or other basis for reaching a different result. This position aligns with the CFPB's 2016 letter to Services & Advocacy for GLBT Elders, explaining that gender identity and sexual orientation discrimination claims are cognizable under ECOA. [25]

LendingClub has consistently adhered to this position as a matter of regulatory compliance and because it is consistent with LendingClub's core values and mission, and we have sought to build industry consensus around it. In 2014, LendingClub joined with a group of CDFIs, advocates, and fintech companies who share our values to form the Responsible Business Lending Coalition. In 2015, this published the *Small Business Borrowers' Bill of Rights*, the first nonprofit/industry consensus standards for responsible small business lending practices.[26] The *Small Business Borrowers' Bill of Rights* sets out six essential rights that small business owners deserve in their financing relationships. This is not simply a high-level statement of generalities – each of the six rights is composed of detailed practice standards that a lender must abide by to become a signatory of the *Small Business Borrowers' Bill of Rights.*

The Right to Inclusive Credit Access, one of these six rights, includes a commitment to non-discrimination. It states that "Lesbian, Gay, Bisexual and Transgender (LGBT) small business owners deserve the same protection when seeking or obtaining credit."[27] To date, over one hundred lenders, marketplaces, brokers, and advocacy groups have signed on to the *Small Business Borrowers' Bill of Rights*, including this statement and other commitments to responsible lending practices. We would appreciate the CFPB's formal confirmation that this position applies to all credit providers.

Adverse Action Notices

LendingClub had the pleasure participating in the CFPB's first tech sprint, in October 2020, designed to "help improve consumer adverse action notices."[28] We fielded a joint team with the Financial Health Network, a nonprofit thought leader with a mission to "improve the financial health of Americans, especially the underserved, by shaping a robust and innovative financial services marketplace with increased access to higher quality products and practices."[29] The tech sprint was a wonderful experience, and we encourage the CFPB to continue this practice.

The LendingClub/Financial Health Network team developed a proposal to "Turn Adverse Actions into Teachable Moments." It included four components, each suggesting a topic on which guidance from the CFPB could encourage development of more useful adverse action notices made possible by consumer adoption of online services.

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[25] Cordray, Richard, "Re: Application of the Equal Credit Opportunity Act to Credit Discrimination on the Basis of Gender Identity and Sexual Orientation," Consumer Financial Protection Bureau, August 20, 2016. Accessible at: https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf

[26] *See* http://www.borrowersbillofrights.org/bill-of-rights.html

[27] *Id.* The other five are the right to transparent pricing and terms, the right to non-abusive products, the right to responsible underwriting, the right to fair treatment from brokers, and the right to fair collection practices.

[28] Consumer Financial Protection Bureau, "CFPB's first tech sprint on October 5-9, 2020: Help improve consumer adverse action notices," Sept 1, 2020. https://www.consumerfinance.gov/about-us/blog/cfpb-tech-sprint-october-2020-consumer-adverse-action-notices/

[29] *See* https://finhealthnetwork.org/about/

1. First, the proposal used behavioral design and a video introduction to address the frustration and hurt the consumer may be feeling as they receive an adverse action. We proposed seeking to meet the emotional experience of being declined for credit with an empathetic video designed to orient the consumer on how to use the notice to their benefit.

   It could be helpful for guidance to address the use of multimedia, such as video, in delivering components of the adverse action notice, or potentially other required disclosures. As mobile devices and social media are influencing how people ingest information, people are increasingly accustomed to short video.

2. Second, we proposed an adverse action notice that is 60% shorter, easier to understand, and—when delivered electronically—interactive.

   It could be helpful for guidance to address the use of roll-over text in disclosures to simplify text or offer contextual explanations.

3. Third, we included integrated, topical, personalized educational content about the specific reasons the application was declined. For example, a notice describing that the consumer is being declined because of a high "debt-to-income ratio" might link that term to an explanation of what a debt-to-income ratio is, and steps a consumer might take to lower it.

   It could be helpful for guidance to address the inclusion of links to financial education materials within the adverse action notice.

4. And finally, we designed a fully digital, dramatically streamlined process to access the free credit report to which the customer is entitled to review upon receiving an adverse action notice. This free credit file access provides a valuable opportunity for consumers to assess their credit record, including identifying and contesting any errors in the file. However, few consumers access this report, in part because it can require contacting the credit bureaus through cumbersome offline methods such as writing and mailing a letter offline, or moving through a dozen steps online. The LendingClub/Financial Health Network proposal, informed by a major credit bureau, identified a method to reduce this process to just a few clicks, potentially leading to a three-to-fivefold increase in the number of consumers accessing their free credit file. Any encouragement from the CFPB towards industry adoption of this approach could be of great benefit to consumers.

