



Federal Housing Finance Agency

Division of Housing Mission and Goals

ADVISORY BULLETIN

AB 2021 - 04: Enterprise Fair Lending and Fair Housing Compliance

Purpose

FHFA's Enterprise fair lending examination program is conducted by the Office of Fair Lending Oversight ("OFLO") within the Division of Housing Mission and Goals. The purpose of this advisory bulletin is to provide FHFA's supervisory expectations and guidance to Fannie Mae and Freddie Mac (the Enterprises) on fair lending compliance. FHFA considers ensuring Enterprise compliance with fair lending laws part of FHFA's obligation to affirmatively further the purposes of the Fair Housing Act in its program of regulatory and supervisory oversight over the Enterprises and its responsibility to ensure the Enterprises comply with all applicable laws.¹

Background

The federal fair lending laws that apply to the Enterprises include:

- Fair Housing Act – 42 U.S.C. 3601 et seq.
 - Discriminatory Conduct Under the Fair Housing Act – 24 CFR part 100
- Equal Credit Opportunity Act (ECOA) – 15 U.S.C. 1691 et seq.
 - Equal Credit Opportunity Act (Regulation B) – 12 CFR part 1002
- Safety and Soundness Act fair housing provision – 12 U.S.C. 4545
 - HUD's Regulation of Fannie Mae and Freddie Mac – 24 CFR part 81, subpart C

FHFA's fair lending policy statement generally articulates its policy on fair lending and how it uses its authorities to ensure compliance with fair lending laws.² The Enterprises are subject to several associated fair lending requirements such as requirements to obtain and maintain data relevant to ensuring compliance with fair lending laws, report certain information to FHFA pursuant to FHFA's reporting order on fair lending,³ include certain information related to fair lending in their annual housing reports, and comply with fair lending requirements associated with other FHFA processes and requirements. The Enterprises are also subject to Department of Housing and Urban Development ("HUD") oversight related to fair housing. FHFA and HUD have signed a

¹ 12 U.S.C. 4511(b)(2), 42 U.S.C. 3608(d).

² <https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Policy-Statement-on-Fair-Lending.aspx>

³ <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Fair-Lending-Oversight.aspx>

memorandum of understanding regarding cooperation and coordination with respect to fair housing and fair lending.⁴ In certain circumstances, FHFA provides notification to HUD and DOJ of information that suggests a violation of the Fair Housing Act or that indicates a possible pattern or practice of discrimination in violation of the Fair Housing Act.⁵ The Enterprises play a unique and important role in the mortgage market, and their operations and policies can promote fair lending compliance and further the purposes of fair lending laws and the public interest in the primary mortgage market.

Guidance

Each Enterprise must fully comply with all applicable fair lending laws in its operations. FHFA expects each Enterprise to maintain a fair lending program that effectively identifies, assesses, monitors, and mitigates fair lending risk and prevents the occurrence of fair lending violations in Enterprise operations. Each Enterprise must fully comply with associated fair lending requirements. FHFA encourages each Enterprise to affirmatively further the purposes of the Fair Housing Act, including promoting fair lending compliance among their business counterparties while furthering their public purposes in the mortgage market and within their own activities relating to housing and urban development.

I. Compliance with Fair Lending Laws

The following section provides general guidance with respect to Enterprise compliance with fair lending laws. It is not intended to provide authoritative or definitive statements of fair lending law and is intended to give practical guidance for fair lending compliance with respect to Enterprise operations based on a combined application of all fair lending laws noted in the Background section. The examples provided are general in nature. When determining whether a fair lending violation has occurred, close scrutiny of the facts and law are warranted in all cases. However, even situations where conduct is close to the line of illegality with respect to fair lending raise questions about appropriate risk management and effectiveness of or support for the fair lending program. The fact that an aspect of fair lending law is not covered explicitly in this advisory bulletin should not be construed to mean that FHFA will not enforce that aspect as part of fair lending supervision.

A. Prohibited Bases

Prohibited bases⁶ protected from discrimination under the Federal fair lending laws noted above are:

- Race
- Color
- Religion
- National Origin

⁴ https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-HUD-MOU_8122021.pdf

⁵ Executive Order 12892 section 2-204, available at: <https://www.govinfo.gov/content/pkg/WCPD-1994-01-24/pdf/WCPD-1994-01-24-Pg110.pdf>.

⁶ See, e.g., 12 U.S.C. 4545, 15 U.S.C. 1691(a), 42 U.S.C. 3601 *et seq.*

- Sex, Sexual Orientation, and Gender Identity⁷
- Marital Status
- Age
- Receipt of income derived from any public assistance program
- Exercise, in good faith, of any right under the Consumer Credit Protection Act⁸
- Familial status
- Disability⁹
- Consideration of the age of a dwelling or age of the neighborhood in a manner that has an unjustified discriminatory effect
- Consideration of the location of a dwelling or the census tract where the dwelling is located in a manner that has an unjustified discriminatory effect

An Enterprise may not discriminate on a prohibited basis because of the characteristics of:

- An applicant, prospective applicant, or borrower
- A person associated with an applicant, prospective applicant, or borrower (for example, a co-applicant, spouse, business partner, or live-in aide)
- The present or prospective occupants of the subject property, or
- The characteristics of the neighborhood or other area where the subject property is located¹⁰

B. Covered Enterprise Activities

Enterprise activities covered by fair lending laws include but are not limited to:

- Purchasing residential real estate loans (including setting terms and conditions for purchase);¹¹

⁷ The Department of Housing and Urban Development has determined that the Fair Housing Act's prohibition on sex discrimination includes discrimination on the basis of sexual orientation or gender identity. *See* Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act, available at: https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf. FHFA supervises and enforces the Fair Housing Act consistent with HUD's interpretation.

