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HUD Final Rule on Disparate Impact under the Fair Housing Act

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On February 8, 2013, the Department of Housing and Urban Development (“HUD” or the “Department”) finalized its controversial discriminatory effects rule¹ (the “final rule” or “discriminatory effects rule”), thus formalizing the Department’s “long held recognition” that a plaintiff or charging party can establish a Fair Housing Act² (“FHA” or the “Act”) violation using the “disparate impact” theory of liability. Although HUD emphasized that the final rule merely codifies preexisting standards, in many respects it differs from applicable Supreme Court precedent.

More problematic from a practical perspective is that the final rule and its accompanying preamble contain numerous ambiguities and unresolved issues. Unfortunately, this will make complying with and defending claims under the final rule particularly tedious.

This alert describes the history of the final rule, summarizes its provisions and discusses the compliance and litigation challenges presented by HUD’s formulation of the effects test in both the final rule and its preamble.

I. Background and Relationship to Supreme Court Challenges

Congress enacted the FHA “to provide, within constitutional limitations, for fair housing throughout the United States.”³ The statute’s key provisions prohibit discrimination “because of race, color, religion, sex, handicap, familial status, or national origin,” in connection with, among other things, “residential real estate-related transactions.”⁴

Courts have recognized two principal theories under which an aggrieved party can seek to prove a claim of discrimination – disparate treatment and disparate impact. The term “disparate treatment” describes an intentional act of discrimination against individuals “because of” one of the protected characteristics, such as race or ethnicity.⁵ The term “disparate impact” describes differential results that arise from “practices that are facially neutral in their treatment of different groups” but that may “fall more harshly on one group than another.”⁶

The Act prohibits practices that constitute disparate treatment of individuals based on the enumerated characteristics. Although eleven of the thirteen United States Courts of Appeals have concluded that the Act also prohibits practices that have a disparate impact or discriminatory effect, the United States Supreme Court has never directly decided the question. During its 2011 term, the Supreme Court granted a petition for writ of certiorari in *Magner v. Gallagher*, No. 10-1032, to address the issue. Days later, HUD issued its proposed discriminatory effects rule under the Act.⁷ After the Supreme Court set the *Magner* case for argument, the petitioner, the City of Saint Paul, withdrew its appeal, reportedly in exchange for a commitment that the United States Department of Justice (“DOJ”) would not pursue a separate legal claim against the City.⁸

In June 2012, defendants in another FHA disparate impact matter petitioned the Supreme Court for a writ of certiorari.⁹ To date, the Supreme Court has not ruled on the petition, and it therefore remains

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to be seen whether the Court will address the availability of the disparate impact theory under the FHA.

On February 8, 2013, HUD finalized its discriminatory effects rule. The final rule was published in the Federal Register on February 15, 2013, and becomes effective on March 18, 2013.¹⁰ HUD received nearly one hundred public comments during the two-month comment period on the proposed rule.¹¹ According to HUD, the final rule “formalizes [HUD’s] long-held recognition of discriminatory effects liability under the [Fair Housing] Act and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act.”¹² On its face, HUD’s final rule applies only to the FHA, but it is possible that the Consumer Financial Protection Bureau and the DOJ may look to HUD’s final rule as guidance in determining how to enforce the other federal fair lending statute, the Equal Credit Opportunity Act (“ECOA”).¹³

For the most part, HUD did not revise the substance of the discriminatory effects rule in response to the critical comments it received from the lending industry or the concerns those comments raised. Most of the changes from the proposed rule to the final rule consist of revisions to the wording of the regulations. Specifically, HUD:

- condensed the definition of “discriminatory effect,” “without changing its meaning,” to “[a] practice [that] 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”;
- revised the first stage of the burden of proof from requiring a charging party to prove “that a challenged practice causes a discriminatory effect” to requiring a charging party to prove “that a challenged practice caused or predictably will cause a discriminatory effect”;
- deleted the term “and manifest” from the phrase “necessary and manifest” in the regulation setting out the second stage of the analysis”;
- added a provision explaining that “[a] legally sufficient justification must be supported by evidence and may not be hypothetical or speculative”;
- revised the second stage of the burden of proof to provide that the challenged practice must be necessary to achieve a “substantial” interest, in addition to a “legitimate, nondiscriminatory” interest; and
- replaced “cannot be served” with “could not be served,” and “demonstrating” with “proving,” in the third stage of the burden of proof.¹⁴

