

**American Bankers Association  
American Financial Services Association  
Consumer Bankers Association  
Consumer Mortgage Coalition  
Housing Policy Council of The Financial Services Roundtable  
Independent Community Bankers of America  
Mortgage Bankers Association  
U.S. Chamber of Commerce**

June 4, 2013

The Honorable Shaun Donovan  
Secretary, Department of Housing and  
Urban Development  
451 7th Street, S.W.  
Washington, D.C. 20410

The Honorable Richard Cordray  
Director, Consumer Financial Protection  
Bureau  
1700 G. Street, N.W.  
Washington, D.C. 20552

Re: Request for Guidance and Clarity on Disparate Impact and Dodd-Frank Mortgage Standards

Dear Secretary Donovan and Director Cordray:

The undersigned trade associations (the “Associations”) submit this letter to request written guidance that includes a clear safe harbor from liability in areas where multiple federal mortgage standards conflict.

The Department of Housing and Urban Development (“HUD”) recently finalized a regulation under the Fair Housing Act that expressly provides for liability for a facially neutral mortgage lending or servicing practice that has a disparate impact or “discriminatory effect” upon a protected class even in the absence of any intention to discriminate.<sup>1</sup> The Consumer Financial Protection Bureau (“CFPB”) has similarly stated its position that a disparate impact theory of discrimination applies to and will create liability under the Equal Credit Opportunity Act (“ECOA”).<sup>2</sup>

At the outset, we would like to stress that we strongly support fair lending. Illegal discrimination has no place in this country, and we strongly support its prohibition under both the Fair Housing Act and under ECOA. While we question the legal foundations underlying HUD’s final rule, especially the burden shifting standards, this letter seeks clarity on how the rule interacts with other requirements since the disparate impact liability concerns appear incompatible with other federal standards. Members of the Associations seek written guidance from HUD and the CFPB

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<sup>1</sup> 24 C.F.R. § 100.500.

<sup>2</sup> CFPB [Bulletin 2012-04](#), *Fair Lending* (April 18, 2012).

so that mortgage lenders and servicers are able to meet their responsibilities under *all* mortgage lending standards. Lenders need clarity on how to reconcile ability to repay, Qualified Mortgage or QM, and disparate impact standards.<sup>3</sup>

These and other rules implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), including those governing ability to repay and risk retention, will tighten credit standards through facially neutral requirements that may lead to disparate outcomes for some categories of borrowers. Requirements for the QM, for example, include a 43 percent debt-to-income requirement, or eligibility for Fannie Mae and Freddie Mac purchase or guarantee. Yet there is no guidance as to whether and to what extent compliance with these requirements amounts to a sufficient business necessity that would avoid liability under the disparate impact rule. Likewise, there is little guidance on the standards used to assess less discriminatory alternatives in the context of complying with federal requirements. This lack of guidance will create great uncertainty, resulting in higher prices to account for risk and less available credit for consumers.

Smaller lenders will be particularly harmed. Not only are they especially vulnerable to reputational damage — no matter how groundless claims might be — community banks and locally owned mortgage companies simply cannot afford to withstand protracted litigation. Depriving consumers of their services and lessening competition would harm consumers further.

We were encouraged by Secretary Donovan’s recent comments at the Mortgage Bankers Association’s National Advocacy Conference where the Secretary expressed support for guidance to help lenders comply, and his hope that this rule would not be unduly disruptive to the industry.

Given the significant amount of uncertainty created by the final disparate impact rule and its intersection with the CFPB’s mortgage rules, we urge you to set out written guidance for the industry that makes clear that a lender will not be subject to disparate impact liability based on specific actions undertaken to avoid liability under the Dodd-Frank rules, such as making only or primarily QM safe harbor loans or limiting QM rebuttable presumption or non-QM loans to borrowers whose risks of default are low.

Companies are working diligently to implement the QM rule’s requirements by January 2014, so these conflicts must be resolved quickly. Compliance with one regulation should not make it impossible to comply with another.

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<sup>3</sup> See the comment letter on this rule (specifically pages 24-26) filed by some of the undersigned organizations, available at: <http://www.regulations.gov/contentStreamer?objectId=0900006480f99128&disposition=attachment&contentType=pdf>

The Associations would welcome an opportunity to discuss these issues in detail at your earliest convenience and to work with you to develop this essential guidance.

Sincerely,

American Bankers Association  
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cc: Board of Governors of the Federal Reserve System  
Federal Deposit Insurance Corporation  
Office of the Comptroller of the Currency  
U.S. Department of Justice  
U.S. Department of the Treasury