⁸ Interference claims are also cognizable under the Fair Housing Act and its implementing regulation. *See supra* Section H, Retaliation or Interference; *e.g.*, 42 U.S.C. 3617 ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title."); 24 CFR 100.400.

⁹ The Fair Housing Act uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This document uses the term "disability," which is more generally accepted.

¹⁰ *See, e.g.*, 12 CFR 1002, Official Interpretations, comment 2(z)-1; 24 CFR part 100.70(a).

¹¹ *See, e.g.*, 24 CFR 100.125.

- Providing loans or financial assistance for residential real estate;¹²
- Participating in credit decisions;¹³
- Selling dwellings (such as through REO disposition);¹⁴
- Advertising, communications, and statements (including among employees);¹⁵
- Setting standards for appraisals and relying on appraisals in purchasing real estate loans;¹⁶
- Making decisions related to loss mitigation in servicing of real estate loans (including establishing standards for such decisions);¹⁷
- Pooling, packaging, and securitizing residential real estate loans and marketing and selling such securities;¹⁸
- Multifamily purchasing and lending, setting standards for such purchasing and lending, servicing multifamily loans, and pooling or securitization related to multifamily dwellings;¹⁹
- Making housing unavailable;²⁰ and
- Models related to these activities

Methods of proving discrimination under these fair lending laws include:

- Overt or direct evidence of disparate treatment;
- Comparative or indirect evidence of disparate treatment (including code word or redlining evidence); and
- Evidence of disparate impact where the Enterprise did not demonstrate a legitimate business justification

Additional types of prohibited discrimination that are relevant in Enterprise fair lending compliance include:

- Discriminatory statements, steering, and discouragement;
- Use of discriminatory appraisals;²¹ and
- Discriminatory interference or retaliation

C. Direct and Vicarious Liability

The Fair Housing Act imposes liability for violations through both direct and vicarious liability,

¹² See, e.g., 24 CFR 100.120.

¹³ See, e.g., 12 CFR 1002, Official Interpretations, comment 2(l)-1.

¹⁴ See, e.g., 24 CFR 100.60.

¹⁵ See, e.g., 24 CFR 100.75, 100.75(c)(2).

¹⁶ See, e.g., 24 CFR 100.135(d)(1).

¹⁷ See, e.g., 24 CFR 100.130(b)(3); see also Federal Reserve CA 09-13 (Dec. 4, 2009) (ECOA guidance for loss mitigation under HAMP program).

¹⁸ See, e.g., 24 CFR 100.125(b)(2), (3).

¹⁹ See, e.g., 24 CFR 100.20 (definition of “dwelling”)

²⁰ See, e.g., 24 CFR 100.70(b).

²¹ See, e.g., 24 CFR 100.135.

including the conduct of employees and agents and third parties in certain circumstances.²²

An Enterprise is directly responsible for a fair housing violation resulting from its own conduct, and vicariously responsible for a fair housing violation that results from the conduct of its agents and employees, regardless of whether the Enterprise knew or should have known of the conduct of its agents and employees, consistent with agency law.²³

An Enterprise is also responsible for failing to take prompt action to correct and end a fair housing violation in certain circumstances, including:

- Such a violation by the Enterprise’s employee or agent where the Enterprise knew or should have known of the discriminatory conduct; and
- Such a violation by a third-party, where the Enterprise knew or should have known of the discriminatory conduct and had the power to correct it, depending on the extent of the Enterprise’s control or other legal responsibility an Enterprise may have with respect to the third party’s conduct.²⁴

D. Disparate Treatment

Disparate treatment occurs when an Enterprise treats a borrower or property differently based on one of the prohibited bases. It does not require any showing that the treatment was motivated by prejudice or a conscious intention to discriminate beyond the difference in treatment itself. Disparate treatment may more likely occur in the treatment of borrowers or properties that are neither clearly well-qualified nor clearly unqualified or where discretionary processes are present.

The existence of illegal disparate treatment may be established either by statements revealing that an Enterprise explicitly considered prohibited factors (overt evidence) or by differences in treatment that are not fully explained by legitimate nondiscriminatory factors (comparative evidence). Disparate treatment can also be shown through appropriate statistical analysis.

1. Overt or Direct Evidence of Disparate Treatment

There is overt evidence of discrimination when oral or written statements indicate an Enterprise discriminates on a prohibited basis without need for inference or comparative evidence.²⁵

Example: Suppose an Enterprise asset manager for REO properties decides not to repair or upgrade a property in the capital city of a tribal nation before putting it on the market and justifies the decision because it is near “Indian nation public housing” and “buyers may have a problem with that.” The decision would be a violation because it was made because of the

²² See, e.g., 24 CFR 100.7.

²³ See, e.g., 24 CFR 100.7(a)(1) and (b).

²⁴ See, e.g., 24 CFR 100.7(a)(1)(iii).

