

## Consumer Compliance

### Fair Lending

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# Introduction

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The Office of the Comptroller of the Currency's (OCC) *Comptroller's Handbook* booklet, "Fair Lending," is prepared for use by OCC examiners in connection with their examination and supervision of national banks, federal savings associations, and federal branches and agencies of foreign banking organizations (collectively, banks). Each bank is different and may present specific risks and issues. Accordingly, examiners should apply the information in this booklet consistent with each bank's individual circumstances. When it is necessary to distinguish among them, national banks, federal savings associations, and covered savings associations are referred to separately.<sup>1</sup>

This booklet provides information and examination procedures to assist examiners in assessing fair lending risk and evaluating a bank's compliance with the Fair Housing Act (FH Act), the Equal Credit Opportunity Act (ECOA), and their implementing regulations.<sup>2</sup> The key principles discussed apply to residential real estate loans, other types of loans, and credit offered to consumers and businesses, unless otherwise noted.

The OCC uses a risk-based approach to identify banks for comprehensive fair lending examinations and to inform the OCC's supervisory strategy. During each supervisory cycle, examiners perform a fair lending risk assessment for each bank. The OCC also performs statistical modeling and analysis of lending, using available data to help to identify fair lending risk and determine which banks should undergo a fair lending examination. The OCC may also conduct nonmortgage lending analysis when non-Home Mortgage Disclosure Act (HMDA) data are available (e.g., small business, small farm and/or consumer loan information maintained for other purposes).

The OCC adopted the Federal Financial Institutions Examination Council's 2009 "Interagency Fair Lending Examination Procedures."<sup>3</sup> This booklet contains the "Interagency Fair Lending Examination Procedures" and appropriate OCC supplemental material and updates. These procedures are intended to guide examiner judgment and are intended to provide a flexible framework to be used in fair lending examinations. The OCC may augment the procedures as necessary to ensure effective implementation.

Examiners work directly with their supervisory office when conducting fair lending examinations. There will be instances, however, when additional information or assistance is

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<sup>1</sup> Generally, references to "national banks" throughout this booklet also apply to federal branches and agencies of foreign banking organizations unless otherwise specified. Refer to the "Federal Branches and Agencies Supervision" booklet of the *Comptroller's Handbook* for more information regarding applicability of laws, regulations, and guidance to federal branches and agencies. Certain federal savings associations may make an election to operate as a covered savings association. For more information, refer to OCC Bulletin 2019-31, "Covered Savings Associations Implementation: Covered Savings Associations," and 12 CFR 101, "Covered Savings Associations."

<sup>2</sup> Federal savings associations are also subject to 12 CFR 128, "Nondiscrimination Requirements."

<sup>3</sup> Refer to the Federal Financial Institutions Examination Council's press release announcing the release of the "Interagency Fair Lending Examination Procedures" (August 2009).

needed for particular scenarios that may arise. In such cases, examiners should consult, as appropriate, with

- the assigned compliance expert in Midsize and Community Bank Supervision, Large Bank Supervision, or Supervision Risk and Analysis (referred to collectively in this booklet as the “Compliance Subject Matter Expert” or “Compliance SME”).
- the Chief Counsel’s Office.
- the Compliance Risk Analysis Division of Supervision Risk and Analysis (CRAD).
- the Compliance Risk Policy Division of Bank Supervision Policy (Policy).
- the examiner-in-charge (EIC).

#### Examples

Examples are provided in boxes like this one throughout this booklet. Examples are hypothetical and are designed to illustrate various concepts throughout the booklet.

## Overview of Fair Lending Laws and Regulations

This section summarizes federal fair lending laws and regulations. For more information, examiners should refer to the laws and regulations in the “References” section of this booklet.

### Equal Credit Opportunity Act

ECOA prohibits discrimination in any aspect of a credit transaction (including oral and written loan applications). ECOA applies to any extension of credit, including those to small businesses, corporations, partnerships, and trusts. ECOA has been amended several times since its enactment in 1974.

ECOA prohibits discrimination based on the following characteristics (collectively known as prohibited bases or PB):<sup>4</sup>

- Race or color
- Religion
- National origin
- Sex<sup>5</sup>
- Marital status

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<sup>4</sup> Refer to 12 CFR 1002.2(x).

<sup>5</sup> On March 16, 2021, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule clarifying that the prohibition against sex discrimination under ECOA and Regulation B includes sexual orientation discrimination and gender identity discrimination. This prohibition also covers discrimination based on actual or perceived nonconformity with traditional sex- or gender-based stereotypes, and discrimination based on an applicant’s social or other associations. Refer to 86 Fed. Reg. 14363.

- Age (provided the applicant has the capacity to contract). Although ECOA prohibits discrimination on the basis of age in the extension of credit, ECOA permits banks to favor elderly applicants as defined in Regulation B (applicants 62 years old or older).
- The applicant's receipt of income derived from any public assistance program.
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.<sup>6</sup>

The Dodd–Frank Wall Street Reform and Consumer Protection Act transferred rulemaking authority under ECOA from the Board of Governors of the Federal Reserve System to the Consumer Financial Protection Bureau (CFPB).<sup>7</sup> Under the Dodd–Frank Act, the CFPB has supervision and primary enforcement authority with respect to ECOA for banks with more than \$10 billion in total assets.<sup>8</sup> The OCC retains supervisory and enforcement authority under ECOA for banks (and their subsidiaries and affiliates) with \$10 billion or less in total assets.<sup>9</sup>

Regulation B (12 CFR 1002) implements ECOA. Regulation B describes acts and practices that are specifically prohibited, permitted, or required. Supplement I to 12 CFR 1002 contains the official CFPB staff interpretations of Regulation B.

## Fair Housing Act

Congress enacted the FH Act in 1968 as Title VIII of the Civil Rights Act of 1968. The FH Act prohibits discrimination in all aspects of residential real estate-related transactions, which generally includes

- making loans to buy, build, repair, or improve a dwelling.
- purchasing real estate loans.
- selling, brokering, or appraising residential real estate.
- selling or renting a dwelling.

The FH Act prohibits discrimination against any person based on the following bases:<sup>10</sup>

- Race or color
- National origin
- Religion

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<sup>6</sup> Refer to 15 USC 1601.

<sup>7</sup> Refer to 12 USC 5581(b)(1) and 12 USC 5481(12)(D).

<sup>8</sup> Refer to 12 USC 5515(b)–(c).

<sup>9</sup> Refer to 12 USC 5516(c)–(d).

<sup>10</sup> Refer to 42 USC 3604.

- Sex<sup>11</sup>
- Familial status (defined as children under the age of 18 living with a parent or legal custodian, pregnant women, and people securing custody of children under 18)
- Disability

The U.S. Department of Housing and Urban Development (HUD) is authorized to administer the FH Act. HUD’s regulation implementing the FH Act is 24 CFR 100. The FH Act states that all executive departments and agencies—including federal agencies with regulatory or supervisory authority over financial institutions—shall administer their programs and activities related to housing and urban development in a manner to affirmatively further fair housing.<sup>12</sup>

Table 1 provides a comparison between PB groups protected by ECOA and the FH Act, respectively.

**Table 1: Comparison of ECOA and FH Act PB Groups**

<b>PB</b>	<b>ECOA</b>	<b>FH Act</b>
Race	X	X
Color	X	X
Religion	X	X
National origin	X	X
Sex	X	X
Marital status	X	
Familial status		X
Disability		X
Age	X	
All or part of the applicant's income derives from any public assistance program	X	
The applicant has in good faith exercised any right under the Consumer Credit Protection Act	X	

## Prohibited Conduct Under Fair Lending Laws and Regulations

Under ECOA, it is unlawful for a bank to discriminate against an applicant on a PB in any aspect of a credit transaction. Under the FH Act, it is unlawful for a bank to discriminate on a PB in a residential real estate-related transaction. Under these laws and their implementing regulations, a bank may not take any of the following actions on a PB:

<sup>11</sup> On February 11, 2021, the U.S. Department of Housing and Urban Development (HUD) issued a memorandum stating that HUD interprets the FH Act to bar discrimination on the basis of sexual orientation and gender identity and directing HUD offices and recipients of HUD funds to enforce the FH Act accordingly. Refer to HUD press release no. 21-021, “HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity” (February 11, 2021).

<sup>12</sup> Refer to 42 USC 3608(d).

- 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 in inquiries about or applications for credit.
- Fail 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.
- Maintain, market, or dispose of other real estate owned (OREO) properties differently.
- Use differing standards in purchasing or selling loans.

A bank may not express, orally or in writing, a preference on a PB or indicate that it will treat applicants differently on a PB. A violation may still exist, in some circumstances, even if a bank ended up treating applicants equally later in the loan process.

A bank may not discriminate on a PB because of actual or perceived characteristics of

- an applicant, prospective applicant, or borrower.
- a person associated with an applicant, prospective applicant, or borrower (e.g., a co-applicant, spouse, business partner, or live-in aide).
- the present or prospective occupants of the property to be financed.
- the neighborhood or other area where an applicant resides or where property to be financed is located.

The FH Act also requires banks to make reasonable accommodations for a person with disabilities when such accommodations are necessary to give the person an equal opportunity to engage in a residential real estate-related transaction.

Additionally, when the OCC becomes aware of potential violations of state fair lending laws, it will take appropriate action. Examiners should consult with the appropriate Compliance SME and Chief Counsel's Office if potential violations of state fair lending laws are identified.

## Methods of Proving Lending Discrimination

The courts have recognized three methods of proving lending discrimination under ECOA and the FH Act:

- Overt evidence of disparate treatment
- Comparative evidence of disparate treatment
- Evidence of disparate impact



## Disparate Treatment

Disparate treatment occurs when a bank treats a credit applicant differently based on one or more of the PBs. Such treatment does not require showing that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself; however, differential treatment (without a legitimate nondiscriminatory reason for the different treatment) may serve as indicia of intent and should be reviewed further. Disparate treatment is a pattern or practice when the discriminatory action is a regular practice rather than an isolated instance. Regular practice does not necessarily mean that the bank always discriminates, that it has a policy of discriminating that is always followed, or that a large number of people are affected or harmed. Statistical modeling and analyses conducted by CRAD or a manual comparative file review conducted by examiners can provide evidence of a pattern or practice of disparate treatment.

Disparate treatment may more likely occur in the treatment of applicants who are neither clearly well-qualified nor clearly unqualified. The bank may, for example, propose solutions to credit or other problems regarding an application, identify compensating factors, and provide encouragement to these applicants. ECOA and the FH Act impose no obligation on banks to provide such assistance; to the extent that they do, however, banks must provide the assistance in a nondiscriminatory way. In other words, applicants must be treated in a similar fashion.

The existence of illegal disparate treatment may be established either by

- **overt evidence:** statements or other evidence revealing that a bank explicitly considered prohibited factors, or
- **comparative evidence:** differences in treatment that are not fully explained by legitimate nondiscriminatory factors.

Evidence of racism or racist intent is not necessary to establish disparate treatment. Intent to discriminate may, however, be inferred from overt or comparative evidence.

### Overt Evidence of Disparate Treatment

There is overt evidence of discrimination when a bank openly discriminates on a PB. Examples 1 and 2 provide different scenarios of overt evidence of disparate treatment.

#### Example 1

A bank offered a credit card with a limit of up to \$750 for applicants aged 21 through 30 and \$1,500 for applicants over 30. This policy violated ECOA's prohibition on discrimination based on age. Refer to appendix N, "Alternative Fair Lending Analyses," of this booklet for more information on credit card-related issues.

There is overt evidence of discrimination even when a bank expresses but does not act on a discriminatory preference.

**Example 2**

A lending officer told a customer, “We do not like to make home mortgages to Native Americans, but the law says we cannot discriminate, and we have to comply with the law.” This statement violated the FH Act’s prohibition on statements expressing a discriminatory preference and 12 CFR 1002.4(b) of Regulation B, which prohibits discouraging applicants on a PB.

## Special Purpose Credit Programs

Special purpose credit programs (SPCP) that meet the standards outlined in Regulation B do not violate ECOA’s prohibition on discrimination.<sup>13</sup> The CFPB issued an advisory opinion regarding SPCPs under ECOA that are designed and implemented by for-profit organizations, including banks, to meet special social needs.<sup>14</sup> The advisory opinion clarifies the content that a bank must include in a written plan establishing an SPCP and the type of research and data that may be appropriate to inform a bank’s determination that an SPCP is needed to benefit a certain class of persons.<sup>15</sup> In addition, HUD issued a legal opinion stating that SPCPs instituted in conformity with ECOA generally would not violate the FH Act.<sup>16</sup> SPCPs may include initiatives for low-income minority borrowers, small business lending programs, and providing credit to minority- or disabled-owned businesses. With proper planning, development, and implementation, creditors can use SPCPs under ECOA and Regulation B to help address the critical credit needs of underserved communities. For more information, refer to appendix E, “Evaluating Bank Responses to Evidence of Disparate Treatment,” of this booklet.

## Comparative Evidence of Disparate Treatment

Example 3 provides a scenario of disparate treatment of similarly situated applicants, in the amount of assistance and information the bank provided. In the example, the disparate treatment appears to be based on a prohibited factor.

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<sup>13</sup> Refer to 12 CFR 1002.8.

<sup>14</sup> Refer to the CFPB’s “Advisory Opinion on Special Purpose Credit Programs,” 86 Fed. Reg. 3762, (January 15, 2021).

<sup>15</sup> Ibid.

<sup>16</sup> Refer to HUD’s “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” (December 6, 2021).

**Example 3**

A non-Hispanic White couple applied for an automobile loan. The bank found adverse information in the couple's credit report. The bank discussed the credit report with the couple and determined that the adverse information, a judgment against the couple, was incorrect because the judgment had been vacated. The bank granted the couple their loan.

An African American couple applied for a similar loan with the same bank. On discovering adverse information in the couple's credit report, the bank denied the loan application on the basis of the adverse information without discussing the adverse information in the report with the couple and allowing them an opportunity to respond.

In such cases, when it appears that a bank has treated similar applicants differently, the bank must provide a credible explanation for the difference in treatment that is not based on a prohibited factor. As a legal matter, discriminatory intent can be inferred from the lack of a legitimate explanation for clearly less-favorable treatment of racial or national origin minorities. The OCC may determine that the bank has engaged in prohibited conduct if the OCC finds that the bank's explanation is not credible.

If the bank shows that at the time of the credit decision it considered a legitimate difference between the applicants that justified treating one more favorably than the other, examiners may conclude that the applicants were not actually similarly situated, justifying the credit decision and a determination that no illegal disparate treatment occurred. Anti-discrimination laws do not require uniform treatment of all customers. Rather, these laws require similarly situated applicants and borrowers to be treated similarly without regard to PB.

## **Redlining**

Redlining is a form of illegal disparate treatment in which a bank provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area where the credit seeker resides or will reside or based on where the residential property to be mortgaged is located. Redlining may violate both ECOA and the FH Act. Redlining may be established with overt evidence of an intent not to serve certain communities based on the PB characteristics of residents of those communities or by comparative evidence of a bank's lending-related activities in minority and nonminority communities.<sup>17</sup>

Overt evidence of redlining is relatively uncommon. Consequently, redlining analysis usually will focus on comparative evidence in which the bank's treatment of areas with contrasting racial or national origin characteristics is compared. Redlining analysis also typically includes a statistical comparison of the bank's lending activity to banks that may be considered appropriate lending peers. Refer to appendix B, "Fair Lending Risk Factors," of this booklet for more information on risk factors for overt discrimination and redlining. Refer to the "Supplemental Procedures" section of this booklet for examination procedures applicable to redlining focal points.

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<sup>17</sup> Refer to the "Interagency Fair Lending Examination Procedures" for a definition of "minority."