HUD also added a new regulatory provision expressly stating that the “[s]ervicing of loans or other financial assistance with respect to dwellings in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates . . . because of race, color, religion, sex, handicap, familial status, or national origin” is an unlawful practice under 24 C.F.R. § 100.130.¹⁵

II. HUD’s Discriminatory Effects Standard

HUD’s final rule declares that “[l]iability may be established under the Fair Housing Act based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”¹⁶

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A. Discriminatory Effect Defined

The final rule states that a practice is deemed to have a discriminatory effect “where 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.”¹⁷

According to the final rule’s preamble, certain commenters asked HUD to remove the word “predictably” from this language, because it would make good faith compliance difficult and could occasion claims that are too speculative. HUD disagreed, concluding that the language and prior interpretations of the FHA support the view that the Act prohibits actions that will have predictable discriminatory effects.¹⁸

B. Legally Sufficient Justification

Consistent with established disparate impact doctrine, HUD’s final rule states that a practice having a discriminatory effect may still be lawful if it is “supported by a legally sufficient justification.” According to the final rule, a legally sufficient justification exists where the challenged practice:

1. is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant;¹⁹ and
2. those interests could not be served by another practice that has a less discriminatory effect.²⁰

1. What is “Necessary”?

In response to a commenter’s request that the final rule define the term “necessary,” HUD remarked in the preamble that the rule “uses ‘necessary’ in its ordinary, most commonly used sense.” Other commenters suggested that HUD remove the word necessary to make the rule’s standard consistent with the standard articulated in the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*.²¹ HUD declined to adopt this suggestion, reasoning that requiring a challenged practice having a discriminatory effect to be “necessary” best effectuates the “remedial goal” of the FHA and is consistent with other federal guidance interpreting the disparate impact theory.²²

Another issue raised in the final rule’s preamble is that the term “necessary” may interfere with voluntary loss mitigation efforts – such as those under the Home Affordable Modification Program and the Home Affordable Refinance Program – because such efforts are not mandatory and, therefore, may not be perceived as “necessary.” HUD did not confirm that such voluntary loss mitigation efforts satisfy the necessary standard, but instead merely noted that the “mere fact that a policy is voluntarily adopted does not preclude it from being necessary.”²³

Finally, HUD noted a commenter’s concern that requiring a respondent or defendant to prove “necessity” may invite unnecessary and frivolous investigations and litigation. In response, HUD said that it did not believe that this problem would arise because, among other matters, lenders have known that they must prove necessity since at least 1994 when HUD and ten other federal agencies published the Joint Policy Statement on Discrimination in Lending (“Joint Policy Statement”).²⁴

2. What is “Substantial”?

In the rule’s preamble, HUD defines a “substantial” interest as “a core interest of the organization that has a direct relationship to the function of that organization.”²⁵ According to HUD, this is analogous to the Title VII requirement that an employer’s interest in an employment practice with a disparate

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impact be “job related.” In the FHA context, however, there is no single objective (such as job-relatedness) against which practices can be evaluated and, therefore, whether a challenged practice is necessary to achieve a “substantial” interest requires a “case-specific, fact-based inquiry.”²⁶

3. What is “Legitimate”?

HUD explains in the preamble that the inclusion of the term “legitimate” is intended to ensure that a justification is “genuine and not false.”²⁷ The Department rejected commenters’ concerns that the term allows for “subjective” review of a proffered justification, reasoning that evaluating whether an interest is “legitimate” will be very fact-intensive, but not subjective.

