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InfoBytes Special Alert: HUD Issues Proposed Disparate Impact Rule

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On November 15, the U.S. Department of Housing and Urban Development ("HUD") issued a proposed rule interpreting the Fair Housing Act (the "FHA") as authorizing so-called "disparate impact" or "effects test" claims. If adopted, it will provide support for private or governmental plaintiffs challenging housing or mortgage lending practices that have a "disparate impact" on protected classes of individuals, even if the practice is facially neutral and non-discriminatory and there is no evidence that the practice was motivated by a discriminatory intent.

The proposed rule adopts a three-step burden-shifting approach to determine liability under a disparate impact claim. Under the proposed rule, once a practice has been shown by the plaintiff to have a disparate impact on a protected class, the defendant would have the "burden of proving that the challenged practice has a **necessary and manifest relationship** to one or more legitimate, nondiscriminatory interests" (emphasis added). Many would consider this elucidation to set a higher standard than the usual "business justification" that defendants typically are expected to meet.[1] Even if the defendant meets this test, the plaintiff could still prevail "by demonstrating that these legitimate nondiscriminatory interests could be served by a policy or decision that produces a less discriminatory effect."

HUD's proposed regulation is consistent with efforts by the U.S. Department of Justice ("DOJ"),[2] the new Consumer Financial Protection Bureau,[3] and the federal bank regulators to aggressively pursue fair lending actions based on disparate impact theories.

Although this rulemaking has clearly been under development for some time, it is ironic that it was issued just a week after the U.S. Supreme Court granted a petition for a writ of certiorari in *Magner v. Gallagher*, 10-1032. The Court is expected to address in *Magner* the question of whether the FHA authorizes disparate impact claims, especially in light of the line of Supreme Court anti-discrimination decisions culminating in *Smith v. City of Jackson*, 544 U.S. 228 (2005), in which the Court held that when the statutory text lacks a provision creating a cause of action based on "effects" of actions, the statute does not permit disparate impact claims.

Parties may submit comments on the proposed rule for 60 days after the date of publication of the proposed rule in the *Federal Register*. Click here for BuckleySandler's previous analysis of the *Magner* case. Click here for a copy of HUD's proposed rule.

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[1] *See, e.g.*, 12 C.F.R. Part 202, Supp. I, Cmt. 6(a)(2) (providing that a "a creditor practice that is discriminatory in effect" may be prohibited "unless the creditor practice **meets a legitimate business need** that cannot reasonably be achieved as well by means that are less disparate in their impact") (emphasis added).

[2] *See, e.g.*, Thomas E. Perez, Assistant Attorney General, Dep't of Justice, Address at the 15th Annual Community Reinvestment Act and Fair Lending Colloquium (Nov. 7, 2011) (http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111107.html).

[3] *See, e.g.*, Consumer Financial Protection Bureau, Supervision and Examination Manual, "Introduction: Overview of Fair Lending Laws and Regulations," 4 (October 2011) (http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf).

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