## Disparate Impact

When a bank applies a facially neutral policy or practice to all credit applicants, but the policy or practice disproportionately excludes or burdens certain persons on a PB, the policy or practice is described as having a disparate impact or discriminatory effect.<sup>18</sup> A policy that results in a disparate impact on a PB and is not legally justified violates fair lending laws and regulations. Evidence of discriminatory intent is not necessary to establish that a bank's adoption or implementation of a policy or practice that has a disparate impact violates ECOA or the FH Act.

Examples 4 and 5 illustrate lending policies that may have a disparate impact.

### **Examples 4 and 5**

Policies that may have a disparate impact:

A bank's policy is not to extend loans for single family residences for less than \$60,000. This policy has been in effect for 10 years. This minimum loan amount policy could disproportionately exclude potential applicants based on race from consideration because of their income levels or the value of the houses in the areas in which they live.

The bank generally uses gross income in underwriting decisions but does not gross-up non-taxable income. Not grossing up non-taxable income could disproportionately exclude particular groups from meeting underwriting guidelines, particularly the elderly and disabled.

The fact that a policy or practice creates a disparity on a PB is not by itself proof of a violation. When evaluating whether a bank's policy or practice has a disparate impact, the OCC considers a number of other factors, including whether there is a robust causal link between the neutral policy or practice and the adverse effect(s) on members of a protected class and whether the policy or practice is necessary to achieve a legitimate business objective. Examiners should consult with the appropriate Compliance SME, Chief Counsel's Office, CRAD, and Policy when evaluating whether a policy or practice has an unlawful disparate impact.

The information in this section is intended to help examiners recognize practices that may result in potential disparate impact. Appendix J, "Other Types of Discrimination Analyses," of this booklet explains how to obtain information that may be relevant to this analysis and indicates how examiners can follow up on this information, as appropriate.

## **Referral to the U.S. Departments of Justice or Housing and Urban Development**

ECOA requires the OCC, for banks within its supervisory authority, to refer matters to the U.S. Department of the Justice (DOJ) "whenever the [OCC] has reason to believe that [one] or more creditors has engaged in a pattern or practice of discouraging or denying applications

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<sup>18</sup> Refer to appendix J, "Other Types of Discrimination Analyses," of this booklet for a discussion of how OCC staff evaluates a bank's response to evidence of disparate impact.

for credit in violation of Section 1691(a) of [ECOA],”<sup>19</sup> which states ECOA’s basic prohibitions against discrimination. ECOA also requires the OCC to notify HUD whenever there is reason to believe that a bank has violated both ECOA and the FH Act and the suspected violations have not been referred to the DOJ.

Furthermore, Executive Order No. 12892 requires that HUD be notified “upon receipt of information ... suggesting a violation” of the FH Act, and that such information be forwarded to the DOJ if it “indicate[s] a possible pattern or practice of discrimination in violation of the [FH Act].”

In determining whether the matter meets the mandatory ECOA or FH Act referral standard, the OCC applies the standards articulated in the 1994 Interagency Policy Statement and in other guidance provided by the DOJ.<sup>20</sup> The 1994 Interagency Policy Statement explains that “[I]solated, unrelated or accidental occurrences will not constitute a pattern or practice. However, repeated, intentional, regular, usual, deliberate, or institutionalized practices will almost always constitute a pattern or practice.”<sup>21</sup>

Refer to the “Conclusion” subsection of the “Examination Procedures” section of this booklet for guidance on responding to a bank’s suspected violation of a fair lending law or regulation.

## Risks Associated With Fair Lending

From a supervisory perspective, risk is the potential that events will have an adverse effect on a bank’s current or projected financial condition<sup>22</sup> and resilience.<sup>23</sup> The OCC has defined eight categories of risk for bank supervision purposes: credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation. These categories are not mutually exclusive. Any product or service may expose a bank to multiple risks. Risks also may be interdependent and may be positively or negatively correlated. Examiners should be aware of and assess this interdependence. Examiners also should be alert to concentrations that can significantly elevate risk. Concentrations can accumulate within and across products, business lines, geographic areas, countries, and legal entities. Such concentrations present additional fair lending risk if they are not subject to sufficient fair lending analysis and oversight. Refer to the “Bank Supervision Process” booklet of the *Comptroller’s Handbook* for an expanded discussion of banking risks and their definitions.

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<sup>19</sup> Refer to 15 USC 1691e(g).

<sup>20</sup> Refer to 59 Fed. Reg. 18226 (April 15, 1994). Appendix P of this booklet provides the full text of the 1994 Interagency Policy Statement.

<sup>21</sup> Ibid.

<sup>22</sup> Financial condition includes impacts from diminished capital and liquidity. Capital in this context includes potential impacts from losses, reduced earnings, and market value of equity.

<sup>23</sup> Resilience recognizes the bank’s ability to withstand periods of stress.

The risks associated with fair lending are compliance, credit, operational, strategic, and reputation.

## Compliance Risk

Compliance risk is the risk to current or projected financial condition and resilience arising from violations of laws, rules, or regulations, or from nonconformance with prescribed practices, internal bank policies and procedures, or ethical standards. This risk exposes a bank to referrals to other agencies, enforcement actions, litigation (including class action lawsuits), civil money penalties, payment of damages, restitution, and the voiding of contracts. Compliance risk can result in diminished reputation, harm to bank customers, limited business opportunities, and lessen expansion potential.

A bank may be at increased risk of engaging in discriminatory practices when it introduces new, modified, or expanded bank products and services (collectively, new activities).<sup>24</sup> Risk can also increase when the bank implements new delivery channels, new practices such as underwriting methods, new or complex modeling techniques such as machine learning, new or alternative data sources, or when the bank experiences significant staff turnover, particularly when new staff are not adequately trained or qualified for the job they were hired to perform. Compliance risk can increase when a bank offers products or services through third parties (e.g., direct or target marketing companies, mortgage loan brokers, and mortgage loan originators), particularly if the bank does not appropriately oversee these third-party relationships.<sup>25</sup>

## Credit Risk

Credit risk is the risk to current or projected financial condition and resilience arising from an obligor's failure to meet the terms of any contract with the bank or otherwise perform as agreed. Credit risk is found in all activities in which settlement or repayment depends on counterparty, issuer, or borrower performance. Credit risk exists any time bank funds are extended, committed, invested, or otherwise exposed through actual or implied contractual agreements, whether reflected on or off the balance sheet.

Vague underwriting and pricing policies not only increase fair lending risk, but they also increase credit risk. Such policies may result in different credit decisions for applicants with similar credit profiles. Vague underwriting and pricing policies also increase subjectivity that could result in approving or declining loan requests that do not align with the bank's credit policy or risk appetite. For example, different loan officers could approve or deny credit to applicants with similar credit profiles based on interpretation of the vague policies.

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<sup>24</sup> Refer to OCC Bulletin 2017-43, "New, Modified, or Expanded Bank Products and Services: Risk Management Principles."

<sup>25</sup> Refer to OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance"; OCC Bulletin 2017-7, "Third-Party Relationships: Supplemental Examination Procedures"; and OCC Bulletin 2020-10, "Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29."

Banks with violations of fair lending laws and regulations can also have credit risk and related profitability concerns. For example, banks with elevated fair lending underwriting or redlining risk can potentially miss opportunities to extend credit to individuals who have the ability to service debt. Moreover, banks could be overpricing loans that result in missed lending opportunities due to applicants and borrowers seeking more favorable pricing from other lenders. Such scenarios can lower profitability because of suboptimal underwriting and pricing strategies.

## Operational Risk

Operational risk is the risk to current or projected financial condition and resilience arising from inadequate or failed internal processes or systems, human errors or misconduct, or adverse external events. Operational risk is inherent in all banking products, activities and processes, including those related to fair lending. Effective operational risk management practices include maintaining an appropriate risk management system that incorporates risk management principles commensurate with the bank's size, complexity, and risk profile.<sup>26</sup>

High volumes of loans, large numbers of transactions processed, extensive use of automation, and complexity of technology often elevate operational risk exposure. Highly automated systems can compound the exposure to errors or violations if such systems lack appropriate controls for fair lending oversight. Operational risk also can arise when a bank engages a third party for operational functions (e.g., loan origination, account management, collections, payment processing, data input, and legal assistance).

A bank may also be at increased risk of engaging in discriminatory practices when it uses manual loan origination practices and services. Operational risks may increase when risk assessments or risk management principles related to new, expanded, or modified products or activities do not consider fair lending before implementation. A bank experiencing a recent merger or acquisition or other activity that alters its lending footprint may also increase its fair lending risk.<sup>27</sup>

The quantity of operational risk and the quality of operational risk management are heavily influenced by the quality and effectiveness of a bank's system of internal controls. The quality of the audit function, although independent of operational risk management, is a key assessment factor. Audit can affect a bank's operating performance by helping to identify and validate correction of weaknesses in risk management and internal controls.

## Strategic Risk

Strategic risk is the risk to current or projected financial condition and resilience arising from adverse business decisions, poor implementation of business decisions, or lack of responsiveness to changes in the banking industry and operating environment.

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<sup>26</sup> Refer to the "Large Bank Supervision" and "Community Bank Supervision" booklets of the *Comptroller's Handbook*.

<sup>27</sup> Refer to OCC Bulletin 2017-43.

A bank's strategic decisions can pose increased strategic risk. Examples include entering, exiting, or otherwise changing the bank's loan products; marketing techniques; underwriting processes; pricing decisions; and loan officer compensation structure.

Strategic risk can increase if a bank deploys additional loan products, expands the geographic areas where the bank lends, or introduces new or revised lending practices without proper risk management oversight.

## Reputation Risk

Reputation risk is the risk to current or projected financial condition and resilience arising from negative public opinion. This risk may impair a bank's competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships.

Inadequate policies and procedures, operational breakdowns, or general weaknesses in any aspect of the bank's fair lending activities can harm the bank's reputation. Failing to employ appropriate measures to conduct activities in compliance with fair lending laws and regulations can expose the bank to heightened adverse publicity. Given the important societal interests that the fair lending laws are designed to protect, such failures can result in enforcement actions or litigation.

## Risk Management

Each bank should identify, measure, monitor, and control risk by implementing an effective risk management system appropriate for the bank's size, complexity, and risk profile. When examiners assess the effectiveness of a bank's risk management system, they consider the bank's policies, processes, personnel, control systems, and areas previously reviewed. Refer to the "Corporate and Risk Governance" and "Compliance Management Systems" booklets of the *Comptroller's Handbook* for expanded discussions of risk management.

Banks should effectively identify, measure, monitor, and control their fair lending risk exposure consistent with their lending levels, types of products offered, the mix of customers served, and complexity and novelty of lending policies. This can be done through a variety of techniques for reviewing fair lending processes, such as a comprehensive fair lending risk assessment.

Depending on such factors as the bank's loan products and volumes, components of a comprehensive fair lending risk assessment may include

- consideration of the use of new modeling methods or alternative data.
- a statistical analysis of loan applications and originations.
- analyses of redlining indicators, including risk from the use of new modeling methods, alternative data, and loan modification and loss mitigation policies and activities across the bank.
- appropriate corrective actions to address gaps in the bank's risk management system.



- commensurate with the bank's potential fair lending risk, verification by an independent party of the bank's controls to adequately identify and mitigate fair lending risk.

## Third-Party Risk Management

The OCC expects a bank to practice effective risk management regardless of whether the bank performs the activity internally or through third parties. A bank's use of third parties does not diminish the responsibility of its management to determine that the activity is performed in a safe and sound manner and in compliance with applicable laws. The OCC expects a bank to have risk management processes that are commensurate with the level of risk and complexity of its third-party relationships and the bank's organizational structures.<sup>28</sup>

Common third-party relationships related to fair lending include marketing, processing of loan applications, loan servicing, and loss mitigation. Such third parties should be incorporated into the bank's third-party risk management processes.

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<sup>28</sup> Refer to OCC Bulletins 2013-29 and 2020-10.

# Examination Procedures

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This booklet contains expanded procedures for examining specialized activities or specific products or services that warrant extra attention beyond the core assessment contained in the “Community Bank Supervision,” “Federal Branches and Agencies Supervision,” and “Large Bank Supervision” booklets of the *Comptroller’s Handbook*. Examiners determine which expanded procedures to use, if any, during examination planning or after drawing preliminary conclusions during the core assessment.

These expanded procedures include (1) primary procedures that cover baseline steps that are generally necessary to complete a fair lending examination for any focal point, and (2) supplemental examination procedures that provide more detailed examination steps.

## Scope

These procedures are designed to help examiners tailor the examination to each bank and determine the scope of the fair lending examination. Examiners should consider work performed by internal and external auditors, independent risk management, and other examiners, including those of other regulatory agencies.<sup>29</sup> Examiners should perform only those objectives relevant to the scope of the examination as determined by the following procedures. Seldom is every objective or step of the expanded procedures necessary.

Refer to appendix H, “Suggested Request for Information,” of this booklet for a range of documentation and other information that might be useful in an examination.

## Selecting Focal Points

In determining the focal points to review in examinations, examiners consider

- the results of the OCC’s annual screening process (for mortgage products only).
- information from the fair lending risk assessment (including nonmortgage products).
- information provided in annual fair lending examination guidance and related materials.

For example, if the annual screening identifies multiple potential focal points for a particular bank, examiners would use the results of the fair lending risk assessment and other supervisory information to assist in determining which focal points to review in examinations.

Examiners should determine the loan product(s), loan features or terms, (including loan purpose(s)), market(s), decision center(s), time frame, PB and control group(s),<sup>30</sup> and the particular outcome at issue (e.g., underwriting or pricing decision) to analyze during the

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<sup>29</sup> Refer to the “Corporate and Risk Governance” booklet of the *Comptroller’s Handbook*.

<sup>30</sup> The control group is the population used as a comparison group for purposes of comparing lending practices or outcomes.

examination.<sup>31</sup> Examination procedures refer to each potential combination of those elements outlined as a focal point. In general, focal points for banks subject to HMDA are identified based on the enhanced risk-based process outlined above. The OCC also uses information gathered from other supervisory activities to identify banks for fair lending examinations, including banks that are not subject to HMDA.

## **OCC's Fair Lending Risk Assessment Process**

Examiners prioritize focal points from the OCC's screenings and risk assessments based on

- quantity of risk.
- data quality and availability and other factors affecting the likelihood of obtaining reliable examination results.
- loan volume and the likelihood of widespread risk to applicants and borrowers.
- the bank's position in the market when compared with lending peers.
- quality of the bank's compliance risk management program.

Examiners should review the most recent OCC fair lending risk assessment to identify areas of potential fair lending risk. A bank that has a strong fair lending compliance management program may still have potential areas that warrant a closer review. Typically, those areas include products, services, or geographies where fair lending risk is moderate to high and risk management processes are satisfactory to weak, or when unknown risks may be present, e.g., the implementation of a new product or lending strategy.

Examiners should consult with the appropriate Compliance SME and CRAD to discuss whether statistical modeling is feasible and appropriate for a selected focal point.

During each supervisory cycle, OCC examiners are required to develop a fair lending risk assessment to collect information and determine a bank's fair lending risk related to ECOA, the FH Act, and their implementing regulations. Collectively, these fair lending laws and regulations create consumer protections throughout a loan's life cycle. This life cycle includes loan product development, marketing, accepting loan applications (originations, denials, and withdrawals), the underwriting process, pricing the loan, compensating originators, servicing, loss mitigation efforts, and maintenance and marketing of bank-owned real estate. The purpose of the fair lending risk assessment is to assist examiners in assessing fair lending risk for the various credit products offered through each stage of the loan's life cycle. The fair lending risk assessment assists examiners in developing fair lending supervisory strategy and in setting the scope of fair lending examinations and other supervisory activities.