4. What is “Nondiscriminatory”?

HUD explains that use of the word “nondiscriminatory” is meant to ensure that “the justification for a challenged practice does not itself discriminate on a protected characteristic.”²⁸

5. “Substantial, Legitimate, Nondiscriminatory Interest” Is Comparable to “Business Necessity”

Commenters to the proposed rule requested that the phrase “legitimate, non-discriminatory interest” be replaced by the more familiar term “business necessity.” HUD opted not to make this change, because the FHA applies to individuals, non-profit organizations and public entities as well as businesses. The Department clarified in the preamble, however, that the “substantial, legitimate, non-discriminatory” standard is equivalent to, and not more lenient than, the “business necessity” standard used in disparate impact case law and elsewhere.²⁹

6. Maximizing Profits and Avoiding Losses

A key question in any disparate impact analysis is whether increasing profits or avoiding losses is a sufficient justification for a practice that has a disproportionate impact adverse to a particular group. In that regard, commenters to the proposed rule requested that HUD expressly state that “increasing profits, minimizing costs, and increasing market share qualify as legitimate, nondiscriminatory interests.” HUD declined to provide this assurance, reasoning that the FHA covers many different types of entities, and a determination of what qualifies as a “substantial, legitimate nondiscriminatory interest” is fact-specific and must be determined on a case-by-case basis.³⁰ It is worth noting, however, that the Joint Policy Statement does explicitly state that in determining business necessity, “[f]actors that may be relevant to the justification could include cost and profitability.”³¹

7. Proving a Substantial, Legitimate, Nondiscriminatory Interest

The final rule specifically states that a legally sufficient justification “must be supported by evidence and may not be hypothetical or speculative.”³² According to the preamble, this language is intended to convey that defendants and respondents relying on the “legally sufficient justification” defense “must be able to prove with evidence the substantial, legitimate, nondiscriminatory interest supporting the challenged practice and the necessity of the challenged practice to achieve that interest.”³³

8. Less Discriminatory Alternative

In the final rule’s preamble, HUD made several observations about how it interprets the third part of a disparate impact analysis, *i.e.*, that the defendant or respondent’s interests could not be served by another practice that has a less discriminatory effect.

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First, HUD states that under its final rule, a less discriminatory alternative “must serve a respondent or defendant’s substantial, legitimate nondiscriminatory interests, must be supported by evidence, and may not be hypothetical or speculative.”³⁴ According to HUD, some commenters stated that for liability to attach, the alternative practice should be “equally effective” as the challenged practice, while others argued that liability should attach unless the alternative “would impose an undue hardship.” HUD declined to adopt the “equally effective” language, because the final rule’s language – that the defendant or respondent’s interests “could not be served” by the alternative – is consistent with the Joint Policy Statement and other authority, and because an “equally effective” standard is less appropriate in the housing context given the “wider range and variety of practices . . . that are not readily quantifiable.”³⁵ HUD also declined to adopt the “undue hardship” standard, because it would place too heavy a burden on the respondent or defendant.³⁶

HUD also rejected a commenter’s request that a charging party or plaintiff be required to show that prior to litigation, that a respondent or defendant knew of and rejected a less discriminatory alternative. According to HUD, such a requirement “would create an incentive not to consider possible ways to create a less discriminatory result.”³⁷

C. Burdens of Proof

One of the more controversial aspects of the new rule is the way that it allocates the burden of proof in a way that some argue is inconsistent with Supreme Court precedent.³⁸ Under the final rule, disparate impact liability is established by a three-part, burden-shifting test:

1. the charging party or plaintiff has the burden of proving that a challenged practice caused or will predictably cause a discriminatory effect;
2. if the charging party or plaintiff satisfies this burden, the burden of proof shifts to the respondent or defendant to prove that the practice is necessary to achieve one or more of its “substantial, legitimate, nondiscriminatory interests”;³⁹ and
3. if the respondent or defendant satisfies this burden, the charging party or plaintiff may still prevail if it can prove that the respondent or defendant’s interests could be served by another practice that has a less discriminatory effect.⁴⁰

According to HUD, the burden-shifting framework described above is consistent with HUD practice, the approach used by most federal courts, the Title VII standard codified by Congress in 1991 and the discriminatory effects standard under ECOA. The Department notes that having the same burden allocations under the FHA and ECOA will yield less confusion in cases brought under both statutes. Further, HUD believes that the burden-shifting approach “makes the most sense because it does not require either party to prove a negative.”⁴¹

D. Servicers are Explicitly within the Ambit of the Final Rule

Finally, the final rule adds a new section that was not contained in the proposed rule. The new section 100.130(b)(3) specifies that servicing of loans is covered by section 805 of the Act. Specifically, the added section reads:

Servicing of loans or other financial assistance with respect to dwelling in a manner that discriminates, or servicing of loans or other financial assistance which are secured by residential real estate in a manner that discriminates, or providing such loans or financial assistance with other terms or conditions

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that discriminate, because of race, color, religion, sex, handicap, familial status, or national origin.

