COMMENTS CONCERNING PROPOSED RULEMAKING ON THE "DISCRIMINATORY EFFECTS STANDARD" OF THE FAIR HOUSING ACT

January 17, 2012

Submitted to:

United States Department of Housing and Urban Development
Regulations Division
Office of the General Counsel

Docket No. FR-5508-P-01
RIN 2529-AA96

SUBMITTED BY:

American Bankers Association

American Financial Services Association

Consumer Bankers Association

Consumer Mortgage Coalition

Independent Community Bankers of America

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By Federal E-Rulemaking Portal

Regulations Division
Office of General Counsel
United States Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410

Re: Implementation of the Fair Housing Act's Discriminatory Effects Standard
Docket No. FR-5508-P-01
RIN 2529-AA96

Ladies and Gentlemen:

This comment is submitted by the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, the Consumer Mortgage Coalition, the Independent Community Bankers of America, and the Mortgage Bankers Association, trade associations whose members are actively involved in the residential mortgage lending industry nationwide (collectively, the "Trade Associations").[1] The Trade Associations submit the following comments concerning the proposed rulemaking (the "Proposed Rule") by the United States Department of Housing and Urban Development (the "Department" or "HUD") on the "discriminatory effects standard" of the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.* ("Fair Housing Act" or the "Act").

The Trade Associations appreciate the Department's efforts in promoting fair lending for all loan applicants, a goal which the Trade Associations strongly endorse, and the Department's efforts in promulgating the Proposed Rule. The Department faces complex issues in effecting the anti-discrimination provisions of the Fair Housing Act. The Trade Associations' comments are meant to assist the Department in determining the proper scope and standards for its enforcement efforts in promulgating rules under the Fair Housing Act. Application of an incorrect standard or improper enforcement of the Act would have serious negative implications for lenders and borrowers alike. Thus, the issues that this letter addresses are of great import both to the members of the Trade Associations and to their customers.

[1] A brief description of each of the Trade Associations is attached hereto as Appendix A.

I. Introduction and Summary of Comments

Congress enacted the Fair Housing Act in 1968. Pub. L. No. 90-284, Title VIII, 82 Stat. 73, 81-89 (1968) (codified at 42 U.S.C. §§ 3601, *et seq.*). In 1988, Congress amended the Act to address, in part, discrimination in residential real-estate-related transactions. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). The purpose of the Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. To that end, the statute prohibits discrimination "because of race, color, religion, sex, handicap, familial status, or national origin," *id.* §§ 3604, 3605, in connection with, among other things, "residential real estate-related transactions," *id.* § 3605.

The Trade Associations vigorously support the Fair Housing Act, and they and their members devote substantial resources on an ongoing basis to the advancement of fair lending. The Trade Associations wholeheartedly oppose the disparate treatment of individuals. "Disparate treatment" describes an intentional act of discrimination against individuals "because of" certain characteristics such as race or ethnicity. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring). The residential mortgage lenders represented by the Trade Associations seek to ensure that their credit decisions are made without regard to any factor prohibited by the Act.

The Trade Associations do not believe, however, that the disparate-impact cause of action created by the Proposed Rule finds support in the Fair Housing Act. "Disparate impact" describes the 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." *Id.* at 239 (plurality op.). Accordingly, and as discussed in detail below, the Trade Associations present the following comments for the Department's consideration:

1. The Department should postpone its rulemaking pending the United States Supreme Court's disposition of *Magner v. Gallagher*. The Proposed Rule presents the same issues that the Supreme Court is currently reviewing in *Magner*, namely, whether the Fair Housing Act prohibits conduct that, although facially neutral, has a purported disparate impact and if so, which burden and standard of proof should apply to disparate-impact claims. To take advantage of guidance from the Court on these issues, the Department should postpone its rulemaking until after the Court has rendered its opinion.

2. By creating liability for disparate impact, the Proposed Rule is inconsistent with the plain language of the Fair Housing Act. Congress's use of language prohibiting discriminatory practices "because of" certain traits or characteristics, such as the language

found in the Fair Housing Act, only extends to disparate treatment. The Department should revise the rule accordingly.

3. Reliance on United States Courts of Appeals rulings is misplaced. Although many of the Courts of Appeals have held that disparate-impact claims may be brought under the Fair Housing Act, these courts' holdings are incorrectly premised on Supreme Court jurisprudence construing language that is found in other statutes but that is *not* found in the Fair Housing Act. The Department cannot rely on those Courts of Appeal decisions in promulgating the Proposed Rule.

4. The Proposed Rule exceeds the Department's authority. If the Department were to promulgate the Proposed Rule in its current form, the Department would surpass the scope of authority that Congress has delegated to it. Moreover, the Department's failure to explain the departure from its prior, official, neutral position with respect to the availability of a disparate-impact cause of action under the Fair Housing Act suggests that the Department should revise the rule to eliminate the proposed cause of action.

5. The burden and standard of proof in the Proposed Rule are inconsistent with Supreme Court jurisprudence. If the Department does not eliminate the disparate-impact cause of action from the final rule, the Department should revise the burden and standard of proof to comport with the Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

6. The Proposed Rule may encourage discrimination. Although the Trade Associations and their members staunchly oppose disparate treatment, the Trade Associations are concerned that the threat of a disparate-impact challenge may encourage efforts by businesses to bring end results more in line with demographics. Such efforts, while intended to avoid disparate-impact liability, may lead to the use of quotas and thus to disparate treatment, the very situation that the Fair Housing Act is intended to eliminate.

7. The Department should provide an exemption from disparate-impact liability for compliance with government and government-sponsored programs or policies. If the Department does not eliminate the disparate-impact cause of action from the final rule, the Department should revise the rule to ensure that it does not create liability for businesses which are otherwise complying with or assisting in government efforts to rehabilitate the residential housing market.

8. In promulgating any rule, it cannot apply retroactively. There is no basis for retroactive application of the Proposed Rule, and such an approach would violate due process.

9. In promulgating any rule, the Department should assure that it complies with applicable requirements for determining the impact of the rule on small businesses. The Department's Regulatory Flexibility Act findings fail to explain how the Proposed Rule would not overburden small businesses.

For these reasons, the Trade Associations recommend that HUD postpone its rulemaking until after the Supreme Court decides *Magner* to take advantage of the Court's guidance in promulgating any rule. If HUD does not do so, the Trade Associations urge HUD to revise the Proposed Rule to make clear that the Fair Housing Act's anti-discrimination provisions address disparate treatment only. At the very least, the Department should revise the rule so that the burden and standard of proof comport with *Wards Cove* and to create an exemption for businesses which are otherwise complying with government and government-sponsored programs or policies intended to rehabilitate the residential housing market.

II. Discussion

A. HUD Should Postpone its Rulemaking Process until the Supreme Court Decides *Magner v. Gallagher*

The issues addressed by the Proposed Rule – namely, whether the Fair Housing Act recognizes disparate-impact claims and if so, what standard applies to such claims – are the same issues that the Supreme Court is currently reviewing in *Magner v. Gallagher*, No. 10-1032 (U.S.). The Court granted the petition for a writ of certiorari in *Magner* on November 7, 2011, and has set the matter for disposition this term. On November 16, 2011, the Department issued the Proposed Rule. Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).

The Department signed the United States' *amicus* brief submitted to the Court in connection with *Magner*. Through that brief, the Department expressed its position to the Court on the questions presented in *Magner*. Accordingly, there is no need for HUD to rush to finalize the Proposed Rule in advance of the Court's decision. On the contrary, a short continuance in the rulemaking process will allow HUD to make use of the Court's guidance as to how the Fair Housing Act is to be interpreted and will not materially delay the promulgation of any rule. If the Court rules that the Fair Housing Act does not recognize disparate-impact claims, the continuance would spare HUD the burden of amending a final rule that was recently

issued and save businesses from the unnecessary expense of attempting to understand the broad scope of a rule only to find that it is inapplicable. If the Court finds that the Fair Housing Act does allow for disparate-impact claims, the Court is likely to provide guidance on the proper burden and standard of proof for such claims. Finalizing a rule that comports with such guidance, again, would be more efficient for HUD and save businesses from the unnecessary expense of attempting to understand the undefined scope of the rule.

Finally, and importantly, by waiting until the Court rules in *Magner*, the Department will demonstrate proper deference to the Court, which is constitutionally charged with ruling on interpretations of federal law, such as the Fair Housing Act. *See* U.S. Const., Art. III, § 2 ("[t]he judicial power shall extend to all cases, in law and equity, arising under … the laws of the United States").

For these reasons, the Department should postpone its rulemaking on the "discriminatory effects standard" under the Fair Housing Act until after the Supreme Court renders its decision in *Magner* so that the Department can take full advantage of the Court's guidance in the rule promulgation process.

B. The Fair Housing Act Does Not Encompass a Disparate-Impact Theory

Even if the Department were to promulgate a rule before the Supreme Court renders its decision in *Magner*, the Trade Associations believe that the Department must revise the Proposed Rule because the Fair Housing Act does not encompass disparate-impact liability.

1. The Plain Language of the Fair Housing Act Does Not Support Disparate-Impact Claims

When Congress intends to prohibit neutral practices that have disparate impact, it employs language expressly concerning the "effects" of such practices. By contrast, Congress's use of language prohibiting discriminatory practices "because of" certain traits or characteristics, such as the language found in the Fair Housing Act, only extends to disparate treatment.