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<sup>31</sup> An examination may aggregate loan product purposes, for example, to a consolidated focal point if the policies are the same within that grouping.

The OCC's fair lending risk assessment process consists of six steps:

1. Documenting relevant background information about the bank.
2. Documenting fair lending supervisory activities and supervisory concerns.
3. Assessing the quantity of fair lending risk at the product or service level and assessing the quality of fair lending risk management.
4. Assessing the direction of fair lending risk.
5. Preparing a risk assessment summary.
6. Preparing recommendations for future supervision.

For more information, refer to appendix A, "OCC's Fair Lending Risk Assessment Process," of this booklet.

Consistent with the OCC's screening and risk-based approach, examiners select all the focal points that can reasonably be reviewed in a given examination. Focal points generally consist of a single loan product, PB group, and outcome, or in the case of redlining, a specific geography. Examiners should consult with the appropriate Compliance SME, Chief Counsel's Office, CRAD, and Policy if they need assistance in selecting among several potential focal points. Examiners should consult with the appropriate Compliance SME, CRAD, Policy, EIC, or the supervisory office, as appropriate, if they need assistance documenting the selection or non-selection of focal points.

Before evaluating the potential for discriminatory conduct, the examiner should review enough information about the bank and its market to understand the credit operations of the bank and the representation of PB group residents within the markets where the bank does business. In addition to the results of the OCC's fair lending screening and factors outlined in the risk assessment (e.g., types, terms, and volume of credit products offered; SPCPs offered; loan officer compensation programs; and the bank's organization of its credit decision-making process), the following factors are important to consider when selecting among possible focal points:

- The products and PB that examiners reviewed during the most recent examination(s) and, conversely, the products and PB that examiners have not recently reviewed in an examination.
- The PB groups that make up a significant portion of the bank's market(s) for the different credit products offered.
- The business model of the target bank (products offered) and the demographics of the market(s) where it operates.
- The volume of control group and PB group applications and originations.
- The products and PB groups that the bank has reviewed and the results of its analysis, including whether the bank identified heightened fair lending risk.
- The type of relevant documentation or data that are available for various loan products and most likely to support a sound and reliable fair lending analysis. Also, consider the extent to which information required can be readily organized and coordinated with other examination components to reduce undue burden on the bank.

When a bank has multiple underwriting or loan processing centers or subsidiaries, each with fully independent credit-granting authority, consider evaluating each center or subsidiary separately, provided there are enough loans to support a meaningful analysis. As part of understanding the bank's own lending operations, it is also important to understand any relationships or contracts that the bank has with affiliated and nonaffiliated mortgage loan brokers and other third-party lenders.

Examiners should consider reviewing alternative PB or products for which sample sizes meet the minimums outlined in appendix F, "Fair Lending Sample Size Tables," of this booklet. For example, the bank may offer products that pose an increased fair lending risk but either have not previously been identified as an examination focal point or could not be statistically analyzed. A limited file review should still be considered in lieu of a full comparative file review for such higher risk products, if warranted. In general, however, examiners should not select a focal point for comparative analysis when the number of observations for the PB group or control group during the 12-month review period does not meet the minimum thresholds in the fair lending sample size tables in appendix F of this booklet.

Risk indicators, however, may favor reviewing a particular focal point even when the minimum sample size is not present. For example, there may be a strong reason to review a situation in which almost all of 19 male borrowers received low rates but almost all of four female borrowers received high rates, even though the number of applicants from each group is fewer than the minimum in appendix F. Similarly, there may be a strong reason to examine a situation in which the bank approved almost all of 100 White applicants but denied all four Black applicants, even though the number of PB denials was fewer than five. Examiners should consult with the appropriate Compliance SME and Policy for assistance in selecting focal points in these situations.

## High-Volume Focal Points

When examiners have chosen a focal point that involves a large volume of applications or originations for comparative analysis, statistical modeling by CRAD should be considered instead of a manual file review, which is generally most useful in identifying specific instances of disparities (differences in outcomes on a PB). Statistical models can also be effective when identifying comparable files manually is difficult, such as when a bank applies a complex pricing matrix. Statistical modeling can control for differences in various factors and estimate how important each factor is to the outcome. For example, an examiner can conclude with a specific level of certainty about any correlation between membership in a PB group and the outcome.

When statistical modeling is used, CRAD generally requests that examiners

- determine what electronic data are available for the decision(s), product(s), and time period(s) at issue in the examination and obtain the relevant data.
- identify bank personnel knowledgeable about the data.
- obtain the policies and procedures that relate to the decision(s) at issue.

- obtain information on whether there were any changes in these policies and procedures during the time period being reviewed.
- recommend how data may be grouped or segmented for analysis; and identify bank products and outcomes that present the greatest potential for a focal point, based on the most recent fair lending risk assessment and available screening results, including the use of a proxy if applicable.<sup>32</sup>

When statistical modeling is used, a manual comparative review may also be conducted to determine that the results from the statistical model are robust. The goal of the comparative file review in such instances is not to replicate or replace the statistical model's results.

Rather, the goals are to

- determine whether there are potentially significant data errors or any bank policies that are incorrectly accounted for in the model.
- determine the robustness of the model by identifying factors that were not, but could be, incorporated into the statistical model.

It is important to note that these factors may or may not explain disparities identified by statistical modeling. If the comparative file review identifies data errors or factors that are not accounted for in the statistical model, examiners should work with CRAD to correct or update the model to the extent possible and evaluate if disparities remain significant. If full correction or updating is not possible, consult with CRAD to assess the statistical model's reliability by considering whether the omitted or inaccurate factor(s)

- are highly correlated with the PB characteristic.
- themselves have a strong effect on the outcome (e.g., underwriting and pricing).
- have a systematic effect. When conducting a comparative file review after statistical modeling, any additional factors identified for inclusion in the model must be legitimately derived from bank policies and occur sufficiently systematically to warrant changes to the model.

It is important not to dismiss statistical results based simply on findings from a manual file review; examiners and CRAD should discuss the manual file review findings and any findings from updates to the model based on the feedback from the file review before finalizing conclusions.

## **Use of Proxies for Nonmortgage Lending and Loss Mitigation Exams**

If examiners identify a nonmortgage product as a potential focal point for a bank for which the OCC has ECOA supervisory responsibility or if examiners identify a mortgage loss mitigation focal point when government monitoring information is not available, examiners should consult their assigned Compliance SME, CRAD, Chief Counsel's Office, and Policy about the use of proxy analysis to assign race, ethnicity, or other PB group characteristics to

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<sup>32</sup> Refer to the "Use of Proxies for Nonmortgage Lending and Loss-Mitigation Exams" section of this booklet.

applicants and borrowers. The term “proxy” refers to any factor related to a loan applicant or borrower that can be used to assign the applicant’s race, ethnicity, sex, or other PB when direct evidence of that characteristic is not available. Proxies may be used to set up a comparative file analysis with PB and control group applicants or borrowers, or to facilitate comparison of outcomes using statistical modeling.

## Commercial Lending

In banks for which the OCC has ECOA supervisory and enforcement responsibility (banks with \$10 billion or less in total assets), examiners may wish to consider selecting commercial lending as a focal point, particularly small business lending, depending on the quantity of risk identified in the most recent fair lending risk assessment relative to other types of lending.

In general, examiners should focus on small business credit (commercial loan applicants that had gross revenues of \$1 million or less in the previous fiscal year) unless bank-specific factors indicate that concentrating on other commercial products is more appropriate.

If the bank makes commercial loans insured by the U.S. Small Business Administration (SBA), consult with CRAD to determine whether SBA loan data (which code race and other factors) are available for the bank and whether an evaluation of the data is warranted. Information reported for Community Reinvestment Act (CRA) purposes and geocoding of loans by census tract are other potential sources of data to determine whether there are patterns of lending activity suggesting heightened underwriting or redlining risk. Examiners should consult with CRAD for assistance in assessing business lending activity.

## Bank’s Fair Lending Risk Management Process

The quality of the bank’s fair lending risk management practices for assessing the adequacy of compliance with fair lending laws and regulations and identifying fair lending problems affects how examiners scope for and plan examinations, as well as how they sample and review individual loan decisions. When a bank performs a self-evaluation or voluntarily shares the results of a self-test of any product or issue that is within the examination scope, examiners should refer to appendix K, “Leveraging Bank Self-Tests and Self-Evaluations,” of this booklet to determine whether and how the bank’s analyses can be used to facilitate the examination.

Additionally, based on information gathered during the fair lending risk assessment, examiners should

- determine whether the bank’s policies and procedures enable management to prevent, or to identify and self-correct (including reporting and escalation), unlawful discrimination in the transactions that relate to the products and issues selected for examination.
- obtain a thorough understanding of the way management addresses its fair lending responsibilities, including
  - the bank’s lending practices and standards.
  - training and other application-processing aids.

- guidance to employees or agents in dealing with customers.
- its marketing or other promotion of products and services.
- consider bank records and conduct interviews with appropriate management personnel in the lending, compliance, audit, legal, and operational risk/risk management functions. Also evaluate the strength of the compliance programs in terms of their capacity to prevent, or to identify and self-correct, fair lending violations in the products or issues selected for analysis. Refer to appendix C, “Compliance Management Checklist,” of this booklet.
- if the examination does not involve enough lending volume to allow statistical modeling, and the examination involves a manual comparative file review (rather than statistical modeling), consider whether the maximum sample sizes in appendix F of this booklet may be adjusted downward based on the strength of the bank’s compliance program.
- identify any compliance program or system deficiencies that merit correction or improvement and present these to management as part of concluding the examination.



# Assessing Fair Lending Compliance

## Primary Procedures

The following primary procedures cover baseline steps that are generally necessary to complete a fair lending examination for any focal point. Depending on the focal point selected and issues that arise during the examination, examiners should also refer to the “Supplemental Procedures” section of this booklet and, as applicable:

- Appendix A, “OCC’s Fair Lending Risk Assessment Process”
- Appendix B, “Fair Lending Risk Factors”
- Appendix C, “Compliance Management Checklist”
- Appendix D, “Considering Credit Scoring Risk Systems and Override of Underwriting and Pricing Policies”
- Appendix E, “Evaluating Bank Responses to Evidence of Disparate Treatment”
- Appendix F, “Fair Lending Sample Size Tables”
- Appendix G, “Identifying Marginal Transactions”
- Appendix H, “Suggested Request for Information”
- Appendix I, “Sample Fair Lending Request Letter”
- Appendix J, “Other Types of Discrimination Analyses”
- Appendix K, “Leveraging Bank Self-Tests and Self-Evaluations”
- Appendix L, “Lending Operations Interview Guide”
- Appendix M, “Regulation B Compliance Checklist”
- Appendix N, “Alternative Fair Lending Analyses”
- Appendix O, “Equal Credit Opportunity and Fair Housing Acts Enforcement Policy Statement (November 17, 1981)”
- Appendix P, “Policy Statement on Discrimination in Lending (April 15, 1994)”
- Appendix Q, “Abbreviations”

**Objective:** Verify accuracy of data.

1. While these procedures focus on the use of HMDA data in fair lending examinations, consider the availability and reliability of other data sources, especially in the case of non-HMDA reporters or for examinations involving loan products not covered under HMDA. For non-HMDA reporters, refer to appendix F.
2. Before any analysis and preferably before the scoping process for the fair lending examination, examiners must assess the accuracy of the data they are reviewing. Data verification should follow specific procedures intended to determine the validity of the review. For example, when a bank’s HMDA loan application register (LAR) data are being relied on, the examiner should validate the accuracy of the bank’s submitted data by selecting a sample of HMDA–LAR entries and verifying that the bank reported the information noted on the HMDA–LAR according to applicable instructions by comparing

information in the loan file for each sampled loan.<sup>33</sup> Focus on identified key data fields during transaction testing related to HMDA data.<sup>34</sup> Additional data fields, outside of the key HMDA data fields, that are relied on for a statistical analysis should, however, be reviewed and determined to be reliable data as well.

3. If the HMDA–LAR data are inconsistent with the information in the loan files, depending on the nature of the errors, the bank may need to correct the data on the HMDA–LAR before a fair lending analysis can be completed. When inaccuracies impede the examination, direct the bank to act to determine data integrity (e.g., data scrubbing, monitoring, and training).<sup>35</sup>

**Objective:** Prepare the request letter.

1. Once the scope has been set, send the bank a request letter at least one month (ideally, 45 days) before the examination starting date to give the bank enough time to gather (and upload on BankNet, the OCC’s secure website for sharing information with banks) the requested documentation (refer to appendix I). If applicable, the request letter should state that examiners may use the bank’s self-evaluations regarding policies, procedures, or transactions within the scope of the examination.

**Objective:** Conduct an interview with bank loan operations staff.

1. Every fair lending examination includes an interview of the loan underwriters (or equivalent bank staff, depending on the type of analysis). From these interviews, the examiner should learn in detail how the bank applies credit criteria and how the lending process operates, with particular focus on the focal point(s) under consideration. Use the “Lending Operations Interview Guide” in appendix L. Use the underwriter’s statements as a framework for the comparisons of outcomes and for evaluating explanations offered later by the bank to account for potential discrimination against PB group individuals.

**Note:** The information obtained from the interview may make it necessary to amend the scope of the examination or sample composition.

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<sup>33</sup> For banks with more than \$10 billion in total assets, examiners should first determine whether the CFPB conducted a validation of the bank’s HMDA data for the same HMDA data year that the OCC plans to be used in the examination and consider whether the CFPB found the data to be reliable.

<sup>34</sup> Refer to OCC Bulletin 2021-63, “Home Mortgage Disclosure Act: Revised Interagency Examination Procedures.”

<sup>35</sup> If potential HMDA compliance issues are discovered at institutions with more than \$10 billion in total assets, it may be appropriate to refer these issues to the CFPB for handling. Consult with the appropriate Compliance SME and Chief Counsel’s Office if such issues are discovered.

**Objective:** Complete Regulation B’s Compliance Checklist in appendix M of this booklet, as applicable, and document and communicate findings to the bank.<sup>36</sup>

1. If the fair lending examination involves a review of transaction files, record information on Regulation B’s Compliance Checklist. Note that the bank’s policy or conduct does not necessarily have to treat applicants differently on a PB to violate many of the requirements of Regulation B. Therefore, using the steps in the next objective, document whether apparent unlawful discrimination arises because of noncompliance with the requirements of Regulation B.
2. Present to bank management any potential violation (even isolated) from Regulation B’s Compliance Checklist and request that the bank provide any explanatory information it has. In consultation with the appropriate Compliance SME, the Chief Counsel’s Office, and Policy, assess the adequacy of the bank’s explanations. If determining, after appropriate consultation, that the potential violation could indicate unlawful discrimination, follow the steps in the next objective. Otherwise, proceed to the next procedure in this objective.
3. If there is no evidence of unlawful discrimination, document examination findings and, as necessary, obtain commitments for corrective action in accordance with supervisory policy.

**Objective:** Document and communicate fair lending compliance examination findings.

1. After following all appropriate procedures (including those in the “Supplemental Procedures” section of this booklet and the appendixes), follow these steps to complete the examination.
2. Determine preliminary examination findings and conclusions and discuss with the EIC or the supervisory office.
3. Discuss preliminary examination findings with bank management, including potential violations, matters requiring attention, recommendations, and conclusions about risks and risk management practices. As appropriate, given the focal points reviewed, present the following to bank management for explanation:
  - Evidence of overt disparate treatment on a PB, if any.
  - Evidence of potential disparate treatment on a PB in underwriting loans or in loan prices, terms, or conditions, depending on the focal point of the examination.
  - Evidence of potential disparate treatment in the form of discriminatory steering, redlining, or marketing policies or practices, depending on the focal point of the examination.

