This document and any attachments are superseded by Comptroller's Handbook - Consumer Compliance - Fair Lending.

Fair Housing Act

The Fair Housing Act (FHA) is Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601 et seq). It regulates many practices relating to housing. Perhaps most critically relevant to financial institutions, the FHA makes it unlawful for any lender to discriminate in its "residential real estate-related" activities against any person because of race, color, religion, sex, handicap, familial status, or national origin. The FHA was most recently amended by the Fair Housing Amendments Act of 1988. These amendments, effective March 12, 1989, were enacted to establish an administrative enforcement mechanism under the U.S. Department of Housing and Urban Development (HUD), to stiffen penalties for noncompliance, and to add handicap and familial status (having children under the age of 18) as prohibited bases for covered housing decisions.

LINKS

Program

The purpose of this Handbook Section is to highlight the key provisions of the FHA. Recognizing that primary enforcement authority for compliance with the FHA is vested in HUD, it is still important for examiners to understand the key requirements of this statute as they relate to thrift institutions. Many of the provisions of the FHA and HUD's implementing regulations are reflected in our own nondiscrimination regulations at 12 CFR Part 528. These regulations and the examination procedures related to them are discussed in Handbook Section 1200: Fair Lending-General.

Note: The Equal Credit Opportunity Act of 1974 (ECOA), as amended (see Handbook Section 1205), prohibits discrimination with respect to any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age, receipt of public assistance, or the exercise, in good faith, of rights granted by the Consumer Credit Protection Act. Anyone in the business of providing loans for housing is subject to both statutes and is, therefore, prohibited from discriminating on any of these bases. There are a few situations in which the FHA and ECOA diverge somewhat. These will be mentioned at appropriate points in this section.

Summary of Key Sections of the Fair Housing Act

(*Note:* Section references apply to the Act as amended in 1988.)

Section 801 states that, "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

With regard to prohibited practices, FHA section 805, which applies to the financing, selling, brokering, and appraising of housing, and FHA section 804, which addresses sales, rentals, and related activities, are of primary relevance to the daily operations of most financial institutions.

Section 805 makes it unlawful for a financial institution to discriminate against any person in making available, or in setting the terms and conditions of, a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status or national origin. Section 805 defines residential real estate-related transaction" to mean (1) the making or purchasing of loans or providing other financial assistance (a) for purchasing, constructing, improving, repairing, or maintaining a dwelling, or (b) secured by residential real estate, and (2) any selling, brokering, or appraising of residential real property.

Section 804 prohibits the following with respect to the sale or rental of housing, if based on race, color, religion, sex, or national origin, or because of a handicap of any applicant, occupant or potential occupant, or associated person:

- Refusing to sell or rent housing after a bona fide offer is made, or refusing to negotiate to sell or rent, or otherwise making unavailable or denying, a dwelling.

- Discriminating with respect to terms, conditions, or privileges of sale or rental, or with respect to the provision of services or facilities in connection with the dwelling.

- Making any oral or written statement or advertisement with respect to a sale or rental that indicates preference, limitation, or discrimination based on a prohibited consideration.

- Representing falsely that a dwelling is not available.

- Inducing or attempting to induce for profit the sale or rental of property through representations regarding the entry or prospective entry into the neighborhood of a certain person or persons.

FHA ***section 804*** is clearly applicable to an institution's managing and marketing of residential real estate owned. Section 804 has a broader application, however, despite reference in its caption to only sales and rentals. This section makes it unlawful not only to refuse to negotiate or complete a sale or rental, but also to "otherwise make unavailable or deny" a dwelling on a prohibited basis. In *United States v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio, 1974), a case dealing with the city's zoning practices, the Court characterized this language as being "as broad as Congress could have made it" and as "catch-all phraseology which may not be easily discounted or de-emphasized."