The plain language of the Fair Housing Act requires proof of intentional discrimination and does not envision a violation founded on disparate impact. Sections 804(a) and 805 of the Act prohibit certain practices in the provision of housing and residential lending, respectively, "because of" certain factors. 42 U.S.C. §§ 3604(a), 3605. The Supreme Court has held that language prohibiting discrimination "because of" certain factors reflects a congressional intent to address intentional discrimination only. *See generally Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005).

In *Smith*, the Court was unanimous in the conclusion that the "because of" language in section 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1), "does not encompass disparate impact liability," but rather contemplates only intentional discrimination. *Compare Smith*, 544 U.S. at 236 n.6 (plurality op.) (section (a)(1) of ADEA makes it unlawful for an employer "to fail or refuse to hire … any individual … *because of* such individual's age," and "[t]he focus of the paragraph is on the employer's actions with respect to the targeted individual") (emphasis added); *with id.* at 246 (Scalia, J., concurring) ("the only provision of the ADEA that could conceivably be interpreted to effect [a disparate-impact] prohibition is § 4(a)(2)"); *and with id.* at 249 (O'Connor, J., dissenting) ("[n]either petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent").

In *Ricci*, the Court reached a similar conclusion with regard to the "because of" language contained in section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1). 129 S. Ct. at 2672-73. The Court reasoned:

> As enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."

Id. at 2672 (citing 42 U.S.C. § 2000e–2(a)(1)) (emphasis added).

By contrast, the Court has held that disparate-impact claims are cognizable under certain other provisions of the ADEA and Title VII because those statutes contain additional language, *not* found in the Fair Housing Act, directed to the effects of discrimination. *See Smith*, 544 U.S. at 235 (plurality op.); *Ricci*, 129 S. Ct. at 2672-73; *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 429-30 (1971). In *Smith*, the Court held that disparate-impact claims are available under the ADEA because, like Title VII, the ADEA prohibits actions by employers that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age." 544 U.S. at 235 (plurality op.) (emphasis in original) (comparing ADEA, 29 U.S.C. § 623(a)(2), with Title VII, 42 U.S.C. § 2000e-2(a)(2)). Congress intended the phrase "otherwise adversely affect," contained in both the ADEA and section 703(a)(2) of Title VII, to address "the *consequences* of employment practices, not simply the motivation." *Smith*, 544 U.S. at 234-35 (plurality

op.) (emphasis in original). Only if a statute "focuses on the *effects* of the action on the [protected individual] rather than the motivation for the action of the [defendant]" does the statute prohibit disparate impact. *Id.* at 236 (plurality op.).

The Fair Housing Act proscribes only conduct undertaken "because of" certain factors. 42 U.S.C. §§ 3604(a), 3605. With respect to section 805, governing residential lending practices, the Act provides: "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 3605 (emphasis added). In the context of the precedent discussed above, the Court has held that the "because of" language found in sections 804(a) and 805 of the Act addresses only intentional conduct.

Unlike certain employment discrimination statutes, the Act does not contain a provision proscribing lending practices that "otherwise adversely affect" individuals on the basis of the enumerated traits or characteristics.[2] Indeed, the Fair Housing Act does not include any of the words that have been interpreted as giving rise to disparate-impact claims, such as "affect" and "tend to," in any of its provisions prohibiting discrimination. *Compare* 42 U.S.C. §§ 3604 and 3605 *with* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2); and 42 U.S.C. § 12112(b)(6); *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 n.13 (2008) (concluding ADEA section 4(a)(2) incorporates disparate-impact because of its "tend to deprive" language); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (concluding same regarding section 102(b) of Americans with Disabilities Act of 1990). Congress, therefore, limited recovery under the Act to claims arising out of disparate treatment, not disparate impact. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343, 2349 (2009) (Congress is presumed to act intentionally where it does not add language to one statute that it has included in another statute); *cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("we may not add terms or provisions where [C]ongress has omitted them").

Furthermore, the executive branch has previously opined that the Fair Housing Act does not recognize a disparate-impact theory. In signing the Fair Housing Amendments Act, the President issued a statement saying that the amended Act "does not represent any

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[2] For the Department's convenience, the Trade Associations attach hereto at Appendix B a chart comparing the provisions in Title VII and the ADEA, which the Court has identified as giving rise to disparate treatment or disparate impact claims, with the language of the Fair Housing Act.

congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that Title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent.… Title 8 speaks only to intentional discrimination." "Remarks on Signing the Fair Housing Amendments Act of 1988," Public Papers of President Ronald W. Reagan, Ronald Reagan Presidential Library (Sept. 13, 1988).[3] That same year, the United States Solicitor General submitted an *amicus* brief to the Supreme Court asserting that a plaintiff must prove *intentional* discrimination to establish a violation of the Act, stating that "[n]ot only do the statute's language and legislative history show that a violation of Title VIII [(i.e., the Fair Housing Act)] requires intentional discrimination, substantial practical problems result if this requirement is discarded," such as "the difficulties in placing meaningful limits on the discriminatory effect standard of liability." *See* Brief for United States as *Amicus Curiae*, *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (No. 87-1961).[4]

Nevertheless, in the United States' *amicus* brief submitted in *Magner*, the Solicitor General now argues that the presence of exemptions in the Fair Housing Act "reinforce[s]" "[t]he existence of disparate-impact liability under" the Act. *See* Brief for United States as *Amicus Curiae*, at 15-16, *Magner v. Gallagher* (Dec. 29, 2011) (No. 10-1032) ("United States' *Magner Amicus* Brief").[5] Besides the inconsistency with the prior position of the government, this argument fails because the exemptions are simply the codification of legitimate, non-discriminatory reasons for taking certain actions. They do not imply any intent on the part of Congress to recognize disparate impact under the Act. Moreover, the mere presence of an exemption cannot give rise to an implied disparate-impact cause of action where Congress might have, but chose not to, create an express cause of action. *See Gross*, 129 S. Ct. at 2349.

Nor is the government's argument persuasive when it asserts that the "otherwise make unavailable or deny" language in section 804(a) of the Fair Housing Act is the equivalent of the "otherwise adversely effect" language in section 703(a)(2) of Title VII. *See* United States' *Magner Amicus* Brief, *supra*, at 11 ("[b]y banning actions that 'make unavailable or deny' housing on one of the specified bases, Section 804(a) [of the Fair Housing Act] focuses

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[3] *Available at* http://www.reagan.utexas.edu/archives/speeches/1988/091388a.htm.

[4] *Available at* http://www.justice.gov/osg/briefs/1987/sg870004.txt.

[5] *Available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1032_neither_amcu_usa.pdf.

on the result of challenged actions … rather than on the intent of the actor"). In so arguing, the Solicitor General takes the phrase "make unavailable or deny" out of context and thus, impermissibly distorts the meaning of the phrase. The complete phrase, "*otherwise* make unavailable or deny," 42 U.S.C. § 3604(a) (emphasis added), is a catch-all at the end of a list of actions that the Fair Housing Act prohibits to be performed with discriminatory intent.[6] It is a fundamental precept of statutory interpretation that a general item within a list with more specific items is construed to have a similar meaning as the specific items in the list. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Because it is contained within a list of items preventing actions based on disparate treatment, the phrase "otherwise make unavailable or deny" must be interpreted similarly and cannot be read to encompass liability for disparate impact. Moreover, neither section 805 of the Act governing residential lending practices nor the other anti-discrimination provisions of section 804 of the Act contain the language "otherwise make unavailable or deny" and thus, could not be interpreted to recognize a disparate-impact theory on that basis. *See, e.g.,* 42 U.S.C. §§ 3604(b)-(e), 3605(a).

2. The Courts of Appeals Have Misapplied the Supreme Court's Title VII Jurisprudence in Construing the Fair Housing Act

The Courts of Appeals have approved the application of the disparate-impact approach under the Fair Housing Act at least in certain circumstances.[7] Yet, their holdings are often incorrectly premised on the Supreme Court's Title VII jurisprudence, which recognizes the availability of a disparate-impact approach in Title VII based on language *not* found in the Fair Housing Act.[8] In particular, the Courts of Appeals' decisions are wrong to the extent

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[6] Section 804(a) provides in full: "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added).

[7] The majority of these decisions address section 804 of the Fair Housing Act governing housing and not section 805 of the Act governing residential real-estate related transactions. Of the ninety-six Courts of Appeals decisions, available through a Westlaw search, addressing disparate impact under either or both sections, ninety-one decisions discuss section 804, whereas only thirteen discuss section 805.

[8] *See, e.g., Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 372 (6th Cir. 2007) ("[r]elying on the analogy between Title VII and the FHA, several other circuits have applied essentially this approach to disparate-impact

that they conclude *Griggs* held that the language "because of" reveals a congressional intent to allow a disparate-impact approach. As made clear by the Court's decisions in *Smith* and *Ricci*, this is not the proper lesson of *Griggs*. Rather, *Smith* and *Ricci* each confirm that the language "because of," including the provision in Title VII, does not permit a disparate-impact approach. *Smith*, 544 U.S. at 236 n.6 (plurality op.); *Ricci*, 129 S. Ct. at 2672-73.

Notably, neither in 1968, when it enacted the Fair Housing Act, nor in 1988, when it amended the Act, nor in 1991, when it amended Title VII to better articulate the disparate-impact theory available under that statute, did Congress choose to incorporate language into the Fair Housing Act analogous to that language under Title VII which the Court has interpreted as providing for a disparate-impact cause of action. As the Court has stated, "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to [other anti-discrimination statutes]. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross*, 129 S. Ct. at 2349. Moreover, Title VII and the Fair Housing Act are separate laws, passed by different acts of Congress in different years. Title VII is a part of the Civil Rights Act of 1964, while the Fair Housing Act is Title VIII of the Civil Rights Act of 1968. That both laws were designed to eliminate discrimination, one in employment and the other in housing, does not warrant identical construction, particularly in light of the Court's aforementioned observation in *Smith*. 544 U.S. at 236 n.6 (plurality op.).

