



FEDERAL HOUSING FINANCE AGENCY

12 CFR Part Chapter XII

[No. 2021-N-7]

Policy Statement on Fair Lending

AGENCY: Federal Housing Finance Agency.

ACTION: Notification of approval and adoption of policy statement; request for comment.

SUMMARY: The Federal Housing Finance Agency (FHFA or agency) is issuing a policy statement on Fair Lending (Policy Statement) to communicate the agency's general position on monitoring and information gathering, supervisory examinations, and administrative enforcement related to the Equal Credit Opportunity Act, the Fair Housing Act, and the Federal Housing Enterprises Financial Safety and Soundness Act, and is soliciting comments on its application.

DATES: The Policy Statement becomes effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Annalyce Shufelt, Senior Attorney Advisor (Fair Lending), Office of Fair Lending Oversight, (202) 649-3416, Annalyce.Shufelt@fhfa.gov, Federal Housing Finance Agency, Constitution Center, 400 7th Street, SW, Washington, DC 20219; or Ming-Yuen Meyer-Fong, Associate General Counsel, Office of General Counsel, (202) 649-3078 (not toll-free numbers), Ming-Yuen.Meyer-Fong@fhfa.gov. The Telecommunications Device for the Deaf is (800) 877-8339.

ADDRESSES: FHFA welcomes comments about application of the principles set out in the policy statement to specific policies and practices. You may submit your comments to FHFA, identified by “Policy Statement; Comment Request: (2021-N-7)”, by any one of the following methods:

- *Agency website:* www.fhfa.gov/open-for-comment-or-input.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: “Policy Statement; Comment Request: (2021-N-7).”
- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: “Policy Statement; Comment Request: (2021-N-7)”, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street, SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Clinton Jones, General Counsel, Attention: “Policy Statement; Comment Request: (2021-N-7)”, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street, SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at <http://www.fhfa.gov>. In addition, copies of all

comments received will be available for examination by the public through the electronic comment docket also located on the FHFA website.

SUPPLEMENTARY INFORMATION:

I. Purpose

FHFA is the primary regulator for Fannie Mae and Freddie Mac (the Enterprises) and the Federal Home Loan Banks (the Banks) (collectively, the regulated entities). FHFA is issuing this Policy Statement to communicate FHFA's general position on monitoring and information gathering, supervisory examinations, and administrative enforcement related to the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and section 4545 of the Federal Housing Enterprises Financial Safety and Soundness Act (Safety and Soundness Act), 12 U.S.C. 4501 *et seq.* (collectively, with implementing regulations and other sources, "fair lending laws"). This Policy Statement is intended to be consistent with those statutes and their implementing regulations and to provide guidance to FHFA's regulated entities seeking to comply with them. It describes sources of statutory authority for actions that may be taken by FHFA and it articulates FHFA's policies for supervisory oversight and enforcement of fair lending matters. FHFA is also issuing this Policy Statement to provide a foundation for possible future interpretations and rulemakings by the agency for its regulated entities.¹

¹ As a historical note, in 1994, a number of Federal agencies published a Policy Statement on Discrimination in Lending (1994 Statement) which, in part, described how Federal agencies use their authorities to oversee fair lending compliance. *See* 59 FR 18266 (April 15, 1994). FHFA did not exist at the time and was not a signatory. In 2008, Congress abolished the former Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board, which had been parties to the 1994 Statement. In their place, Congress established FHFA with authorities that, in contrast to its predecessor agencies, include overseeing Enterprise and Bank compliance with applicable law. 12 U.S.C. 4511(b) (FHFA "shall have general regulatory authority over each regulated entity ... and shall exercise such general regulatory authority ... to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out"). Given the importance of fair lending compliance, FHFA is publishing this FHFA Policy Statement on Fair Lending to implement its authorities and articulate agency activities in relevant areas including monitoring, examination, enforcement, and coordination to oversee regulated entity fair lending compliance.

II. Policy Statement

Fair Lending Policy Statement

FHFA is committed to ensuring that its regulated entities operate consistently with the public interest and with sufficient overall risk management by providing fair, equitable, and nondiscriminatory access to credit and housing. Fair lending is central to the principles under which the U.S. housing finance system operates and is a requirement of law. FHFA will never tolerate illegal discrimination by the regulated entities. FHFA will engage in comprehensive fair lending oversight of its regulated entities and adopts the following high-level policies to guide its fair lending monitoring, supervision, and enforcement. FHFA is committed to interagency engagement, coordination, and collaboration in fair lending.

Legal Overview

While many Federal statutes seek to promote fair lending, FHFA's policy statement focuses on ECOA, the Fair Housing Act, and the fair lending provisions of the Safety and Soundness Act as they apply to the regulated entities' activities. This policy statement does not create or confer any substantive or procedural rights which could be enforceable in any administrative or civil proceeding.