HUD contends that this new section was added, in response to public comment, to illustrate that servicing is also a condition of loans or other financial assistance under the ambit of section 805. Although the Department's view will likely not come as a surprise to most mortgage loan servicers, this addition to the final rule reveals HUD's recent focus on fair servicing, in addition to fair lending. Mortgage loan servicers should consider evaluating and monitoring their servicing activities, including loss mitigation and loan modifications, in light of the prominence of servicing in the final rule.

III. Compliance Issues and Questions

HUD's final rule and its preamble raise a number of compliance issues that will require careful consideration.

A. Multiple Acts or Policies Can Serve as the Basis for a Claim

Under Supreme Court precedent, in order to show a *prima facie* case of disparate impact, the charging party or plaintiff must identify a *specific* policy or practice that causes the alleged impact.⁴² In the discriminatory effects rule, HUD diverges from this requirement by providing that a charging party or plaintiff may be able to challenge the effects of a "decision-making process as a whole," as opposed to a specific, isolated practice or policy. According to HUD, this is appropriate because "the elements of a decision-making process may not be capable of separation for analysis," and multiple acts or policies may together result in discrimination.⁴³

Laying aside whether this view is defensible under Supreme Court precedent,⁴⁴ it will create compliance challenges for lenders seeking to assess potential liability under the final rule. Although evaluating disparate impact liability is always complicated, it is much more straightforward to assess whether a *particular* factor – as opposed to an entire business process – raises fair lending concerns. For example, if a lender suspected that a proposed down payment requirement could have a disparate impact, using historical loan origination information, it could evaluate whether the proposed requirement would adversely impact one or more borrower groups. If the answer to this inquiry was yes, the lender could perform testing on whether the proposed requirement would be justified, for example, by improving loan performance and decreasing losses.

In contrast, under HUD's discriminatory effects rule, it is not clear how a lender should choose policies or practices for disparate impact assessment. Should a lender determine whether its underwriting criteria in their entirety have an adverse impact on one or more groups? If the answer is yes, how does the lender determine whether the criteria are defensible? Lenders should consider working closely with outside counsel and statistical consultants in evaluating their businesses for risk under the final rule.

B. Can Compliance With Dodd-Frank's Ability to Repay Create Liability Under the Rule?

Among the thorniest issues confronting the mortgage lending industry under the discriminatory effects rule is whether compliance with the Dodd-Frank Act's ("Dodd-Frank") ability to repay ("ATR") and qualified mortgage ("QM") requirements will create disparate impact liability. In the preamble to the final rule, HUD noted that commenters expressed concern that the rule could lead to lawsuits challenging lenders' compliance with Dodd-Frank, as well as their use of credit scores and other

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common underwriting criteria. Other commenters requested that HUD create a safe harbor for lenders complying with standards established by federal or state law, such as Dodd-Frank’s ATR and QM requirements, or by government-sponsored enterprises or investors.⁴⁵

These comments provided an opportunity for HUD to offer some certainty around these issues, so that lenders could, for example, lend only to meet the standards of the QM and ATR provisions without fearing the possibility of having to defend against a costly and disruptive FHA claim. HUD declined to provide any assurances around these issues, and instead opined – without any rationale – that it does not believe the rule will prompt lawsuits challenging credit scores, other underwriting standards or Dodd-Frank’s ATR and QM requirements, and that a safe harbor is not “appropriate or necessary.” The Department also repeated its mantra that the rule merely reiterates long-existing standards, and again noted that the lending industry has lived with an effects test at least since the issuance of the Joint Policy Statement eighteen years ago.⁴⁶

C. Discretion

The granting of discretion (for example, providing loan originators with the ability to grant price exceptions) has, in recent years, been used as a basis for fair lending complaints and enforcement.⁴⁷ In the preamble to the final rule, HUD states that policies “that allow for discretion or the use of subjective criteria, may result in a discriminatory effect actionable under the Fair Housing Act.”⁴⁸ As pointed out by at least one commenter, this view is at odds, at least in some respects, with the Supreme Court’s 2011 decision in *Wal-Mart v. Dukes*.⁴⁹ In *Wal-Mart*, the Supreme Court rejected the application of the disparate-impact theory to a company-wide policy of discretion for the purposes of class certification under Title VII.⁵⁰ The Supreme Court found that, “[w]here hundreds or thousands of persons independently exercise discretion in carrying out their job duties, that is “just the opposite of a uniform . . . practice.”⁵¹ HUD dismissed this view, noting, among other matters, that *Wal-Mart* addressed class certification under Title VII, not substantive standards under the FHA.⁵²