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claims under the FHA"); *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (noting that the Fair Housing Act's "language prohibiting discrimination – 'because of ... race ... or national origin' – is identical to Title VII's, and since *Griggs*, every one of the eleven circuits to have considered the issue has held that the FHA similarly prohibits not only intentional housing discrimination, but also housing actions having a disparate impact"); *Langlois v. Abington Hous. Auth.,* 207 F.3d 43, 51 (1st Cir. 2000) (noting that "[i]n light of *Griggs* and the similarity of the statutes, it is a fair reading of the Fair Housing Act's 'because of race' prohibition to ask that a demonstrated disparate impact in housing be justified by a legitimate and substantial goal of the measure in question"); *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 & n.1 (9th Cir. 1996) ("look[ing] for guidance to employment discrimination cases" in finding that the Fair Housing Act provides for disparate impact); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977) ("in [Fair Housing Act] cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response"). *But see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) (cautioning against the "wholesale transposition" of discrimination theories and standards of proof from the Title VII context to the unique area of "credit discrimination").

3. HUD's Reading of the Fair Housing Act Exceeds the Scope of Its Delegation of Authority from Congress

A federal agency "literally has no power to act … unless and until Congress confers power upon it." *American Library Ass'n v. F.C.C.*, 406 F.3d 689, 698 (D.C. Cir. 2005). If "[t]here is no statutory foundation for" an agency's proposed rule, the agency "act[s] outside the scope of its delegated authority when it adopt[s]" such a rule. *Id.* at 692, 698; *Nagahi v. I.N.S.*, 219 F.3d 1166, 1169 (10th Cir. 2000) ("an agency cannot create regulations … beyond the scope of its delegated authority").

In addition, agency regulations "may not serve to amend a statute, nor add to the statute something which is not there." *California Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997) (concluding agency exceeded authority Congress delegated to it) (quotations and citations omitted). "It is a fundamental precept of administrative law that an agency … rule … cannot overcome the plain text enacted by Congress." *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 141 n.9 (5th Cir. 2010). Because an agency may not interpret a statute to "supersede the language chosen by Congress," "a regulation which operates to create a rule out of harmony with the statute, is a mere nullity." *Pacific Gas & Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) (citing *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980)). Furthermore, the Supreme Court has ruled that if Congress has made itself clear through statutory language, any agency interpretation "must give effect to" Congress's intent. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). When an agency rule is contrary to the plain language of a statute, the rule is not entitled to any deference and should be rejected. *See New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008).

Although Congress has conferred on the Department the authority to "make rules … to carry out" the Fair Housing Act, 42 U.S.C. § 3614a, such authority does not extend to making rules that are contrary to the Act's plain language. As discussed above, the plain language of the Act contains no recognition of disparate-impact liability. The Supreme Court has expressed a belief that an agency acts beyond the scope of its delegated authority in promulgating regulations that encompass disparate impact where the operative statute does not itself encompass disparate impact. *See Alexander v. Sandoval*, 532 U.S. 275, 285-86 & n.6 (2001) ("[w]e cannot help observing … how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 [of Title VI of the Civil Rights Act of 1964], ... when § 601 permits the very behavior that the regulations forbid").

Furthermore, the "creating, perpetuating, or increasing segregated housing patterns" language in proposed section 100.500(a)(2) may extend liability far beyond the type of factual circumstances presented in the lawsuits that the Department cites as support for the provision, as most of those cases raised at least a suggestion of intentional discrimination.[9] *See* 76 Fed. Reg. at 70,925.

The Act requires that lenders make credit decisions without consideration of factors such as race or national origin, and yet the proposed section seems to require that lenders consider these impermissible factors in making credit decisions. For instance, assume that an Asian-American applicant seeks financing for a home purchase in a residential area that is comprised almost exclusively of Asian-American residents. The proposed language of section 100.500(a)(2) raises the question of whether approving the loan would have "the effect of … perpetuating, or increasing segregated housing patterns on the basis of race … or national origin." At the same time, denial of the application because of the race or national origin of the applicant would constitute overt discrimination that is prohibited by the Act. The elimination of segregated housing patterns is a desirable social goal, but no law, including the Fair Housing Act, imposes an obligation on lenders, to consider such factors in individual credit decisions. In fact, the law specifically precludes such considerations.

Because it has proposed a rule that is contrary to the plain language of the Fair Housing Act, the Department has exceeded the scope of the authority delegated to it by Congress. Moreover, by attempting to "supersede the language chosen by Congress," the Proposed Rule would be "a mere nullity" and would have no force of law. Nor would the rule be entitled to any deference. Accordingly, the Department should revise the Proposed Rule to make clear that its interpretation of the Fair Housing Act does not extend to disparate impact.

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[9] Indeed, in each of the cases that HUD cites, the defendant was a government actor, not a private defendant, and had implemented zoning ordinances or regulations that, despite superficial neutrality, were designed to prevent minority penetration into homogeneous housing sectors. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928-32 (2d Cir. 1988); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1181-83 (8th Cir. 1974); *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*; 749 F. Supp. 2d 486, 491-93 (N.D. Tex. 2010); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 529 (N.D. Tex. 2000).

4. HUD Fails to Acknowledge, much less Explain, the Proposed Rule's Departure from HUD's Prior Official Position

In its original position interpreting the Fair Housing Act, which position the Department issued through the notice-and-comment process, the Department expressed no opinion as to whether the Fair Housing Act extended to disparate-impact claims. Rather, in describing the "Standard for Proving a Violation" under the Act, the Department stated that the "regulations are *not* designed to answer the question of whether intent is or is not required to show a violation." Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3234-35 (Jan. 23, 1989) (emphasis added). The Department left no doubt that it was not taking a position on the issue, stating that it would "maintain a neutral position on the issue of whether discriminatory intent is necessary for advertising to be considered violative of the [Fair Housing Act]." *Id.* at 3275.

Now, for the first time in an official notice-and-comment capacity,[10] the Department posits that the Fair Housing Act provides for disparate-impact claims. The Proposed Rule, however, does not acknowledge that the Department's official regulatory position for the past twenty-two years has been neutral with respect to the question of the availability of disparate impact under the Fair Housing Act, much less explain why HUD proposes to depart from that position. Rather, the Department contends that it "has long interpreted the Act to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." 76 Fed. Reg. at 70,921. Moreover, the Department states, without citation, that it "has repeatedly determined that the … Act is directed to the *consequences* of housing practices, not simply their purpose." *Id.* at 70,922 (emphasis added). The Department's inability to provide an adequate explanation of the change in its official interpretation of the Fair Housing Act suggests that the Department should revise the Proposed Rule to comport with the plain language of the Act and eliminate disparate impact from any rule.

[10] Although HUD joined a 1994 Policy Statement on Discrimination in Lending that suggested that the Act could be violated through disparate impact, *see* 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994), that statement was not subject to the official notice-and-comment process.

C. Even if Disparate-Impact Claims Were Viable under the Fair Housing Act, a Standard of Review that Shifts Part of the Burden of Proof to Defendants Is Contrary to Supreme Court Jurisprudence

1. The Burden and Standard the Proposed Rule Articulates Are Contrary to the Burden and Standard the Supreme Court Set Forth in Wards Cove

If the Fair Housing Act is found to recognize a disparate-impact approach, the Trade Associations believe that the Proposed Rule incorrectly states the burden and standard of proof for that type of claim as articulated by the Supreme Court. Several aspects of the Proposed Rule contravene the Court's jurisprudence, namely (1) the requirement that a defendant articulate a policy which "has a *necessary and manifest* relationship to one or more of the housing provider's legitimate, nondiscriminatory interests," (2) the shifting of the burden of proof to the defendant to prove that relationship, and (3) the requirement that a plaintiff only establish that a less-discriminatory alternative *could* serve the defendant's business interests. 76 Fed. Reg. at 70,925 (emphasis added).

The burden and standard articulated by the Proposed Rule are contrary to the burden and standard set forth by the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (*"Wards Cove*"), which decision would apply to any disparate-impact claim under the Fair Housing Act if that type of claim were viable under the Act. In *Wards Cove*, the Court articulated the necessary elements for stating a prima facie case for disparate impact in the Title VII employment context, namely that a plaintiff must (1) identify a specific policy or practice, (2) demonstrate a disproportionately unfavorable impact on a protected class of which the plaintiff is a member, and (3) establish that the challenged policy or practice *caused* the impact. *See* 490 U.S. at 656 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). In doing so, the plaintiff would typically introduce statistical data asserting that a defendant's actions have caused a substantial adverse impact on the protected class. *See Watson*, 487 U.S. at 987. To be valid, the statistical data must reflect the proper comparison. For example, in a hypothetical claim against a lender made pursuant to the Proposed Rule, the proper comparison would be between the recipients of the subject type of loan and applicants from the protected class who were *otherwise qualified for* that type of loan in the market in question. *See Wards Cove*, 490 U.S. at 650-52. In its current form, however, the Proposed Rule does not apply the correct baseline – the composition of "the pool of qualified … applicants" in the relevant market – for the type of prima facie comparison mandated by *Wards Cove*. *Id.* at 651; *cf. Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) ("a proper comparison was between the racial composition of

Hazelwood's teaching staff and the *racial composition* of the *qualified* public school teacher *population in the relevant* labor *market*") (emphasis added)).