²⁵ See, e.g., 1994 Policy Statement on Discrimination in Lending, available at: <https://www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm>; Federal Financial Institutions Examination Council Interagency Fair Lending Exam Procedures, available at: <https://www.ffiec.gov/PDF/fairlend.pdf>.

race of nearby residents of the neighborhood.²⁶

2. Comparative or Indirect Evidence of Disparate Treatment

If an Enterprise has apparently treated similarly situated borrowers or properties differently on the basis of a prohibited factor, it must provide a legitimate non-discriminatory explanation for the difference in treatment. If the Enterprise's explanation is found to be not credible or not applied consistently to similarly situated borrowers or properties, FHFA may find that the entity discriminated.²⁷

Example: Suppose an Enterprise asset manager for REO properties repairs or upgrades an REO property in a white neighborhood when “only cosmetic” repairs are needed but does not repair an REO property with similar characteristics in a minority neighborhood when “only cosmetic” repairs or upgrades are needed. Suppose also that there is no clear policy on how to handle cosmetic repairs, leaving it to the asset manager's discretion. The decision would be a violation because it treated similarly situated properties in minority and white neighborhoods differently without a credible legitimate non-discriminatory explanation or consistent application.

Example: Suppose an Enterprise determines it will stop doing business with a minority multifamily sponsor due to property maintenance concerns. A white multifamily sponsor presents similar property maintenance concerns, but instead, receives a warning. The Enterprise is unable to provide evidence explaining the difference in treatment between the two sponsors. The decision would be a violation because it treated two similarly situated sponsors of different race/ethnic backgrounds differently without a credible legitimate non-discriminatory explanation or consistent application.

3. Redlining

Redlining is a form of illegal disparate treatment in which an Enterprise treats borrowers or properties differently because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area without any legitimate business reason. It is often shown by overt evidence, comparative evidence of differences in treatment, and can be supported by maps showing differences in outcomes for borrowers or properties in neighborhoods with different racial characteristics.²⁸

²⁶ See, e.g., 42 U.S.C. 3604(b), 24 CFR 100.65(b)(2), *Nat'l Fair Hous. Alliance v. Bank of Am., N.A.*, 401 F. Supp. 3d 619, 639 (D.Md. July 18, 2019), Questions and Answers For Federal Reserve-Regulated Institutions Related to the Management of Other Real Estate Owned (OREO) Assets, June 27, 2012, available at: <https://www.federalreserve.gov/supervisionreg/srletters/sr1210a1.pdf> (“[I]nstitutions may not avoid or delay the maintenance or repairs of dwellings based on the racial or ethnic composition of the geographic area where they are located.”)

²⁷ See, e.g., 1994 Policy Statement, Interagency Fair Lending Exam Procedures.

²⁸ See, e.g., 1994 Policy Statement on Discrimination in Lending, FFIEC Interagency Fair Lending Exam Procedures.

Example: Suppose an Enterprise provides discretion to multifamily underwriters to accept or reject purchases of multifamily loans. For the past two years, this Enterprise accepted nearly four times as many applications for properties located in white neighborhoods compared with properties located in Black neighborhoods. Maps of Metropolitan Statistical Areas (“MSAs”) depicting accepted and rejected purchases showed avoidance of majority-Black neighborhoods, and where there were accepted loans in majority-Black neighborhoods, they were almost exclusively along the edges of those neighborhoods in close proximity to white neighborhoods. This policy would present fair lending risk and could be a violation because the Enterprise’s discretionary policies resulted in redlining.

4. Code Word Evidence of Disparate Treatment

Use of certain code words can be evidence of disparate treatment. Whether a code word is evidence of disparate treatment depends on the context, inflection (if spoken), tone of voice (if spoken), custom, and historical usage.²⁹ Examples of potential code words include describing minority neighborhoods as “crime-ridden,” “inner city” neighborhoods, or lacking “pride of ownership.”³⁰ Code word evidence should be carefully evaluated in its full context before drawing conclusions.

E. Disparate Impact

When a neutral policy or practice disproportionately excludes or burdens certain persons or neighborhoods on a prohibited basis, the policy or practice is described as having a “disparate

²⁹ *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). See *Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 506 (9th Cir. 2016) (applying *Ash v. Tyson* standard in a Fair Housing Act case). In general, when analyzing the custom factor, FHFA looks at real estate and mortgage industry standards and practices rather than “local” custom as suggested by the Supreme Court in the employment context.

³⁰ See, e.g., *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 674 (Ct. Com.Pl. Ohio 1997) (noting “pride of ownership” as subjective, discriminatory criteria in insurance underwriting); Consent Decree in *United States v. Nationwide Mut. Ins. Co.*, C2-97-291 (S.D. Ohio Mar. 10, 1997), available at <http://www.justice.gov/crt/about/hce/documents/nationsettle.php> (banning “pride of ownership” in insurer’s underwriting as discriminatory); *Avenue 6E Investments, LLC v. City of Yuma*, 818 F.3d at 499 (noting “pride of ownership” as discriminatory comment in public opposition to affordable housing development); Uniform Standards of Professional Appraisal Practice, Advisory Opinion 16 (advising appraisers not to use the term “high-crime area” in fair housing advisory opinion from Appraisal Advisory Board). See *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F.Supp.2d 563, 571–72 (E.D.La.2009) (finding references to crime “racially-loaded”); *Atkins v. Robinson*, 545 F. Supp. 852, 874 (E.D.Va.1982) (reference to “an abundance of crime” “may be interpreted as [a] veiled reference[] to race”); *Pierce v. Metropolitan Liability & Property Ins. Co.*, 1983 U.S. Dist. LEXIS 11368, *18 (S.D. Ohio 1983) (“This report stated, in part, that the Plaintiffs’ house was located in an area where there were a number of vacant or run-down houses, that the area of Plaintiffs’ residence was located in a center city with a high frequency of reports of crime and vice. Based upon these facts, one could infer that Plaintiffs’ house was located in a predominantly minority area.”); *Barrick Realty, Inc. v. City of Gary*, 354 F. Supp. 126 (N.D. Ind. 1973) (“Among the fears of white residents as non-whites begin to move into their neighborhood are rising crime rates, overcrowded schools, declining property values, and a generally lower quality of life.”).

impact."

The fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation. When a disparate impact is identified, the next step is to determine whether the policy or practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory objectives. Factors that may be relevant to the justification could include cost, profitability, or compliance with legal requirements, among others. Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by a legitimate nondiscriminatory objective, the policy or practice still may be found to be in violation of the Fair Housing Act if an alternative policy or practice could serve the legitimate nondiscriminatory interests by another practice with less discriminatory effect. Evidence of discriminatory intent is not necessary to establish a violation based on disparate impact. Appropriate statistical analysis is usually necessary to evaluate whether a policy creates a disparity and may also be relevant in assessing justification and potential less discriminatory alternatives.³¹

A fair lending self-evaluation of a policy or practice, assessing its impact and considering whether potential less discriminatory alternatives would serve the Enterprise's legitimate nondiscriminatory objective, could be part of an effective compliance risk management process, and provide helpful support for concluding that the policy or practice is not a disparate impact violation, especially when evidence indicates that the least discriminatory alternative was adopted.

Example: Suppose an Enterprise has a special Guide requirement in place for properties in Puerto Rico. This policy has been in place without review for a substantial period of time to determine its effectiveness or need in preventing significant costs or losses. The Enterprise does not subject any other state or territory to this requirement with similar or greater risk. This policy disproportionately affects Latino borrowers as the predominant residents of Puerto Rico. The policy would be a violation because it has a significant disparate impact but lacks clear justification.

Example: Suppose an Enterprise's automated underwriting model includes a factor that leads to significantly lower disproportionate acceptance rates for Black borrowers. The factor improves the model's ability to predict risk, but only marginally so. The model is still a sound, predictive model that meets the Enterprise's business needs without the factor. Including the factor would be a violation because it has a significant disparate impact but the model without the factor would be a less discriminatory alternative.³²

Example: Suppose an Enterprise's business policy treats properties with a current market value of lower than \$100,000 less favorably than properties above that threshold. The policy disproportionately affects more properties in minority neighborhoods than white neighborhoods. The policy has a legitimate business purpose, but other means having less disproportionate impact are available to achieve that purpose. The policy would be a violation because less discriminatory alternative policies are available.

³¹ See, e.g., 24 CFR 100.500, 12 CFR 1002.6(a), 1994 Policy Statement on Discrimination in Lending, FFIEC Interagency Fair Lending Exam Procedures.

³² See, e.g., OCC Bulletin 97-24, available at: https://ithandbook.ffiec.gov/media/resources/3672/occ-bl-97-24_credit_scor_models.pdf ("National banks should avoid including in their credit scoring systems variables that have little influence on the total credit score, yet disadvantage applicants on a prohibited basis to a statistically significant degree.").

Example: Suppose an Enterprise underwriting model has a higher cutoff score for certain metro areas. The higher cutoff score is based on an Enterprise’s risk assessment of a specific factor for that metro and is unknown to applicants and lenders. The policy has a disproportionate impact on Black and Latino applicants who are rejected by this higher cutoff score at higher rates than white applicants. The Enterprise generally does not take metro-area differences into account in underwriting in other ways. The projected stress losses of not using the higher cutoff score for certain metro areas are minimal. The policy would be a violation because a less-discriminatory alternative exists in the Enterprise’s general policy of not taking into account metro-area differences. Prudent fair lending risk management is especially warranted of location-based criteria that have a disparate impact given the Enterprise’s obligations under its statutory charter and the Safety and Soundness Act.³³

F. *Discriminatory Statements, Steering, and Discouragement*

Making or publishing advertisements, statements, or notices that indicate a preference, limitation or discrimination on a prohibited basis violate the Fair Housing Act.³⁴ Such statements could be made to the public, or to agents or employees if made as part of a decision-making process.³⁵ Selecting media or locations for publication or the form of advertisements (such as the repeated absence of non-white models) may also constitute discriminatory advertisements or statements. Whether a statement is a violation does not depend on the intent of the speaker or writer, but on whether a reasonable person would interpret the statement to indicate a preference, limitation, or discrimination.

Unlawful steering also constitutes a violation of the Fair Housing Act.³⁶ Steering involves restricting or attempting to restrict neighborhood choice by word or conduct to perpetuate segregated housing patterns or discourage or obstruct free neighborhood choice. Examples include statements that discourage home purchases on a prohibited basis by exaggerating the drawbacks or failing to note the desirable features of a home or neighborhood and statements that indicate a person would not be comfortable or compatible with existing neighborhood residents. It is also a violation to make oral or written statements to applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application for credit.³⁷

Example: Suppose an Enterprise advertises an REO property on its website and notes its location in a “culturally diverse area.” The residents of the neighborhood where the property is located are nearly all Black. This statement would be a violation because it describes the neighborhood in racial terms. It also could constitute a steering violation because it can reasonably be interpreted to indicate who may or may not be comfortable living near the

³³ 12 U.S.C. 4545(1), 24 CFR 81.42; 12 U.S.C. 1716(4) (Fannie Mae charter); 1451(b)(4) (Freddie Mac charter).