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<sup>36</sup> Examiners should complete the checklist only when the OCC has primary supervisory and enforcement authority under ECOA (banks with \$10 billion or less in total assets).

- Evidence that denied PB group applicants were not afforded the same level of assistance or the same benefit of discretion or received less favorable treatment by the lender as approved control group applicants who were similarly situated.
- Evidence of facially neutral policies, procedures, or practices that appear to have a disparate impact on a PB applicant or group.

**Note:** Any fair lending discussion with bank management should involve at least two examiners to provide support if the content of the discussion is disputed. Submit questions to management in writing and request responses in writing.

4. Explain that unless there are legitimate, nondiscriminatory explanations (or in the case of disparate impact, a valid or legitimate business justification provided by the bank with no less discriminatory alternative) for each of the preliminary findings of discrimination, the OCC could conclude that the bank violated applicable fair lending laws.<sup>37</sup> Evidence of discriminatory intent is not necessary to establish that a lender's adoption or implementation of a policy or practice violates ECOA or the FH Act.
5. Document all responses that the bank provides, not just its best or final response. Document each discussion with dates, names, titles, questions, responses, and other information that supports or undercuts the bank's credibility and any other information related to issues raised in the discussion(s).
6. Determine whether the responses are consistent with previous statements, information obtained from any file review, documents, reasonable banking practices, and other sources, and whether the responses are logical and credible.
  - Do not speculate or assume that the bank's decision makers had specific intentions or considerations in mind when they took the actions under evaluation. Do not, for example, conclude that because a potential legitimate, nondiscriminatory reason for a denial was identified (such as an applicant's credit weakness) that no discrimination occurred unless, at the time of the denial, the bank actually based the denial on that reason.
  - Perform follow-up file reviews and comparative analyses, as necessary, to determine the accuracy and credibility of the bank's explanations.
  - Refer to appendix E for common types of responses.
  - Also refer to appendix E for guidance on evaluating the bank's responses to potential disparate impact.
7. If, after completing steps 1 through 6, the conclusion is that the bank has failed to demonstrate adequately that one or more potential violations had a legitimate nondiscriminatory basis or were otherwise lawful, prepare a draft discussion of the preliminary findings and provide to the EIC or supervisory office for review.

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<sup>37</sup> The justification must be clear and may not be hypothetical or speculative. Factors that may be relevant to the justification could include cost and profitability. Even if a policy or practice that has a disparate impact on a PB can be justified by business necessity, the bank still may be found to be in violation if an alternative policy or practice could serve the same purpose with less discriminatory effect.

8. Consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy regarding (a) whether any of the preliminary findings of unlawful discrimination could result in a referral or notification to the DOJ or HUD; and (b) the process to initiate review of such preliminary findings. If the preliminary findings indicate that potential violations of Regulation B or the FH Act occurred but do not implicate a referral or notification, prepare the draft supervisory letter or draft report of examination and consult with the Chief Counsel's Office regarding how to proceed. If the preliminary findings could result in a referral or notification to the DOJ or HUD, consult with the Chief Counsel's Office regarding whether the evidence also supports citing a violation of law or whether there is reason to refer the matter first and consider the violation(s) of law subsequent to the referral.
9. Update the OCC's supervisory information systems to reflect examination findings.
10. Document recommendations for future supervision to facilitate performing the next fair lending risk assessment and examination.
11. Retain and organize work papers in accordance with OCC policies and procedures.
12. Dispose of or secure any paper or electronic media that contain sensitive bank or customer information.

## Supplemental Procedures

The following procedures provide steps on how to conduct analyses for several types of examination focal points. Examiners should refer to the objectives that are relevant to their examinations. These procedures provide more detail for underwriting, pricing and other terms and conditions, steering, redlining, marketing, mortgage servicing, and OREO practices focal points. For practices that have a potential disparate impact, examiners should refer to the guidance in appendix J.

**Objective:** Select a fair lending examination sample based on the identified focal point.

1. The purpose of selecting samples of PB group and control group applicants or borrowers is to assist in identifying potential discriminatory outcomes in pricing- or credit-related decisions. The sample serves as the basis for a comparative file review to assist in determining whether treatment or outcomes varied as the result of a PB characteristic.
2. In some examinations, particularly those involving high-volume focal points, CRAD compares files primarily using statistical modeling. When CRAD uses a statistical model to evaluate outcomes, there are limited circumstances when it is necessary to perform a manual file comparison. The scope and nature of any file review should complement, not replicate, the statistical analysis conducted. Consult with the appropriate Compliance SME and CRAD to determine the purpose, timing, and scope of any manual file review.
3. If the examination primarily involves a manual comparative file review (rather than statistical modeling), identify the appropriate sample size for the examination. Refer to the guidelines in appendix F to identify the number of files to review for PB and control group applicants or borrowers. Note that these sampling guidelines are applicable only to fair lending examinations. Review each objective for more information on determining and selecting an appropriate sample. The sample size and type of file are contingent on the type of examination. For example:
  - When conducting an underwriting examination, at least two specific samples are required: PB group denials and control group approvals.
  - In pricing examinations, PB originations should be compared with control group originations.
  - For steering or reviews, compare PB loan files with less favorable terms with control group loan files with more favorable terms.
  - For mortgage servicing matters, compare PB files with control group files and assess differential treatment for loan modification or other loan-servicing related outcomes on a PB.
4. Depending on the circumstances, however, additional file review may be warranted (for example, to rebut bank explanations). Specifically, this may involve comparing PB applicants with favorable outcomes to control group applicants with unfavorable outcomes. If examiners find a potential pattern or practice of lending discrimination, consult with the appropriate Compliance SME and Policy. For more guidance on the

types of files that examiners should review, refer to the “Supplemental Procedures” section of this booklet and appendix F.

Refer to the following resources depending on the type of review:

- Underwriting: Refer to table 1 in appendix F.
  - Pricing/steering: Refer to table 2 in appendix F.
  - Redlining: Comparative file review is unnecessary in a redlining examination (unless other potential issues, such as underwriting discrimination, are also being assessed).
  - Mortgage servicing: Refer to the “Discriminatory Loan Servicing and Loss Mitigation Risk Factors” section in appendix B.
5. If the focal point involves mortgage loans, retrieve data from one or more of the following sources:
    - If the bank is a HMDA reporter, gather information from the HMDA–LAR.
    - Electronic databases that contain applicant or borrower information in addition to data required to be collected under HMDA.
    - If the bank is not a HMDA reporter, refer to the bank’s trial balance or other internal bank report(s) or electronic data about the product type(s).
  6. If the focal point(s) involves consumer loans, refer to the loan trial balance or other internal bank report or electronic databases about the product type. If the focal point is a nonmortgage product for which creditors are generally prohibited from collecting information about PB characteristics, consult with the appropriate Compliance SME, Chief Counsel’s Office, CRAD, and Policy regarding a proxy analysis.
  7. If the focal point involves commercial, small business, or small farm loans, refer to the bank’s trial balance, CRA small business data, or other internal bank report(s) about the product type. Consult with the appropriate Compliance SME and CRAD to determine the availability of data to assist in the examination and whether a review of the data is warranted.

**Objective:** If the examination is not focused on redlining or statistical modeling is not performed, perform a manual comparative file review.

1. The purpose of a comparative file review is to compare credit decisions or level of service to identify whether qualified PB and control group applicants are treated differently and whether there are legitimate explanations for the difference in treatment. Consider using the comparative file review in conjunction with the various types of fair lending reviews outlined in the “Supplemental Procedures” section of this booklet. If the file review reveals potential fair lending violations, consult with the appropriate Compliance SME and Chief Counsel’s Office.
2. The purpose of the manual comparative file review is not to determine whether the bank made the correct credit or pricing decision for an applicant or borrower. Reviewing a

single application file may indicate that the bank made the decision based on the bank's credit-granting criteria. Instead, file review should compare differences in how the bank made the decision for PB and control group applicants.

**Objective:** Consider the effects of credit scoring.

1. If the focal point involves making decisions by using a scoring system, refer to appendix D.
2. If the bank uses a credit scoring program that scores age for any loan product selected for review either as the sole underwriting determinant or only as a guide to making loan decisions, refer to appendix D.

**Objective:** Consider disparate impact issues.

1. Whenever evidence shows that a bank policy or practice appears to have a disparate impact on a PB group, refer to appendix J and consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy.

**Objective:** Conduct transactional underwriting analysis of residential and nonresidential loans.

1. Depending on the size of the applicant population reviewed, the analysis of underwriting decisions may involve a manual comparative file review, a statistical analysis (or statistical modeling by CRAD), or other specialized techniques. Each examination process assesses a bank's credit decision standards and whether the bank applies these standards to applicants without regard to a PB. Consult with the appropriate Compliance SMEs, CRAD, or Policy on suitable techniques to use during the examination.

When performing a manual comparative file review of underwriting and not using CRAD resources in the examination, follow these steps.

- Develop the sample.
  - For each focal point reviewed, select files for PB group denials and control group approvals. Choose the samples directly using government monitoring information for residential loan applications or through application data and use of proxies for consumer applications.
    - The sample selection is based on race, ethnicity, gender, or age (ECOA only for age):
  - Using table 1 in appendix F, determine the initial sample sizes for each focal point based on the number of PB group denials and the number of control group approvals during the 12-month (or calendar year) period preceding the examination, or if the focal point was identified on the OCC's screening list for underwriting, the applicable HMDA data year(s).
  - When selecting the PB group and control group applicants for the sample loan files, filter the loans to obtain a homogeneous sample (for example, loan type, loan purpose, lien status, loan amount, occupancy, location, loan program, debt-



to-income, loan-to-value (LTV), and credit score) based on the bank's underwriting policies. Consult with the appropriate Compliance SME, CRAD, and Policy for available tools and resources.

**Note:** If the number of PB group denials or control group approvals during the previous 12-month period (or calendar year) substantially exceeds the maximum sample size shown in table 1 in appendix F, refer to CRAD for modeling assistance.<sup>38</sup>

**Note:** If the number of PB group denials or control group approvals for a given focal point during the 12-month period (or calendar year) referenced in step 1 does not meet the minimum standards in table 1 in appendix F, but other risk factors favor analyzing such a focal point, consult with the appropriate Compliance SME and Policy on possible alternative methods of analysis.

**Note:** Regardless of application volume or sample size, examiners must treat any clear instance of potential disparate treatment—even if the comparison consists of only two files—as a potential violation. Consult with the appropriate Compliance SME and Chief Counsel's Office.

- To the extent the bank maintains records of loan outcomes resulting from exceptions to its credit underwriting standards or other policies (e.g., overrides to credit score cutoffs), request such records for all control group approvals and PB group denials within the loan sample during the sample period, sorted by loan product and branch or decision center, if the bank can do so. Generally, include in the initial sample for each focal point all exceptions or overrides applicable to that focal point.
- Using HMDA–LAR data or, for non-HMDA reporters or consumer loans, comparable loan register data to the extent available, choose approved and denied applications based on selection criteria that maximize the likelihood of finding marginal approved and denied applicants, as discussed in this section.
- To the extent that these factors are inapplicable or other selection criteria are unavailable or do not facilitate selection of the entire sample size of files, complete the initial sample selection by making random file selections from the appropriate sample categories in the sample size table.

## 2. Compare approved and denied applications.

- Although a bank's written policies and procedures may appear to be nondiscriminatory, one type of prohibited lending activity may occur if lending personnel interpret or apply policies in a discriminatory manner. To detect disparate treatment among applicants, first eliminate all but marginal transactions (refer to the "Complete applicant profiles" bullet below) from each selected focal point sample. Then record in an applicant profile spreadsheet a detailed description of each marginal applicant's qualifications, the level of assistance received during the application process, the reasons for denial, the loan terms, and other information.

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<sup>38</sup> Refer to the "High-Volume Focal Point" section of this booklet.

Once profiled, compare the PB and control groups to determine whether there is evidence that the bank treated similarly qualified applicants differently as to either the bank's credit decision or the quality of assistance provided.

- Create applicant profile spreadsheet.
  - Based on the bank's written or articulated credit standards and loan policies, create a worksheet with each applicant's name and each data element to be reviewed. Always include in the worksheet certain data elements (for example, income, loan amount, and debt) and applicable underwriting criteria and other data elements tailored for each loan product and the bank based on such issues as branch location and underwriter. When credit bureau scores or application scores are an element of the bank's underwriting criteria (or when such information is regularly recorded in loan files, whether expressly used or not), include a data field for this information in the spreadsheet.
  - To facilitate comparisons of the quality of assistance provided to PB group and control group applicants, respectively, provide a comments block in the worksheet to record observations from the file or interviews about how an applicant was, or was not, assisted in overcoming credit deficiencies or otherwise qualifying for approval.

**Note:** All examiners who review files should meet before starting the file review to establish a uniform understanding of the file items to be identified and recorded (for example, how credit report codes are interpreted, debt ratios are calculated, and income and monthly loan payments are totaled).

- Complete applicant profiles.
  - From the application files sampled for each focal point, complete applicant profiles for selected denied and approved applications.
  - A principal goal is to identify whether similarly qualified PB and control group applicants had different credit outcomes, because the agencies have found that discrimination, including differences in granting assistance by loan personnel (such as additional days to approve application and additional effort made to qualify a loan applicant) during the approval process, is more likely to occur for applicants who are neither clearly qualified nor unqualified (i.e., marginal applicants). The examiner should, during the following steps, judgmentally select from the initial sample those denied and approved applications that constitute marginal transactions. (Refer to appendix G for more information.)
    - Review denied application files in the sample to eliminate PB group applicants with qualifications so weak that there are unlikely to be any approved applicants with similar qualifications. Record only the name or number of the application, the disposition, and the key facts justifying the credit decision.
    - Similarly, review the approved control group application files to eliminate well-qualified control group applicants (those without flaws or with flaws too minor to serve as a basis for denial). Record only the name or number of the application, the disposition, and the key facts justifying the credit decision.

- If few marginal control group applicants are identified from the initial sample, review additional files of approved control group applicants. This increases the number of marginal approvals.
- Perform the judgmental selection of marginal-denied and marginal-approved applicant loan files together, in a back-and-forth manner, to facilitate close matches and a more consistent definition of “marginal” between these two types of loan files.
- Once the marginal applicants are identified, record the applicant data elements for each marginal applicant in the worksheet or spreadsheet. When more than one reason for denial exists, but the applicant nearly met the bank’s standard for each requirement, retain the denied file in the sample to use in comparisons for each reason.
- When reviewing the files, simultaneously look for and document in the spreadsheet any evidence found in marginal files regarding the extent
  - ♦ of any assistance, including affirmative aid and waivers or partial waivers of credit policy provisions or requirements, that appears to have been provided to marginal-approved control group applicants, particularly if it assisted them to overcome one or more credit deficiencies, such as excessive debt-to-income ratios.
  - ♦ to which marginal-denied PB group applicants with similar deficiencies were or were not provided similar affirmative aid, waivers, or other forms of assistance.
- Review and compare profiles.
  - For each focal point, review all marginal profiles to determine whether the bank treated similarly situated PB group denials and control group approvals the same. Determine whether the underwriter followed bank lending policies in denying applications and whether the reason(s) for denial were supported by facts documented in the loan file and properly disclosed to the applicant pursuant to Regulation B. If the examiner notes (a) unexplained deviations from credit standards, (b) inaccurate reasons for denial, or (c) incorrect disclosures (whether in a judgmental underwriting system, a scored system, or a mixed system), obtain an explanation from the underwriter and document the response in an appropriate work paper.