We are grateful for this opportunity to share these ideas in support of the CFPB's consideration of ECOA regulation. If we can be helpful in discussing any of these topics, please do not hesitate to contact us.

Sincerely,

Richard H. Neiman
Head of Public Policy

Louis Caditz-Peck
Director, Public Policy

Armen Meyer
VP, Public Policy

October 18, 2019

Regulations Counsel
Office of the General Counsel
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451 Seventh St. SW, Room 10276
Washington, D.C. 20410-0001

Submitted electronically at http://www.regulations.gov

RE: Docket No. FR-6111-P-02
Notice of Proposed Rulemaking, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

ZestFinance appreciates the opportunity to comment on the Department of Housing and Urban Development's proposed rule titled *Implementation of the Fair Housing Act's Disparate Impact Standard* (the proposal).[1] Zest agrees with HUD that algorithmic models, if used responsibly, can extend access to credit to otherwise underserved communities. Our own experience developing machine learning underwriting models bears this out. However, we are concerned that HUD's proposal—in particular the defenses for allegations based on discriminatory effects caused by models—risks encouraging the use of opaque and flawed models in ways that would threaten consumers and unnecessarily perpetuate discrimination.

A. <u>Executive Summary</u>

ZestFinance is a financial services technology company that helps lenders develop machine learning underwriting models for a wide range of credit products, including auto finance and consumer and mortgage loans. Zest's tools allow lenders to approve more creditworthy borrowers while maintaining the institutions' risk profiles. Lenders use our software and

[1] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (Aug. 19, 2019) (to be codified at 24 C.F.R. § 100.500) ("Proposed Rule").

modeling capabilities to increase loan approval rates, lower defaults, and make their lending fairer. Importantly, our tools allow lenders to explain, validate, interpret, and document the reasoning behind their credit decisions, all of which are critical to the responsible use of models.

We agree with HUD's twin observations: (1) models can "be an invaluable tool in extending access to credit and other services to otherwise underserved communities"; and (2) "disparate impact provides an important tool to root out factors that may cause these models to produce discriminatory outputs."[2]

In our view, however, HUD's primary emphasis on "substitutes or close proxies" for protected classes does not adequately account for the discrimination risks raised by models, especially sophisticated machine learning models. The terms "substitutes" and "proxy" are undefined and likely to cause confusion. More importantly, it is inappropriate to focus solely on variables in isolation, because seemingly benign variables can combine in sophisticated models to generate significant and unnecessary disparities. Similarly, providing immunity for reliance on models developed by third parties—without assessing the transparency, validity, or fair lending testing of those models—will encourage reliance on opaque, flawed, and discriminatory third-party models.

There is no need to provide a defense specific only to models. Models should be assessed under the same framework applied to other policies: Does the model cause a disparate impact? If so, is the model justified? If so, is there a less discriminatory alternative? Lenders can and do undertake that traditional inquiry today, even when using sophisticated machine learning models. We have developed a methodology that allows lenders to easily and quickly identify whether their models result in adverse disparities, and whether less discriminatory alternative models exist that would decrease those disparities while still serving the lenders' business interests. This methodology does not impose material burdens on lenders; rather, it enables them to eliminate unnecessary disparities while making, in the words of the Supreme Court, "'the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.'"[3]

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[2] *Id.* at 42859.
[3] *Id.* at 42859 (quoting *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015)).

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B. Background on Models and Machine Learning

1. Machine leaning models are the future of credit underwriting, offering benefits to lenders and consumers.

Using models and algorithms for credit scoring is not new. As early as 2004, the FTC reported that automated underwriting models for assessing applicants for loans had already become "particularly important in the mortgage market."[4] Even in 2003, about 75% of loans were made through automated underwriting, and 94% of lenders had implemented at least one automated underwriting system.[5] Using models for credit scoring is ubiquitous in today's market, especially for mortgage loans.

What is new is the advent and increasing prevalence of artificial intelligence models in the financial industry for assessing creditworthiness, marketing, and other key decisions. According to a 2017 survey, 79% of bankers agree that artificial intelligence "will revolutionize the way they gain information from and interact with customers."[6] Seventy-six percent believe that "in the next three years, the majority of organizations in the banking industry will deploy [artificial intelligence] interfaces as their primary point for interacting with customers."[7] In the words of one observer: "Algorithms rule the world."[8]

Machine learning is a particularly powerful type of artificial intelligence that discovers relationships between many variables in a dataset to make better predictions. These models can leverage very large amounts of data, meaning the models can consider and assess a broader and more diverse set of variables than standard statistical models traditionally used for credit underwriting. Because machine learning-powered credit models substantially outperform traditional credit models, companies are increasingly using them to make more accurate decisions.