In the case of *Laufman v. Oakley Building and Loan Company*, 408 F. Supp. 489 (S.D. Ohio, 1976), the Court specifically held that, although section 804 generally applies to sales and rentals and section 805 to extensions of financial assistance in connection with housing, transactions involving sales or rentals and loans or other financial assistance in connection with housing are subject to both. The Court went on to say that the same conduct may be prohibited by either or both. Consequently, a financial institution's practices in the area of housing finance should be examined in a general way to ensure that they do not "otherwise make unavailable or deny" housing, regardless of the fact that no specific act or practice may violate any explicitly named prohibition of the FHA.

FHA ***section 810*** provides that a person who claims to have been discriminated against may, within one year after the alleged discriminatory housing practice has occurred or terminated, file a written complaint with HUD. The Secretary of HUD may also initiate complaints directly. HUD will investigate either type of complaint, generally determining within 100 days whether to file a charge or dismiss the complaint. If a charge is filed, HUD will attempt to resolve the grievance between the complainant and the respondent(s) by conciliation.

A conciliation agreement may provide for binding arbitration, which may award appropriate relief, including monetary relief. Each conciliation agreement is made public unless the complainant and the respondent agree and the Secretary determines that disclosure is not required. If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary, the Secretary may authorize civil action for appropriate temporary or preliminary relief. Upon receipt of such authorization, the Attorney General of the United States shall promptly commence such action.

FHA ***sections 803 and 807*** establish conditions under which specified transactions qualify to be exempted from FHA requirements. For example, special allowances are made for owner/occupant sales and rentals that meet stated (very limiting) criteria. Also, certain "housing for older persons" and housing operated by and for religious organizations or private clubs may be exempt from some or all provisions. As a practical matter, financial institutions will generally not qualify for any exemption from the FHA, although certain of an institution's borrowers may so qualify.

FHA ***section 811*** provides that the Secretary of HUD may issue subpoenas and order discovery in aid of investigations of complaints filed for discriminatory housing practices. Under this section, any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry, or to produce records, documents, or other evidence shall be fined not more than $100,000 or imprisoned not more than one year, or both. These penalties are also applicable to any person who makes any false entry or statement of fact and for any person who willfully mutilates, alters, or by any other means falsifies any documentary evidence.

Section 812 provides that when a complaint is led under Section 810, the person on whose behalf a complaint has been led may elect the forum in which the complaint will be processed. The options include (a) a proceeding before an administrative law judge (ALJ) with right to appeal to a federal appeals court, or (b) a trial in a federal district court. The election must be made not later than 20 days after filing of the charge. If the administrative hearing is elected and discriminatory conduct is found, the ALJ is authorized to issue an order for relief as may be appropriate, including actual damages and injunctive or other equitable relief and civil penalties. The ALJ's order may be reviewed by the Secretary within 30 days after issuance; otherwise the order becomes final. If a jury trial is elected, the complainant will be represented by an attorney from the United States Department of Justice. In these cases, the relief that may be granted includes permanent or temporary injunction, restraining order, or other relief, including monetary damages and civil penalties.

FHA ***section 813*** provides that aggrieved persons may commence a civil action in an appropriate United States district court or State court within two years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement. An aggrieved person may commence civil action under this section whether or not a complaint has been led under Section

810. The court may appoint an attorney for the plaintiff. If it finds that a discriminatory practice has occurred or is about to occur, the court may grant relief as it deems appropriate, including any permanent or temporary injunction, temporary restraining order, or other order enjoining the defendant from engaging in such practice. The court may also award to the plaintiff actual and punitive damages.

FHA ***section 814*** provides that the Attorney General may commence civil action in United States district court against any person or persons when reasonable cause exists to believe such person(s) are engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by the FHA. The Attorney General may also commence action when an alleged discriminatory housing practice or a breach of a conciliation agreement has been referred by the Secretary of HUD.