**Note:** In constructing the applicant profiles to be compared, select the facts to compare to determine whether assistance, waivers, or acts of discretion are treated consistently between applicants. For example, if a control group applicant’s debt-to-income ratio was lowered to 42 percent because the bank decided to include short-term overtime income, and a PB group applicant who was denied because of insufficient income would have had their ratio drop from 46 percent to 41 percent if their short-term overtime income had been included, consider 41 percent, not 46 percent, in determining the benchmark. Moreover, if it appears that the bank asked the control group applicants about additional income sources, such as short-term overtime income, but did not ask the PB group applicants, request an explanation from the bank and document the response.

- For each reason for denial identified within the PB group, rank the denied PB group applicants, beginning with the applicant whose qualification(s) related to that reason for denial were least deficient. (The top-ranked denied applicant in each reason-for-denial (refer to HMDA code) ranking will be referred to as the “benchmark” applicant.)
- Compare each marginal control group approval with the benchmark applicant in each reason-for-denial ranking developed in the immediate prior step. If there are no approved applicants who are equally or less qualified, then the sample has not identified instances of potential disparate treatment, unless differences in levels of assistance have been noted. For all approved applicants who appear no better qualified than the denied benchmark applicant,
  - identify the approved applicant in the worksheet as an overlap approval.
  - compare that overlap approval with other marginal PB group denials in the ranking to determine whether additional overlaps exist. If so, identify all overlapping approvals and denials.

**Note:** When the focal point involves use of a credit scoring system, the analysis for disparate treatment is similar to the prior procedures and should focus primarily on scoring system overrides or any judgmental portion of the underwriting process. For guidance on this type of analysis, refer to appendix D.

3. Obtain explanations from the appropriate loan officer or other employees for any overlap approvals or other differences that exist and reanalyze the sample to determine whether those explanations are credible and whether evidence of discrimination continues to exist. Refer to appendix E for guidance on evaluating the credibility of the bank’s responses. Submit questions to management in writing and request responses in writing. Do not have fair lending discussions with bank management without at least two examiners present.
4. If there is evidence of potential violations in the underwriting process but not enough to establish whether there is reason to believe that a pattern or practice may exist, expand the sample as necessary and consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy to determine whether such a pattern or practice exists. There does not have to be a pattern or practice for a violation to be present or for a referral or notification to another agency to occur.
5. Discuss all findings resulting from the comparisons with the appropriate Compliance SME, Chief Counsel’s Office, CRAD, Policy, EIC, or the supervisory office, as appropriate, before meeting with bank management. Following these discussions, proceed with delivering findings and conclusions to bank management and document both the findings and all conversations in an appropriate worksheet, following the steps listed in the “Primary Procedures” section of this booklet.

**Objective:** Conduct underwriting analysis for commercial loans.

Unlike consumer credit, when loan products and prices are generally homogenous and underwriting involves evaluating a limited number of credit variables, commercial loan

underwriting methods and loan pricing may vary depending on many credit variables and combinations thereof. The additional credit analysis involved in underwriting commercial credit products adds complexity to the sampling and discrimination analysis process. Small businesses may have fewer borrowing options, which may make them more vulnerable to discrimination. Therefore, in implementing these procedures, examinations should generally focus on small business credit (commercial applicants that had gross revenues of \$1 million or less in the preceding fiscal year), absent evidence that a focus on other commercial products would be more appropriate.

1. Understand commercial loan policies. For the commercial product line selected for analysis, review credit policy guidelines and interview appropriate commercial loan managers and officers to obtain written and articulated standards used by the bank in evaluating commercial loan applications. Select or adapt questions from appendix L for the interviews. Consult with the appropriate OCC credit SME.
2. Conduct comparative file review.
  - Select all (generally, a maximum of 10) denied applications that were acted on during the three-month period before the examination. To the extent feasible, include denied applications from businesses that are (1) in areas with identifiable concentrations of minority residents (refer to the “Supplemental Procedures” section of this booklet for redlining); or (2) appear to be owned by PB group members, based on a proxy such as the names of the principals shown on applications. (In the case of banks that regularly conduct commercial lending, review a minimum of 10 applications.)
  - For each of the denied commercial applications selected, record specific information from loan files and through interviews with the appropriate loan officer(s) about the principal owners, the purpose of the loan, and the specific, pertinent financial information about the commercial enterprise, including type of business (for example, retail, manufacturing, and service), that the bank used to evaluate the credit request.<sup>39</sup>
  - Select 10 (or more for lenders with regular commercial lending) approved loans that appear to be similar for business type, purpose of loan, loan amount, loan terms, and type of collateral, as the denied loans sampled, but (1) are extended to businesses not located in geography or geographies identified above or (2) appear to have been extended to businesses owned by the control group. For example, if the denied loan sample includes applications for lines of credit to cover inventory purchases for retail businesses, select approved applications for lines of credit from retail businesses.
  - For each approved commercial loan application selected, obtain and record information parallel to that obtained for denied applications.

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<sup>39</sup> Maintenance or use of data that identify PB characteristics of those involved with the business (either in approved or denied loan applications) should be evaluated as a potential violation of Regulation B. Refer to 15 USC 1691c-2 (also known as section 1071 of the Dodd–Frank Act). Note that the CFPB is charged with rulemaking activities to implement section 1071 of the Dodd–Frank Act. Section 1071(e)(2)(G) requires financial institutions to collect and report “the race, sex, and ethnicity of the principal owners of the business.” It is anticipated that data collected in conformance with these requirements would not violate Regulation B.

- Focus on comparing the credit criteria considered in the credit process for each of the approved and denied applications to established underwriting standards, rather than comparing files directly.
- Identify deviations from credit standards for approved and denied credit requests and differences in loan terms granted for approved credit requests.
- Discuss with the commercial credit underwriter when deviations from credit standards and terms are noted but not explained in the file. Each discussion should be documented in an appropriate work paper.

3. Examine identified files.

- If deviations from credit standards or pricing either are not sufficiently explained by other factors, whether documented in the credit file or for which the commercial underwriter could not provide a reasonable explanation, determine whether deviations were detrimental to any applicants of a particular PB group or area with identifiable minority concentrations.
- If members of one or more PB groups or applications from areas of identifiable minority concentration exist among commercial credit requests that were not underwritten according to established standards or received less favorable terms, select additional commercial loans. Select applicants who are members of the same PB group or are from the identifiable area, and select similarly situated control group credit requests to determine whether there is a pattern or practice of discrimination. Select these additional files based on the specific applicant circumstance(s) that appeared to have been viewed differently by lending personnel on a PB.
- If there are not enough similarly situated applicants for comparison in the original sample period to draw a reasonable conclusion, expand the sample period. Examiners considering expanding the initial review period should consult with the appropriate Compliance SME and Policy.

4. Expanded sampling guidelines.

- Generally, use judgment when selecting an appropriate expanded sample of PB and control group applications for commercial loans. Select a sample that is large enough to draw a reasonable conclusion. Refer to appendix F.
- Select from the applications that were acted on during the initial sample period, but were not included in the initial sample, and select applications from prior time periods as necessary.
- The expanded sample should include both approved and denied PB and control group applications when a similar product or loan type was requested by similar enterprises for similar purposes.

**Note:** If the number of PB group and control group loans during the preceding 12-month period or preceding calendar year substantially exceeds the maximum sample size shown in table 2 in appendix F, consult with CRAD for modeling assistance.

**Objective:** Analyze potential disparities in pricing and other terms and conditions.

Depending on the type of decision being reviewed and the size of the relevant applicant or borrower population, the analysis of decisions on pricing and other terms and conditions may involve a manual comparative file review, statistical modeling or other statistical analysis, or other specialized techniques. Consult with the appropriate Compliance SME or CRAD on appropriate techniques to use during the examination. Each examination process assesses a bank's credit decision standards and whether decisions on pricing and other terms and conditions are applied to borrowers without regard to a PB.

1. Comparative file review.

- Set sample size: Review data in their entirety or restrict the analysis to a sample depending on the examination approach used, the size of the relevant application or borrower population, and the quality of the bank's compliance management process.
  - For each focal point being reviewed, select files for (1) PB group approvals and (2) control group approvals, both identified either directly from monitoring information in residential loan applications or through application data or using proxies in consumer or commercial applications. Consult with CRAD about using a proxy methodology.
  - Using table 2 of appendix F, determine the initial sample sizes for each focal point, based on the number of PB group approvals and the number of control group approvals during the 12-month (or calendar year) period preceding the examination. If the focal point is high-volume, but statistical modeling is not being used in the examination, reduce the time period from which the samples are selected to a shorter period. (In doing so, select a period when the bank's standards for the term or condition being reviewed are most representative of those in effect during the full 12-month period preceding the examination.)

**Note:** If the number of PB group and control group approvals during the preceding 12-month period or preceding calendar year substantially exceeds the maximum sample size shown in table 2 in appendix F, consult with CRAD for modeling assistance.

**Note:** Regardless of application volume or sample size, examiners must treat any instance of potential disparate treatment—even if the comparison consists of only a single file—as a potential violation that could result in a referral. Consult with the appropriate Compliance SME and Chief Counsel's Office.

- Determine sample composition and create applicant profiles.

**Note:** Sample composition for a comparison of price and other terms and conditions exams generally initially focuses on controlling for two nondiscriminatory variables that can have a significant impact on loan terms: whether the loan was sold and the loan closing date. Other variables are accounted for on a case-by-case basis

depending on the factors that the bank being examined uses in making decisions on pricing or other terms and conditions.

- While the period for review generally is 12 months, PB group and control group approvals should be grouped and reviewed around a range of dates during which the bank’s practices for the term or condition being reviewed were the same (e.g., for the time period that a rate sheet was in effect). Generally, use rate lock date, or, if that is not available (such as for loans approved but not accepted by the applicant), use HMDA action date.
  - Tailor the sample and subsequent analysis to the specific factors that the bank considers when determining its pricing, terms, and conditions. For example, while decisions on pricing and other terms and conditions are generally part of the bank’s underwriting process, common underwriting criteria, such as debt to income, should not be used in the pricing analysis if they are not relevant. In another example, geographic considerations should not be taken into account if pricing does not vary by geography. Additionally, consider only legitimate factors. If the bank is using factors that do not appear to be legitimate, document these factors in accordance with steps listed in the “Primary Procedures” section of this booklet.
  - Identify data to be analyzed for each focal point and record this information for each approval in a worksheet to ensure a valid comparison of terms and conditions. For example, in certain cases, a bank may offer slightly differentiated products with significant pricing implications to borrowers. In these cases, group these products together for evaluation. This approach would be particularly applicable during an analysis of potential illegal loan steering activity.
- Compare terms and conditions with applicant outcomes.
    - Review all loan terms and conditions (for example, rates, points, fees, maturity variations, LTV requirements, and collateral requirements), paying particular attention to those that are left to the discretion of loan officers or underwriters. For each such term or condition, identify (a) approved PB group applicants in the sample who appear to have been treated unfavorably for that term or condition and (b) approved control group applicants who appear to have been treated favorably for that term or condition. Thoroughly document this analysis in the work papers.
    - Identify control group approvals in the sample that appear to have been treated more favorably than one or more of the previously identified PB group approvals and that have pricing or creditworthiness factors (under the bank’s standards) that are equal to or less favorable than the PB group approvals.
  - Obtain explanations from the appropriate loan officer or other employee for differences that exist, assess the consistency and credibility of such explanations using the guidance in appendix E, and review the sample taking into account the nondiscriminatory factors outlined by bank staff for evidence of disparate treatment. Do not conduct fair lending discussions with bank management without at least two examiners present. Submit questions to management in writing and request responses to the questions in writing.



- Consider expanding the sample if there is some evidence of violations in the imposition of terms and conditions but not enough to clearly establish the existence of a pattern or practice. Expand the sample as necessary to determine whether a pattern or practice exists. Consult with the appropriate Compliance SME and Chief Counsel's Office when conducting this step to determine whether a pattern or practice exists.
  - Discuss with bank management any differences in comparable loans and document all conversations in an appropriate worksheet, following the steps listed in the "Primary Procedures" section of this booklet. Discussions should be conducted by at least two examiners. Submit questions to management in writing and request responses in writing.
2. For exams not identified through screening, analyze aggregate pricing disparities. Depending on the availability of data and the bank's pricing policies, determine whether it would be useful to calculate and compare average pricing received by PB group and control group applicants. For example, the bank may set minimum pricing for the product in question but may not have written policies or procedures governing when loan officers can set pricing above the minimum. In these and other circumstances, calculating average pricing provides a starting point for further analysis.
- Determine availability of data to review.
    - Determine whether data on pricing are available electronically. If not, consider using pricing information derived from any comparative file review performed under the steps described previously.
    - If the examination does not involve HMDA-reportable loans for which government monitoring information is available, use proxies to assign race, ethnicity, and gender to the applicant or borrower. Consult with CRAD for assistance with a proxy methodology.
    - Include approvals in the analysis based on time periods during which relevant pricing criteria were the same. Generally, use the loan origination date, if applicable, or if not, use the approval date for offers approved by the bank but not accepted by the applicant. If the bank offers multiple options within the product being examined, determine that product options that have the same relevant pricing criteria are grouped together.
  - Calculate average pricing disparities.
    - If there are enough data to review after performing the previous step ("Determine availability of data to review"), calculate average pricing received for each product under review for each PB group analyzed as compared with the control group.
    - If patterns of concern are identified, contact the appropriate Compliance SME or CRAD to determine whether additional analysis should be conducted.

**Note:** If such statistical analysis is used to draw examination conclusions, then consult with CRAD to determine that the appropriate analysis is performed.

**Objective:** Evaluate potential for discriminatory steering.

A bank that offers a variety of lending products or product features through one or multiple channels may benefit consumers by offering greater choices and meeting the diverse needs of applicants. Greater product offerings and multiple channels, however, may also create a fair lending risk that applicants will be illegally steered to certain choices on a PB. Refer to appendix A for information on assessing the risk of steering and to appendix B for indicators of steering risk. Note that for most closed-end loans secured by a dwelling, Regulation Z, implementing the Truth in Lending Act, provides protections against steering regardless of the PB group characteristics of the consumer.<sup>40</sup>

1. Clarify what options are available to applicants.
  - Determine each focal point (product(s)/features(s) and alternative product(s)/feature(s) pairing or grouping) to be reviewed.
  - Through interviews with appropriate bank personnel and review of policy manuals, procedure guidelines, and other directives, obtain and verify the following information for each product-alternative product pairing or grouping identified:
    - All underwriting criteria for the product or feature and the alternative(s) that the bank, subsidiary, or affiliate offered. Examples of products may include a Federal Housing Administration or conventional loan. Examples of terms and features include prepayment penalties and escrow requirements. The distinction between a product, term, and feature may vary from bank to bank. For example, some banks may consider a stated income loan a feature, while others may consider it a distinct product.
    - Pricing or other costs applicable to the product and the alternative product(s), including interest rates, points, and all fees.
2. Document the policies, conditions, or criteria that the bank has adopted for determining how referrals and product suggestions are to be made and choices presented to customers.
  - Review policies and procedures established by the bank and the subsidiary or affiliate for (1) referring a person who applies to the bank but does not meet the applicable criteria to another internal lending channel, subsidiary, or affiliate; (2) offering one or more alternatives to a person who applies to the bank for a specific product or feature but does not meet the criteria; (3) referring a person who applies to a subsidiary or affiliate for its product to the bank, when that person appears to be qualified for a loan from the bank; or (4) referring a person who applies for a product through one internal lending channel to another lending channel, when that person appears to be qualified for a loan through the lending channel the person applied to.
  - Review information about the product or feature offered by the bank and alternative products offered by subsidiaries or affiliates, and information on products and alternatives offered solely by the bank, e.g., conventional and Federal Housing

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<sup>40</sup> Refer to 12 CFR 1026.36(e). For more information, refer to the “Truth in Lending Act” booklet of the *Comptroller’s Handbook*.