³⁴ 24 CFR 100.75. Affirmative marketing meeting certain requirements may be considered an exception to this prohibition. *See supra* I.J, Recognized Exceptions..

³⁵ 24 CFR 100.75(c)(2).

³⁶ 24 CFR 100.70.

³⁷ 12 CFR 1002.4(b).

existing residents of the neighborhood.

G. *Reliance on Discriminatory Property Valuation*

It is a Fair Housing Act violation to use a property valuation in connection with the sale or financing of a dwelling when an Enterprise knows or reasonably should know that the property valuation improperly takes into consideration a prohibited basis.³⁸ Further, the Safety and Soundness Act fair housing provision, implemented by HUD regulations, prohibits an Enterprise from discriminating in any manner in the purchase of a mortgage, including discriminatory property valuation.³⁹

Example: Suppose an Enterprise relies on an appraisal that undervalues a property in a minority neighborhood in establishing the loan-to-value ratio for a loan purchase and the appraisal includes comments from the appraiser that the neighborhood is “predominately Hispanic,” the residents have “assimilated their culture heritage” into the neighborhood, and it was now “one spicy neighborhood.” The reliance would be a violation because the Enterprise should have known the appraisal improperly considered a prohibited basis.

H. *Retaliation or Interference*

It is a Fair Housing Act violation to coerce, intimidate, threaten, or interfere with any person for having aided or encouraged any other person in the exercise of fair housing rights. This includes such conduct toward Enterprise employees or agents that report fair housing violations to an Enterprise or other authorities including FHFA or HUD or who take steps to try to correct such violations.⁴⁰

Example: Suppose an Enterprise employee believes an Enterprise operational area is violating fair lending laws and seeks to correct the problem. The employee’s manager threatens to reassign him to a different practice group if he does not immediately drop the matter and reverse his assessment. The conduct would be a violation because the employee engaged in protected activity by trying to uphold fair housing rights and the manager’s actions interfered with that activity in circumstances indicating it was motivated by the protected activity.

I. *Reasonable Accommodations*

It is a Fair Housing Act violation for an Enterprise to fail to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with disabilities equal opportunity to use and enjoy a dwelling unit.

³⁸ 24 CFR 100.135(d)(1). The Fair Housing Act does include a limited exemption for appraisers, who may “take into consideration factors other than race, color, religion, national origin, sex, [disability]. . . , or familial status” regardless of other requirements in the statute. 42 U.S.C. 3605(c).

³⁹ 12 U.S.C. 4545(1), (6).

⁴⁰ 24 CFR 100.400.

Example: Suppose an Enterprise policy offers single-family mortgage underwriting flexibility for legal guardians of adults with developmental disabilities but not legal guardians of adults with traumatic brain injuries. The Fair Housing Act protects persons with disabilities and persons associated with them broadly, and the policy would be a violation because it treats persons associated with persons with traumatic brain injuries less favorably without any apparent justification. The policy would effectively provide a reasonable accommodation to some borrowers protected by the Fair Housing Act but not to others also protected by the Act who are similarly situated.

J. Recognized Exceptions

There are activities that may appear to be violations of fair lending law but are recognized exceptions to the law. If conducted by an Enterprise according to appropriate legal standards, supervisory action would generally not be warranted in these circumstances.

1. Special Purpose Credit Programs

The ECOA and Regulation B allow for-profit creditors, including an Enterprise, to establish special-purpose credit programs benefiting applicants who meet certain eligibility requirements. Generally, these programs target an economically disadvantaged class of individuals and are authorized by federal or state law. This could include eligibility requirements involving one or more prohibited bases. The requirements for special purpose credit programs are provided for in Regulation B.⁴¹ Prudent risk management by an Enterprise offering such a program would also counsel good-faith conformity with the advisory opinion of the Consumer Financial Protection Bureau (CFPB) in implementation of any special purpose credit program, which would provide liability protection under section 706(e) of ECOA.⁴² HUD confirmed in legal guidance that special purpose credit programs complying with ECOA and Regulation B do not violate the Fair Housing Act,⁴³ and the Department of Justice has recognized special purpose credit programs in a remedial settlement agreement that includes the Fair Housing Act.⁴⁴

2. Age-Restricted Properties

⁴¹ See 12 CFR 1002.8.

⁴² See Advisory Opinion on Special Purpose Credit Programs (Dec. 21, 2020), available at: <https://www.consumerfinance.gov/rules-policy/final-rules/advisory-opinion-on-special-purpose-credit-programs/>.

⁴³ See Office of General Counsel Guidance on the Fair Housing Act's Treatment of Certain Special Purpose Credit Programs That Are Designed and Implemented in Compliance with the Equal Credit Opportunity Act and Regulation B (Dec. 6, 2021), available at: https://www.hud.gov/sites/dfiles/GC/documents/Special_Purpose_Credit_Program_OGC_guidance_12-6-2021.pdf.

⁴⁴ See, e.g., Settlement Agreement between the United States of America and Kleinbank, May 8, 2018, available at: <https://www.justice.gov/opa/press-release/file/1060996/download>.