FHA ***section 814A*** establishes a privilege for the report of results of a self-test to determine the level of an institution's compliance with the FHA. This parallels a similar provision in the ECOA. HUD regulations implementing this provision match-up with the Federal Reserve Board's implementing regulations contained in Regulation B at §202.15. (See Handbook Section 1205).

FHA ***section 815*** provides that the Secretary of HUD may make rules necessary to carry out the FHA. Under this mandate, HUD has issued amended rules under Title 24 C.F.R. Part 100 to implement and enforce the provisions of the Fair Housing Act. The text of these regulations, which became effective March 12, 1989, was distributed with Thrift Bulletin No. 19 (March 10, 1989).

FHA ***section 818*** states that it is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of any right granted or protected by sections 803, 804, 805, or 806 of the Act, including the right to aid or encourage other persons to exercise such rights.

UNLAWFUL DISCRIMINATORY LENDING

PRACTICES UNDER THE FHA

Like most other civil rights statutes, the Fair Housing Act was broadly written by Congress, and has been accorded "a sweep as broad as its language" in the courts. The 1988 amendments, although as yet untested in the courts as to specific cases, are expected to further reinforce the breadth of protection courts have accorded under the FHA. Even prior to the 1988 amendments, a wide variety of lending practices have been found illegal under the FHA, including some that are not specifically mentioned in the Act itself, but which have been determined to be illegal because they violate requirements and prohibitions that are implicit in its language. What follows are discussions of some prohibited practices, and where relevant, discussions of the cases in which courts have determined them to be prohibited.

1. Redlining on a racial basis has been held by the courts to be prohibited by the FHA, Laufman v. Oakley Building and Loan Company. One may reasonably infer that redlining on any other discriminatory basis proscribed in the FHA would draw the same conclusion. Redlining is the practice of denying loans for housing in certain neighborhoods even though the individual

applicant may be otherwise eligible for credit. The term "redlining" refers to the presumed practice of mortgage lenders of drawing red lines around portions of a map to indicate disfavored neighborhoods. The FHA does not prohibit "redlining" on grounds other than the prohibited factors set forth in the statute. However, excluding any geographical area from lending activity, even on seemingly sound economic grounds (e.g., the area lies along an active geologic fault line) could have discriminatory effects disproportionately adverse to a protected segment of the population and, therefore, be construed as a possible violation of the FHA. The burden in such cases is on the lender to substantiate that the exclusion is based solely on valid economic considerations.

2. Making excessively low appraisals in relation to purchase prices, based on prohibited considerations, is closely akin to redlining. This practice, which forces minority loan applicants to make larger downpayments, was held, in connection with a court-approved settlement, to violate FHA sections 804 and 818 (formerly 817) in a case brought by the Justice Department against the American Institute of Real Estate Appraisers, US v. AIREA. This decision's logic would apply to financial institutions that lend on the basis of such appraisals, as well.

3. The use of arbitrary, subjective, and non-reviewable rental criteria leading to an otherwise unexplained racial (or sexual, religious, etc.) imbalance in clientele was found to be illegal under section 804 in the case of US v. Youritan Const. Co., 370 F. Supp. 643 (N.D. Cal., 1973). In Youritan, the resident manager had instructed the rental agents to use differing procedures when approached by a black applicant than when approached by a white applicant. For example, white applicants were told that no credit check was necessary, whereas black applicants were told a lengthy one would be necessary. White applicants were told that there were vacancies when black applicants were told there were none. The court's rationale would clearly be applicable to lenders who use such standards in their housing lending, as well.

4. Creation and exploitation of a racially exclusive image, even where there may be little concurrent evidence of a discriminatory policy put into practice against any given individual applicant, has been repeatedly found to be illegal in the employment context. It was also held to violate the Fair Housing Act in US v. Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss, 1972). One indication of the existence of such an image, and possibly of its exploitation by management, might be the absence or clearly less than conspicuous display of the required Equal Housing Lender poster (12 CFR 528.5) in the lobby of each office.

