THE FINANCIAL SERVICES ROUNDTABLE
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HPC
HOUSING POLICY COUNCIL

Consumer Mortgage Coalition

ICBA
INDEPENDENT COMMUNITY BANKERS of AMERICA

September 17, 2013

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th street, NW
Room 10276
Washington, D.C. 20410-1500

Re: Docket No.FR-5173-P-01; RIN 2501-AD33, Affirmatively Furthering Fair Housing

To whom it may concern:

The Financial Services Roundtable,[1] the Housing Policy Council,[2] Independent Community Bankers of America,[3] and the Consumer Mortgage Coalition[4] (collectively "the Associations") are pleased to comment on the proposed rule on Affirmatively Furthering Fair Housing ("proposed rule").

[1] The Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[2] The Housing Policy Council of The Financial Services Roundtable consists of 31of the leading national mortgage finance companies. HPC members originate, service, and insure mortgages. We estimate that HPC member companies originate approximately 75% and service two-thirds of mortgages in the United States. HPC's mission is to promote the mortgage and housing marketplace interests of member companies in legislative, regulatory, and judicial forums.

[3] The Independent Community Bankers of America®, the nation's voice for more than 7,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

[4] The Consumer Mortgage Coalition is a trade association of national mortgage lenders, servicers, and service providers.

The Associations and its members are fully committed to fair lending and strongly oppose discrimination prohibited under the Fair Housing Act ("Act") and other related acts including the Equal Credit Opportunity Act. Our members have strong compliance systems to monitor the issuing of credit and distribution of credit to protected classes. In addition, our members partner with many different community-based organizations to improve outreach to underserved communities.

While the Associations fully support the Act, we do not believe the proposed rule furthers the intended purpose of the Act. The Associations oppose the promulgation of this rule on the grounds that the rule assumes the legality of a disparate impact analysis under the Fair Housing Act, an assumption that we believe is in error. We believe the proposed rule may have the unintended consequence of restricting credit to protected classes – exactly the opposite of what the Act is intended to do.

The Fair Housing Act makes it unlawful "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," or "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[5] By these plain terms, section 3604 prohibits only intentional discrimination, i.e., discrimination *because of* race, color, religion, sex, familial status, national origin, or handicap.

Statutes that create disparate impact liability use different language – such as language proscribing actions that "adversely affect" an individual because of his or her membership in a protected group – to focus on the effect of the action on the individual rather than on the motivation for the action.[6] Unlike such statutes, the text of the Fair Housing Act does not prohibit practices that result in a disparate impact in the absence of discriminatory intent.

While there have been a variety of lower court decisions concerning the authority of a disparate impact analysis under the Fair Housing Act, the U.S. Supreme Court has not ruled directly on the question. It had an opportunity to do so in the case of Magner v. Gallagher,[7] but the city of St. Paul, Minnesota, the petitioner in Magner, voluntarily dismissed its case before the Supreme Court on February 14, 2012.[8] The Court now has before it another case that specifically

[5] 42 U.S.C. § 3604(b), (f).
[6] See Title Vii of the Civil Rights Act, which states that it is unlawful to deprive anyone of employment opportunities "or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." 42. U.S.C. sec. 2000e-2(a).
[7] No. 10-1032, cert granted November 7, 2011.
[8] See Staff of H.Comm. on Oversight and Government Reform, et al., 113th Congress, DOJ's Quid Pro Quo with St Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law

addresses the authority of the Fair Housing Act to support a disparate impact analysis,[9] and a determination of that case is expected in the next number of months.

The proposed rule focuses on the expansion of the Act to emphasize the affirmative action that must be taken to implement the Act. But such affirmative action cannot itself create additional authority for using any but the discriminatory prohibitions that are in 12 U.S.C. § 3604. The only available authority is the explicit language in § 3604, and that language requires that the alleged illegal action be motivated by discriminatory intent.

The proposed rule itself contemplates an analysis that goes well beyond the finding of any specific intent to discriminate. It contemplates massive plans that take into account statistical analyses of race, gender, land use, facilities, siting and a variety of other determinants. Those do not require an analysis to show that any discrimination against a member of the protected classes was intentional. In fact, the entire contemplation of the proposed rule is that through careful planning in advance and carefully implemented restrictions on actions of participants (albeit benign actions), HUD can decide how best to avoid actions that might have a discriminatory impact on one or more protected groups. Protection against intentional discrimination is not a focus of this rule.

Whether this extensive planning exercise that overrides local laws, rules and practices is wise or should be the law of the land is perhaps a legitimate subject for debate. But that debate should occur within the legislative body that establishes the laws, not in a proposed regulation of an agency of the executive branch that has been created to administer the laws, not create them. HUD must be bound by the terms of the Fair Housing Act, and that act does not authorize the use of disparate treatment analysis as the basis for a finding of discrimination.

We therefore urge that HUD withdraw this proposed rule, and if it chooses to go forward with a rule in this area, do so only within the confines of the legislative authority granted in the Fair Housing Act.

Respectfully submitted,

The Financial Services Roundtable
The Housing Policy Council
Independent Community Bankers of America
The Consumer Mortgage Coalition

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