



**Department of  
Financial Services**

# **Update on Fair Lending and the Community Reinvestment Act**

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# Fair Lending

# Fair Lending Laws and Regulations

## Equal Credit Opportunity Act

- Prohibits certain types of discrimination in any aspect of credit transaction.
- Applies to all loans, including those made to businesses, partnerships, and trusts.
- Prohibits discrimination based on seven categories.
- Implemented by Regulation B (12 CFR part 1002).

# Fair Lending Laws and Regulations

## Fair Housing Act

- Prohibits certain discrimination all aspects of “residential real estate transactions”
- Prohibits discrimination in six categories
- Applies to:
  - Loans to buy, build, repair, or improve a dwelling
  - Purchasing real estate loans
  - Selling/brokering/appraising a dwelling
  - Selling or renting a dwelling

# Fair Lending Laws and Regulations

## New York Human Rights Law (Executive Law § 296-a)

- Prohibits discrimination in the extension of credit in race, creed, color, national origin, sexual orientation, *gender identity or expression*, *military status*, age, sex, marital status, disability, or familial status
- Two of the above categories of discrimination are not covered by federal law
- Notes that “[i]t shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants' overall credit worthiness”

# Gender Expression Non-Discrimination Act

- In January 2019, New York enacted the Gender Expression Non-Discrimination Act (GENDA).
- Among other things, GENDA amended Executive Law § 296-a to prohibit discrimination in the extension of credit based on gender identity or expression.
- “Gender identity or expression” is defined as “a person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.” (Executive Law § 292(35).)

# Implications of Fair Lending Laws

## Lenders may not, based on prohibited factors:

- Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards
- Discourage or selectively encourage applicants with respect to inquiries about or applications for credit
- Refuse to extend credit or use different standards in determining whether to extend credit
- Vary the terms of credit offered, including the amount, interest rate, duration, or type of loan
- Use different standards to evaluate collateral
- Treat a borrower differently in servicing a loan or invoking default remedies
- Use different standards for pooling or packaging a loan in the secondary market
- Express, orally or in writing, a preference based on prohibited factors or indicate that it will treat applicants differently on a prohibited basis

# Fair Lending Covered Persons

## **Lenders may not discriminate on a prohibited basis against:**

- 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 either the property to be financed or the characteristics of the neighborhood or other area where property to be financed is located.

# Compliance Management Systems

- Institutions are expected to implement self-testing, training, and internal policies and procedures to avoid fair lending violations
- DFS examiners review institutions' fair lending plans against the standards set forth in the February 18, 2000 Industry Letter (available at <https://www.dfs.ny.gov/legal/industry/il000218.htm>)
- Letter is intended to give institutions clear guidance and a “gold standard” for fair lending plans and programs

# Industry Letter – Point 1

- “The Board of Directors and senior management should formulate the Plan to ensure that the institution’s lending practices comply with its provisions.”
- “If the Board of Directors does not have a Fair Lending Committee, then the Plan should designate which Committee of the Board is responsible for the institution’s compliance with Executive Law Section 296- a.”

## Industry Letter – Point 2

- “The fair lending compliance program should monitor the implementation of and adherence to the Plan’s policies and procedures. Monitoring should be conducted for the institution as a whole, as well as sub-parts of the institution.”
- “Further, the Plan should provide for monitoring, on an ongoing basis, the institution’s consumer, small business and mortgage application and underwriting process as well as the institution’s pricing policies. In particular, the compliance program should ensure that the business personnel understand their duties and responsibilities under the Plan and that such duties are being carried out.”

# Industry Letter – Point 3

- “The Plan should implement a training program that provides adequate training to new hires and current employees, including management and other key personnel, and provides lending personnel with at least semi-annual updates on fair lending issues.”
- “Compliance personnel should administer and conduct the training program and participants should certify that they understand and commit to upholding the principles of Executive Law Section 296-a and the policies and procedures contained in the Plan.”

# Industry Letter – Point 4

- “The Plan should provide for an automatic and timely review by a higher level supervisor of all applications that are rejected or withdrawn.”

# Industry Letter – Point 5

- “The principles of the Plan should extend to the institution’s refinancing, collection and foreclosure practices.”

# Industry Letter – Point 6

- “The Plan should address how the institution will disclose and document to an applicant that he or she meets underwriting standards that typically would qualify him or her for a conventional loan product and whether that applicant will be referred to an affiliated lender.”

# Industry Letter – Point 7

- “The Plan should identify actions taken to demonstrate that the institution has taken the appropriate measures to extend the policies and procedures of the Plan to the solicitation, establishment and maintenance of the institution’s relationships with third party loan originators (i.e. mortgage bankers, mortgage brokers, automobile dealerships, home improvement contractors, etc.).”
- “The institution should obtain written agreements from all such third party loan originators with which it has relationships certifying that they acknowledge their responsibility to comply with Executive Law Section 296-a and the policies and procedures contained in the Plan to the extent such policies and procedures are applicable to them. Such agreements should be updated regularly.”

# Industry Letter – Point 8

- “The Plan should contain a process by which complaints from applicants relating to alleged violations of Executive Law Section 296-a are resolved efficiently without being unduly burdensome to the applicant.”

# Industry Letter – Point 9

- “The Plan should be periodically reviewed by the Compliance Officer and senior management to ensure that it remains current.”

