VI. Disparate Impact Liability's Future Under the Biden Administration and Best Practices

A. Introduction

In 2020, under the Trump administration, the Department of Housing and Urban Development (HUD) adopted a disparate impact rule, making it more difficult for plaintiffs to bring claims under the Fair Housing Act (FHA).[1] HUD has proposed rescinding this rule and published a notice of proposed rulemaking (NPRM) on June 25, 2021.[2] The NPRM also proposes to restore HUD's 2013 discriminatory effects rule, which provided a uniform framework for assessing potential discrimination.[3] HUD's decision is motivated by criticism from fair housing advocates, recent ligation, and policy changes under the Biden Administration.[4] Although the outcome of HUD's 2020 Disparate Impact Rule is unclear, the 2013 Rule will likely be reinstated, resulting in a lower burden for establishing disparate impact liability.[5] Lenders, therefore, need to pay closer attention to the effects of their lending policies and practices.

Although no fair lending case has gone to trial, there has been a resurgence in regulatory action and lawsuits unparalleled before the promulgation of HUD's 2013 Rule.[6] The Supreme Court's 2015

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[1] Richard M. Alexander et al., *New HUD Rulemaking May Mark Increased Use of Disparate Impact Test in Analysis of Discrimination Under the Fair Housing Act,* ARNOLD & PORTER (July 8, 2021), https://www.arnold porter.com/en/perspectives/publications/2021/07/hud-rulemaking-may-increase-disparate-impact-test. *(explaining the history of disparate impact liability).*

[2] *Id.*

[3] *Id*.; *see also* Restatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590 (June 25, 2021) (to be codified at 24 C.F.R. pt. 100) (Proposing modifications to the 2020 rule).

[4] See *id.*

[5] *Id.*

[6] Stacy E. Seicshnaydre, *Is Disparate Impact Having an Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 391–92 (2013) (Finding that the average annual Viable Appellate Cases has increased from 2.4 cases per year to 4.3 cases per year); Alex Gano, Disparate Impact and Mortgage Lending: A Beginner's Guide, 26 J. Afford. Hous. & Community Dev. L. 437 (2018) (Noting that no

decision in *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.* (*Inclusive Communities*), which affirmed the availability of disparate impact claims under the FHA, adds a wrinkle in the future of disparate impact liability.[7] However, an examination of common challenges under the 2013 Rule provides guidance on ways that lenders can avoid discriminatory lending practices by instituting policies and procedures to mitigate against likely disparate impact challenges.

Part I of this article briefly discusses the history of the FHA and the development of disparate impact liability. Part II discusses HUD's attempt at establishing national uniformity for disparate impact liability through its 2013 Final Rule. Part III discusses the effect of the Supreme Court's holding in *Inclusive Communities* on HUD's 2020 Rule. Part IV discusses recent developments impacting the implementation of the 2020 Rule and why it is probable that the 2013 Rule will be reinstated. Finally, Part V provides guidance on the best practices and policies for institutional lenders to mitigate against disparate impact challenges in the event that the 2013 Rule is reinstated.

B. The Fair Housing Act

Like much reformist legislation of the early twentieth century, HUD's origin is rooted in Congress's response to the Great Depression.[8] Between 1934 and 1937, Congress created the Federal Housing Administration and passed the U.S. Housing Act, which provided public subsidies for low-income housing.[9] Less than thirty years later, Congress decided to replace the National Housing Agency and the Housing and Home Finance Agency with a new cabinet-level agency, HUD.[10] Since its inception, HUD has focused on establishing housing

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court has decided a fair lending case under a theory of disparate impact on its merits).

[7] *See Texas Dept. of Hous. And Com. Aff. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522–24 (2015) (stating limitations on the 2013 rule and indicating some new requirements).

[8] K. Heidi Smucker, *No Place Like Home: Defining HUD's Role in the Affordable Housing Crisis*, 71 ADMIN. L. REV. 633, 634 (2019) (discussing the history of the HUD).