For example, customers using Zest's machine learning underwriting tools to predict creditworthiness have seen a 10% approval rate increase for credit card applications, 15%

[4] FTC, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 at 79 (2004).
[5] *Id.*
[6] Accenture, Banking Technology Vision 2017: Technology for People, 22 (2017), https://www.accenture.com/_acnmedia/pdf-47/accenture-banking-technology-vision-2017.pdf
[7] *Id.*
[8] Leo Hickman, *How Algorithms Rule The World*, Guardian (July 1, 2013), https://www.theguardian.com/science/2013/jul/01/how-algorithms-rule-world-nsa.

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approval rate increase for auto loans, and a 51% approval rate increase for personal loans—each with no increase in defaults.[9]

This innovation is good news for lenders and consumers and it should be encouraged. Machine learning increases access to credit, especially for low-income and minority borrowers with thin or no credit files. In particular, a test we ran with a major mortgage originator found that machine learning modeling techniques could responsibly expand access to mortgages for the thousands of American families that have traditionally been unnecessarily excluded from these markets.

2. **Machine learning models can raise risks and must be developed and deployed responsibly.**

At the same time, machine learning models can raise serious risks for institutions and consumers. Machine learning models are opaque and inherently biased.[10] For this reason, they are sometimes referred to as "black boxes." Even the human that programmed the model may not be able to discern how variables were combined or considered, or how those combinations were weighted to yield the model's predictions.[11] Moreover, like any model, machine learning models are developed by humans that make various decisions during development and implementation, including about what datasets should be used to train the model, what assumptions should be made when calibrating the model, what variables should be assessed by the model during implementation, and what cut scores, thresholds, and segmentations should be used—all of which (as well as many other decisions) offer the opportunity for bias or discrimination to affect the model.

For good reason, Congress, federal agencies, academics, and civil rights groups have expressed concerns that these new forms of models and the large amounts of new data they can process can be discriminatory, biased, unfair, and perpetuate inequalities.[12] For example,

[9] Douglas Merrill, Zest, *Testimony to the House Committee on Financial Services AI Task Force* at 1 (June 26, 2019) (attached as Exhibit A).
[10] *See, e.g.*, Chris DeBrusk, *The Risk of Machine-Learning Bias (and How to Prevent it*), MIT Sloan Management Review (March 26, 2018), https://sloanreview.mit.edu/article/the-risk-of-machine-learning-bias-and-how-to-prevent-it/; Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671, 677-87 (2016) (discussing how data mining for models may reflect societal discrimination).
[11] Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147, 1159 (2017).
[12] *See, e.g.*, Carol A. Evans, Federal Reserve, *Keeping Fintech Fair: Thinking About Fair Lending and UDAP Risks*, Consumer Compliance Outlook (2017), https://www.frbsf.org/

algorithms trained on real-world data may reflect existing discriminatory patterns or biases, which can unnecessarily perpetuate inequalities and unconscious prejudices.[13] In one Princeton study, an AI algorithm linked white-sounding names with "pleasant" and black-sounding names with "unpleasant."[14] African American-sounding names are also more likely to generate advertisements related to arrest records than names typically associated with white Americans. [15] And criminal sentencing algorithms have been criticized for relying on data that contains racial bias, reflecting, for example, higher incidents of minorities with criminal records in minority areas where police focus their efforts.[16]

These very serious risks exist to the same extent in models used for underwriting credit. As the OCC has explained:

> Bank management should be aware of the potential fair lending risk with the use of [artificial intelligence] or alternative data in their efforts to increase efficiencies and effectiveness of underwriting. It is important to understand and monitor underwriting and pricing models to identify potential disparate impact and other fair lending issues. New technology and systems for evaluating and determining creditworthiness, such as machine learning, may add complexity while limiting transparency. Bank management should be able to explain and defend underwriting and modeling decisions.[17]

Without understanding why a model made a decision, bad outcomes will occur. For example, a used-car lender we work with had two seemingly benign signals in their model. One signal was that higher mileage cars tend to yield higher risk loans. Another was that borrowers from a particular state were slightly riskier than those from other states. Neither of these signals

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banking/files/Fintech-Lending-Fair-Lending-and-UDAp-Risks.pdf; FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

[13] Evans, *supra* note 12; Barocas, *supra* note 10, at 674.

[14] James Zou, *Are We Making AIs Racist and Sexist? Researchers Warn Machines Are Learning To Have Human Biases*, Daily Mail (Sept. 26, 2016), http://www.dailymail.co.uk/sciencetech/article-3808834/Are-making-AIs-racist-sexist-Researchers-warn-machines-learning-human-biases.html.

