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January 17, 2012

Via Electronic Submission & Mail

Regulations Division
Office of General Counsel, Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500
www.regulations.gov

Re: Docket No. FR-5508-P-01; *Implementation of the Fair Housing Act's Discriminatory Effects Standard*

Dear Rules Docket Clerk:

On behalf of the undersigned, we write in support of HUD's proposed regulation implementing the Fair Housing Act's discriminatory effects standard. The events of the last several years have shown that we must be particularly vigilant in ensuring that members of every community have equal access to safe, affordable home financing.

With one clarification (detailed below), this proposed regulation will formalize HUD's longstanding and consistent position that the anti-discrimination provisions of the Fair Housing Act are directed to the consequences of housing and home financing policies and practices, not simply their purpose. This position comports with the interpretation of the Act by the federal courts of appeals, which have consistently held, for over forty years, that liability under Title VIII may be established based on a showing that a neutral policy or practice has a disparate impact on a protected group.

The disparate impact standard is critical to effective and vigorous fair housing enforcement in a variety of contexts. This is evident from the array of examples listed in the proposed regulation (76 Fed. Reg. 70924-25). However, disparate impact analysis is arguably most important – and likely to have the greatest impact – in cases involving access to credit.

While discriminatory practices by a landlord, realtor or developer will certainly have serious negative consequences, the impact is likely to be limited geographically and numerically. In contrast, the policies or practices of large financial institutions, mortgage insurers, credit bureaus and other participants in the home finance market can affect hundreds of thousands of people across the country; ensuring that those policies or practices do not have a discriminatory effect on the basis of race, gender or other protected characteristics can go far to promote a fair housing market and integrated communities. Furthermore, purchasing a home is the most significant financial transaction most families

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ever undertake. Home loans that are overpriced or contain features that increase the likelihood of default and foreclosure negatively impact families' ability to build assets, access educational opportunities or plan for the future, potentially locking in wealth and income disparities for generations.

There is ample evidence of credit discrimination in the U.S. home finance market. For example, a study of 2007 HMDA data showed that African-American applicants were 3.2 times more likely than white applicants to receive a high-cost conventional loan and 2.6 times more likely to be denied a loan. Hispanic applicants faced similar difficulties; they were 2.6 times more likely to receive a high-cost conventional loan and 2.3 times more likely to be denied a loan.[1]

Statistically significant disparities in the mortgage market remain, even after credit risk and other factors are taken into account.[2] Some of the disparity in outcome may be attributable to unequal treatment by individual loan officers,[3] but some portion of it is the result of arguably neutral policies, practices and incentive structures that nevertheless have a discriminatory effect on protected groups.[4] The disparate impact standard, which encourages actors in the housing market to seek the least discriminatory means of meeting their business needs, is ideally suited for identifying and remedying such practices.

Preserving the "business necessity" standard in the burden-shifting analysis

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[1] Robert B. Avery, Kenneth P. Brevoort, & Glenn B. Canner, Div. of Research & Statistics, Fed. Reserve Bd., *The 2007 HMDA Data*, 94 Fed. Reserve Bull. A107 (Dec. 2008)

[2] *See, e.g.*, Office of Pol'y Dev. & Research, United States Dep't of Hous. & Urban Dev., Risk or Race: an assessment of subprime lending patterns in nine metropolitan areas (Aug. 2009) (concluding that "[i]n general, the inclusion of credit score measures did not explain away the troubling finding that even after years of public policy efforts, race and ethnicity remain important determinants of the allocation of mortgage credit in both home purchase and home refinance markets."); Bocian, et al., Center for Responsible Lending, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosure* (Nov. 2011).

[3] *See, e.g.*, Office of Pol'y Dev. & Research, United States Dep't of Hous. & Urban Dev., All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, Final Report (Apr. 2002) (finding that loan officers generally treated paired testers the same, but where there were differences, black and Hispanic applicants were much more likely to receive unfavorable treatment than white Anglo applicants).

[4] *See, e.g.*, Compl. United States v. Countrywide Fin. Corp., No. 11-CV-10540 (C.D. Cal. Dec. 21, 2011) at ¶ 6-7 ("Countrywide's home mortgage lending policies allowed its employees and mortgage brokers both to set the loan prices charged to borrowers and to place borrowers into loan products in ways that were not connected to a borrower's creditworthiness or other objective criteria related to borrower risk. Countrywide's policies created financial incentives for its employees and mortgage brokers by sharing increased revenues with them. Countrywide knew or had reason to know... that its policies... were resulting in discrimination.")

We support HUD's choice to create a single regulation to apply to both public and private actors, but suggest that the regulation be revised to make clear that it incorporates the "business necessity" standard articulated in the 1994 *Interagency Policy Statement on Discrimination in Lending*. This policy was signed by ten government agencies, including HUD, and reads:

> When a lender's policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by "**business necessity**." The **justification must be manifest** and may not be hypothetical or speculative. 59 Fed. Reg. at 18269 (emphasis added).

The Interagency Policy Statement standard is well-established, especially in fair lending matters, and we would urge including it in the regulation so that there is no confusion over, or dilution of, that standard.

As currently written, the regulation provides that if a plaintiff meets the burden of demonstrating that a housing practice has a discriminatory effect, as defined in proposed §100.500(a), the defendant has the opportunity to prove that the practice "has a necessary and manifest relationship to one or more legitimate, nondiscriminatory interests" (proposed §100.500(c)(2)). That language sets the bar too low and is also too vague to provide advance guidance to institutions seeking to comply with fair housing and fair lending requirements.

We propose two changes to the proposed language. First, for all respondents and defendants, the legitimate, nondiscriminatory interest should be "substantial," not merely legitimate. This is a stronger standard than the proposed regulation, but still not the most stringent possible. For example, some court have required proof of a "compelling business necessity."[5] However, we recognize that when HUD previously argued for this standard, the 10th Circuit rejected it.[6] Requiring that the nondiscriminatory interest be "substantial" is a reasonable approach, recognized by the courts.[7]

Second, the regulation should specify that defendants or respondents engaged in commercial activity must meet the business necessity standard set forth in the 1994 policy statement. While business necessity may not have meaning in all contexts (for example, where a government agency is the defendant), it provides a clearer, more predictable standard for lenders and other financial institutions seeking to meet fair housing requirements than simply "legitimate, nondiscriminatory interests."

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[5] *See, e.g.*, *Pfaff v. HUD*, 88 F.3d 739, 747 (9th Cir. 1996) ("appropriate standard of rebuttal in disparate impact cases normally requires a compelling business necessity"); *Graoch Associates # 33 v. Louisville/Jefferson County*, 508 F.3d 366, 387) (6th Cir. 2007).

[6] *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243, 1254 (10th Cir.1995).

[7] *See, e.g., Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir. 2000) ("a demonstrated disparate impact in housing [must] be justified by a legitimate and substantial goal of the measure in question")

Provided this clarification is made, HUD's proposal will foster the goals of the Fair Housing Act and benefit our clients. The proposal represents a long-needed confirmation of the propriety of disparate impact claims under the Fair Housing Act and a clarification of the burden of proof under this standard. It provides a national standard for courts, housing providers, municipalities and the financial and insurance industries. These issues are now being considered by the Supreme Court and we urge HUD to issue the final rule as soon as possible to provide the Court definitive agency interpretation concerning these issues.

Very truly yours,

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