[9] Leah Powers, *The Uncertain Future of the Fair Housing Act: HUD's Recent Changes to the Disparate Impact Standard*, 74 SMU L. REV. F. 29, 31 (2021) (summarizing the historical impetus behind the HUD).

[10] *Id.*

programs that address various political, economic, and social issues, such as "fighting discrimination in housing markets."[11]

The history of the United States housing market is characterized by housing segregation, marred by decades of systematic discrimination, racially adverse public and private housing policies, and pronounced racial and economic disparities.[12] During the civil rights era, this systemic problem reached a breaking point. In 1967, the United States experienced one hundred sixty-four race riots in urban cities around the country, resulting in thousands of injuries and widespread property damage.[13] Citizens were concerned about the "rapidly approaching state of anarchy."[14] President Lyndon B. Johnson, in responding to the social unrest, established the National Advisory Commission on Civil Disorders (the Kerner Commission) to determine the causes of the unrest.[15] The Kerner Commission ultimately found that racial discrimination and segregation in employment, education, and housing were primarily to blame.[16] Regarding housing, the Kerner Commission recommended enacting a comprehensive federal anti-discrimination law for the sale and rental of all housing.[17]

In the two years before the release and publicity of the Kerner Commission's report, fair housing legislation was repeatedly stalled in Congress.[18] However, after the report's publication, a reluctant Senate narrowly passed the FHA and sent the bill back to the House for reconsideration, where the bill was expected to fail.[19] Instead, despite criticism around the Act, the bill was accelerated through the House and

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[11] *Id.*
[12] Valerie Schneider, *In Defense of Disparate Impact: Urban Development and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 550 (2014).
[13] Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PA. ST. L. REV. 421, 428 (2015).
[14] *Id.* at 429.
[15] Susan T. Gooden & Samuel L. Myers, Jr., *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 RUSSELL SAGE FOUND. J. SOC. SCIS. 1,1 (2018) (Giving an overview of the Kerner Commission).
[16] *See id.* at 2.
[17] NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) ("It is time to adopt strategies for action that will produce quick and visible progress.").
[18] Powers, *supra* note 7, at 33.
[19] *Id.* at. 33.

signed on April 11, 1968, without debate in the wake of Martin Luther King, Jr.'s assassination.[20]

The FHA was passed as Title VIII of the 1968 Civil Rights Act.[21] The Act begins with a broad declaration that "it is the policy of the United States to provide, within institutional limitations, for fair housing throughout the United States."[22] To further this goal, the FHA prohibits discrimination in the sale or rental of housing, in residential real estate transactions, and the provision of brokerage services based on race, color, national origin, religion, sex, familial status, or disability.[23] Moreover, under the Act, the Secretary of HUD was "granted the authority and responsibility for administering the FHA."[24] The secretary also has the authority to make appropriate rules to administer the Act but must allow the public to comment on any proposed regulations.[25]

C. Disparate Impact Liability

Since the FHA's inception, HUD has consistently interpreted the Act as prohibiting facially neutral policies that have a discriminatory effect.[26] Aligned with this interpretation, eleven federal appeals courts have held that the FHA creates liability for discriminatory effects.[27] However, courts have gradually added variations to their assessment of discriminatory effects violations over time because the FHA does not expressly enumerate a standard for it.[28] For example, the Sixth and Tenth Circuits combined a burden-shifting framework and a balancing test into one standard. In contrast, the Fourth Circuit adopted a four-factor balancing test for public defendants and a burden-shifting test for private defendants.[29]

1. HUD's 2013 Final Rule

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[20] Corbin, *supra* note 11, at 552.
[21] *See* 42 U.S.C. § 3601
[22] 42 U.S.C. § 3601.
[23] 42 U.S.C §§ 3604–3606.
[24] 42 U.S.C § 3608(a).
[25] 42 U.S.C §3614a.
[26] Powers, *supra* note 7, at 34.
[27] *Id.*
[28] Powers, *supra* note 7, at 35.
[29] *Id.*