Using advertising that tends to select applicants of a particular race, etc., is another way in which a housing lender might exploit an exclusive image. The use of only white human models in advertisements, suggesting that white applicants are preferred, is an example of this type of advertising. Another is use of media that caters only to selected segments of the population, if such selectivity is not offset by other advertising efforts. Selective advertising practices are explicitly noted by the revised HUD fair housing regulation at 24 CFR 109.25 as potentially discriminatory either by intent or in effect, and must be used by lenders with great care.

Section 804(c) makes it unlawful to make or print a statement or advertisement with respect to the sale or rental of a dwelling indicating any preference or limitation based on a prohibited characteristic. In Holmgren v. Little Village Community Reporter, 342 F. Supp. 512 (N.D. Ill., 1971) the court applied this prohibition to newspaper advertisements soliciting tenants and home buyers who spoke certain languages.

The creation of an exclusive image which tends to discourage certain otherwise qualified applicants may also be considered a violation of the ECOA, specifically section 202.5(a) with regard to discouraging applications on a prohibited basis. Read together, the FHA and ECOA produce a strong statutory prohibition against prescreening or otherwise discouraging applicants in any manner, beginning with the content of advertising, that may be construed to have a discriminatory impact. Consequently, a financial institution would be well advised to ensure that its advertising and marketing policies do not have the effect, even inadvertently, of prescreening potential applicants for credit on prohibited bases.

5. Discriminatory acts which have a negative impact on non-minorities, such as white persons, are illegal, and such persons have standing to sue, the Supreme Court decided in Trafficante v. Metropolitan Life Ins. Co., 409 US 205 (1972). Two tenants of an apartment complex, one white and one black, were able to bring suit under section 810(a) for loss of the social and business advantages they suffered because of the owner's policy of discriminating against nonwhites. They also claimed that they were "stigmatized" by policies which made the complex in which they lived a "white ghetto."

Additionally, a white plaintiff who was refused a mortgage on standard terms because the property was in an "integrated" neighborhood was permitted to bring suit under FHA sections 804 and 818 (formerly 817) in Harrision v. Heinzeroth Mtg. Co., 430 F. Supp. 893 (N.D. Ohio 1977).

6. The use of excessively burdensome qualification standards for the purpose, or with the effect, of denying housing to minority applicants, is illegal under FHA section 804 as the court held in US v. Youritan Const. Co., 370 F. Supp. 643 (N.D. Cal., 1973). In Youritan, for example, the rental agents emphasized the security deposit to black applicants, but not to whites, and required credit checks for black applicants, but not for whites.

7. The imposition on minority loan applicants of more onerous interest rates, or other terms, conditions, or requirements, is explicitly prohibited under FHA section 805. The phrase "terms or conditions" as used in the FHA is very broad, and will cover many types of discriminatory practices. Constructing upon very similar language in section 804(b), for instance, the court in Williams v. Matthews Co., 499 F.2d 819(8th Cir., 1974), found it to be illegal for a developer to follow a policy of selling lots in a subdivision only to persons having construction contracts with "approved" builders. All the "approved" builders were white and none of them would break the segregation barrier by building a house for a black family in a white subdivision.

8. As a further development of the "terms or conditions" language of section 805, the application of differing standards or procedures in administering foreclosures, late charges,

penalties, or reinstatements, or other collection procedures is also unlawful, as the court held in Harper v. Union Savings Assoc., P-H Section 15,203 (N.D. Ohio, 1977).

9. Discrimination in the terms or availability of insurance is a subject with respect to which the FHA and the ECOA may be seen to diverge somewhat. The ECOA does not prohibit a creditor who sells or participates in the sale of insurance from differentiating in the terms and availability of insurance on prohibited bases. Nor does it prohibit discrimination regarding the availability or terms of credit on the basis that insurance is unavailable, except when the insurance has been denied on the basis of age. However, when dealing with housing credit the result may be different.