[15] Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56 Communications of the ACM, 44 (May 2013) http://cacm.acm.org/magazines/2013/5/163753-discrimination-in-online-ad-delivery/.

[16] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information*, 38 (2015); Att'y Gen. Eric Holder Speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting, U.S. Department of Justice (Aug. 1, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th.

[17] OCC, Semiannual Risk Perspective at 23 (Spring 2019).

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appeared to be an obvious proxy for a protected class under fair lending laws. However, our machine-learning tools noted that, taken together, these signals predicted a borrower to be African-American and more likely to be denied.[18] Without visibility into how seemingly fair signals interact in a model to hide bias, lenders will make decisions that tend to adversely affect minority borrowers.

Lenders put themselves, consumers, and the safety and soundness of our financial system at risk if they do not use transparent models and appropriately validate and monitor those models, including testing for disparate impact risk.

C. Zest Innovations

Zest has spent the last decade becoming the leader in machine learning models for credit. Our customers regularly see double digit increases in approval rate while also reducing losses by double digits as well. At the same time—and just as importantly—all of our models are completely explainable. This means that, no matter the complexity of the model, Zest can reveal the contributions or influence of each input feature towards the model prediction.[19]

Moreover, Zest's tools allow lenders to assess and mitigate adverse impacts of their models—such as different rates of selection across protected classes like race and national origin. Relying on the transparency tools built into Zest's software, a lender can identify adverse impacts and easily modify a model to reduce those disparities without meaningfully affecting the model's performance. This allows lenders to quickly identify the availability of less discriminatory alternative models that retain the power of the machine learning models. In this way, Zest's tools decrease disparate impacts across protected groups and ensure that the use of machine learning-based underwriting models mitigate, rather than exacerbate, discrimination in lending. This process is fast and efficient; it allows lenders to pick and deploy better, less-discriminatory models without imposing meaningful burdens.

While these tools were developed to solve the problem of identifying and resolving disparate impact risks raised by sophisticated machine learning models, they can be used just as effectively and efficiently on the types of traditional statistical models widely used for credit underwriting.

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[18] Merrill, *supra* note 9 (attached as Exhibit A).

[19] *See* Evan Kriminger, Mark Eberstein, Sean Kamkar, Jose Valentin, Douglas Merrill, *Beyond the Black-Box: A Better Framework for Explainable AI* (November 2018) (included as appendix to Exhibit A); John Merrill, Geoff Ward, Sean Kamkar, Jay Budzik, Douglas Merrill, *Generalized Integrated Gradients: A Practical Method for Explaining Diverse Ensembles* (Sept. 4, 2019) (attached as Exhibit B).

D. Concerns Regarding HUD's Proposal

HUD's proposal would allow a defendant to defeat an allegation of discriminatory effect caused by a model, such as a "risk assessment algorithm," in one of three ways. The first and third defenses put undue emphasis on identifying substitute or proxy variables in isolation. The second defense would immunize the use of models produced by undefined third parties, potentially encouraging the use of flawed models.

To defeat an allegation of discriminatory effect caused by a model, a defendant may:

1. Provide[] the material factors that make up the inputs used in the challenged model and show[] that these factors do not rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act and that the model is predictive of credit risk or other similar valid objective;
2. Show[] that the challenged model is produced, maintained, or distributed by a recognized third party that determines industry standards, the inputs and methods within the model are not determined by the defendant, and the defendant is using the model as intended by the third party; or
3. Show[] that the model has been subjected to critical review and has been validated by an objective and unbiased neutral third party that has analyzed the challenged model and found that the model was empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives, and that none of the factors used in the algorithm rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act.[20]

We agree with HUD that it is important for lenders to carefully consider the inputs used in their models. With limited exceptions, the use of a prohibited basis as a variable in a credit scoring model is intentionally discriminatory and violates the Fair Housing Act and ECOA.[21] HUD's proposal rightly indicates that it would be illegal to use "substitutes or close proxies" for protected classes.[22] This implication makes sense: a variable such as "subscribes to Ebony

[20] Proposed Rule, 84 Fed. Reg. at 42862.
[21] 12 C.F.R. § 1002.6(b)(1) ("[A] creditor shall not take a prohibited basis into account in any system of evaluating the creditworthiness of applicants"); FFIEC, Interagency Fair Lending Examination Procedures at 8 (Aug. 2009), https://www.ffiec.gov/pdf/fairlend.pdf (explaining that "overt discrimination" includes using "variables in a credit scoring system that constitute a basis or factor prohibited by Regulation B or, for residential loan scoring systems, the FHAct").
[22] OCC, OCC Bulletin 97-24, *Credit Scoring Models* at 10 (1997), https://ithandbook.ffiec.gov/media/resources/3672/occ-bl-97-24_credit_scor_models.pdf ("Moreover, factors linked so

magazine" is so intuitively related to a protected class that it should be treated no differently than the protected class itself.