Under *Wards Cove*, if the plaintiff makes a prima facie showing, the defendant can justify the challenged policy by articulating a legitimate business goal that the policy serves. 490 U.S. at 658-59 ("at the justification stage of … a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer"). The Court never articulated that the legitimate business interest must be *necessary* as does the Proposed Rule, *see* 76 Fed. Reg. at 70,927, and the Court expressly disclaimed any requirement that the defendant establish that its policy was "essential" or "indispensable."[11] 490 U.S. at 659. Indeed, the government has previously acknowledged as much with respect to regulations promulgated under the ADEA. *See Meacham*, 554 U.S. at 93 n.9.

A simple example illustrates the complicated position in which the standard of the Proposed Rule would place those subject to it. The decision to charge a certain amount of rent might be related to a legitimate business interest, such as maintaining a certain profit margin. Yet, if a plaintiff brings a disparate-impact lawsuit, and establishes that charging a higher rent has had a disproportionate effect on people who share one of the enumerated traits or characteristics, it would be difficult for the defendant to establish maintaining its desired profit margin constitutes a "business necessity."

As another example, the Proposed Rule would interfere with loss-mitigation activities, including activities undertaken in connection with the Home Affordable Modification Program ("HAMP") and Home Affordable Refinance Program ("HARP") of the United

[11] The Proposed Rule also cites with approval to *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008), suggesting that for a creditor, creditworthiness may be the only basis for a business justification defense. This position is without basis in law. *Cf.* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (1994) ("When an Agency finds that 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.' … Factors that may be relevant to the justification could include *cost* and *profitability*." (emphasis added)). Accordingly, the Department should clarify that the scope of interests that may support a business justification defense extends to interests beyond just creditworthiness.

States Department of the Treasury ("Treasury").[12] HAMP is a voluntary program, as are all loss mitigation activities. Thus, if a servicer were sued on the basis that its HAMP practices had a disproportionate impact on people who share one of the enumerated traits or characteristics, it may not be able to defend on the basis that it complied with HAMP standards because participation in that program is not "necessary." The Trade Associations, therefore, propose that the Department revise the Proposed Rule to provide an exemption so that a lender or servicer would not face disparate-impact liability if it is otherwise meeting the requirements or standards established by the federal government, any state government, government-sponsored enterprises, or investors. The exemption proposed by the Trade Associations is discussed in detail below.

In addition, the Proposed Rule contravenes *Wards Cove* by shifting the burden of proof to the defendant. Under *Wards Cove*, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific … practice remains with the plaintiff *at all times*." 490 U.S. at 659 (emphasis in original). Therefore, the Trade Associations recommend that the Department revise the Proposed Rule to reflect that the plaintiff bears the burden of proof throughout the course of an action brought pursuant to the Fair Housing Act.

Furthermore, having articulated a legitimate business goal, the defendant should prevail unless the plaintiff can prove "that 'other tests or selection devices, without a similarly undesirable racial effect, *would* also serve the ... legitimate [business] interest[s]'" in an equally effective manner. *Id.* at 660 (emphasis added) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)). Under *Wards Cove*, the plaintiff cannot prevail by merely showing that a less discriminatory alternative *could* serve the defendant's business interest. Yet, ignoring *Wards Cove*, the Proposed Rule adopts such a standard. *See* 76 Fed. Reg. at 70,927. Moreover, the standard in the Proposed Rule suggests that the plaintiff can suggest a hypothetical alternative about which a defendant may not have any knowledge or capacity for implementing. This too is contrary to *Wards Cove*. The Court stated that any alternative must not only be "equally effective as" the chosen practice but also must have been known to and rejected by the defendant; it cannot merely be a post-hoc creation of the

[12] HAMP and HARP are part of Treasury's Making Home Affordable program and, in conjunction with the Federal Housing Finance Agency for HARP, were implemented under authority granted to Treasury in the Emergency Economic Stabilization Act of 2008. Pub. L. No. 110-343, § 109, 122 Stat. 3765 (Oct. 3, 2008); *see* Departmental Offices, Privacy Act of 1974, as Amended, 74 Fed. Reg. 38,484, 38,484 (Aug. 3, 2009) (discussing HAMP); 2010-2011 Enterprise Affordable Housing Goals; Enterprise Book-Entry Procedures, 75 Fed. Reg. 9034, 9040 (Feb. 26, 2010) (discussing HARP).

plaintiff. *See* 490 U.S. at 660-61. This is a logical extension of the Court's recognition that "[c]ourts are generally less competent than [businesses] to restructure business practices." *Id.* at 661 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

In response to *Wards Cove,* Congress altered the standard for future Title VII litigation with the passage of the Civil Rights Act of 1991. Specifically, Congress amended Title VII to allow plaintiffs to challenge a group of employment practices without having to identify a specific practice as being the cause of their alleged harm, as well as to require that the burden of persuasion shift to the defendant to articulate a "business necessity" for the challenged practices. *See* 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B). Congress has never made any such amendments to the Fair Housing Act, and accordingly, if the Act recognizes a disparate-impact theory, the burden and standard of proof articulated in *Wards Cove* would remain applicable to such claims under the Act. The Supreme Court made this clear in *Smith*, in which it stated that "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S. at 240.

Finally, proposed section 100.120(b)(2) suggests that "[p]roviding loans … in a manner that results in disparities in their cost, rate of denial, or terms or conditions, or that has the effect of denying or discouraging their receipt of the basis of race" violates the Fair Housing Act. 76 Fed. Reg. at 70,926. This proscription could be read as imposing liability for disparities correlated with a prohibited basis without application of the burden or standard of proof mandated by *Wards Cove* or even by proposed section 100.500. Proposed section 100.120(b)(2) may also permit the filing of frivolous lawsuits based on statistical data alone – for example, on the public loan data reported by financial institutions under the federal Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801, *et seq.*[13] But such data by

[13] HMDA itself is a disclosure law. It establishes neither unlawful lending terms nor a cause of action. HMDA requires most mortgage lenders to report information about their home-lending activities. 12 U.S.C. § 2803. Federal Reserve Board Regulation C implements HMDA and describes the information to be submitted to federal agencies, which subsequently is made public by the Federal Financial Institutions Examination Council ("FFIEC"). See www.ffiec.gov. Information regarding the disposition of all loan applications (that is, whether they were accepted or declined) is reported, but only limited information about loan pricing is reported. For example, Regulation C previously required reporting as to the spread between certain higher-priced mortgage loans' annual percentage rate ("APR") and the yield on comparable Treasury obligations but not the actual APR, much

itself is not predictive of illegal discrimination. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ----, 131 S. Ct. 2541, 2555-56 (2011) (criticizing reliance on mere statistical disparity between members of two different groups as basis for bringing Title VII claims).

The Proposed Rule seeks to implement an approach adopted by Congress when it amended Title VII through the Civil Rights Act of 1991. Yet, it required an act of Congress to establish such an approach in the Title VII context. Congress has never made a comparable amendment to the Fair Housing Act. Accordingly, the Trade Associations believe that the Department should revise the Proposed Rule to correctly set forth the burden and standard of proof as set forth by the Supreme Court in *Wards Cove*.

2. The Burden and Standard the Proposed Rule Articulates Are Contrary to Wal-Mart

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ----, 131 S. Ct. 2541 (2011) ("*Wal-Mart*"), the Supreme Court narrowed the application of the disparate-impact theory in cases where discretion in decision-making is challenged.[14] In particular, *Wal-Mart* rejected the application of the disparate-impact theory to a company-wide policy of discretion. 131 S. Ct. at 2554-55. Where hundreds or thousands of persons independently exercise discretion in carrying out their job duties, that is "just the opposite of a uniform ... practice" which is normally the subject of a disparate-impact approach – such as the height and weight requirement applied uniformly to all prison guard applicants in *Dothard v. Rawlinson*, 433 U.S. 321, 323-24 (1977). *Wal-Mart*, 131 S. Ct. at 2554. Rather, the Court found the challenged conduct to be "a policy against having uniform employment practices." *Id.* In its reasoning, the Court opined, "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members'

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less requiring that such spread be reported for all loans. 12 C.F.R. § 203.4(a)(12) (2008). In addition, borrowers' credit scores, income and assets, and cash reserves, the debt-to-income ratio, and the loan-to-value ratio are not among the currently reported data. 12 C.F.R. § 203.4 (2011).

[14] The Court first recognized disparate-impact challenges to subjective policies, such as discretion in decision-making, in *Watson*, 487 U.S. at 989-91 (applying the disparate-impact approach to subjective decision-making regarding promotions, to address the "functional equivalent" of intentional discrimination). *Wal-Mart*, however, operates to limit the application of *Watson* in certain factual circumstances.

claims for relief will produce a common answer to the crucial question why was I disfavored." *Id.* at 2552.[15]

The Proposed Rule, however, contravenes *Wal-Mart* where it provides for a disparate-impact cause of action for facially-neutral policies involving the exercise of discretion. *See* 76 Fed. Reg. at 70,924 ("Any facially neutral action … [such as] policies, practices, or procedures, including those that allow for *discretion* …, may result in a discriminatory effect actionable under the Fair Housing Act and this rule." (emphasis added)). Accordingly, at the very least, the Department should remove those aspects of the Proposed Rule that would give rise to disparate-impact liability based on the exercise of discretion.