The Fair Housing Act provides for occupant age-restricted housing under certain circumstances when the housing meets conditions under HUD's regulations.⁴⁵ Enterprise programs that allow for purchase of occupant age-restricted properties meeting Fair Housing Act standards are permissible.

3. Affirmative Marketing

Affirmative advertising that attempts to reach members of traditionally disadvantaged groups or to reach persons who are least likely to apply for a program is a compliant strategy for advertising and outreach under the Fair Housing Act and the Equal Credit Opportunity Act.⁴⁶

II. Effective Enterprise Fair Lending Program

The following section provides general guidance on FHFA's supervisory expectations for effective Enterprise fair lending programs. Note: this guidance does not affect or supersede other FHFA supervisory guidance on risk management, including compliance risk management and model risk management.

FHFA expects each Enterprise to maintain a fair lending program that effectively identifies, assesses, monitors, and mitigates fair lending risk and prevents the occurrence of fair lending violations in Enterprise operations. Fair lending risk includes violations of fair lending law or conditions that permit the occurrence of fair lending violations, but also issues that subject an Enterprise to reputational harm related to issues such as fair lending and serving the Enterprise's public purposes. In this way, fair lending risk poses both management and operational risks.

The responsibility for an effective fair lending program goes beyond specific personnel responsible for fair lending. An effective fair lending program requires appropriate board and management oversight and support for the fair lending program, and the cooperation from business and operational areas at an Enterprise. Clear expectations that operational areas must take steps necessary to implement controls to mitigate fair lending risk and prevent the occurrence of fair lending violations should be underscored by board and management support. The fair lending program should have board and management support in conducting its work free from interference or retaliation. Cooperation with FHFA and HUD in their fair housing oversight of the Enterprise is also an important element of an effective fair lending program and a supervisory expectation of FHFA.

A. Identifying Fair Lending Risk

Identifying fair lending risk involves personnel knowledgeable in fair lending, Enterprise activities and business operations, and recurring risk assessment to identify operational areas where fair lending risk may be present.

B. Assessing Fair Lending Risk

Assessing fair lending risk involves the assessment of operational areas using both qualitative and quantitative methods to accurately assess the amount and nature of the fair lending risk present in an

⁴⁵ 24 CFR part 100 subpart E.

⁴⁶ 12 CFR 1002.4 comment 4(b)-2.

operational area.

C. Monitoring Fair Lending Risk

Monitoring fair lending risk involves having processes in place to monitor the identification and assessment of fair lending risk in an operational area to ensure that the identification and assessment remain up to date and accurate. It can involve both qualitative assessment of changes in the operational area, as well as regular statistical analysis to monitor fair lending risk.

D. Mitigating Fair Lending Risk

Mitigating fair lending risk involves creating and supporting a control environment around operational areas where fair lending risk is identified and assessed to effectively mitigate the risk. Appropriate fair lending training both at a general level and a specific level to an operational area's specific fair lending risks are an important component of mitigating fair lending risk. Because an Enterprise's responsibility for fair lending extends to agents and, in some cases, other third parties, third party risk management is also an important component of mitigating fair lending risk. Development and assessment of less discriminatory alternatives in key business areas is an important component of mitigating fair lending risk, as well as preventing the occurrence of fair lending violations.

E. Preventing the Occurrence of Fair Lending Violations

Preventing the occurrence of fair lending violations is a core component of an effective fair lending program, and failure to prevent the occurrence of fair lending violations is an indication that fair lending risk has not been appropriately identified, assessed, and mitigated. Such failure can also indicate an operational area has not adequately implemented controls or taken the steps identified by the fair lending program necessary to mitigate fair lending risk—a broader compliance issue for that operational area and an issue implicating board and management support for fair lending and oversight of the operations of the Enterprise.⁴⁷

F. Cooperation

Cooperation is an important element of an effective fair lending program and a supervisory expectation of FHFA for all Enterprise operational areas. Cooperation is expected of both business and operational areas with respect to the Enterprise's internal fair lending program, as well as with FHFA and HUD in conducting fair lending supervision. Cooperation includes the sharing of complete information requested by FHFA or HUD in fair lending supervision. FHFA's policy statement on fair lending encourages self-reporting of potential fair lending violations, and FHFA views self-reporting favorably in exercising its supervisory and enforcement discretion.⁴⁸

III. Fair Lending Risk Factors

⁴⁷ See, e.g., 12 CFR part 1236.

⁴⁸ <https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Policy-Statement-on-Fair-Lending.aspx>.

Certain risk factors are commonly associated with higher fair lending risk and the existence of conditions under which fair lending violations may occur. FHFA's supervisory expectation is that an effective Enterprise fair lending program will take account of these risks and establish appropriate compliance controls when they are present. Failure to appropriately mitigate fair lending risk that occurs because of fair lending risk factors can result in supervisory findings depending on the facts and circumstances.

Risk factors commonly associated with higher fair lending risk include:

- Substantial discretion to make decisions on transactions or properties
- Lack of clear policies, procedures, business rules, or decision criteria
- Use of factors in decision-making that are subjective rather than objective
- Use of geographic factors or different treatment of geographies
- Policies impacting outcomes that lack clear business justification
- Policies impacting outcomes that have not undergone review for effectiveness or need for a significant period of time
- Compensation criteria or other incentives that could lead to disparities in outcomes
- Reliance on third parties without appropriate oversight
- Unreliable or incomplete data
- Consumer complaints
- Employee statements indicating aversion to doing business in certain areas with relatively high concentration of residents sharing a protected class characteristic

IV. Associated Fair Lending Requirements

Requirements associated with fair lending not discussed above include requirements related to ECOA notices, data collection and reporting, the Annual Housing Activities Report, credit score approval, new activities and new products, fulfillment of HUD requirements, and FHFA conservatorship requirements. It is an FHFA supervisory expectation that an Enterprise comply with these requirements.