- Administration-secured and unsecured home improvement loans, and prime and subprime mortgages.
- Obtain information on a subsidiary of the bank directly from that entity but seek information on an affiliate or holding company subsidiary from the bank. If circumstances appear to warrant a different approach to information gathering (e.g., obtaining information from another entity or its regulator), consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy.
  - Obtain documentation or employee estimates on the volume of referrals made from or to the bank or channel for each product, during a relevant time period.
  - Determine whether loan personnel are encouraged, through financial incentives or otherwise, to make referrals between the bank and a subsidiary or affiliate or between channels. Similarly, determine whether the bank provides financial incentives related to products and features. Note that for most closed-end consumer credit transactions secured by a dwelling, such financial incentives based on terms are generally prohibited.<sup>41</sup>
  - After reviewing all appropriate documentation, prepare a written summary of all discussions with loan personnel and managers and documents reviewed.
  - Resolve to the extent possible discrepancies between information found in the bank’s documents and information obtained in discussions with loan personnel and managers by conducting appropriate follow-up interviews.
3. Determine how referral decisions are made to another lending channel, subsidiary, or affiliate. Determine the reason(s) for referral and how they are documented.
  4. Determine whether individual loan personnel can exercise discretion in deciding what loan products or other credit alternatives the loan personnel will offer a given applicant. If so, document to the extent possible which products or alternatives were provided to the control group and PB group applicants, and document differences for discussion with management.
  5. Determine whether individual loan personnel adhere to the bank’s stated policies, conditions, or criteria. If not, document differences in the policies or practices actually in effect.
    - Using the worksheets developed in step 6, record data for the PB group sample and determine whether the bank is applying its criteria as stated. For example, if one announced criterion for receiving a more favorable prime mortgage loan was a back-end debt ratio of no more than 38 percent, review the worksheets to determine whether that policy was adhered to. If the bank’s actual treatment of PB or control group applicants appears to differ from its stated criteria, document such differences for subsequent discussion with management.

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<sup>41</sup> Refer to 12 CFR 1026.36(d) and the “Truth in Lending Act” booklet of the *Comptroller’s Handbook*.

6. To the extent that individual loan personnel have any discretion in deciding the credit products and features to offer applicants, conduct a comparative analysis to determine whether that discretion has been exercised in a nondiscriminatory manner.
  - Compare the bank’s, subsidiary’s, or affiliate’s treatment of control group and PB group applicants by adapting the benchmark and overlap technique discussed in these procedures (consult with CRAD for assistance with modeling a large volume of transactions). For purposes of this steering analysis, conduct that technique as follows:
    - For each focal point to be analyzed, select a sample of PB group applicants who received less favorable treatment (e.g., referral to a finance company, subprime mortgage subsidiary, or counteroffers of less favorable product alternatives).

**Note:** In selecting the sample, follow the guidance of table 2 in appendix F, and select marginal applicants as instructed in the objective named “Conduct transactional underwriting analysis of residential and nonresidential loans” in the “Supplemental Procedures” section of this booklet.

- Prepare a spreadsheet for the sample that contains data entry categories for those underwriting and referral criteria the bank identified in the previous steps as used in reaching underwriting and referral decisions between the pairs of products.
  - Review the less favorably treated PB group sample and rank this sample from least qualified to best qualified applicant based on the criteria identified for the control group. The best qualified PB group applicant becomes the benchmark applicant.
  - Select a sample of control group applicants. Identify those who were treated “more favorably” for the same product-alternative product pair as the PB group. (Refer to the explanatory notes for table 2 in the sample size tables and marginal applicant processes noted previously in selecting the sample.)
  - Compare the qualifications of the benchmark applicant with those of the control group applicants, beginning with the least qualified member of that sample. Any control group applicant who appears less qualified than the benchmark applicant should be identified in the spreadsheet as a control group overlap.
  - Compare all control group overlaps with other less qualified PB group applicants to determine whether additional overlaps exist.
  - Document all overlaps as possible disparities in treatment. Discuss all overlaps and related findings (e.g., differences between stated and actual underwriting criteria) with management. Document all such conversations in examination work papers.
7. If examiners believe that contacting applicants may be useful in the analysis, consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy.

**Objective:** Determine potential for discriminatory redlining.

Like other forms of disparate treatment, redlining can be proven by overt or comparative evidence. If any written or oral policy or bank statement suggests that the bank links the racial or national origin character of an area with any aspect of access to or terms of credit, refer to the procedures on documenting and evaluating overt evidence of discrimination. Refer to appendix B for more information on risk factors for overt discrimination and redlining.

Overt evidence includes not only explicit statements but also any geographical terms used by the bank that would, to a reasonable person familiar with the community in question, connote a specific racial or national origin character. For example, if the principal information conveyed by the phrase “north of 110th Street” is that the indicated area is principally occupied by Hispanics, then a policy of not making credit available “north of 110th Street” is overt evidence of potential redlining on the basis of national origin.

Overt evidence is relatively uncommon. Consequently, redlining analysis usually focuses on comparative evidence in which the bank’s treatment of areas with contrasting racial or national origin characters is compared. Redlining analysis also typically includes a statistical comparison of the bank’s lending activity to banks and other lenders that are appropriate peers. For most redlining examinations, CRAD will have performed a statistical analysis of available HMDA data, including peer analysis at the screening stage. Consult with the appropriate Compliance SME, Chief Counsel’s Office, CRAD, and Policy regarding any additional peer analysis and perform the same steps in this objective, as appropriate, to supplement the CRAD analysis.

For purposes of this analysis, redlining is a form of illegal disparate treatment in which a bank provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area where the credit seeker resides or will reside or where the residential property to be mortgaged is located. Redlining may also include reverse redlining, the practice of targeting certain areas with less advantageous products or services based on prohibited characteristics. If examiners identify possible reverse redlining, consult with the appropriate Compliance SME and Policy.

The redlining analysis may be applied to determine whether, on a PB, a bank

- fails or refuses to offer credit or extends credit on a less advantageous basis in such an area.
- targets certain areas with less advantageous products.
- makes loans in such an area but at a restricted level or on less favorable terms or conditions as compared with contrasting areas.
- omits or excludes such an area from efforts to market residential loans or solicit customers for residential credit.
- receives or originates a lower proportion of applications or loans in such areas than its peers.

These procedures focus on possible discrimination based on race or national origin. The same analysis could be adapted to evaluate relative access to credit for other PB groups when residents of such groups are concentrated in specific geographic areas.

When the risk assessment or scoping process shows that a redlining analysis should be initiated and OCC screening analysis has been performed, consult with the appropriate Compliance SME and CRAD before completing an analysis using the steps discussed in step 1 below. Discuss whether to request CRAD resources to assist in the analysis by providing support for geographic mapping of the bank's assessment areas, branches, and lending activity or statistical evaluation of application and lending activity of the bank and its peers beyond what is already included in the OCC's screening process.

In performing the five steps listed next, recognize that a different order may be preferable in any given examination. For example, the bank's explanation (step 5) for one of the policies or patterns in question may already be documented in the CRA materials reviewed (step 1) and the CRA examiners may already have verified it, which may be sufficient to use for the redlining analysis.

In another example, as part of the scoping process, examiners may have reviewed an analysis of the geographic distribution of the bank's loan applications and originations with respect to the racial and national origin composition of census tracts within its CRA assessment or reasonably expected market area. Such analysis might have documented the existence of significant discrepancies between areas by degree of minority (racial or national origin) concentrations, in loan application or origination volumes, approval and denial rates, or rates of denials because of insufficient collateral. When the scoping process has produced a reliable factual record, begin with step 5 (obtain and evaluate specific types of information) of the redlining analysis.

In contrast, when OCC screening analysis, the scoping process, or previous supervisory activities have not addressed or fully addressed the following procedures, examiners must address them as part of the redlining examination.

1. Identify and delineate areas within the bank's CRA assessment area and reasonably expected market area that represent a racial or national origin group.

**Note:** The CRA assessment area can be convenient for redlining analysis because information about it is typically already in hand. The CRA assessment area may be too limited, however. The redlining analysis focuses on the bank's decisions about how much access to credit to provide to different geographical areas. The areas for which those decisions can best be compared are areas where the bank actually marketed and provided credit and where it could reasonably be expected to have marketed and provided credit. Some of those areas might be beyond or otherwise different from the CRA assessment area.

A redlining analysis is not appropriate for areas that cannot be identified for their racial or national origin group character within the bank's CRA assessment area and reasonably

expected market area for residential products. (If there is a substantial but dispersed minority population, potential disparate treatment may be evaluated by statistical modeling or a comparative file review of applicants.)

This step may have been substantially completed during scoping, but unresolved matters may remain. For example, several community spokespersons may allege that the bank is redlining but disagree in defining the area. In these situations,

- describe as precisely as possible why a specific area is recognized in the community (for example, perceptions of residents) and is objectively identifiable (based on census or other data) as having a racial or national origin group character.
  - The most obvious identifier is the combined minority percentage of the specific area in question. The combined minority population of an area (i.e., the population of an area that is non-White or Hispanic) should be documented. In general, consider majority-minority geographies to be those with a minority population of greater than 50 percent and low minority geographies to be those with a minority population of 50 percent or lower. Document the percentages of racial or national origin groups residing within the census tracts that make up the area. Analyzing racial and national origin group concentrations in quartiles (such as zero to 25 percent, more than 25 percent to less than 50 percent, more than 50 percent to less than 75 percent and more than 75 percent) or based on majority concentration (zero to 50 percent, and more than 50 percent) may be helpful. Bear in mind, however, that it is illegal for the bank to consider a prohibited factor in any way. For example, an area or neighborhood may only have a racial or national origin group population of 20 percent, but if the area's minority concentration appears related to lending practices, it would be appropriate to use that area's demographics in the analysis. Contacts with community groups can be helpful to learn whether such features of racial or ethnic characteristics exist within a neighborhood.
  - Assess whether geographical groupings that are used for CRA assessment areas may obscure racial patterns. For example, an underserved, low-income, predominantly minority neighborhood that lies within a larger low-income area that primarily consists of low-minority neighborhoods may seem adequately served when the entire low-income area is analyzed as a unit. A pattern of unequal service to racial or national origin group areas might be revealed, however, if the low-income minority neighborhood shared a border with an underserved, middle-income minority area and those two minority areas were grouped together for purposes of analysis. For example, there may be too few observations in one neighborhood potentially discriminated against, but if that neighborhood were combined with another, this could increase the sample size, allowing the disparity to be more easily recognized.
- describe how the racial or national origin characteristics change across the suspected redlining area's various boundaries.
  - Document the demand for credit within the identified minority area. This may include, if available, reviewing and analyzing data for all HMDA reporters for loans originated and applications received from the suspected redlined areas or

evaluating the applicable demographics of the area, including the percentage of homeowners, median house value, median family income, or number of small businesses. Review the bank's nonoriginated loan applications from the suspected redlined areas. Community contacts may also be helpful in determining the demand for such credit.

- Determine the bank's market share in its assessment area(s) or reasonably expected market area for deposits and residential loan products. Determine whether there are differences of concern relating to market share in high-minority versus low-minority census tracts.
2. Determine whether any minority group area identified in step 1 is excluded, underserved, excluded from product offerings or marketing efforts, or otherwise less favorably treated in any way by the bank.

Begin with the risk factors identified during the risk assessment or scoping process. For most redlining examinations, the unfavorable treatment will have been substantially documented during the screening analysis through peer comparisons and only needs to be finished in this step. If screening results are not available, this step verifies and measures the extent to which HMDA or other data show that the minority group areas identified in step 1 are underserved or unequally served and how the bank's policies or practices treat those areas less favorably.

- Review prior CRA lending test analyses to learn whether they have identified excluded or otherwise underserved areas or other significant geographical disparities in the bank's lending. Determine whether any of those areas coincide with the racial or national origin group areas identified in step 1.
  - Determine from the bank whether, as a matter of policy or practice, it treats any separate or distinct geographical areas within its marketing or service area differently from other areas. This may have been done completely or partially during a risk assessment or scoping analysis. The differences in treatment can be in marketing, products offered, branch operations (including the location, services provided, and the hours of operation), appraisal practices, application processing, approval requirements, pricing, loan conditions, evaluation of collateral, or any other policy or practice materially related to access to credit. Determine whether less-favored areas coincide with the minority group areas identified in step 1.
  - Obtain in writing from the bank (1) its reasons for any such differences in policy or practice, (2) how the differences are implemented, and (3) any specific conditions that must exist in an area that receives the treatment (more favorable or less favorable) that the bank has indicated or demonstrated in practice.
3. Identify the location of racial or national origin group areas just outside the bank's CRA assessment area(s) or reasonably expected market area for products, such that the bank may be avoiding such areas.
- Review the analysis from prior CRA examinations of whether the assessment area(s) appears to have been influenced by prohibited factors. Also review additional



- mapping or geographic analysis available from CRAD, the appropriate Compliance SME, or Policy. If there are minority group areas that the bank excluded from the assessment area(s), include them in the redlining analysis. Analyze the bank's reasonably expected market area in the same manner.
4. Obtain and evaluate specific types of other information that may support or contradict a finding of redlining.
    - The following types of information may be relevant in this analysis:
      - **Branching:** The bank's record of branching and delivery of lending services. Request from the bank information about its overall record of serving or attempting to serve the entire geographic area under review and the racial or national origin groups that the suspected redlined area is identified with. Consider the bank's record of opening and closing branches, its history of providing services in the area under review (including loan officer staffing of branches or regions), and its expansion patterns. Map the location of the bank's branches and those of any competitors identified as appropriate lending peers under the steps listed under the "lending performance compared to peers" sub-bullet below. Determine whether the bank has offered its services including branches and other delivery channels (such as loan production offices) on a similar basis in the suspected redlined area and the overall geographic area under review. If the bank conducts substantial lending activity through brokers or other third parties, consider the location of such third parties and the areas these third parties serve and bank policies, practices, and oversight risk management for such third parties.
      - **Marketing:** Exclusion or omission of the suspected redlined area from the bank's marketing of loan products supports a finding that the bank did not provide services on an equal basis in the area. Marketing decisions are affirmative acts to include or exclude areas. If sufficiently clear and supported by other evidence, a difference in marketing to racially different areas could itself be treated as a violation of the FH Act. (Refer to the "Supplemental Procedures" section of this booklet for potential marketing discrimination.) In any event, marketing patterns are relevant to an assessment of redlining.
        - Review materials that show how the bank has marketed in the suspected redlined area and in low-minority areas. Begin with available CRA materials and discuss the issues with CRA examiners, then review any other available materials. The materials may include, for example, the bank's guidance or practices for geographically distributing preapproved solicitations for credit cards or home equity lines of credit, advertisements in local media or business or telephone directories, business development calls to real estate brokers, relationships or meetings with community leaders and groups for the purpose of business development, and calls by telemarketers. Also consider the bank's geographic marketing strategy, if any, including for direct mail or telephone solicitations and social media.
        - Consider the availability of opportunities to advertise the bank's products in publications and media outlets targeted to high minority areas and whether the bank availed itself of these opportunities.

- Consider whether differences in marketing practices may be part of a pattern of evidence that the bank made lending services available on an unequal basis.
- **Lending performance compared to peers:** Geographic analysis of lending activity, market share analysis, and other comparisons to peers can provide evidence relevant to a finding of redlining.

For example, a bank’s lack of lending activity in a minority area, as a proportion of its overall lending activity, as compared with its peers’ higher proportion of lending activity in the minority area provides strong support for a finding of redlining. Conversely, if the bank is as active as other lenders, when taking into account both the bank’s and its peers’ overall lending in the reasonably expected market area, that would suggest that the bank is competing for rather than avoiding business in the area.