Unfortunately, however, these defenses would introduce serious problems that threaten the stability of disparate impact as applied to models. For this reason, we urge HUD to abandon them.

First, the term "substitute or close proxy" is undefined and so is likely to inject confusion and uncertainty into lenders' fair lending analyses. Our Ebony magazine example is an easy one, but many other variables will not be so straightforward. Thus, emphasizing this analysis above all else will leave institutions overly-focused on whether variables that may be correlated with protected characteristics are permissible, and second-guessing whether a range of variables are permissible. This uncertainty will hinder innovation. Determining whether variables in isolation are proxies or close substitutes can be useful for assessing disparate treatment risk. But it should not be the sole focus of a disparate impact analysis of models, which should take into account the actual *impacts* of the model, not just its inputs.

Second, the defense would be available as long as the "*model* is predictive of credit risk or other similar valid objective," without an analysis of the predictiveness of potentially problematic *variables*. That formulation could mean that a variable that drives disparate impact caused by a model would be immunized, even if that variable was not itself predictive. There is no statistical or legal basis for the use of variables that drive disparate impact and that do not contribute to model performance.

Third, these defenses inappropriately ignore the actual *effects* or *impacts* of models on applicants, which has always been the primary focus of disparate impact law. A defense based only on proxies or substitutes would be inconsistent with disparate impact case law, as well as agency regulatory materials (including other parts of HUD's own proposal) confirming that the first step of a disparate impact analysis looks to adverse impacts.[23]

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closely to a prohibited basis that they may actually serve as proxies for that basis cannot be used to segment the population").

[23] *See, e.g.*, HUD, OFHEO, DOJ, OCC, OTS, Federal Reserve Board, FDIC, FHFB, FTC, NCUA, Joint Policy Statement on Discrimination in Lending, 59 Fed. Reg. App'x O (published April 15, 1994) ("When a lender applies a policy or practice equally to credit applicants, but the policy or practice has a *disproportionate adverse impact* on applicants from a group protected against discrimination, the policy or practice is described as having a 'disparate impact.' Policies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, *disproportionately and adversely affect* a person's access to credit." (emphasis added));

It is not the case that the existence of proxies or substitutes for a protected class will determine the effects of a model on applicants. In fact, an emphasis on whether a model uses any factors that are proxies or substitutes for protected classes misunderstands how models—particularly machine learning models—operate. A model that contains a proxy may not have disproportionately adverse impacts on protected classes; for example, if the proxy carries little weight, if its effects are offset by other variables, or if it works to the advantage of the protected class. Similarly, a model that does *not* contain proxies may well have adverse impacts on protected classes. Machine learning models, for example, generate countless combinations of variables (and combinations of combinations of variables) to generate predictions. How these variables interact is often unintuitive. As the example we provide above about high-mileage cars and residing in a particular state demonstrates: seemingly benign variables—meaning variables that are not substitutes or proxies in isolation—can (and often do) interact in ways likely to cause disparate adverse impacts on protected classes. Other stages in model development can also contribute to adverse impacts, including unrepresentative training data, unfavorable outcome definitions, and many other factors.

For this reason, identifying whether the model itself produces an adverse impact—for example, denial-disparities that disproportionately disadvantage members of protected classes—is essential. Whether a model includes proxies does not answer the question whether the model has a disparate impact on protected classes. Focusing on that end-result is the same analysis used in other contexts; there is no basis for treating allegations based on models differently. HUD's proposal explains that despite this special exception for disparate impact as applied to models, it is not providing an exemption. Instead, a focus on these variables allows a defendant to demonstrate "lack of a robust causal link between the defendant's use of the model and the alleged disparate impact."[24] But this is not how models work. As described above, an absence of proxies or substitutes does not mean an absence of disparate impact.

<u>Fourth</u>, focusing only on proxies or substitutes for protected classes eliminates any inquiry into whether less discriminatory alternative models exist. This new standard would eliminate what the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), recognized is the defendant's burden: "prov[ing] [a policy] is necessary to achieve a valid interest."[25] If a less discriminatory alternative exists—for example a model that would achieve the business interest with less adverse impact on protected classes—then the policy cannot be "necessary."