The Consumer Financial Protection Bureau's (CFPB) Regulation B, 12 CFR part 1002, along with Official Interpretations in Supplement I to 12 CFR part 1002, implements ECOA.² The U.S. Department of Housing and Urban Development's (HUD) regulations at 24 CFR part 100 implement the Fair Housing Act. Together, these statutes and regulations prohibit discrimination on the basis of race or color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), receipt of income derived from any public assistance program, exercise, in good faith, of

² The Federal Reserve Board of Governors also implements ECOA through a regulation covering auto dealers.

any right under the Consumer Credit Protection Act, familial status (defined by 42 U.S.C. 3602(k) of the Fair Housing Act as children under the age of 18 living with a parent or legal custodian, pregnant women, and people securing custody of children under 18), and disability.³

The Enterprises are also subject to section 4545 of the Safety and Soundness Act, which requires HUD, by regulation, to prohibit the Enterprises from discriminating in the purchase of mortgages on the bases of race, color, religion, sex, disability, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a discriminatory effect.⁴

FHFA also recognizes that there are a number of applicable and relevant sources of fair lending law and guidance, including judicial decisions, administrative interpretations and guidance, and administrative actions.

Fair Lending Oversight Considerations

FHFA has broad statutory authority to supervise the regulated entities, including authority to monitor and gather information, conduct supervisory examinations, and enforce compliance with law where appropriate. FHFA monitors regulated entities for fair lending risk, conducts supervisory examinations, and, when necessary, takes enforcement action to ensure compliance with fair lending laws.

Monitoring and Information Gathering

FHFA regularly monitors the fair lending risk presented by Enterprise and Bank activities and may request data and information in its role as supervisor and regulator to

³ The Fair Housing Act uses the term “handicap” instead of “disability.” This document uses the term “disability,” which is more generally accepted. *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings under the Fair Housing Act, April 30, 2013, *available at* <https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF> (*citing Bragdon v. Abbott*, 524 U.S. 624, 631 (1998), to say that both terms have the same legal meaning).

⁴ 12 U.S.C. 4545.

ensure effective, ongoing oversight. FHFA reviews the regulated entities' internal fair lending data monitoring, risk assessments, policies and procedures, internal control systems, and other information to appropriately scope monitoring and examinations commensurate with fair lending risk. Fair lending monitoring information may be collected pursuant to FHFA's supervisory and regulatory authority, including 12 U.S.C. 4514(a) which authorizes FHFA to order regulated entities to submit both regular and special reports. FHFA may require regulated entities to submit "regular reports . . . on the condition (including financial condition), management, activities, or operations of the regulated entity, as the Director considers appropriate."⁵ Fair lending monitoring information includes, but is not limited to: data and other information necessary to monitor and evaluate the policies, programs, and activities of the regulated entities; information about changes in policies, programs, and activities; information about the regulated entities' fair lending testing and other compliance activities; and the regulated entities' self-evaluations of fair lending risk and the compliance of their policies, programs, and activities with respect to fair lending laws.

Supervisory Examinations

FHFA has broad authority to supervise the Enterprises and the Banks for compliance with fair lending standards. The regulated entities are subject to FHFA's overarching "supervision and regulation."⁶ FHFA may conduct examinations of the regulated entities whenever FHFA determines that an examination is necessary or appropriate.⁷ FHFA examiners have examination authority equivalent to other Federal

⁵ 12 U.S.C. 4514(a).

⁶ 12 U.S.C. 4511(b)(1) ("Each regulated entity shall, to the extent provided in this chapter, be subject to the supervision and regulation of the Agency"); 12 U.S.C. 4511(b)(2) ("The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.").

⁷ 12 U.S.C. 4517(b).

prudential regulators.⁸ FHFA also has a duty to ensure that the regulated entities are operating consistently with the public interest.⁹

FHFA conducts risk-based fair lending examinations of the regulated entities. FHFA's fair lending oversight program is committed to effective, appropriately tailored supervisory measures to ensure that the regulated entities adhere to applicable fair lending compliance standards. The Enterprises and the Banks each engage in activities that present differing levels and kinds of fair lending risk. FHFA carefully weighs the totality of available information, including monitoring information, market intelligence, and relevant data, when considering how best to employ supervisory resources.

Enforcement

FHFA may use its administrative enforcement authority to address violations of ECOA and the Fair Housing Act by the regulated entities. That a regulated entity is in conservatorship does not preclude other enforcement actions; however, the conservator's broad statutory powers may provide FHFA with more efficient means to address problems than traditional enforcement tools. FHFA as conservator may take immediate action, consistent with applicable law, to direct or restrict the activities at the regulated entity, including the activities of the board of directors and executive management.

FHFA has broader enforcement authority than its predecessor agencies FHFB and OFHEO, including for fair lending violations. The Housing and Economic Recovery Act (HERA)¹⁰ granted FHFA the authority to use cease and desist orders to enforce violations of all applicable laws, including ECOA and the Fair Housing Act.¹¹ FHFA may also use

⁸ 12 U.S.C. 4517(e). The statute particularly references the authority of examiners employed by the Federal Reserve banks.

⁹ 12 U.S.C. 4513(a)(1)(B)(v).