An in-depth analysis of the extent to which HUD’s view that discretion can form the basis for an FHA violation is beyond the scope of this alert. In structuring their compliance policies, however, lenders should be aware that HUD believes the granting of discretion can serve as the basis of an FHA claim.

D. Compliance with Third Party Requirements

A commenter to the proposed discriminatory effects rule raised the question of whether the rule “may create strict liability for entities complying with contractual obligations set by third parties, including the federal government.” This question provided an opportunity for HUD to answer a question that has created great uncertainty in the lending industry in recent years, *i.e.*, whether a lender can abide by investors’ underwriting requirements without risk of liability under the Act. HUD dodged the question entirely, and merely repeated that the final rule “permits a defendant or respondent to defend against a claim of discriminatory effect by establishing a legally sufficient justification.”⁵³ Thus, the issue of compliance with investor or other third party requirements remains unresolved.

IV. Litigation Issues and Questions

A. Measuring Impact

As reflected in HUD’s discriminatory effects rule, the first step in a disparate impact analysis is to assess whether a policy or practice has a discriminatory effect. Although this initially appears to be a straightforward question, how to properly evaluate whether an impact exists can be complicated. For

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example, in assessing whether an underwriting policy adversely effects females, what groups should be evaluated? The lender's actual female applicants as compared to its male applicants? All creditworthy female consumers as compared to all creditworthy male consumers? Likely female applicants as compared to likely male applicants? The rule is silent on this issue.

Another issue is what magnitude of impact is sufficient to establish a claim. Are statistically significant, but economically *de minimis* differences across borrower groups sufficient to allege a disparate impact? Several commenters to the proposed discriminatory effects rule expressed concern that the rule did not specify the degree to which a practice must disproportionately impact one group over another to be actionable. Another commenter worried that small statistical differences in loan pricing may be actionable.

The question of how large a difference across borrower groups must be to raise fair lending concerns has been a long-standing compliance difficulty for lenders seeking to minimize risk. Although certain informal rules of thumb have emerged over the years, the government has never officially articulated a standard, but enforcement experience suggests the benchmarks have become more conservative over time. HUD declined to provide specific guidance on this issue in its final rule, instead reiterating that whether "a particular practice results in a discriminatory effect is a fact-specific inquiry."⁵⁴

B. HMDA Data

It is generally well-accepted that Home Mortgage Disclosure Act ("HMDA") data cannot itself serve as the basis for proving a fair lending violation, because many legitimate factors that are not included in HMDA reports influence underwriting, pricing and other lending decisions.⁵⁵ Yet, HUD declined to confirm the point, and instead, included language in the rule's preamble that could create confusion.

First, one commenter requested that the Department clarify that census, HMDA and other data can be used to demonstrate that a practice "predictably results in a discriminatory effect." Instead of affirmatively refuting what should be viewed as a patently erroneous statement, HUD dodged the issue by stating that the purpose of the rule is not to describe how data and statistics may be used in the application of the disparate impact standard.⁵⁶ Second, in another part of the preamble, in response to a commenter's concern that the rule would allow lawsuits based only on HMDA data, HUD states that:

HUD and courts have recognized that [HMDA data] may indicate a disparate impact. Such a showing, however, does not end the inquiry. The lender would have the opportunity to refute the existence of the alleged impact and establish a substantial, legitimate and nondiscriminatory interest for the challenged practice . . .⁵⁷

Even though this language correctly confirms that a lender may be able to refute the existence of a HMDA-based impact, it leaves open the question of whether a complainant or plaintiff can properly allege an impact based on such data in the first place. This ambiguity could prompt unmeritorious and costly litigation.