Proposed 24 C.F.R. § 100.500(b)(2) (requiring plaintiff to show challenged policy causes a "disparate impact" and "discriminatory effect").

[24] Proposed Rule, 84 Fed. Reg. at 42859.

[25] *Inclusive Cmtys.*, 135 S. Ct. at 2523.

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Lenders routinely analyze the adverse impact of credit models by evaluating whether traditional credit models result in an adverse impact and, if so, assessing whether alternative predictive variables or other changes to the model are available that have less of a disparate effect and do not significantly degrade the predictive power of the model.[26]

Although this type of analysis can be complicated when using machine learning models, we have developed tools that are up to the task. Relying on the transparency tools built into Zest's software, lenders can identify adverse impacts and easily modify a model to reduce those disparities without meaningfully affecting the model's performance. This tool allows lenders to assess the availability of less-discriminatory alternative models that retain the power of the machine learning models.

This solution is a win-win: It is fast, efficient, and easy for lenders to use. It is also consistent with years of disparate impact law and HUD's existing disparate impact rule.

Fifth, HUD's defense for models "produced, maintained, or distributed by a recognized third party that determines industry standards," is unclear and could immunize seriously problematic models. The proposal does not explain what would qualify as a "recognized third party that determines industry standards." Unlike in some other contexts where there may be generally accepted professional standards for developing tests, and for which developers have professional obligations to provide evidence of validity, no such industry standards exist in credit underwriting. This defense will increase uncertainty for entities that use third-party models and for entities that develop these models. It will also put entities that do *not* qualify as ones that "determine industry standards"—however that term is understood—at a competitive disadvantage, without any clear basis for doing so. Providing immunity for reliance on third parties that may have incentives to sell scores rather than support responsible nondiscriminatory underwriting—and that may themselves be immunized from liability because of causation or other issues—is a recipe for encouraging dangerous and discriminatory lending and will increase costs and uncertainty.

For this reason, lenders should not rely on models developed by third parties absent transparency into development, validation, and fair lending testing of those models.

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[26] *See, e.g.*, David Skanderson and Dubravka Ritter, Federal Reserve Bank of Philadelphia, *Fair Lending Analysis of Credit Cards* 38-40 (2014).

Conclusion

Zest has proven that developing transparent and fair machine learning models for credit underwriting is not only possible, but that it can increase access to credit to otherwise underserved communities. The responsible use of such models should be encouraged. At the same time, we agree with HUD that disparate impact provides an important tool for rooting out discriminatory models and encouraging lenders to use responsible and fair models. We urge HUD not to adopt its proposed defense for allegations related to models because it will increase uncertainty and risk encouraging the use of flawed and unnecessarily discriminatory models.

Sincerely,
Kareem Saleh
EVP, ZestFinance

3900 W. Alameda Ave, 16th Floor, Burbank, CA 91505

BANK OF AMERICA

June 29, 2020

The Honorable Brian Montgomery
Deputy Secretary
U.S. Department of Housing and Urban Development
Washington, DC 20410

Re: Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Mr. Montgomery,

Bank of America appreciates the commitment that the Secretary, you and the Department of Housing and Urban Development ("HUD") have demonstrated to administering the Fair Housing Act. We commend HUD's recognition that discrimination—both intentional and unintentional—continues to exist in the United States, and its affirmation that the disparate impact theory under the Fair Housing Act is an important tool in the continuing fight against unlawful discrimination.

Over the last several weeks, our nation has experienced a series of tragic events that have led to a collective heightened awareness of systemic racism. We have all witnessed the expressions of anguish and anger about what has happened and have developed greater understanding of and sensitivity to the historical roots of those feelings. Numerous conversations with employees inside our own company have only served to reinforce our shared belief that the emotion and legitimacy of these concerns is deep seated and justifiably real. Given the importance of this moment in history and the very real prospect of progress, we respectfully urge that this is not a time for actions, however well intentioned, that some will interpret as diminishing hard fought protections. Rather, it is a time for thoughtful reflection so that we can drive meaningful progress on equity and inclusion.

Given the recent protests and events, and the recognition of where we are as a country, we would respectfully offer that the time is not right to issue a new rule on disparate impact. We have all heard the legitimate concerns that have been raised that the proposed rule could make it more difficult to ensure that the Fair Housing Act's protections and avenues of redress against unlawful discrimination are available to all Americans. The proposed rule could have significant impact and come in the context of what we as a country are currently experiencing. We believe more deliberation is required.

We respectfully urge that HUD refrain from issuing the proposed new disparate impact rule at this time.