In 2013, to remedy inconsistencies among the circuit courts' interpretations of discriminatory effects violations under the FHA, HUD published its 2013 Final Rule.[30] HUD was seeking to provide national uniformity by setting forth its long-standing three-part burden-shifting framework.[31] In addition, HUD wanted to give "more clarity and predictability" for understanding how the discriminatory impacts test applies in the fair housing context by adopting a statutory burden-shifting framework.[32]

Under the 2013 Rule, a plaintiff has the burden of making a prima facie showing that a policy or challenged practice, even one that is facially neutral, has a discriminatory effect when it actually or predictably results in a disparate impact on a group of persons, or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status or national origin.[33] If the plaintiff makes this prima facie showing, the burden shifts to the defendant to show that the challenged practice is necessary to achieve the defendant's substantial, legitimate, nondiscriminatory interests.[34] Should the defendant meet this burden, the plaintiff or charging party may still prevail by proving that substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.[35] The 2013 Rule further states that evidence must support the justification; it cannot be "hypothetical or speculative."[36] Accordingly, the Rule assigns the burden of proving such an alternative to the plaintiff.

D. The Effect of *Inclusive Communities* on Disparate Impact Liability and HUD's 2020 Rule

In 2015, the U.S. Supreme Court in *Inclusive Communities* held that disparate impact claims are cognizable under the FHA.[37] Although

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[30] Mitchell E. Feldman, *Statistically Speaking: Restrictive Changes to Fair Housing Act Disparate Impact Liability*, 62 B.C. L. REV. 1321, 1333 (2021).
[31] Powers, *supra* note 7, at 35; 12 C.F.R. § 1002.4(b) (2017).
[32] Powers, *supra* note 7, at 35; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,460 (2013).
[33] 24 C.F.R. § 100.500(a) (2013).
[34] 24 C.F.R. § 100.500(b) (2013).
[35] 24 C.F.R. § 100.500(c)(2) (2013).
[36] Powers, *supra* note 7, at 44; 24 C.F.R. § 100.500(b)(ii)(2).
[37] *Texas Dept. of Hous. And Com. Aff. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513.

the Supreme Court referenced the 2013 Rule, the Court undertook its analysis of disparate impact based on the language of the FHA, and analysis of similar language in Title VII and the Age Discrimination in Employment Act (ADEA).[38] The Court concluded that those two anti-discrimination statutes demonstrated that the FHA must be interpreted to allow disparate impact liability where the statute references the consequences of actions and when such interpretation is consistent with the purpose behind it.[39] The Court also reasoned that when amendments were made to the FHA in 1988, Congress was aware of precedent that recognized disparate impact liability under the FHA and still chose to reject a proposed amendment excluding discriminatory effects liability.[40]

The Court made additional observations about appropriate uses and limits of disparate impact and discussed safeguards as a viable way to avoid "displacement of valid governmental policies" and prevent abuses.[41] First, the Court made clear that liability may not be imposed "based solely on a showing of statistical disparity" and that such claims "must fail if the plaintiff cannot point to a defendant's policy or policies" causing the disparity.[42] The Court characterized this concept as a "robust causality requirement."[43] The concept is grounded in Supreme Court jurisprudence interpreting Title VII, which seeks to ensure that defendants are not "held liable for racial disparities that they did not create."[44] The Court overcame the "constitutional avoidance" argument,that disparate impact theory must be set aside to avoid the serious risk of constitutional violation, by debunking the notion that a prima facie case of disparate impact can be made solely based on racial disparities.[45]

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[38] *Id.* at 2522.
[39] *Id.* at 2511.
[40] *Id.* at 2520.
[41] *Id.* at 2522.
[42] *Id.* at 2522–24.
[43] *Id.* at 2512.
[44] *Id.* at 2523; Morgan Williams & Stacy Siecshnaydre, *The Legacy and the Promise of Disparate Impact*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (Gregory D. Squires, ed., 2018).
[45] *Id.*

On May 15, 2017, HUD issued a Federal Register notice requesting public comment on any potential "outdated" regulations.[46] HUD received many comments asking it to reevaluate its 2013 Rule against the Supreme Court's decision in *Inclusive Communities*.[47] In response, HUD issued a notice of purposed rulemaking seeking comments on the 2013 Rule and ultimately published its final 2020 Disparate Impact Rule (2020 Rule) on September 24, 2020.[48]