C. Discovery of Proprietary Information

Because the discriminatory effects rule places the burden on the charging party or plaintiff to demonstrate a less discriminatory alternative, an issue arises regarding the information that such a party would need to obtain in order to prove this element. Evaluating whether an alternative to a challenged practice is in fact less discriminatory and whether it could serve the respondent or

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defendant's interests would, in many or most cases, require elaborate and sophisticated analysis of large amounts of sensitive or proprietary information.

HUD notes in its preamble that the Federal Rules of Civil Procedure and comparable rules for administrative proceedings would allow for discovery of such material and that an "appropriately tailored protective order" could provide respondents and defendants "adequate protection" from disclosure of this information.⁵⁸ As a practical matter, financial institutions facing discovery demands for sensitive, proprietary or consumer information should carefully consider the scope and enforceability of any protective order obtained to protect it. Even with an adequate protective order, the discovery process is likely to be very intrusive on the affected business groups.

D. Retroactivity

Although the final discriminatory effects rule is not effective until March 18, 2013,⁵⁹ HUD states in the preamble that the rule will "apply to pending and future cases."⁶⁰ Although HUD declines to characterize the rule as "retroactive" ("it 'is no more retroactive than in its operation than is a judicial determination construing and applying a statute to a case in hand'"),⁶¹ given that the Department will apply it to "pending cases," it appears that HUD views the rule as applicable to cases involving conduct that occurred before its effective date.

E. Remedies

In the preamble, HUD rejected a commenter's view that the most appropriate remedy for an FHA violation under the effects theory is declaratory or injunctive relief, stating that the FHA "specifically provides for the award of damages – both actual and punitive – and penalties."⁶²

* * * * *

Whether HUD's final discriminatory effects rule will result in material liability to the lending industry will depend in large part on whether the rule is fairly and responsibly interpreted and enforced. It may be some time before we know how HUD and the courts will approach these issues. In the meantime, lenders should consider working with counsel to develop compliance strategies to minimize their potential risk under the final rule.

If you have any questions about HUD's final rule or how it will apply to your business, please contact Melanie Brody at (202) 778-9203, Paul Hancock at (305) 539-3378 or Andrew Glass at (617) 261-3107.

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¹ Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

² 42 U.S.C. §§ 3601 *et seq.*

³ 42 U.S.C. § 3601.

⁴ 42 U.S.C. §§ 3604, 3605.

⁵ *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring).

⁶ *Id.* at 239 (plurality op.).

⁷ See Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).

⁸ See United States Congress, Committee on the Judiciary, Letter to Attorney General Eric Holder (Sept. 24, 2012)(requesting documents and interviews related to the allegations of quid pro quo in the *Magner* case); Mary Kissel, *HUD's Shady St. Paul Dealings*, Wall Street Journal (Oct. 31, 2012).

⁹ *In the matter of Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507.

¹⁰ 78 Fed. Reg. 11,460.

¹¹ *Id.* at 11,464.

¹² *Id.* at 11,460.

¹³ With the enactment of the Dodd-Frank Act, the Consumer Financial Protection Bureau obtained regulatory and enforcement authority over ECOA. HUD continues to have regulatory and enforcement authority over FHA because the Dodd-Frank Act did not transfer this authority to the Consumer Financial Protection Bureau.

¹⁴ *Id.* at 11,463.

¹⁵ *Id.* at 11,464 (discussing language of new 24 C.F.R. § 100.130(b)(3)).

¹⁶ *Id.* at 11,482.

¹⁷ *Id.*

¹⁸ *Id.* at 11,468.

¹⁹ The final rule refers to both "charging parties" and "respondents" and "plaintiffs" as well as "defendants" because the FHA provides for both administrative and judicial enforcement. 42 U.S.C. §§ 3612, 3613, 3614.

²⁰ 78 Fed. Reg. 11,482.

²¹ 490 U.S. 642 (1989).

²² 78 Fed. Reg. 11,471-11,472.

²³ *Id.* at 11,472.

²⁴ *Id.*

²⁵ *Id.* at 11,460, 11,470.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 11,471.

³¹ Interagency Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (Apr. 15, 1994).

³² 78 Fed. Reg. 11,482.

³³ *Id.* at 11,471.

³⁴ *Id.* at 11,473.