Sincerely,

Anne Finucane

Anne Finucane
Vice Chairman

Wells Fargo Home Lending
MAC F2401-064
One Home Campus
Des Moines, IA 50328

July 14, 2020

The Honorable Ben Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Re: Fair Housing Act Disparate Impact Rule

Dear Secretary Carson:

On behalf of Wells Fargo, I write with a straightforward but important request: that HUD defer issuance of its final disparate impact rule to allow for additional voices to be heard on an issue that too many in our country still face—housing discrimination in America.

We appreciate HUD's efforts to draft the proposed rule, and we support a disparate impact framework that facilitates the expansion of housing opportunities to underserved communities and provides a clear legal framework to address discrimination. To achieve that goal, HUD should acknowledge that Americans' attention to racial discrimination is more pronounced and expansive than when the comment period was open last year. People across the country have considered more closely that centuries of discrimination, segregation, and economic disenfranchisement have lasting impacts today, including discriminatory effects in housing.

Wells Fargo commits itself to working with HUD, other lenders, and the civil rights community to participate in this discussion and ensure that the disparate impact framework remains a vital tool towards fighting unjust discrimination.

Sincerely,

Michael DeVito
EVP – Head of Home Lending

Quicken Loans
1050 Woodward Ave. | Detroit, MI 48226

July 10, 2020

The Honorable Brian Montgomery
Deputy Secretary
U.S. Department of Housing and Urban Development
Washington, DC 20410

Re: *Pending Implementation of the Fair Housing Act's Disparate Impact Standard*

Dear Deputy Secretary Montgomery:

Quicken Loans appreciates the commitment of the Department of Housing and Urban Development (HUD) in administering the Fair Housing Act and its efforts to challenge discrimination in housing. Housing discrimination–from the intentional to the inadvertent– remains a stumbling block for millions of Americans to gain fair access to quality and affordable homeownership. As the fight for fair housing continues, it is imperative that we maintain strong enforcement of the Fair Housing Act and thoughtful use of the disparate impact theory that has long been central to that enforcement.

We write to you today to convey concern with HUD's proposed rule to change the way the disparate impact framework would be used to enforce the Fair Housing Act. We recognize that the proposed changes are intended to clarify the use of disparate impact in housing discrimination cases. We agree that unclear rules in the housing and mortgage markets can, and often do, constrain lending and investment in the space, harming those the rules are intended to help. However, legitimate concerns have been raised about how the proposed rule proposed would make it difficult to address some of the more challenging systemic issues of discrimination that the Fair Housing Act should be used to address.

We are living in a pivotal moment of American history, with much of the nation looking more deeply at the systemic effects of discrimination throughout our society and economy. In the spirit of that moment, policymakers and industry participants alike should look beyond the surface forms of discrimination to those that lie beneath, because the effects are often no less destructive.

In recognition of our nation's rising awareness surrounding issues of racial justice, equity, and inclusion; we believe that more deliberation is required, and ask that HUD reconsider its proposal on disparate impact. We believe that HUD should continue to focus on the deeper forms of discrimination, and has an opportunity to work together with lenders, consumer advocates, and civil rights experts to find a common ground proposal on disparate impact that is fair, clear, and remains a strong and effective tool for our nation in combatting all forms of housing discrimination.

We thank you for your consideration of our request to rethink the issuance of the proposed disparate impact rule at this time. If you have any questions you may reach out to Chrissi Johnson, Vice President of Federal Policy and External Affairs at chrissijohnson@rockcentraldetroit.com or 651-216-0396.

Sincerely,

Bill Emerson
Vice Chairman, Quicken Loans

NATIONAL ASSOCIATION OF REALTORS®

Vince Malta
2020 President

Bob Goldberg
Chief Executive Officer

ADVOCACY GROUP

William E. Malkasian
Chief Advocacy Officer / SVP

Shannon McGahn
SVP Government Affairs

July 13, 2020

The Honorable Dr. Ben Carson
Secretary
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

RE: Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Dr. Carson:

The National Association of REALTORS® thanks HUD again for the opportunity in October to comment on its proposed rule to amend the HUD interpretation of the Fair Housing Act's disparate impact standard. At that time, HUD described the rule as necessary to reflect how the Department would apply the Supreme Court's 2015 ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* in disparate impact cases under the Fair Housing Act.

While there is debate among industry, government, and advocates as to whether additional clarity is needed with respect to disparate impact claims, there is broad consensus across the country that now is not the time to issue a regulation that could hinder further progress on addressing ongoing systemic racism in our country.

The tragic killings of George Floyd and Breonna Taylor, among others, coupled with a pandemic that has taken a disproportionate toll on minority populations, have been painful reminders of the devastating impact of discrimination and segregation on racial minorities in nearly every facet of American life. NAR continues to reckon with the role it played decades ago in segregating our metropolitan areas and the ongoing housing discrimination a recent *Newsday* story reminded us still exists.