The 2020 Rule replaced the 2013 Rule's three-prong test with a five-prong test that is more stringent and places a heavier pleading burden on the plaintiff.[49] Under the 2020 Rule, a plaintiff must first plead sufficient facts to support that a challenged policy or practice is "arbitrary, artificial, and unnecessary to achieve a valid or legitimate objective," such as a practical business, profit, policy consideration, or requirement of law.[50] Then, the plaintiff must plead that the challenged policy or practice disproportionately affects a protected class.[51] After which, the plaintiff must demonstrate a "robust causality," i.e., a direct causal link between the challenged practice and its discriminatory effect on members of a protected class.[52] If they can show a direct link, the plaintiff must then establish that the alleged disparity caused by the policy or practice is significant.[53] Lastly, the plaintiff must plead that there is a direct relation between the disparity and the injurious conduct alleged.[54]

Aside from providing more detail on a plaintiff's burden of proof, the 2020 Rule makes three defenses available to the defendant.[55] The first defense pertains to the defendant's use of predictive models and practices that predict outcomes, such as risk analysis.[56] HUD gives the example of predictive models, including automated underwriting,

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[46] Powers, *supra* note 7, at 38; HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,856 (proposed Aug. 19, 2019).
[47] Powers, *supra* note 7, at 38.
[48] *Id.*
[49] *Id.* at 40.
[50] 24 C.F.R. § 100.500(b)(1)–(5) (2020).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *See* 24 C.F.R. § 100.500(d)(2) (2020); see also HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288, 60,290 (Sept 24, 2020) (codified at 24 C.F.R. pt. 100).
[56] 24 C.F.R. § 100.500 (d)(2)(ii) (2020).

that accurately calculate risk.[57] The defendant can show that the plaintiff failed to meet their burden of proof if "the prediction presents a valid interest" and the prediction does "not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class."[58] The second defense is to show that the plaintiff failed to prove their prima facie case.[59] Finally, the third defense allows the defendant to show that their conduct was "reasonably necessary to comply with a third-party requirement."[60]

To predict the 2020 Rule's probable repercussions, it is vital to look at how it is similar to and different from the 2013 Rule. Preliminarily, when comparing the burden-shifting framework of the two rules, the 2013 Rule is encompassed mainly in the first element of the 2020 Rule.[61] For example, under the 2013 Rule, the plaintiff's initial burden is to prove a discriminatory effect, which the defendant can rebut by showing a sufficient justification for the practice.[62] If they do, the plaintiff could overcome the defendant's rebuttal by showing a less discriminatory alternative.[63] However, under the 2020 Rule, the plaintiff must first demonstrate that the challenged policy is not required to satisfy a legitimate purpose.[64] Then, if the defendant can prove that the practice is necessary, the plaintiff must establish that there is an alternative practice that does not place a material burden on the defendant.[65] Although the burden of proof for a less discriminatory practice shifts between the parties, the 2020 Rule significantly increases this burden by requiring that the alternative be "equally effective" and not impose "greater costs" or other significant burdens on the defendant.[66]

There are also notable evidentiary differences. Whereas the 2013 Rule required the defendant to provide a sufficient justification for the challenged practice and policy (that is, that they cannot rely on hypothetical or speculative evidence), the 2020 Rule reverses the roles

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[57] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. at 60,290.
[58] *Id.*
[59] §100.500(d)(2)(iii).
[60] *Id.*
[61] Powers, *supra* note 7, at 44.
[62] Powers, *supra* note 7, at 44; 24 C.F.R. § 100.500(c)(1)–(3) (2013).
[63] 24 C.F.R. § 100.500(b)(1) (2020).
[64] § 100.500(c)(3).
[65] *Id.*
[66] Powers, *supra* note 7, at 44.

and indicates that it is the plaintiff who cannot rely solely on statistical or speculative evidence.[67]

E. Recent Developments Affecting the 2020 Rule

Implementation of the 2020 Rule has been met with steep criticism from fair housing advocates.[68] Critics are concerned that the 2020 Rule will have negative consequences on the future of disparate impact liability because of its heightened evidentiary and pleading standards before ever reaching discovery.[69] Critics are also concerned that the rule undermines decades of consistent judicial and agency precedent, as well as the critical policy behind the FHA's enactment: eliminating racial discrimination and segregation.[70] Fortunately for housing advocates, the courts, President Biden's Administration, and even major lending institutions echo these concerns.