# Indirect Automobile Lending Guidance

- In August 2018, DFS issued guidance to institutions that engage in indirect automobile lending (*i.e.*, transactions in which institutions receive and assess information about a prospective borrower from a third party, typically and an auto dealer, and make an offer to acquire a loan from a dealer at a specified APR).
- The August 2018 guidance continues guidance previously issued by DFS regarding fair lending plans and fair lending guidelines.

# Indirect Automobile Lending Guidance

- Indirect automobile lending carries with it the potential for compliance issues due to the actions of a third party—typically, an auto dealer.
- DFS is concerned about the potential misuse of the discretion lenders grant to dealers in the credit transaction.
- Many lenders permit dealers to exercise discretion and add a “markup” or “overage” to the borrower’s interest rate.
- Dealers are compensated, in whole or in part, by the interest rate markup.
- Institutions that permit dealers to mark up borrowers’ interest rates are potentially liable for pricing disparities on a prohibited basis.
- Because dealer markup is part of the credit transaction, it must be charged non-discriminatorily to comply with fair lending laws.

# Indirect Automobile Lending Guidance

**The guidance includes a series of actions institutions can take to address fair lending risk.**

- Institutions should learn about a dealer and its business practices before entering into a third-party loan origination agreement. Institutions should periodically evaluate their relationships with dealers to determine whether practices need to be revised or the relationship terminated, and make provisions for such evaluations in the lender's compliance procedures.
- Institutions should review any policies or procedures a dealer uses when arranging financing for customers and advise the dealer of any areas of weakness or concern.

# Indirect Automobile Lending Guidance

- Institutions should regularly assess marketing and advertising strategies to ensure those strategies comply with the principles and provisions of fair lending laws and the fair lending plan.
- Institutions should consider reducing dealer discretion by placing limits on dealer markup, or eliminating dealer discretion to markup interest rates by using a different method of dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination. Limits on markup do not, however, guarantee protection from fair lending liability.

# Indirect Automobile Lending Guidance

- Institutions should monitor both their whole portfolio and specific dealers for compliance with fair lending policies and procedures. Depending on the size and complexity of the institution, this may require conducting regular statistical and regression analyses of loan data.
  - These analyses can test for potential evidence of discrimination based on prohibited factors in the credit transaction and product pricing.
  - Legitimate reasons for differences in the interest rate include differences in the credit quality between applicants or demonstrable differences in business climate at the time of the offers.
- The lender should take prompt corrective action if it finds any differences in interest rates that are unexplained by objective credit factors, such as restricting or eliminating a dealer's ability to markup, terminating the lender's relationship with a dealer, and providing restitution to affected consumers.

# Leading Areas of Fair Lending Risk

- Discretionary pricing
- Steering
- Redlining

# Discretionary Pricing

- Allowing loan originators unlimited discretion in setting the cost of credit for different borrowers creates the possibility of a disparate impact in which protected class borrowers receive inferior terms of credit to non-protected class borrowers that is uncorrelated to any objective measure of borrower creditworthiness.
- DFS encourages lenders to adhere to written rate sheets, guidelines and standards for loan pricing.
- Discretionary pricing, when used, should have a documented basis, such as existence of a competing offer or payment constraints.

# Steering

- Allowing loan originators unlimited discretion in determining which products to present to different borrowers creates the possibility of a disparate impact in which protected class borrowers receive inferior offers of credit to non-protected class borrowers.
- Loan originators should be given written guidelines on what products should be discussed with and offered to applicants.

# Redlining

- Failing to make or market loans to lower-income communities could result in regulatory and litigation risk.
- Banks should ensure they have sufficient loan production resources, offices, and personnel (relative to the bank's respective size) to ensure equal access to the bank's credit products throughout the market area.

# Community Reinvestment Act

# NYS CRA Law and Rules

- New York is one of a handful of states that has a state Community Reinvestment Act, Banking Law § 28-b.

*“Each banking institution... to which the Community Reinvestment Act of 1977... applies shall... [be subject to] an assessment, in writing, of the record of performance... in helping to meet the credit needs of its entire community, including low and moderate-income neighborhoods, consistent with safe and sound operations of the banking institution.” (Section 28-b(1) and (3).)*

- General Regulations of the Superintendent Part 76

## OCC's Advance Notice of Proposed Rulemaking

- In August 2018, the OCC issued an advance notice of proposed rulemaking (ANPR) inviting comments on reforming the regulations that implement the CRA.
- The OCC stated in the ANPR that its goals are to develop a new regulatory framework that (1) encourages more lending, investment, and activity where it is needed most; (2) evaluates CRA activities more consistently; and (3) provides greater clarity regarding CRA-qualifying activities.

# OCC's Advance Notice of Proposed Rulemaking

The ANPR also sought comments on:

- Whether to update the regulation to accommodate digital lending channels;
- The range of activities supporting community and economic development that qualify for CRA consideration;
- Increased use of metrics in the performance evaluation process; and
- Recordkeeping and reporting requirements.

## OCC's Advance Notice of Proposed Rulemaking

- DFS submitted a comment letter to the OCC. The letter is available on the Department's website:  
[https://www.dfs.ny.gov/system/files/documents/2019/01/dfs\\_comment\\_letter\\_recommreinvestact\\_20181119.pdf](https://www.dfs.ny.gov/system/files/documents/2019/01/dfs_comment_letter_recommreinvestact_20181119.pdf)
- DFS believes that there are opportunities to improve and modernize the CRA regulations, but reform should not undermine the history and purpose of the CRA—to address discrimination and lack of access to credit.
- DFS believes that reform to the CRA regulations should maintain the CRA's community-based focus.

# Questions



# Contact Information

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