3. *The Burden and Standard the Proposed Rule Articulates Are Contrary to* Meyer v. Holley

Citing with approval to *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008), the Proposed Rule suggests that an entity can be held liable for the neutral practices of a third party. But *Miller* is not entitled to any weight. First, the decision merely denied a motion to dismiss brought at the outset of the case. Second, to the extent that the decision could be read to support liability against a defendant for actions of third parties over which the defendant lacks control, *Miller* is at odds with *Meyer v. Holley*, 537 U.S. 280 (2003), which limits vicarious liability under the Fair Housing Act to traditional agency relationships. 537 U.S. at 286-89. Finally, the *Miller* matter became part of a multi-district litigation proceeding in which a motion to certify a putative disparate-impact class was denied because under *Wal-Mart*, "statistical evidence of average disparities does not suffice" to establish commonality. *In re Countrywide Fin. Mortgage Lending Practices Litig.*, No. 08-MD-1974, 2011 WL 4862174, at *3-4 (W.D. Ky. Oct. 13, 2011), *Fed. R. Civ. P. 23(f) review pending* (No. 11-514, 6th Cir.).

As written, however, the Proposed Rule would create liability for entities complying with contractual obligations set by third parties, including the federal government. For instance, a loan servicer applying loss-mitigation criteria set by the party that owns the loan (very commonly not the servicer) or by Treasury may face liability under the Proposed Rule for purported disparate impact caused by the criteria. In addition, lenders may face liability for credit decisions based on automated underwriting systems that the government-sponsored

[15] The Court further reasoned that granting employees discretion "is also a very common and presumptively reasonable way of doing business – one that we have said should itself raise no inference of discriminatory conduct." *Wal-Mart*, 131 S. Ct. at 2554 (quotations omitted).

enterprises Fannie Mae and Freddie Mac require lenders to use and that contain credit-risk algorithms which lenders have no ability to alter. Accordingly, the Trade Associations believe that the Department should revise the Proposed Rule to correctly set forth the standard the Supreme Court set forth in *Meyer*.

D. The Trade Associations Are Concerned That Creating a Disparate-Impact Cause of Action May Encourage Lenders to Consider Prophylactic Measures That Would Present Legal Risks and Draw Resources Away from Efforts to Prevent Disparate Treatment

The disparate-impact approach originally was designed to challenge "practices, adopted without a deliberately discriminatory motive, [that] may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987. The Proposed Rule's application of the disparate-impact approach to the residential mortgage lending industry could have unintended consequences. The disparate-treatment approach is well suited to rooting out discrimination in lending, but the threat of a disparate-impact challenge inevitably causes lenders to consider prophylactic measures to minimize risk. These measures are themselves undesirable and, perversely, can enhance rather than minimize legal risk to the detriment of lenders, hindering their efforts to serve borrowers.

The threat of disparate-impact liability arises when the end results of a lender's operations have different demographic results, despite the uniform application of sound, neutral financial standards. For instance, notwithstanding a lender's neutral credit assessment policies, applicants belonging to one racial group may be rejected for financing at a greater rate than applicants from another racial group. If the differences in the rejection rates are deemed statistically significant (that is, the results can not be attributed to mere chance), the lender faces the prospect of a disparate-impact lawsuit. The risk can arise regardless of the racial group impacted or whether men or women experience differential results.

In lending, generally-accepted credit assessment standards, which themselves raise no inference of discrimination, may produce differential results that can be correlated with factors such as race or national origin. For instance, it is commonplace and accepted for lenders to consider applicants' credit scores as an important indicator of credit risk, because such a score is highly predictive of risk and costs relatively little to obtain. At the same time, the Federal Reserve Board has found that the "[d]ifferences in credit scores among racial or ethnic groups … are particularly large," with 52.6% of African-Americans in the sample appearing in the lowest two score deciles, as compared to 16.3% of non-Hispanic whites. *See* Board of Governors of Fed. Reserve Sys., *Report to the Congress on Credit Scoring and*

Its Effects on the Availability and Affordability of Credit, at 80 (Aug. 2007) ("FRB Study").[16] Similarly, the National Community Reinvestment Coalition ("NCRC") has stated that "our analysis finds that zip codes with concentrations of minorities contain a disproportionate percentage of consumers with [low] FICO scores between 580 and 620." Nat'l Cmty. Reinvestment Coal., *Working-Class Families Arbitrarily Blocked from Accessing Credit: NCRC's Fair Lending Investigation of Credit Score Restrictions by Federal Housing Administration-Approved Lenders*, Mortgage Lending Disparities Series Paper, at 15 (Dec. 2010).[17]

Down-payment requirements also impact various racial and ethnic groups differently. This result is reflected in examining census data on household wealth, because wealth (versus income) is the primary source for a down payment. In 2009, the median wealth of white households was 20 times that of African-American households and 18 times that of Hispanic households. *See* Pew Research Center, *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, at 1 (July 2011)[18] (analyzing 2009 U.S. Census Bureau data and finding that average African-American and Hispanic households had $5,677 and $6,325 in wealth, respectively, while the average white household had $113,149 in wealth). Debt-to-income and loan-to-value requirements can also have a differential impact among various racial and ethnic groups.

These are simple examples of basic elements of assessing credit risk, and yet differences in their impacts could be expected to trigger at least the initial stages of a legal claim under a disparate-impact approach. In reality, the issues faced by lenders are far more complex in that the many elements related to credit risk assessment are usually layered in complex models or algorithms often developed by third parties. For example, as noted above, the government-sponsored enterprises Fannie Mae and Freddie Mac require lenders to evaluate credit risk pursuant to automated underwriting systems containing models proprietary to those entities. The sum total of the elements in the model might have the same differential impact as the application of single assessment elements such as credit score and ability to

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[16] A*vailable at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf.

[17] A*vailable at* http://www.ncrc.org/images/stories/mediaCenter_reports/fha%20white%20paper-120810-final.pdf.

[18] *Available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

make a down payment, yet lenders are not in a position to "justify" each element of the model much less the relationships among all the variables.

And, in making two new types of residential mortgage loans – namely, Qualified Mortgages ("QMs") and Qualified Residential Mortgages ("QRMs") – created pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act") and certain of its proposed implementing regulations, lenders may engage in more conservative underwriting to avoid ability-to-repay liability (in connection with QM loans) or risk-retention requirements (in connection with QRM loans). *See* Dodd-Frank Act §§ 941, 1412. These cautious underwriting practices may restrict the availability of loans to groups with less wealth or income and, correspondingly, to individuals who are members of racial or ethnic minorities.[19] Such differentials may prompt disparate-impact lawsuits.

The Trade Associations recognize that under the Proposed Rule, liability would not attach unless the challenged policy or practice lacked a necessary, non-pretextual business justification. But the primary objective of most lenders, as with most businesses, is to minimize the risk of ever facing such a challenge. A lawsuit alleging lending discrimination is a very serious charge and can occasion an immediate reputational injury and business disruption caused by the need to defend such charges. The allegation of a statistical impact is still newsworthy even if there is no reasonable inference that it is caused by an impermissible differential treatment. Moreover, defending allegations of disparate impact is typically very expensive.

In these circumstances, the possibility exists that businesses may seek to manage their end numbers so as to avoid legal risk. Lenders might manage their end numbers by extending credit to individuals who are members of a racial minority group but who would otherwise not qualify for credit. For example, the threat of liability under the "perpetuating … segregated housing patterns" standard of proposed section 100.500(a)(2), *see* 76 Fed. Reg. at 70,926, may encourage lenders to consider demographics in making credit decisions. The Supreme Court has recognized this result as it has allowed the expansion of the use of a disparate-impact approach in the employment discrimination field. *See Watson*, 487 U.S. at 992-93 (noting that "the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures"). The Court has

[19] *See* charts, attached hereto at Appendix C, reflecting correlation, based on data from federal government sources, between groups with less wealth or income and individuals who are members of racial or ethnic minorities.

expressed concerns that a lender's efforts to avoid a disparate-impact legal challenge may themselves constitute intentional unlawful discrimination. *See, e.g., Ricci*, 129 S. Ct. at 2664 ("[w]e conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute"); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989) (rejecting a set-aside program for minority contractors, since "an amorphous claim that there has been past discrimination ... cannot justify the use of an unyielding racial quota"). And the Court has cautioned that "[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. … That would amount to a de facto quota system." *Ricci*, 129 S. Ct. at 2675.

Thus, implementing a rule that recognizes a disparate-impact approach under the Fair Housing Act may place lenders in the predicament of facing suit where they are attempting to comply with law, no matter what they do. The threat of such suits is not merely hypothetical. In the past several years, lenders have faced frequent disparate-impact suits.[20] No matter how frivolous such suits may be, the threat of such suits may cause lenders to manage their end numbers, which creates another kind of risk, and the defense of such lawsuits would inevitability draw resources away from lenders' efforts to ensure the fair treatment of individual loan applicants and from lenders' ability to fund loans.

For these pragmatic reasons, the Trade Associations believe HUD should revise the Proposed Rule to make clear it does not recognize disparate impact as creating liability under the Fair Housing Act.