1. Recent Litigation Staying the 2020 Rule

The 2020 Rule was supposed to become effective on October 26, 2020; however, a recent challenge to the law has halted its effectiveness.[71] In *Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, the Massachusetts District Court granted a preliminary injunction, staying the implementation of the 2020 Rule on October 25, 2020—just one day before the rule was scheduled to take effect.[72] The court found that "significant alterations" in the 2020 Rule "run the risk of effectively neutering disparate impact liability under the Fair Housing Act" and

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[67] *Id.*; *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,860–42,863 (proposed Aug. 19, 2019).

[68] *See, e.g.*, U.S. Comm'n on C.R., Comment Letter in Opposition to Notice of Proposed Rulemaking re HUD's Implementation of the Fair Housing Act's Disparate Impact Standard 2 (Oct. 18, 2019) https://www.usccr.gov/press/2019/10-18-HUD-Disparate-Impact-Proposed-Rule.pdf [https://perma.cc/A635-RM8G].

[69] *Id.*

[70] *See*, *e.g.*, Kriston Capps, *How HUD Could Dismantle a Pillar of Civil Rights Law*, CITY LAB (Aug. 16, 2019), https://www.citylab.com/equity/2019/08/fair-housing-act-hud-disparate-impact-discrimination-lenders/595972/ [https://perma.cc/PUR6-26H6].

[71] *Id.*

[72] *Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urb. Dev.*, 496 F. Supp. 3d. 600 (D. Mass. 2020).

"appear inadequately justified" by HUD.[73] Furthermore, the court found that the "2020 Rule's massive changes pose a real and substantial threat of imminent harm ... by raising the burdens, costs, and effectiveness of disparate impact liability."[74] After balancing the potential harm and public interest, the court granted a preliminary injunction to stay implementation of the 2020 Rule and to enjoin its enforcement.[75] This postponed the effective date of the 2020 Rule until the court reaches a final judgment.

2. President Biden's Memorandum to HUD Secretary

President Biden issued a memorandum on January 26, 2021, only five days after taking office, instructing the Secretary of HUD to "assess the impact" of the 2020 Rule.[76] In this memorandum, President Biden acknowledged the federal government's role in protecting against discrimination in housing, and recognized that despite the passage of the FHA, "access to housing and the creation of wealth through homeownership have remained persistently unequal …"[77] He interprets the language of the FHA as "not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities."[78] President Biden has asked the Secretary of Housing and Urban Development to reconsider the 2020 Rule in light of this policy goal.[79]

3. NPRM: Proposal to Return to the 2013 Rule

In response to the current injunction staying the effect of the 2020 Rule, President Biden's memorandum, and recent criticism of the 2020 Rule, HUD published a NPRM proposing to rescind the 2020

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[73] *Id.* at 611.
[74] *Id.* at 607.
[75] *Id.* at 611.
[76] Powers, *supra* note 7, at 53; Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 2021 DAILY COMP. PRES. DOC. 202100090, at 2 (Jan. 26, 2021).
[77] *Id.* at 1.
[78] *Id.* at 2.
[79] Powers, *supra* note 7, at 54.