The Department of Justice has taken the position that the FHA is violated when insurance required for housing credit is denied, or made more difficult to obtain, on a basis prohibited by the FHA.

This does not mean that a financial institution cannot require insurance, particularly casualty insurance, in connection with its mortgage loans. However, if the financial institution sells, or assists in obtaining, insurance, and the insurance is denied or made available on more onerous terms because of unlawful discrimination, or if the customer is adversely affected in the terms or availability of credit because insurance is unavailable, the financial institution has violated the FHA. If, on the other hand, the financial institution merely requires that the customer obtain insurance from an acceptable insurance company of the applicant's choice, it is probable that the institution is not liable for any discriminatory actions by the unaffiliated third party insurance provider.

10. Racial steering, or deliberately guiding potential purchasers to or away from certain areas because of race, is illegal and violates section 804. In Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich., 1975), the Court said: "Unlawful steering or channeling of a prospective buyer is the use of a word or phrase or action…which is intended to influence the choice of a prospective property buyer on a racial basis…Where choice influencing factors such as race are not eliminated, freedom of choice in the purchase of real estate becomes a fantasy…. It is the freedom of choice for the purchaser which the Fair Housing Act protects. Accordingly, any action…which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful."

11. Other possible discriminatory lending practices might include:

    - Racial notation or code on appraisal forms or loan forms (other than the information required by law to be retained for monitoring purposes).

    - Use of scripts by initial interview personnel that are designed to discourage applications.

12. The following are some of the situations that may be encountered which constitute sex discrimination, a prohibited consideration under FHA as well as ECOA:

    - Discounting or disregarding the income of a working wife or single woman.

- Refusing to grant a loan, or granting a loan on different terms and conditions, because of sex.
- Requiring more or different information from a female applicant than from a male applicant (for example, birth control arrangements or a family plan).
- Subjecting a female applicant to a different or more extensive credit check than that which is usually required for male applicants.
- Refusing to include alimony or child support as viable income where evidence is provided of a history of consistent prior payment and indicates that payments are likely to continue.
- Basing any aspect of a lending decision on general presumptions about women (for example, women of childbearing age are poor risks).
- Treating single working parents differently from married working parents
- Requiring a cosigner for female applicants, but not for male applicants.

It should be emphasized that financial institutions are not expected to make unsound real estate loans or render services on more favorable terms to applicants solely because of their status as members of a class that is protected by the FHA. What is intended by Congress is that loans and related services not be denied or made more onerous on the basis, even partially, of any applicant's status with regard to one of the prohibited characteristics: Race, color, religion, sex, handicap, familial status, or national origin. The taint of prohibited considerations must be removed completely from housing-related transactions. As the court in *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir., 1974), put it with respect to one such characteristic: "Race is an impermissible factor in real estate transactions under both [the Fair Housing and the 1870 Civil Rights Acts] and cannot be brushed aside [just] because it was neither the sole reason for discrimination nor the total factor of discrimination."

REFERENCES

Laws

42 USC 2000d et seq.	Civil Rights Act of 1964, Title VI Federally Assisted Programs
42 USC 3601 et seq.	Civil Rights Act of 1968, Title VIII Fair Housing Act (as amended thru 1988)
42 USC 3631	Civil Rights Act of 1968, Title IX Prevention of Intimidation in Fair Housing

Regulations

24 CFR 100	Department of Housing and Urban Development Fair Housing Regulation (especially Section 109, Advertising)
12 CFR 528	Office of Thrift Supervision, Department of the Treasury, Nondiscrimination Requirements Regulation

Memorandum, Bulletins, Resolutions, and Opinions

SP Memoranda

SP 15	May 25, 1978-Violation of Parts 528 and 531.8 of the Bank System Regulations

Bulletins

TB 19	Revised HUD Fair Housing Regulations
TB 25	Disparities in Mortgage Lending

Other References

FFIEC Pamphlet	Home Mortgage Lending and Equal Treatment