³⁵ *Id.*

³⁶ *Id.*

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³⁷ *Id.*

³⁸ For a detailed discussion of how the final rule's burden-shifting approach differs from Supreme Court precedent, see Paul F. Hancock and Andrew C. Glass et al., Mortgage Industry Submits Comments on HUD's Proposed Disparate-Impact Rule under the Fair Housing Act (Feb. 1, 2012), available at <http://www.klgates.com/mortgage-industry-submits-comments-on-huds-proposed-disparate-impact-rule-under-the-fair-housing-act-02-01-2012>.

³⁹ Section 100.500(d) of the final rule states that the fact that a practice is supported by a legally sufficient justification may not be used as a defense against a claim of intentional discrimination. 24 C.F.R. § 100.500(d). This provision is somewhat confusing because "intentional" discrimination – or disparate treatment – by definition involves discrimination because of a prohibited factor. Further, it is well accepted that a defendant accused of disparate treatment may defend the claim by showing that the difference in treatment was due to a legitimate, non-discriminatory factor (provided that the factor was not a pretext for discrimination). See, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, (1st Cir. 2000); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). It is not clear whether HUD added Section 100.500(d) in an effort to alter how disparate treatment claims are evaluated or if it mistakenly conflated treatment and impact.

⁴⁰ 78 Fed. Reg. 11,474.

⁴¹ *Id.*

⁴² See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

⁴³ 78 Fed. Reg. 11,469.

⁴⁴ See Paul F. Hancock and Andrew C. Glass et al., Mortgage Industry Submits Comments on HUD's Proposed Disparate-Impact Rule under the Fair Housing Act (Feb. 1, 2012), available at <http://www.klgates.com/mortgage-industry-submits-comments-on-huds-proposed-disparate-impact-rule-under-the-fair-housing-act-02-01-2012>; Paul F. Hancock and Andrew C. Glass et al., Supreme Court Brief Filed on Behalf of Mortgage Lenders (Jan. 5, 2012), available at <http://www.consumerfinancialserviceswatch.com/2012/01/05/supreme-court-brief-filed-on-behalf-of-mortgage-lenders>; Paul F. Hancock and Melanie Hibbs Brody et al., Supreme Court vs. HUD: The Race to Decide "Impact or Intent" (Nov. 17, 2011), available at <http://www.klgates.com/emsupreme-court-vs-hudem--the-race-to-decide-impact-or-intent-11-17-2011>.

⁴⁵ 78 Fed. Reg. 11,475, 11,476, 11,477.

⁴⁶ *Id.* at 11,476. Although it is correct that the Joint Policy Statement provides for the use of disparate impact in fair lending cases, as a practical matter, the federal government did not use the approach to prosecute large-scale enforcement actions until recently.

⁴⁷ See, e.g., *In re Wells Fargo Residential Mortgage Lending Discrimination Litig.*, No. 3:08-md-01930-MMC, slip op. (N.D. Cal. Sept. 6, 2011) (denying class certification on Fair Housing Act claim because, in part, claim relied upon discretion of individual brokers or branches).

⁴⁸ 78 Fed. Reg. 11,468.

⁴⁹ 131 S. Ct. 2541 (2011).

⁵⁰ *Id.*

⁵¹ *Id.* at 2554.

⁵² 78 Fed. Reg. 11,488.

⁵³ *Id.* at 11,475.

⁵⁴ *Id.* at 11,468.

⁵⁵ See Interagency Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994) ("Data reported by lenders under the HMDA do not, standing alone, provide sufficient information for [fair lending] analysis because they omit important variables, such as credit histories and debt ratios.").

⁵⁶ 78 Fed. Reg. 11,468.

⁵⁷ *Id.* at 11,478.

⁵⁸ *Id.* at 11,474.

⁵⁹ *Id.* at 11,460.

⁶⁰ *Id.* at 11,474.

⁶¹ *Id.*

⁶² *Id.*

Consumer Financial Services Practice Contact List

K&L Gates' Consumer Financial Services practice provides a comprehensive range of transactional, regulatory compliance, enforcement and litigation services to the lending and settlement service industry. Our focus includes first- and subordinate-lien, open- and closed-end residential mortgage loans, as well as multi-family and commercial mortgage loans. We also advise clients on direct and indirect automobile, and manufactured housing finance relationships. In addition, we handle unsecured consumer and commercial lending. In all areas, our practice includes traditional and e-commerce applications of current law governing the fields of mortgage banking and consumer finance.

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