A. ECOA Notice Requirements

The Equal Credit Opportunity Act requires notice to applicants when a creditor participating in the credit decision takes certain actions.⁴⁹ This includes certain servicing decisions.⁵⁰ FHFA's supervisory expectation is that an Enterprise will comply with applicable ECOA requirements in the appropriate business lines and operational areas.

B. Data Collection and Reporting Requirements

Each Enterprise is required by law to collect and report underlying race, ethnicity, and other

⁴⁹ See, e.g., 12 CFR 1002.9.

⁵⁰ See, e.g., Federal Reserve Consumer Affairs Letter 09-13, available at: <https://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm>.

demographic data used for fair lending monitoring and analysis for various purposes.⁵¹ The Enterprises are required to report certain fair lending information to FHFA on a quarterly basis and additional information upon request pursuant to FHFA's Enterprise Compliance and Information Submission with Respect to Fair Lending Order.⁵²

C. Annual Housing Activities Report

Each Enterprise, in its Annual Housing Activities Report, is required to assess underwriting standards, business practices, repurchase requirements, pricing, fees, and procedures that affect the purchase of mortgages for low- and moderate-income families, or that may yield disparate results based on the race, color, religion, sex, handicap, familial status, age, or national origin of the borrower, including revisions thereto to promote affordable housing or fair lending.⁵³ FHFA expects that an Enterprise will engage in a meaningful analysis of its standards, practices, and requirements that may yield disparate results on prohibited bases and provide transparency to the public into its analysis and the revisions it undertook to promote fair lending.

D. Validation and Approval of Credit Score Models

The FHFA regulation for validation and approval of credit score models contains requirements related to fair lending. Each application under the process must meet the standards set forth in the regulation related to fair lending compliance and certification for applications, as well as any additional requirements related to fair lending in the credit score solicitation.⁵⁴ Each Enterprise must conduct a fair lending assessment as part of assessment process under the rule.⁵⁵

E. Requirements related to HUD and Federal ECOA-enforcing Agencies

Each Enterprise is required to undertake certain actions related to fair lending enforcement in the primary mortgage market at the direction of HUD, including providing certain information to HUD regarding lenders and servicers either to assist HUD or Federal agencies enforcing ECOA, and to undertake remedial actions against certain lenders at the direction of HUD.⁵⁶ FHFA expects that an Enterprise will fully cooperate with HUD in any such direction.

⁵¹ 12 U.S.C. 1456(e), 1723a(m), 4544(b)(3), 4545(2)-(3), 4561(d)(1). Primary mortgage market lenders are required to collect data for government fair lending monitoring as well under 12 CFR 1002.13 and 12 CFR part 1003. The Enterprises' Uniform Residential Loan Application (URLA) is a vehicle frequently used for the collection of this data across the mortgage industry.

⁵² See In Re: Enterprise Compliance and Information Submission with Respect to Fair Lending, Order No. 2021-OR-FNMA-2 and Order No. 2021-OR-FHLMC-2, *available at*: <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Fair-Lending-Oversight.aspx>.

⁵³ 24 CFR 81.43.

⁵⁴ 12 CFR 1254.6(a), (a)(2).

⁵⁵ 12 CFR 1254.8(b)(2).

⁵⁶ 24 CFR 81.44, 81.46.

F. FHFA Conservatorship Requirements

While the Enterprises are in conservatorship, FHFA’s conservatorship function for each Enterprise also includes fair lending oversight. FHFA conservatorship directives may include requirements associated with fair lending compliance or intended to further fair lending principles. FHFA expects each Enterprise to comply with these conditions and have available information demonstrating compliance for supervisory review.

V. Steps to Promote Fair Housing and Fair Lending

The Enterprises play a unique and important role in the mortgage market, and their operations and policies can promote fair housing and fair lending compliance and further the purposes of fair lending laws and the public interest in the primary mortgage market. Historically, the Enterprises have often played a leading role in adopting standards to promote fair lending. FHFA encourages each Enterprise to promote among their business counterparties fair lending compliance and the purposes of fair lending laws while furthering their public purposes in the mortgage market. While such Enterprise actions are not a substitute for ensuring fair lending compliance in an Enterprise’s own operations, an effective fair lending program, or compliance with associated fair lending requirements, they demonstrate a commitment to promoting fair lending that FHFA encourages and recognizes. An Enterprise that takes such actions to promote fair lending is encouraged to document them and to provide them to FHFA during FHFA’s fair lending oversight, even when not required to by other FHFA requirements.

Additionally, FHFA has established the Equitable Housing Finance Plan framework as conservator, under which an Enterprise is required to engage in ongoing barrier identification, planning, and goal-setting, and to undertake meaningful actions to address those barriers.⁵⁷ Each Enterprise is also required to report progress on such plans annually. FHFA’s supervisory expectation is that an Enterprise’s efforts under the Equitable Housing Finance Plan will demonstrate full compliance with the framework.