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[20] *See, e.g.*, *In re Countrywide Fin. Mortgage Lending Practices Litig.*, No. 08-MD-1974, 2011 WL 4862174, at *3-4 (W.D. Ky. Oct. 13, 2011) (denying motion to certify disparate-impact class; under *Wal-Mart*, "statistical evidence of average disparities does not suffice to" establish commonality); *Rodriguez v. National City Bank*, --- F.R.D. ----, 2011 WL 4018028, at *5-7 (E.D. Pa. Sept. 8, 2011) (declining to certify class for settlement of disparate-impact claims because discretion provided to defendants' various loan officers precluded finding of commonality in light of *Wal-Mart*); *In re Wells Fargo Residential Mortgage Lending Discrimination Litig.*, No. 3:08-md-01930-MMC, slip op. at 5-8 (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).

E. The Department Should Create an Exemption, or Alternatively, a Safe Harbor, for Lending and Servicing Practices That Are Undertaken in Compliance with Government or Government-Sponsored Policies or Programs

As discussed above, the Proposed Rule's burden and standard of proof, and in particular, the business-necessity requirement, will likely engender disparate-impact lawsuits based on lending or servicing actions that are paradoxically undertaken in compliance with, or encouraged by, government or government-sponsored policies or programs. To avoid such a divergence in government objectives, the Trade Associations request that any final rule contain an exemption from disparate-impact lawsuits that would otherwise arise as a result of participation in or compliance with government or government-sponsored policies and programs. In the alternative, the Trade Associations request that any final rule contain a safe-harbor provision for actions taken in compliance with or as the result of following the guidance of such policies and programs.[21]

In particular, the Proposed Rule would run counter to two other significant federal policies. First, as discussed above, it would conflict with the ability of lenders, servicers, and investors to continue with foreclosure prevention activities under such programs as HAMP and HARP.

Second, it would conflict with the loan origination reforms Congress enacted with the Dodd-Frank Act. The QRM and QM rules to be promulgated under the Dodd-Frank Act, along with Dodd-Frank Act amendments to the Home Ownership and Equity Protection Act ("HOEPA"),[22] will make compliance with the Proposed Rule difficult.[23] The purpose and design of several Dodd-Frank Act revisions to mortgage lending is to cause fewer loans to be made to borrowers with weaker credit profiles and to increase the cost of those loans if they are made.

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[21] Another alternative is for the Department to create a presumption of non-discrimination for the conduct of a lender or servicer taken in compliance with HAMP guidelines, the proposed QM and QRM rules, or similar statutes and regulations or government-sponsored requirements.

[22] Enacted as part of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, §§ 151-158, 108 Stat. 2160 (1994).

[23] As the first of the charts attached hereto at Appendix C reflects, less than a quarter of all loans purchased by government-sponsored entities between 1997 and 2009 would meet QRM requirements.

Under the Dodd-Frank Act, lenders may permissibly make both QRM loans and non-QRM loans, QM loans and non-QM loans, and loans defined as "high-cost"[24] and loans that are not so defined. Each of these types of loans is defined at least in part by the costs and terms of the loan. There are increased costs for non-QRM loans, such as fees and risk-retention requirements. There are also increased costs for non-QM loans and for high-cost loans imposed by the Truth-in-Lending Act, *see* 15 U.S.C. § 1640, as amended by the Dodd-Frank Act, *see* Dodd-Frank Act §§ 1413, 1416. QRM loans and non-QRM loans are additionally, and expressly, defined by the borrower's credit profile.

QRM loans, non-"high-cost"-loans, and QM loans that are not "high-cost" loans may be available to borrowers with stronger credit profiles and less credit risk. This is true of QRM loans because they are defined as loans to borrowers with only a very strong credit profile.[25] This is also true of non-"high-cost" loans because, by definition, they are less expensive than "high-cost" loans. This is also true of QM loans (that are not "high-cost" loans) because there is a limit on the rate a lender may charge on such loans,[26] and on the points and fees for these loans. *See* Dodd-Frank Act § 1412. Borrowers with stronger credit profiles are more likely to be eligible for these loans because of the lower risk, and thus lower cost, associated with lending to such borrowers. Groups and individuals with less wealth or income, some of whom may be in protected classes, may obtain non-QRM, non-QM, and "high-cost" loans disproportionately more than other groups.

Congress made the policy decision that some borrowers should be able to obtain mortgage credit only at higher cost than other borrowers or not at all. Consequently, in deciding how to meet the new Dodd-Frank Act requirements, lenders will be forced to make decisions about how to make mortgage credit available in a manner that is likely to disparately affect certain groups of borrowers. No matter what a lender does to implement the Dodd-Frank Act mortgage reforms, the lender will face liability under the Proposed Rule. Lenders, servicers,

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[24] The Dodd-Frank Act expressly defines what constitutes "high-cost" loans. Dodd-Frank Act § 1431(a) (amending 15 U.S.C. § 1602(aa)).

[25] For example, under the proposed QRM rule, a QRM loan would be one on which the loan-to-value ratio is no more than 80 percent in a purchase transaction (and 70 to 75 percent for refinances). Credit Risk Retention, 76 Fed. Reg. 24,090, 24,167 (April 29, 2011) (proposed to be codified at 24 C.F.R. § 267.15(d)(9)).

[26] A QM loan that is not a "high-cost" loan must have a rate under the rate threshold in the definition of "high-cost" loans. *See* Dodd-Frank Act § 1431(a).

and investors should not be put in the position of having to choose or balance which of competing government policies to implement and which to ignore.

The purpose of the Trade Association's suggested exemption, therefore, would be to make clear that a lender's or servicer's decision to originate or service a loan in accordance with government or government-sponsored programs, incentives, or statutes and regulations would not be subject to liability under disparate impact as articulated by the Proposed Rule. For example, the exemption would shield entities from liability for actions taken in compliance with the Treasury's guidelines under HAMP, the recently proposed QM and QRM loan regulations,[27] and similar federal, state, or government-sponsored policies or programs.

In effect, the exemption would work in tandem with the Proposed Rule's business-necessity exception. Specifically, the exemption would make clear that the business-necessity exception includes, per se, actions taken in compliance with or as a result of following guidance of government or government-sponsored policies or programs which are targeted at credit criteria and conditions. A list of such programs or policies would include, without limitation, HAMP guidelines, government-sponsored enterprise requirements, QM and QRM rules and incentives, FHA/VA lending regulations, and Ginnie Mae requirements.

Regardless of its form, whether an exemption, a safe-harbor provision, or a presumption, the critical element of such a revision to the Proposed Rule is to ensure that the rule does not create a Catch-22 for lenders or servicers who are otherwise complying with or assisting in government efforts to rehabilitate the residential housing market.

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[27] As noted above, the proposed QM and QRM regulations, issued pursuant to the Dodd-Frank Act, would establish incentives and requirements for the lending industry to employ conservative underwriting standards. *See generally* Regulation Z, Truth in Lending, 76 Fed. Reg. 27,390 (May 11, 2011) (proposing QM rules); Credit Risk Retention, 76 Fed. Reg. 24,090 (Apr. 29, 2011) (proposing QRM rules).

F. The Proposed Rule Should Not Apply Retroactively

The Supreme Court has recognized that "[r]etroactivity is not favored in the law" and, therefore, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("courts should be reluctant to find such authority absent an express statutory grant").

Nothing in Congress's delegation of rulemaking authority under the Fair Housing Act serves as an express authorization to promulgate retroactive rules. The delegation reads, in whole:

> The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

42 U.S.C. § 3614a. This general rulemaking authority, like that in *Bowen*, "contain[s] no express authorization of retroactive rulemaking." 488 U.S. at 213 ("where Congress intended to grant the Secretary the authority to act retroactively, it made that intent explicit").

Accordingly, the Department should clarify that any final rule will apply prospectively only.

G. The Proposed Rule Would Unnecessarily Burden Small Businesses

When HUD issues a proposed rule, it must "prepare and make available for public comment an initial regulatory flexibility analysis" that "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). The regulatory flexibility analysis must describe and, if feasible, estimate how many "small entities to which the proposed rule will apply." *Id.* § 603(b)(3). The analysis "shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *Id.* § 603(c). HUD must engage in a similar regulatory flexibility analysis when it finalizes a rule. 5 U.S.C. § 604.

The Department recognized this duty in the Proposed Rule. 76 Fed. Reg. at 70,926 ("[t]he Regulatory Flexibility Act … generally requires an agency to conduct a regulatory flexibility analysis"). Yet, HUD's analysis does not discuss the number of small entities that the Proposed Rule will affect or discuss any alternatives to the proposal. HUD simply concludes

"that the proposed rule will not have a significant economic impact on a substantial number of small entities" because "HUD's objective in this proposed rule is to achieve consistency and uniformity" in the application of disparate impact under the Fair Housing Act "and therefore reduce burden for all who may be involved in a challenged practice." *Id.*

Contrary to HUD's limited analysis, the Proposed Rule will place an unnecessary burden on small lending businesses. First, businesses may incur substantial costs in performing statistical and legal analysis of whether their neutral policies have a disparate impact. Second, small businesses may face expenses and burdens from the risk-mitigation measures imposed by large industry participants, particularly if the conduct of third parties is considered a "policy" for disparate-impact liability purposes as the Proposed Rule suggests. Third, as discussed above, the Proposed Rule will place lenders in the predicament of facing suit where they are attempting to comply with law, no matter what they do, and the defense of such lawsuits would inevitability draw resources away from lenders' efforts to ensure the fair treatment of individual loan applicants and from lenders' ability to fund loans. Accordingly, the Trade Associations urge the Department to revise the Proposed Rule to include adequate initial and final regulatory flexibility analyses before proceeding with any final rulemaking.