¹⁰ The Housing and Economic Recovery Act of 2008 (HERA), Pub. L. 110-289 (July 30, 2008), *available at* <https://www.govinfo.gov/content/pkg/PLAW-110publ289/pdf/PLAW-110publ289.pdf>.

¹¹ Pub. L. 110-289, sec. 1101 (amended the former OFHEO authorities to provide the new FHFA general supervisory and regulatory authority requiring regulated entity compliance with the Safety and Soundness

civil money penalties as a tool to ensure fair lending compliance, where the statutory bases for such penalties are present.¹²

Prior to HERA, OFHEO's fair lending enforcement authority over the Enterprises was limited to the Safety and Soundness Act fair housing provision and HUD's implementing regulation.¹³ HUD's implementing regulation anticipates HUD referring violations and potential violations of that provision by an Enterprise to FHFA for enforcement.¹⁴ FHFA will support enforcement of HUD's regulation implementing the Safety and Soundness Act's fair housing provision. FHFA will conduct a full review of HUD's referral of a violation or potential violation and all evidence submitted as part of the referral and resolve the matter appropriately and in accordance with FHFA's enforcement policy and in consultation with HUD. In addition, FHFA will continue to facilitate HUD's periodic fair lending reviews of the Enterprises. FHFA may also independently pursue administrative enforcement actions for any violations of section 4545 of the Safety and Soundness Act.

FHFA's enforcement policy applies when taking any enforcement action against regulated entities for violations of law, including violations of fair lending law.¹⁵

Pursuant to FHFA's enforcement policy, FHFA may engage in consent order negotiations

Act, the regulated entities statutory charters, and "any other applicable law"); sec. 1151 (amended cease and desist authorities to include violations of law generally); *codified at* 12 U.S.C. 4511 and 4631.

¹² 12 U.S.C. 4636.

¹³ *See* 24 CFR 81.47(a).

¹⁴ 24 CFR 81.47(a). Under the Safety and Soundness Act, FHFA is empowered to initiate enforcement actions for Enterprise violations of 12 U.S.C. 4545 and HUD's implementing regulations. The process for referring "violations or potential violations" to FHFA under 24 CFR 81.47(a) is distinct from the process under 24 CFR 81.47(b), in which HUD shall conduct an investigation of the Fair Housing Act complaint, make a determination as to whether or not reasonable cause exists to believe discrimination occurred, and, if it does, proceed to enforcement under the Fair Housing Act.

¹⁵ Federal Housing Finance Agency, Advisory Bulletin: FHFA Enforcement Policy, AB 2013-03 (issued May 31, 2013), *available at* [https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20\(2\).pdf](https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20(2).pdf).

with regulated entities to resolve violations of fair lending laws.¹⁶ FHFA is not required by statute to refer potential fair lending violations to the Attorney General when the agency has a reason to believe that a regulated entity has engaged in a pattern or practice of discouraging or denying applications for credit.¹⁷ Nevertheless, FHFA will consult with and refer matters to the Attorney General and coordinate with the Department of Justice on enforcement of fair lending matters as appropriate.

FHFA will consider whether the regulated entity has conducted any self-evaluations or undertaken any corrective actions when making supervisory and enforcement decisions. FHFA will view responsible business practices such as self-testing, implementation of management controls, and voluntary remedial action favorably when making fair lending supervisory and enforcement determinations. In particular, FHFA commits to taking into consideration an entity's cooperation and candor during examinations and monitoring. Regulated entities are not required to self-report potential violations of fair lending laws. However, self-reporting of violations of fair lending laws will be viewed favorably by FHFA as it exercises its discretion. FHFA also considers the number and duration of violations identified, the nature of the evidence of discrimination (*i.e.*, overt discrimination, disparate treatment, or disparate impact), the pervasiveness of the discrimination, the presence and effectiveness of any anti-discrimination policies, any history of discriminatory conduct, any corrective measures implemented or proposed by the regulated entity, and any other factors for determining the appropriateness of any potential action.

Consideration of Differences between the Banks and the Enterprises

¹⁶ Federal Housing Finance Agency, Advisory Bulletin: FHFA Enforcement Policy, AB 2013-03 (issued May 31, 2013), *available at* [https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20\(2\).pdf](https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/AdvisoryBulletinDocuments/20130531_AB_2013-03_FHFA-Enforcement-Policy_508%20(2).pdf). The Enforcement Policy further describes a number of informal and formal actions that FHFA may take, many of which may be used for enforcing compliance with fair lending laws.

¹⁷ 15 U.S.C. 1691e(g).

FHFA recognizes the important distinctions between the two types of regulated entities, the Enterprises and the Banks. In drafting this Policy Statement, FHFA has considered the differences between the Enterprises and the Banks with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability, as well as other applicable differences.¹⁸

Sandra L. Thompson,
Acting Director, *Federal Housing Finance Agency*.
[FR Doc. 2021-14438 Filed: 7/8/2021 8:45 am; Publication Date: 7/9/2021]

¹⁸ 12 U.S.C. 4513(f).