Related Guidance and Regulations

I. Federal Fair Lending Laws and Regulations

Fair Housing Act – 42 U.S.C. 3601 *et seq.*

Discriminatory Conduct Under the Fair Housing Act – 24 CFR part 100

Equal Credit Opportunity Act – 15 U.S.C. 1691 *et seq.*

Equal Credit Opportunity Act (Regulation B) – 12 CFR part 1002

Safety and Soundness Act fair housing provision – 12 U.S.C. 4545

⁵⁷ <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Equitable-Housing-Finance-Plans-RFI.pdf>.

HUD's Regulation of Fannie Mae and Freddie Mac – 24 CFR part 81, subpart C

II. FHFA Fair Lending Guidance and Requirements

[FHFA Fair Lending Policy Statement](#)

[FHFA Fair Lending Reporting Orders](#)

[FHFA-HUD Memorandum of Understanding Regarding Fair Housing and Fair Lending Coordination](#)

III. Federal Fair Lending Guidance

These resources are issued by Federal agencies related to fair lending matters. They may provide helpful guidance on the application of fair lending laws or exam and investigation procedures and methods in a variety of contexts. While FHFA considers the resources relevant and helpful guidance, the list of resources is not intended to be comprehensive. FHFA carefully considers the full context of the facts and law in any particular matter involving the Enterprises' fair lending compliance.

A. General Federal Fair Lending Guidance

General guidance from Federal agencies regarding fair lending can provide helpful guidance in particular matters.

[1994 Policy Statement on Discrimination in Lending](#)

[Interagency Fair Lending Exam Procedures](#)

[HUD Fair Housing Act Complaint intake, Investigation, and Conciliation Handbook](#)

[CFPB ECOA Baseline Review Modules](#)

B. Federal Enforcement Actions and Administrative Decisions

Complaints, administrative opinions, consent orders, and similar actions by Federal agencies that enforce fair lending laws can provide helpful guidance on particular matters.

[DOJ Housing and Civil Enforcement Section Cases](#)

[HUD Administrative Law Judge Fair Housing Act Decisions](#)

[FDIC Enforcement Actions](#)

[Federal Reserve Enforcement Actions](#)

[Office of the Comptroller of the Currency Enforcement Actions](#)

C. Specific Federal Fair Lending Guidance

Guidance from Federal agencies regarding specific topics as they relate to fair lending can provide helpful guidance in particular matters.

1. Accessibility (Design and Construction), Group Homes, Reasonable Accommodation, Service Animals

[Accessibility \(Design and Construction\) Requirements for Covered Multifamily Dwellings under the Fair Housing Act](#)

[Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act \(HUD FHEO-2020-01\)](#)

[Reasonable Accommodations under the Fair Housing Act](#)

[State and Local Land Use Laws and Practices and the Application of the Fair Housing Act](#)

2. Advertising, Discriminatory Statements

[Fair Housing Act Advertising Guidelines \(former 24 CFR part 109\)](#)

[Memorandum on Guidance Regarding Advertisements Under 804\(c\) of the Fair Housing Act](#)

3. Criminal Background Checks

[Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions](#)

4. Gender Identity, Sexual Orientation

[Implementation of Executive Order 13988 on Enforcement of the Fair Housing Act](#)

5. Limited English Proficiency

[Fair Housing Act Protections for Persons with Limited English Proficiency](#)

6. Low-Income Housing Tax Credit Properties

[Inter-governmental Agreement on Low-Income Housing Tax Credit Properties](#)

7. Models

[OCC Bulletin 97-24 \(Disparate Treatment and Disparate Impact sections\)](#)

8. Occupancy Standards

[Fair Housing Enforcement – Occupancy Standards Notice of Statement of Policy](#)

9. Public Assistance Income

[Section 8 Housing Choice Voucher Homeownership Program \(CFPB Bulletin 2015-02\)](#)

[Social Security Disability Income Verification \(CFPB Bulletin 2014-03\)](#)

10. Real Estate Owned Property

[Questions and Answers for Federal Reserve-Regulated Institutions Related to the Management of Other Real Estate Owned \(OREO\) Assets \(Fair Housing Act portions\)](#)

11. Special Purpose Credit Programs

[Advisory Opinion on Special Purpose Credit Programs](#)

[Office of General Counsel Guidance on the Fair Housing Act's Treatment of Certain Special Purpose Credit Programs That Are Designed and Implemented in Compliance with the Equal Credit Opportunity Act and Regulation B](#)

12. Tribal Housing

[Limiting Housing to Indian Families or Tribal Members \(HUD Notice PIH 2009-4\)](#)

IV. Other Relevant FHFA Guidance

[Appendix to Part 1236, Prudential Management Operating Standards](#)

[AB 2020-06 Enterprise Risk Management Program](#)

[AB 2019-05 Compliance Risk Management](#)

[AB 2018-08 Oversight of Third-Party Provider Relationships](#)

[AB 2017-01 Classification of Adverse Examination Findings](#)

[AB 2013-07 Model Risk Management Guidance](#)

[AB 2013-03 FHFA Enforcement Policy](#)

FHFA has statutory responsibility to ensure that the regulated entities carry out their missions consistently with the provisions and purposes of FHFA's statute and the regulated entities' authorizing statutes and applicable law. Advisory Bulletins describe supervisory expectations in particular areas and are used in FHFA examinations of the regulated entities. For comments or questions pertaining to this Advisory Bulletin, contact James Wylie at James.Wylie@fhfa.gov or by phone at 1-202-649-3209.