III. Conclusion

The Trade Associations and their members strongly support the Fair Housing Act and fair lending. They submit that the Act prevents disparate treatment of individuals but does not recognize a disparate-impact theory. For the reasons set forth above, the Trade Associations urge the Department to revise the Proposed Rule to make clear that the Act does not encompass disparate-impact liability or, at a minimum, wait until the Supreme Court renders a decision in *Magner* before promulgating a final rule. If the Department does not so revise the Rule, in the alternative, the Trade Associations submit that *Wards Cove* establishes the proper burden and standard of proof for that type of claim and that the Department should revise the Proposed Rule to align with controlling Supreme Court jurisprudence. Finally, the Trade Associations request that the Department revise the Proposed Rule to ensure that it does not create liability for their members who are otherwise complying with or assisting in government or government-sponsored efforts to rehabilitate the residential housing market.

The Trade Associations would greatly appreciate the opportunity to meet with the Department to discuss the issues raised in this comment letter, including the scope of Fair Housing Act liability, the burden and standard of proof that should apply if the Act does extend to disparate impact, the full contours of an exemption for government and government-sponsored policies and programs as well as the list of programs and policies to

which it would apply, and the impact of the Proposed Rule on members of the financial services industry, including small businesses, and borrowers.

Very truly yours,

/s/ Paul F. Hancock

Paul F. Hancock
K&L GATES LLP

Appendices

On behalf of:

American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Mortgage Coalition
Independent Community Bankers of America
Mortgage Bankers Association

APPENDIX A

American Bankers Association ("ABA"), headquartered in Washington, D.C., is the principal national trade association of the financial services industry. The ABA's members, located in each of the 50 states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States.

American Financial Services Association ("AFSA") is a national trade association for providers of financial services to consumers, including residential mortgage loans. AFSA seeks to promote responsible, ethical lending to informed borrowers and to improve and protect consumers' access to credit.

Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services – banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, the CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

Consumer Mortgage Coalition ("CMC") is a trade association comprised of national residential mortgage lenders, servicers, and service providers. CMC was formed in 1995 to pursue reform of the mortgage origination process. CMC members participate in every stage of the home financing process.

Independent Community Bankers of America ("ICBA") is a trade association that represents nearly 5000 community banks of all sizes and charter types nationwide. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes. ICBA member community banks are actively engaged in the business of residential mortgage lending in the communities that they serve.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's website.

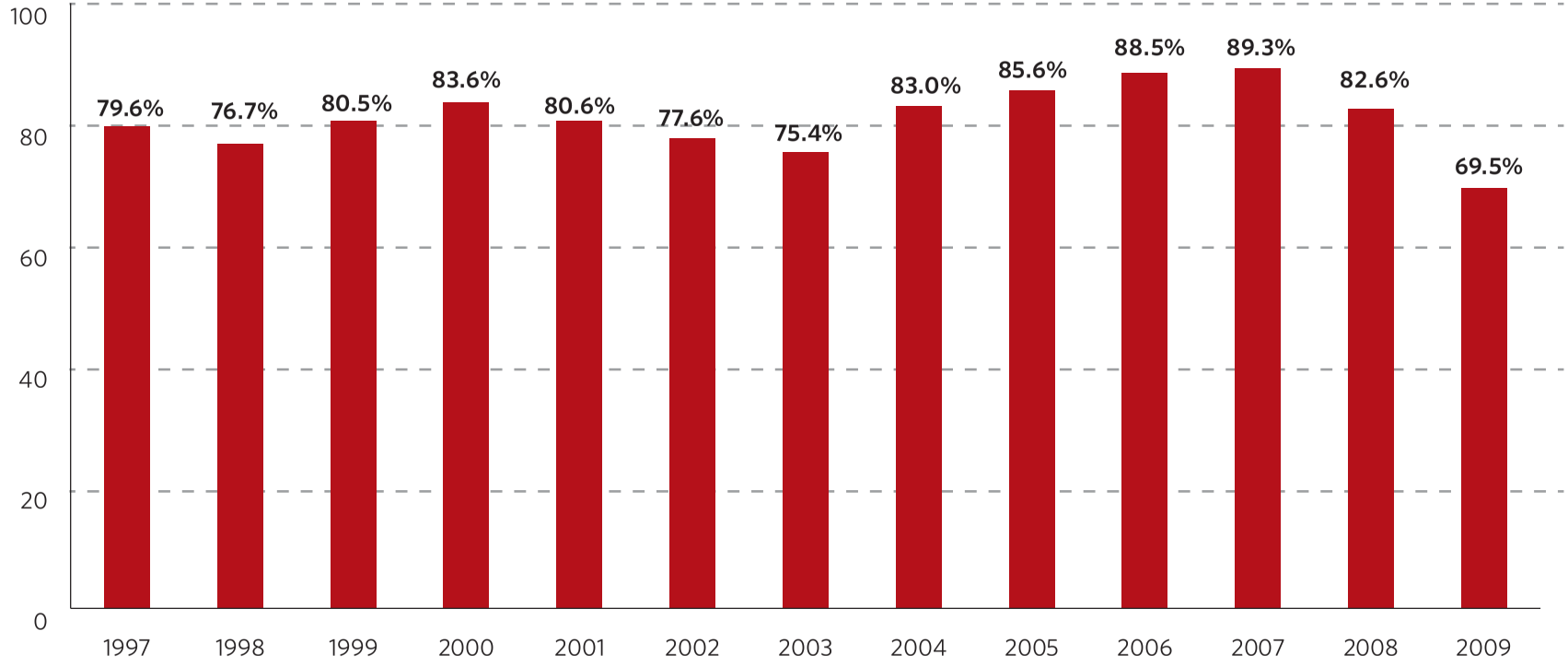
APPENDIX B

	Title VII, Sec. 703(a)	**ADEA, Sec. 4(a)**	**FHA, Sec. 804(a)**	**FHA, Sec. 805**
Disparate Treatment Proscription	(a) It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin;	(a) It shall be unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age;	[I]t shall be unlawful – (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.	It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin.
Disparate Impact Proscription	(a) It shall be an unlawful employment practice for an employer – … (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin.	(a) It shall be unlawful for an employer: … (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's age….	None.	None.

APPENDIX C

More Than 80 Percent of GSE Business from 1997–2009 Would Not Have Been QRM

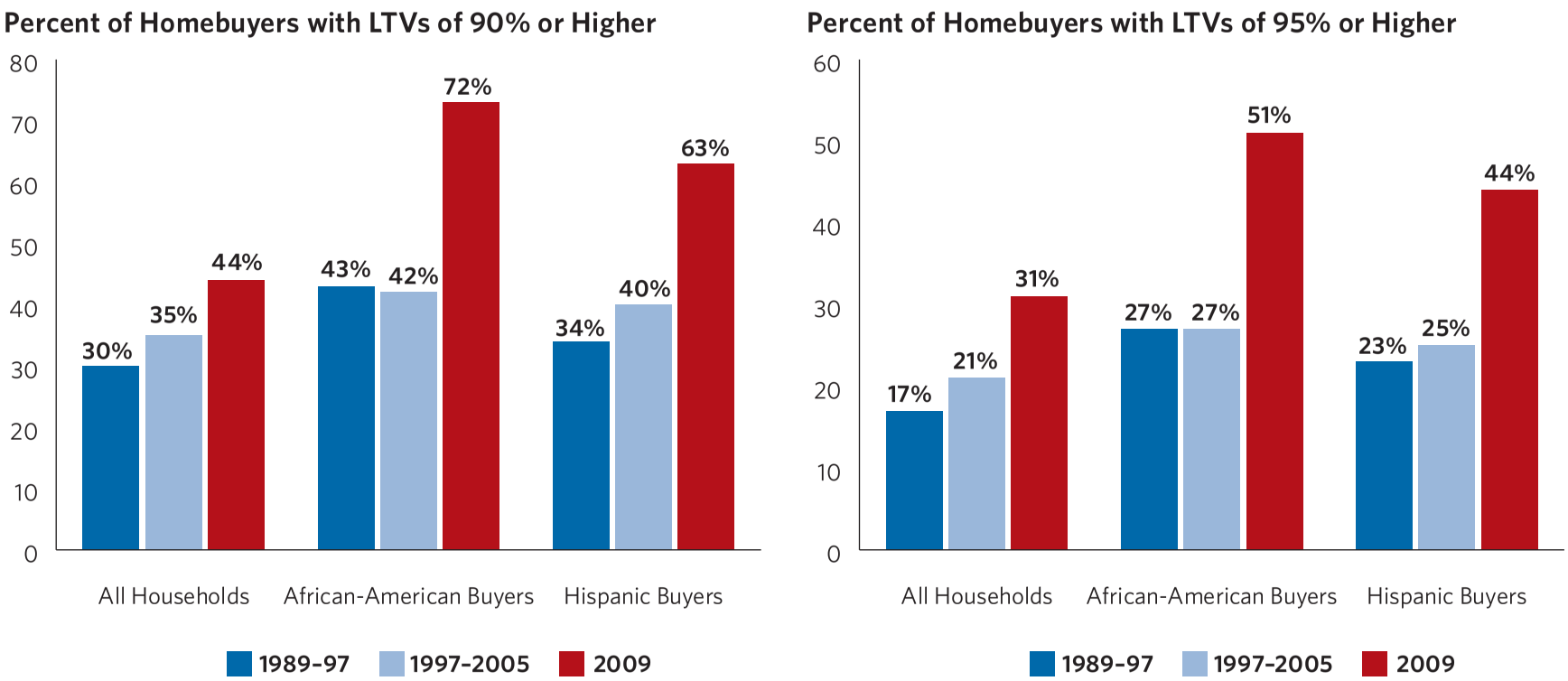
Percent of all mortgages that would NOT have met all requirements under the proposed QRM standard, by year of origination



Source: FHFA.