- Review the peer comparison results included in the OCC’s annual screening results. If the bank was not included on the screening list, consult with CRAD for support with performing peer analysis.
- **Comparative file review:** If disparities in underwriting or pricing are being reviewed as part of the redlining examination, consider conducting a comparative file review. Compare treatment of applicants from within the suspected redlined area with treatment of applicants from the contrasting area:
  - Determine whether there were denials of qualified applicants from the suspected redlined area. If so, that may support the view that the bank wanted to avoid doing business in the area.
  - Determine whether the file review identified instances of disparate treatment against applicants of the same race or national origin as the suspected redlined area within the majority-minority census tract at issue. If so, this may support the view that the bank was avoiding doing business with applicants of a group, such as the residents of the suspected redlined area. Determine whether any such identified victims applied for transactions in the suspected redlined area.
  - If there are instances of either of the outcomes in the prior two steps, identify denied residents of other racial or national origin groups, if any, in the suspected redlined area and review their application files to learn whether they appear to have been treated in an irregular or less favorable way. If so, this may support the view that the character of the area appears to have influenced the credit decisions.
  - Review withdrawn and incomplete applications for the suspected redlined area, if those can reasonably be identified, and learn whether there are reliable indications that the bank discouraged those applicants from applying. If so, that may support the view that the bank was avoiding conducting business in the area and may constitute evidence of a violation of 12 CFR 1002.4(b).

**Note:** If a comparison of individual transactions show that the bank treated the racial and national origin group applicants at issue within and outside the suspected redlined area similarly, but there are disparities across racial and national origin group applicants, it does not rule out redlining, and it may be evidence of underwriting discrimination. Examiners should refer to the “Supplemental Procedures” section for underwriting.

- **Interviews of third parties:** The perspectives of third parties are considered by reviewing available materials during scoping. In certain circumstances, examiners may find that information from third parties could help support whether the bank’s apparent differences in treatment of minority and low-minority areas constitute redlining.
  - Identify persons (such as housing or credit counselors, home improvement contractors, or real estate and mortgage brokers) who may have extensive experience dealing with credit applicants from the suspected redlined area.
  - Consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy to consider whether interviews are necessary, and if so, the scope of such interviews (including limitations on the disclosure of confidential supervisory information). If interviews are necessary, at least two examiners should interview those persons to learn of their first-hand experiences related to
    - ♦ oral statements or written indications by bank personnel that loan applications from a suspected redlined area were discouraged.
    - ♦ whether the bank treated applicants from the suspected redlined area as called for in its own procedures (as examiners understand them) or whether the bank treated applicants similarly to applicants from areas with low-minority group characteristics (as the examiners are familiar with those transactions).
    - ♦ unusual delays or irregularities in loan processing for transactions in the suspected redlined area.
    - ♦ differences in the bank’s pricing, loan conditions, and property valuation practices, for example, in the suspected redlined area compared with contrasting areas.
    - ♦ differences in the bank’s marketing personnel or services provided within identified areas. Information regarding opportunities to market within minority communities may be useful in assessing whether the bank provided its services on an equal basis in the identified areas.
  - Gather from third parties the names of applicants that recounted to the third parties questionable behavior by the bank and consider contacting those consumers after consulting with the appropriate Compliance SME, Chief Counsel’s Office, and Policy.
  - If third parties witnessed specific conduct by the bank indicating that the bank acted in ways that discouraged or avoided business from the area in question or witnessed specific conduct demonstrating appropriate treatment or positive actions or outreach toward such an area, such information would be relevant to the analysis of whether disparate treatment occurred.
  - The work papers should describe whether and why examiners believe that such information from third parties is reliable.
- **Relevant internal bank communications, including emails:** These communications can provide evidence relevant to findings of redlining. Before requesting such communications, consult with Chief Counsel’s Office and Policy.

5. Obtain the bank's explanation for the potential difference in treatment between the areas and evaluate whether the explanation is credible and reasonable.

This step completes the comparative analysis by soliciting from the bank additional information not yet considered by the examiners that might show whether there is a nondiscriminatory explanation for the apparent disparate treatment.

For each matter that requires explanation, provide the bank full information about what differences appear to exist in how it treats minority and low-minority areas and how examiners reached their preliminary conclusions at this stage of the analysis.

If the bank's explanations do not adequately account for apparent differences in treatment (the assessment of bank explanations should be done in consultation with the Compliance SME, Chief Counsel's Office, and Policy), consider additional relevant information that is available, including, for example, internal bank communications, including emails, and determine whether that additional information might support or contradict the interpretation that there are differences in treatment on a PB. Examiners should not make assumptions about what the lender's explanations will be.

- Determine whether conditions identified by the bank as justifying differential treatment pursuant to bank policy were applied consistently in minority and low-minority neighborhoods.
  - If there are minority areas that met those conditions but did not receive the favorable treatment called for by bank policy, ask the bank to explain why the areas were treated differently despite the similar conditions.
  - If there are low-minority neighborhoods with the conditions identified by the bank as justifying less favorable treatment pursuant to bank policy but that received favorable treatment, ask the bank to explain why those areas were treated differently, despite the similar conditions.
  - Obtain explanations from the bank for any apparent differences in treatment observed by the examiners but not called for by the bank's policies.
  - If the bank's explanation cites specific conditions in low-minority areas to justify more favorable treatment, determine whether areas with minority group characteristics in step 1 satisfied those conditions. If there are minority group areas for which those conditions existed but were treated differently, ask the bank to explain why the minority group areas were treated differently despite the similar conditions.
  - If the bank's explanation cites specific conditions in the minority areas to justify less favorable treatment, determine whether the low-minority areas(s) had those conditions. If there are low-minority areas for which those conditions existed but were treated differently, ask the bank to explain why those areas were treated differently despite the similar conditions.
- Evaluate the bank's responses by applying appropriate principles selected from appendix E.

**Note:** If the bank’s explanation is that the disparate results are the consequence of a specific, neutral policy or practice that the bank applies broadly, such as not making loans on homes worth less than a certain value, review the guidance in appendix J and consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy.

**Objective:** Determine potential for discriminatory marketing practices.

A marketing analysis should be undertaken as part of every redlining review or may also be a separate review if there are no other indications of redlining. Proceed as follows.

1. Identify the bank’s marketing initiatives.
  - Preapproved solicitations
    - Determine whether the bank sends out preapproved solicitations for
      - home purchase loans.
      - home improvement loans.
      - refinance loans.
      - other types of lending.
    - Determine how the bank selects recipients for such solicitations by
      - learning from the bank’s criteria for such selections.
      - reviewing guidance or other information the bank provided to credit reporting companies or other companies that supply such lists.
  - Media usage
    - Determine which newspapers, social media, online media, and broadcast media the bank advertises in and
      - identify racial or national origin identity types associated with those media.
      - determine whether those media focus on geographical communities of a minority or national origin characteristic.
    - Determine the bank’s strategies for geographic and demographic distribution of advertisements.
    - Obtain and review copies of the bank’s printed advertising, promotional materials, and website.
    - Determine what criteria the bank communicates to media about what an attractive customer or an attractive area to cultivate business.
    - Determine whether advertising and marketing are similar for a product or service regardless of the racial or national origin character of the area.
  - Self-produced promotional materials
    - Determine how the bank distributes its own promotional materials, including the bank’s methods (such as direct mail) and the bank’s selected geographical distribution.
    - Determine how the bank determines, and what it regards, as the target audience(s) for those materials.
  - Real estate agents, brokers, contractors, and other intermediaries
    - Determine whether the bank solicits business or maintains business relationships with specific real estate agents, brokers, home improvement contractors, dealers, and other third parties.

- Determine how the bank decides which intermediaries it solicits from.
  - Identify the parties contacted and determine the distribution between different racial and ethnic areas.
  - Obtain and review the types of information the bank distributes to intermediaries.
  - Determine how and how often the bank contacts intermediaries.
  - Determine what criteria the bank communicates to intermediaries about the type of customers it seeks or the nature of the geographic areas where it wishes to do business.
- Telemarketers or predictive dialer programs, including those using artificial intelligence for placing calls
    - Determine how the bank identifies which consumers to contact and whether the bank sets parameters on how the list of consumers is compiled.
2. Decide whether the bank’s activities show a significantly lower level of marketing effort toward majority-minority group areas or toward media or intermediaries that tend to reach majority-minority group areas or applicants and borrowers. Marketing materials should be reviewed for demographic representation between minority and nonminority individuals.
  3. If there is any such disparity, document the bank’s explanation.
    - For more information on marketing, refer to appendix J.

**Objective:** Determine potential for discriminatory mortgage servicing practices.

When the risk assessment or scoping processes identify significant risk factors related to mortgage servicing, consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy about a possible mortgage servicing discrimination analysis. If examiners decide to proceed, collect information as follows:

1. Evaluate the bank’s policies and procedures for mortgage servicing and determine whether they
  - adequately address fair lending in the servicing context, including the training of appropriate employees.
  - adequately address compliance with Regulation X<sup>42</sup> and any forbearance programs mandated by federal law or, for federal loans, by federal agency policy and guidelines.
  - vary by geography or another basis that may be correlated with a PB group characteristic.
2. Determine the extent that individual servicing personnel have discretion in

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<sup>42</sup> Refer to 12 CFR 1024. For more information, refer to the “Real Estate Settlement Procedures Act” booklet of the *Comptroller’s Handbook*.

- deciding which loss mitigation options (e.g., loan modification, forbearance, or short sale) to offer applicants, including the extent to which loan personnel have discretion in approving or denying those options.
  - assessing or waiving fees in connection with loss mitigation options.
  - deciding the extent of assistance that is offered (e.g., in identifying and gathering appropriate documentation).
3. Determine whether individual decision makers in fact adhere to the bank’s stated policies and procedures and obtain a list of the bank’s exceptions related to mortgage servicing.
  4. Determine the extent to which servicing outcomes, or timelines for response or decision, differ on a PB group characteristic by conducting a comparative review.
  5. Determine the bank’s practices for servicing loans held by borrowers with limited English proficiency.<sup>43</sup>
  6. Determine whether the bank considers mortgage servicing activities in fair lending audits, monitoring and testing activities, reporting, and analyses, including complaint management.
  7. Obtain the bank’s explanation for potential differences in treatment on a PB and determine whether it is credible and reasonable.

**Objective:** Determine potential for discriminatory OREO practices.

OREO includes real estate a bank acquires through satisfaction of debts previously contracted (e.g., real estate acquired through a property foreclosure or deed-in-lieu).<sup>44</sup> Banks are required to dispose of OREO within certain timeframes. Most commonly, banks dispose of OREO by selling the real estate to satisfy the loan obligation partially or totally. Disparities in maintenance, marketing, and disposition of OREO properties correlated with the race or ethnicity of a neighborhood’s residents may violate the FH Act. When the risk assessment or scoping processes identify significant risk factors related to OREO practices, consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy about a possible discrimination analysis. If the analysis proceeds, complete the following procedures:

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<sup>43</sup> Refer to the CFPB’s “Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency,” 86 Fed. Reg. 6306 (January 13, 2021).

<sup>44</sup> For regulatory reporting purposes, OREO also includes former banking facilities, including properties that were acquired for future expansion but for which banking use is no longer contemplated. This procedure does not apply to former banking facilities that were reported as OREO.

1. Evaluate the bank's policies and procedures for OREO activities and determine whether they<sup>45</sup>
  - adequately address fair lending and nondiscrimination in this context, including the training of appropriate employees.
  - cover all OREO activities, including property maintenance, marketing, repairs, and renovations.
  - outline a centralized or standard processes for managing OREO through the sale of the property, including pricing the sale, and do not vary by geography or another basis correlated with a PB group characteristic.
2. Determine whether individual decision makers in fact adhere to the bank's stated policies and procedures and obtain a list of the bank's exceptions related to OREO.
3. Determine the extent that individual personnel have discretion throughout all phases of the OREO process.
4. Identify third parties that the bank employs to conduct OREO activities, and evaluate the bank's fair lending and nondiscrimination controls and monitoring with respect to the third party's activities.

The use of third parties does not diminish the bank's responsibility to ensure that foreclosed properties and other OREO are administered in compliance with applicable laws and regulations. Determine whether the bank performed proper due diligence before entering into a contract with each third party and has proper ongoing monitoring to assess management of OREO properties from a fair lending and nondiscrimination perspective.

5. Determine whether the bank considers OREO activities in fair lending and other nondiscrimination audits (for example, to determine whether properties are maintained in an equal manner without regard to the demographic characteristics of neighborhoods to avoid any potential violations of the FH Act), monitoring and testing activities, reporting, and analyses, including complaint management.
6. Obtain the bank's explanation for potential differences in treatment on a PB and determine whether it is credible and reasonable.

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<sup>45</sup> For more information about fair lending risk management of OREO, including managing foreclosed properties, refer to the "Other Real Estate Owned" booklet of the *Comptroller's Handbook*.



## Conclusions

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The quantity of fair lending risk is  
(low, moderate, or high).  
The quality of fair lending risk management is  
(strong, satisfactory, insufficient, or weak).  
The aggregate level of fair lending risk is  
(low, moderate, or high).  
The direction of fair lending risk is  
(increasing, stable, or decreasing).

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**Objective:** To determine, document, and communicate overall findings and conclusions regarding the examination of fair lending.

1. Determine preliminary examination findings and conclusions and discuss with the EIC, including
  - quantity of fair lending risk.
  - quality of fair lending risk management.
  - aggregate level and direction of fair lending risk.
  - overall risk in fair lending.
  - findings on the adequacy of fair lending controls and compliance management systems.
  - violations of law and other concerns.
2. Discuss examination findings with bank management, including violations, deficient practices, and conclusions about risks and risk management practices. If necessary, obtain commitments for corrective action.
3. Compose conclusion comments, highlighting issues that should be included in the report of examination, conclusion memo, or supervisory letter. If necessary, compose matters requiring attention and potential violation write-ups. Consult with the Compliance SME and Chief Counsel's Office when there are fair lending matters requiring attention or potential violations of laws or regulations.
4. Provide final examination findings and conclusions to the EIC.
5. Update the OCC's supervisory information systems and any applicable report of examination schedules or tables.
6. Document recommendations for the supervisory strategy (e.g., what the OCC should do in the future to effectively supervise fair lending by the bank, including recommendations for time periods, staffing, and workdays required).

7. Update, organize, and reference work papers in accordance with the appropriate certified electronic record-keeping system. Work papers must be retained in accordance with the OCC's record retention schedules and policies.
8. Appropriately dispose of or secure any paper or electronic media that contain sensitive bank or customer information.

# Appendixes

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## Appendix A: OCC's Fair Lending Risk Assessment Process

Examiners identify and assess fair lending risks for banks during each supervisory cycle. Examiners should consult with the appropriate Compliance SME for questions regarding guidance, tools, and fair lending risk assessment supporting materials. Evaluation of information collected as part of the risk assessment assists examiners in developing fair lending strategies for individual banks.

The fair lending risk assessment is a standalone document with sufficient explanatory comments to support risk ratings and recommendations for future supervisory activities. The fair lending risk assessment must be completed in addition to any other examination documents.

### Components

The OCC's fair lending risk assessment process generally consists of six steps:

1. Bank background
2. Fair lending summary
3. Quantity of fair lending risk
4. Quality of fair lending risk management
5. Risk assessment summary
6. Future supervision

These six steps discuss the process of conducting a fair lending risk assessment. Refer to appendix B, "Fair Lending Risk Factors."

### Bank Background

The purpose of documenting a bank's background is to record basic information about the bank and the market(s) where it operates. This information helps to give context about the bank and gives a sense of the bank's overall business strategy and fair lending risk monitoring program. In this section, examiners describe the bank's market area, strategy, products and services, and competition and the bank's processes for managing fair lending risk, including oversight routines for designated fair lending compliance personnel to monitor and test. Examiners can obtain much of this bank process and organizational information from the bank's latest OCC CRA performance evaluation and the bank's CRA public file.