HUD rule.[80] The NPRM also proposes restoring the 2013 Rule that formalizes discriminatory effects in assessing potential discrimination.[81] While the future of HUD's disparate impact rule is unclear, the 2013 Rule will likely be restored.[82] Given that the 2013 Rule places a heavy burden on defendants and is likely to result in more disparate impact cases, lenders must reassess their current policies and practices to ensure they are not opening themselves up to likely disparate impact challenges.[83]

F. Best Practices for Lending Institutions

How effective the 2013 Rule will be at adapting to the changing nature of the housing market and rapid advances in lending technology is less clear. Lenders can, however, prepare for common statistical challenges. It is also noteworthy that commentators have recently noted several possible disparate impact claims based on emerging trends in the market, namely those concerning mortgage lending products based on overly restrictive credit scoring models.[84]

Under the 2013 Rule, a Plaintiff must plead that a facially neutral policy, procedure, or practice has a significantly greater discriminatory impact on members of a protected class and then show the adverse effect by offering sufficient statistical evidence demonstrating that the practice was the cause of the adverse effect.[85] Therefore, lenders need to consider internal testing of a wide range of policies and practices that are race-neutral in intent but could have a discriminatory effect along racial lines.[86] Conducting "routine statistical self-assessments on a [portfolio-wide] basis" is one of the most dependable ways to do so.[87]

Lenders should also assess their internal rules and protocols to see whether there are any situations when discretion is allowed in underwriting or other credit processes, since this might lead to

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[80] *See* Restatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590 (June 25, 2021) (to be codified at 24 C.F.R. pt. 100).
[81] Alexander, *supra* note 1.
[82] *Id.*
[83] See *id.*
[84] Howard Hyde et al., *HUD's Disparate Impact Proposal Shows New Gov't Priorities*, LAW 360, https://www.law360.com/articles/1407527/hud-s-disparate-impact-proposal-shows-new-gov-t-priorities (July 28, 2021).
[85] *Id.*
[86] *Id.*
[87] *Id.*

discriminatory outcomes.[88] Organizations should build mechanisms into their corporate governance structures "to approve such exceptions or departures from common practice" and properly document every such instance along with a reason for the departure from normal business practice, "[t]o the extent [that] policies and procedures allow for discretion or exceptions."[89] Suppose the company considers any modifications to its policies and procedures due to the evaluation.[90] In that case, senior management should explain the business or risk-related reasons for making or not making such changes.[91]

Lenders that depend exclusively on algorithms developed or given by other parties are also vulnerable to disputes arising from statistical differences.[92] Notably, the FHA covers algorithmic decision-making that lacks proper control regarding the impact of such judgments on protected groups.[93] Lending institutions, therefore, need to critically assess the effects of their algorithms to ensure they are not creating discriminatory effects that likely arise from the implicit biases of the data scientists that create the programs. A possible solution would be to hire an external development firm to audit the effects of the algorithms.

Furthermore, every decision to change or discontinue a product or service should be thoroughly evaluated, and the reasons for doing so should be well documented.[94] Senior management and fair lending risk committees should assess substantial changes to product and service offerings as part of the organization's corporate governance procedures.[95] Meeting minutes and other documents should be used to document the review's findings, including evaluations of the rationale for the business actions under question.[96]

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Virginia Foggo & John Villasenor, *Algorithms, Housing Discrimination, and the New Disparate Impact Rule*, 22 COLUM. SCI. & TECH. L. REV. 1, 31 (2020) (Extrapolating a court's language to discriminatory algorithms).
[93] *Id.*
[94] Hyde, *supra* note 75.
[95] *Id.*
[96] *Id.*

G. Conclusion

While the future of HUD's 2020 disparate impact rule is uncertain, the 2013 Rule will probably be reinstated.[97] This shift is primarily a result of criticism of HUD's interpretation of *Inclusive Communities* and criticism that the 2020 Rule unnecessarily impedes on decades of disparate impact jurisprudence. Although the 2013 Rule is consistent with an increased focus on consumer rights, it could also lead to an increase in challenges to lenders' policies and practices. Unlike the 2020 Rule, however, lenders can better prepare for the likely challenges under the 2013 Rule because of its consistent jurisprudence and well-defined limits. As markets and technology evolve, therefore, lenders need to be mindful of the effects of their products on members of a protected class, even when algorithms are implemented to reduce possible bias.

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