Chart 1

High LTV Lending Is Not a Recent Innovation — Heavily Used by Borrowers of Color

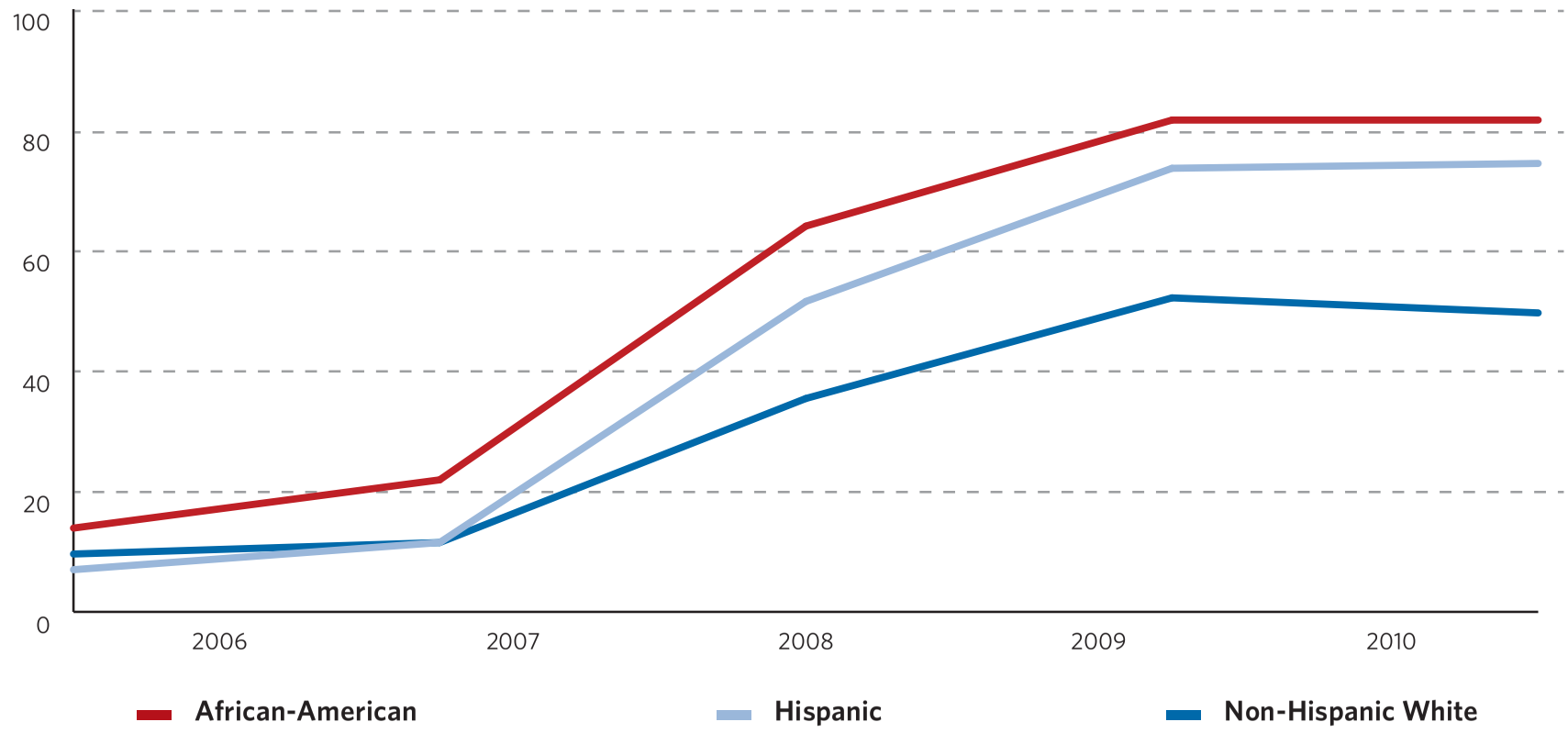


Source: MBA Analysis of Census Bureau American Housing Survey Data.

- High LTV loans have been an important component of the home purchase market for decades.
- Borrowers of color have made much greater use of these loans.
- All homebuyers have made more use following the loss of wealth in the recession.

Borrowers of Color Use Government Lending to a Greater Extent

Government[a] Share of Home Purchase Loans by Borrower Characteristic



a. FHA, VA, USDA

Source: Federal Reserve Analysis of HMDA data.

- HMDA data show that borrowers of color have already heavily been using government housing programs such as FHA in recent years.
- For example, 81.6 percent of African-American borrowers used a government program to finance the purchase of a home in 2010.
- An overly narrow QRM definition would further increase borrowers of color reliance on these government programs, as they would be the primary source of low-down payment lending.

Family Net Worth by Selected Characteristics

Family Characteristic	Median Net Worth 2007	2009
All Families	**125.4**	**96.0**
Percentile of income (2007)		
Less than 20	10.1	7.2
20–39.9	39.1	32.9
40–59.9	95.4	72.6
60–79.9	216.7	167.5
80–89.9	373.5	302.5
90–100	1,205.1	894.5
Race or ethnicity of respondent (2007)		
White non-Hispanic	178.8	149.9
Non-white or Hispanic	32.8	23.3
Housing status (2007)		
Owner	244.8	192.6
Renter or other	5.5	3.6

Source: Federal Reserve, 2009 Survey of Consumer Finances

Trends in Loan-to-Value Ratio by Income and Race / Ethnicity for First-Time Homebuyers, 1989–2005

Income or Race / Ethnicity LTV Category	1989–2005 (%)	1989–1997 (%)	1997–2005 (%)	Change (%)
*Low-income buyers**				
80% or less	44.4	45.9	43.1	-2.8
80.1 to 90%	19.3	19.5	19.1	-0.4
90.1 to 95%	12.1	10.2	13.5	3.3
Above 95%	24.3	24.3	24.2	-0.1
Moderate-income buyers				
80% or less	41.9	43.4	40.4	-3.0
80.1 to 90%	22.4	24.2	20.8	-3.5
90.1 to 95%	14.4	14.1	14.7	0.6
Above 95%	21.3	18.3	24.1	5.9
High-income buyers				
80% or less	45.5	44.5	46.4	1.9
80.1 to 90%	26.0	28.6	23.9	-4.7
90.1 to 95%	13.2	14.0	12.4	-1.6
Above 95%	15.3	12.9	17.3	4.4
White buyers				
80% or less	44.4	45.1	43.0	-2.1
80.1 to 90%	23.7	25.0	22.2	-2.8
90.1 to 95%	13.0	12.7	13.4	0.7
Above 95%	19.0	17.2	21.4	4.2
African-American buyers				
80% or less	37.8	36.7	37.9	1.1
80.1 to 90%	19.9	20.1	20.4	0.3
90.1 to 95%	15.4	16.2	15.0	-1.2
Above 95%	26.8	27.0	26.7	-0.2
Hispanic buyers				
80% or less	40.5	42.1	41.0	-1.0
80.1 to 90%	20.4	23.8	18.6	-5.2
90.1 to 95%	14.9	11.6	15.3	3.7
Above 95%	24.2	22.5	25.0	2.5

- The table to the left shows that African-American, Hispanic, low-income and first-time homebuyers have consistently turned to high LTV loans in greater proportions.
- The table shows data from 1989–2005 calculated from the American Housing Survey (AHS) conducted by the Census Bureau.
- AHS data for 2009 shows:

	All Households	African-American Buyers	Hispanic Buyers
80% or less	26%	14%	20%
80.1%–90%	17%	13%	17%
90.1%–95%	14%	21%	19%
Above 95%	31%	51%	44%

Source: MBA analysis of AHS data.

LTV = loan-to-value

* Low-income homebuyers are defined as those whose incomes are less than 80 percent of the area median income.

Source: Tabulations from the 1991–2005 American Housing Surveys

Table from Belsky and Herbert, "Initial Housing Choices Made by Low-Income and Minority Homebuyers," *Cityscape,* 2008.

Borrowers of Color Use Government Lending Programs to a Greater Extent

Incidence of Selected Types of Home Purchase Loans by Borrower Characteristic

	2006				2007				2008				2009			
Minority status of borrower	Government*	GSE	Other**	Portfolio	Government*	GSE	Other**	Portfolio	Government*	GSE	Other**	Portfolio	Government*	GSE	Other**	Portfolio
African-American	13.9	16.9	43.2	26	21.9	34.2	15.7	28.2	64	19.4	5.2	11.4	81.4	9.2	2.6	6.8
Hispanic	7	18.2	46.5	28.3	12.2	37	17.2	33.6	51.5	29.5	6.1	13	73.6	15.3	4.1	6.9
Non-Hispanic white	9.6	33.2	27.8	29.4	11.5	44	16.2	28.4	35.4	36.2	9.9	18.5	52.1	28.9	7.1	11.9

* FHA, VA, USDA

** Conventional, non-GSE

Source: Federal Reserve Analysis of HMDA data, Avery et al, 2010.

- HMDA data show that borrowers of color have already been heavily using government housing programs, such as FHA, in recent years.
- For example, 81.4 percent of African-American borrowers in 2009 used a government program to finance the purchase of a home.
- An overly narrow QRM definition would further increase borrowers of color use of these government programs, as they would be the primary source of low down payment lending.