As the nation's largest membership trade association, with 1.4 million members, NAR is committed to advancing policy that affords everyone the equal opportunity to own and transfer property and to enjoy all the benefits that accrue from homeownership.

We believe now is the time for government, industry, and advocates to explore how we may work together to eliminate unnecessary barriers to housing opportunity and advance policies that allow more Americans to fully participate in the American Dream.

Therefore, we respectfully ask that HUD withdraw its rule to amend the HUD interpretation of the Fair Housing Act's disparate impact standard.

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Today, the words of Justice Anthony Kennedy, writing for the Supreme Court in 2015, resonate more urgently. At that time, he wrote, “Much progress remains to be made in our nation’s continuing struggle against racial isolation.”

NAR welcomes the opportunity to work with HUD, advocates, consumers, and other industry partners in advancing “the Fair Housing Act’s continuing role in moving the nation toward a more integrated society.”

Sincerely

Vince Malta
2020 President, National Association of REALTORS®

NAAHL | National Association of Affordable Housing Lenders

October 18, 2019

Regulations Counsel
Office of the General Counsel
Department of Housing and Urban Development
451 Seventh St. SW, Room 10276
Washington, D.C. 20410-0001

Submitted electronically at http://www.regulations.gov

RE: Docket No. FR-6111-P-02
Notice of Proposed Rulemaking, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

To Whom it May Concern:

The National Association of Affordable Housing Lenders (NAAHL) appreciates the opportunity to comment on the proposed rule titled *Implementation of the Fair Housing Act's Disparate Impact Standard* (the Proposal), issued by the Department of Housing and Urban Development (HUD).[1]

NAAHL is the national alliance of major banks, community development financial institutions, and other capital providers for affordable housing and inclusive neighborhood revitalization. NAAHL's mission is to expand economic opportunity through responsible private financing for affordable housing and inclusive neighborhood revitalization.

NAAHL members understand the significance of this rulemaking and the principles that underscore it, and we share HUD's goal to provide clarity, certainty, and fairness to the disparate impact liability standards under the Fair Housing Act (FHA) for all stakeholders.

In the interest of promoting clarity, we will start by being very clear – the theory of disparate impact liability under the FHA is well established under law. Ample judicial precedent, including from the U.S. Supreme Court, speaks to its viability, as well as its centrality for mitigating discrimination and effectuating the goals and objectives of the FHA. As the Supreme Court explained, "[r]ecognition of disparate-impact claims is consistent with the FHA's central

[1] 84 FR 42854 (Aug. 19, 2019).

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purpose. . . [t]o eradicate discriminatory practices within a sector of our Nation's economy."[2] That much is very clear and very certain.

It is equally clear that disparate impact liability under the FHA must have defined boundaries. In the words of the Supreme Court in *Inclusive Communities*: "[D]isparate-impact liability has always been properly limited in key respects."[3] Without such limitations, disparate impact liability would thwart the very goals that the FHA seeks to promote by deterring legitimate actors, like NAAHL members, from playing key roles in the creation of affordable housing for all communities. As the Supreme Court explained, this outcome would be "paradoxical."[4]

Indeed, these existing boundaries of disparate impact liability, as articulated by the Supreme Court, have helped NAAHL members serve the public and fulfill the goals of the FHA. For years, NAAHL members have implemented systems and procedures to comply with the doctrine of disparate impact in a way that advances the purposes of the FHA while meeting the reasonable demands of their businesses. NAAHL members, their customers, and their communities have all benefited from these boundaries.

While HUD's Proposal requires grappling with significant complexity and legal issues that are of immense consequence, NAAHL members support viewing the Proposal through a simpler lens – the basic principle that HUD should adhere to existing Supreme Court precedent.

Because existing Supreme Court precedent has served all our stakeholders well, we ask, simply and clearly, that HUD fashion this critical rule by doing no more – and no less – than that precedent requires. In that regard, we are particularly concerned that the Proposal would exceed the Supreme Court precedent in two critical areas: (1) the application of the "arbitrary, artificial, and unnecessary" standard for bringing disparate impact claims; and (2) the potential legal defenses to disparate impact claims involving the use of algorithmic models. In their current form, these elements would undercut the FHA's effectiveness in promoting economic opportunity for all Americans.

Thank you for the opportunity to comment on this Proposal to implement the FHA's disparate impact standard.

Yours truly,

Benson F. Roberts
President and CEO

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[2] *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (internal citations omitted).
[3] *Id*. at 2522.
[4] *Id*. at 2523.