### Quantity of Fair Lending Risk

In this section, examiners should assess the quantity, or level, of fair lending risk at the bank and determine whether the quantity of risk is low, moderate, or high. During the assessment, examiners should consider each lending product separately. For example, mortgages should

be broken down into purchase money, refinance, or home improvement. The bank is likely to offer several different versions of each product. For example, home purchase mortgages may be fixed or variable rate, and requirements for LTV and length of term may vary. Examiners should evaluate similar products together to the extent possible. For example, similar products may be fixed-rate purchase money mortgages for which terms and underwriting are substantially similar and do not represent unique fair lending risk, such as fixed-rate, 30-year mortgages.

Examiners should take the following steps to complete the fair lending risk assessment process.

## **Review Residential Loan Products**

- Identify the types of residential loan products the bank offers. Divide residential loans into the following groups: home purchase, home improvement, home equity lines of credit (HELOC), home equity loans, reverse mortgages, home loan modifications, and refinancings. Subdivide those loan groups further if a bank does a significant number of any of the following types of residential lending, and consider them separately as follows:
  - Government-insured loans
  - Mobile home or factory housing loans
  - Wholesale, indirect, and brokered loans
  - Portfolio lending (including portfolios of Fannie Mae and Freddie Mac rejections)
- Determine whether the bank offers conventional affordable housing loan programs, SPCPs, or other programs specifically designed to assist certain applicants, such as underserved populations. Also determine whether the loan terms and conditions/assistance make the loan program incompatible with regular conventional loans for comparative purposes. If so, consider them separately.

## **Review Nonresidential Loan Products**

- Identify the types of nonresidential loan products the bank offers, including
  - automobile loans.
  - commercial loans.
  - credit cards.
  - personal loans (secured/unsecured).
  - student loans.
  - other nonresidential loan products.
  - small business lending.

## **Document and Assess Fair Lending Risk for Product Features**

- Document the following for each loan product offered by the bank:
  - Number of loans in portfolio
  - Number of loans originated
  - Number of purchased loans

- Percentage of portfolio loans
- In addition to the quantitative information detailed previously, document certain information regarding each loan product’s features, such as
  - alternative products: Loans that vary significantly from industry standards for the loan type, such as mortgage loans with interest only, balloon payments, or low/no documentation loans.
  - government-backed: Loans with guarantees from the federal government, which protects lenders against defaults on payments. Examples include Federal Housing Administration, U.S. Department of Veterans Affairs, and SBA loans.
  - portfolio loans: Loans that function as investments by staying in the bank’s portfolio, rather than being sold in the secondary market.
  - traditional saleable: Loans that may be securitized and sold in the secondary market.
- After documenting information for individual loan products, assign a risk rating—low, moderate, or high—related to the product features and describe the rationale for the risk rating.
  - Whether the features of a particular loan product constitute elevated fair lending risk largely depends on the level of discretion lenders have in varying the loan terms. Typically, government-backed loans and traditional, saleable loans, such as those sold to government-sponsored enterprises, present less fair lending risk because these loans are generally underwritten consistently based on investor standards. On the other hand, some alternative loan products, such as interest only, balloon payments, and no documentation loans, may present more fair lending risk, especially if such product(s) represent a substantial proportion of the bank’s overall volume of loans or percentage of the bank’s loan portfolio. Fair lending risks may be elevated, however, when a new product is introduced or an existing product is modified or expanded because of lender inexperience with that particular product even if a bank makes few loans for that product. Refer to appendix B as a resource for evaluating indicators of heightened risk.

**a. Document and assess fair lending risks for delivery channels.**

- For each loan product identified, document information regarding the channels the bank uses to originate each loan product, such as
  - branch: The bank takes loan applications for the respective product through its branch offices.
  - loan production office: The bank takes loan applications for the respective product through loan production offices.
  - phone or mail: The bank takes loan applications for the respective product over the phone or through the mail.
  - preapproved: The bank sends out notices to prospective applicants that they are receiving an offer of credit subject to the terms and criteria that were established by the bank to make the offer.
  - web: The bank takes loan applications for the respective product through the web.
  - mobile: The bank takes loan applications for the respective product through mobile phones or mobile applications.

- third party: The bank takes loan applications for the respective product through a third-party intermediary. Examples include mortgage brokers, correspondent lenders, automobile dealers, and home improvement contractors. An application taken by a third party presents additional fair lending risks as the bank has less control over the training and activities of the loan originators. Loan documentation is frequently not available to the bank to review communications with the borrower. Banks are responsible for the actions of third parties acting on the bank’s behalf or for loans that the bank underwrites or purchases through third parties.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for the loan product delivery channels and describe the rationale for the risk rating.

**b. Document and assess fair lending risks for underwriting processes.**

- For each loan product identified, document the following information regarding the methods used to originate the loan products:
  - Centralized: A single office or authority makes underwriting decisions for the bank.
  - Decentralized: A central authority does not make underwriting decisions. The underwriting decisions are made across a variety of authorities.
  - Credit scoring used: The bank uses a numerically based system to evaluate the creditworthiness of applicants. Such a system could be proprietary or could use third-party-supplied credit scores commonly used in the industry.
  - Judgmental: The bank uses a system that at least in part relies on loan officer discretion to underwrite the loan product.
  - Third-party underwriting: The bank uses a third party to underwrite the respective loan product. These loans may or may not be purchased contracts.
  - Underwriting exceptions: The bank’s frequency of overriding its loan underwriting policies.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to underwriting and describe the rationale for the risk rating.

Centralized underwriting decisions are more likely to be consistent than decentralized operations or decision centers, where consistency can vary. Banks that use automated credit-scoring systems that have been validated, have a low volume of overrides, and consider few judgmental factors generally have lower fair lending risk than banks that use credit-scoring systems that have a high volume of overrides or rely on many judgmental factors. The level of loan officer discretion within the underwriting process can also affect fair lending risk. Underwriting performed by third parties increases fair lending risk because a bank generally has less control over the underwriting process.

**c. Document and assess fair lending risks for pricing.**

- For each loan product identified, document the following information regarding the various strategies that the bank uses to price loans, for example
  - standard pricing across bank (no discretion): The bank uses standard pricing and does not permit discretion or deviation from this policy.
  - regional (no discretion): The bank allows limited deviation from preset pricing policies by allowing for geographic market variances.
  - risk-based pricing: The bank prices the respective loan according to the risk level of the borrower using credit score or a combination of risk factors.
  - discretionary pricing (including third-party set pricing): The bank allows loan originators (including third parties) pricing discretion when setting the terms of a loan.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to pricing and describe the rationale for the risk rating.

Using standard pricing guidelines with few exceptions and variances presents less fair lending risk than using discretionary pricing or unwritten, nonstandardized pricing policies. Using risk-based pricing does not inherently increase fair lending risk as long as the pricing models are consistently applied and exceptions are limited and supported. Fair lending risk increases if pricing varies from region to region or loan officer to loan officer. Pricing set by third parties presents unique risks to a bank, as the bank may ultimately be determined to be responsible for the pricing outcomes of the loans in its portfolio.

**d. Document and assess fair lending risks for marketing.**

- For each loan product identified, document the following information regarding the strategies that the bank uses to market each loan product:
  - Standard marketing in all of the bank’s markets: The bank’s marketing efforts are uniform across its markets and do not change according to applicant characteristics or geography.
  - Targeted demographic advertising: The bank employs different marketing approaches to attract applicants based on demographics.
  - Direct-mail campaigns: The bank uses mailings (for example, letters and flyers) to communicate general product information or preapproved loan offers. Filters may be used to target specific markets or applicant characteristics.
  - Branch level: The bank allows individual branches to conduct their own marketing efforts.
  - SPCP: The bank offers an SPCP.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to marketing and describe the rationale for the risk rating. Document complete information for individual loan products and how the bank approaches and monitors such marketing efforts (including Facebook, Twitter, and Instagram). Pay particular attention to new forms

of marketing, such as advertisements or search hits returned by an internet search (for example, Google).

**e. Document and assess fair lending risks for loan originator compensation.**

- For each loan product identified, document information regarding the various ways the bank compensates loan originators.
  - Flat fee per loan: Loan originators receive a fixed fee per loan, regardless of loan characteristics.
  - Salary: Loan originators receive a salary.
  - Fee based on volume of loans: Loan originators receive an additional incentive for loans closed beyond the minimum number required in a given period.
  - Fee based on a percentage: Loan originators receive a fee based on a percentage of the loan amount.
  - Fee based on terms: Loan originators receive a fee based on the terms of the loan. These may include yield spread premiums, overages, markups, or other compensation including sales of additional services such as debt cancellation coverage, or other items that increase the cost to the borrower.<sup>46</sup>
  - Fee based on portfolio growth/performance: Loan originators receive a fee based on the increase in number or performance of loans that they originate.
  - Fee based on referral: The bank pays or receives a fee based on a referral of a loan application to or from a third party.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to originator compensation and describe the rationale for the risk rating.

Compensation incentives can lead to fair lending issues if the bank compensates loan officers based on loan amount, loan terms, volume of originations, or other variations. These factors could entice loan officers to steer potential applicants into higher-priced loan products or products with other unfavorable terms that may harm the borrower. Alternatively, flat fees paid as compensation for loan originations or referrals typically present less fair lending risk.

**f. Document and assess fair lending risks for servicing.**

- For each loan product identified, document the following information regarding servicing, loss mitigation, collection, and foreclosure risks.
  - Servicing for self: The bank collects interest, principal, and escrow payments for portfolio loans or because the bank retains servicing rights for loans the bank originates.

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<sup>46</sup> For most closed-end, consumer credit transactions secured by a dwelling, loan originators generally may not receive (and no person may pay directly or indirectly) compensation based on a term of the transaction, the terms of multiple transactions, or the terms of multiple transactions by multiple individual loan originations. Refer to 12 CFR 1026.36(d) or the “Truth in Lending Act” booklet of the *Comptroller’s Handbook*. Consult with the appropriate Compliance SME and Chief Counsel’s Office as appropriate, if this type of practice is identified.



- Servicing for others: The bank engages in servicing under agreements between the bank and investors that describe each investor’s requirements for servicing its assets.
- Servicing for prime loans: The bank services prime mortgage loans.
- Servicing for subprime loans: The bank services subprime loans (generally high cost—offered to borrowers with subprime credit ratings). Servicing a subprime loan typically requires more interaction with the consumer and increased servicing demands.
- Standard servicing process: The bank uses standard servicing procedures and limits any degree of discretion to deviate from standard policy.
- Discretionary servicing process: The bank permits servicing staff discretion in negotiating matters such as the payment of late fees, payment holidays, or forbearance.
- Standard loan modification process: The bank uses standard loan modification and loss mitigation procedures and does not permit servicing staff any degree of discretion to deviate from standard policy.
- Discretionary loan modification process: The bank permits servicing staff discretion to deviate from standard policy.
- In-house debt collection: The bank performs debt collection activities for portfolio loans.
- Third-party debt collection: The bank collects debts for other lenders or relies on third parties to collect payments on or service delinquent/charged off loans.
- Standard foreclosure process: The bank has a standard process relating to foreclosure decisions and actions and limits discretion to deviate from this process.
- Discretionary foreclosure process: The bank permits servicing staff discretion to deviate from standard policy.
- Fee based on foreclosure strategy: Collections staff receive fees or other compensation corresponding to collection efforts or foreclosure strategy.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to post-origination practices and describe the rationale for the risk rating.

**g. Document and assess fair lending risks for reputation.**

- For each loan product identified, document the following information regarding certain reputation risks.
  - Complaints: The type and number of recent fair lending or unfair or deceptive acts or practices complaints related to any loan product, including foreclosure and servicing complaints. Refer to the OCC and CFPB complaints databases and the bank’s public CRA file. Review the complaints filed with the bank.
  - CRA assessment areas: Document whether the previous CRA performance evaluation found that assessment area delineations did not comply with regulatory requirements or rated any assessment area needs to improve under the lending test or otherwise found poor geographic distribution of loans. Determine whether

redlining was identified as a potential focal point in the OCC’s screening analysis based on the shape of the bank’s assessment area or whether the OCC expressed concern with shape of the bank’s assessment area during a previous fair lending examination. Consider for future supervisory activities any such assessment area for potential redlining.

- Litigation: Any current or past litigation related to fair lending, or unfair or deceptive acts or practices regarding loan products, including private class action lawsuits.
- Referrals to and investigations by the CFPB, DOJ, HUD, and other agencies: Any referral to another enforcement agency for fair lending matters regarding loan products.
- Significant issues, such as lending disparities on a PB, identified by the OCC, the bank, or another agency: OCC, bank, or other agency identification of significant or substantive disparities, based on analysis of loan or other data. In addition to identifying this element in the risk matrix, describe these disparities in the “Bank-Identified Fair Lending Issues,” “Fair Lending Screen Focal Points,” or “Fair Lending Issues Identified by Other Supervisory Agencies” sections of the fair lending risk assessment.
- After documenting complete information for individual loan products, assign a risk rating—low, moderate, or high—for these products related to the bank’s reputation and describe the rationale for the risk rating.

#### **h. Assign initial product quantity risk ratings.**

- After assessing each risk element in each of the eight risk categories in the prior objectives, assign an initial product risk rating of low, moderate, or high for each loan product in the risk assessment. Refer to the ratings and rationale behind previously assigned features/factors to assist in the initial product risk rating.
- Review the risk ratings assigned for the bank’s product features, delivery channels, underwriting, pricing, marketing, originator compensation, post-origination practices, and reputation risks associated with each product.
- Consider whether certain risk ratings or risk elements warrant greater weight in determining the initial product risk ratings.
- Consider risk ratings or risk elements for each product that elevate, or have the potential to elevate, the bank’s level of fair lending risk.
- Assign an initial quantity rating for each product based on the information reviewed and considered in the previous three steps.

## Quality of Fair Lending Risk Management

### **a. Document and rate the bank’s quality of fair lending risk management.**

- For each loan product identified, assess the quality of the bank’s fair lending risk management. Effective risk management consists of two factors: effective internal controls and effective training. When assessing a bank’s quality of fair lending risk management, consider questions in a two-step process:

- Does the bank employ any type of fair lending risk management practice for each loan product? (Examples include statistical monitoring, training, audits, policy review, and modification.)
- Has the OCC reviewed this fair lending risk management practice and concluded on its adequacy or effectiveness?
- Determine whether a bank has effective internal controls to manage fair lending risk. Determine whether the bank has
  - effective fair lending risk assessment/analysis: The bank has an effective fair lending risk assessment that covers all lending products for the full life cycle of the bank’s loan products, including servicing and other post-origination activities relating to lending. The bank may also conduct an effective fair lending analysis based on higher risk products identified by the risk assessment.
  - effective second review process: The bank has implemented an effective second review process for loans.
  - effective policies and procedures: The bank has developed effective policies and procedures that are regularly vetted for fair lending concerns by qualified individuals.
    - Adequate staffing: Staffing of key areas related to lending and fair lending compliance is appropriate and staffed by knowledgeable and qualified employees.
    - Effective compliance controls (audit, testing, self-assessments): The bank has effective controls and monitoring for fair lending compliance.
    - Effective complaint management: The bank has an effective customer complaint system that responds accurately and on a timely basis to customer complaints.
    - Management responsive to issues: The bank’s management is responsive to examiner concerns and self-identified issues and takes corrective action, as appropriate.
- Determine whether a bank effectively trains its employees to manage fair lending risk. Determine whether the bank has:
  - effective training of origination/platform employees: The bank regularly trains its origination and platform employees in job-specific fair lending.
  - effective training of underwriters: The bank regularly trains its underwriters in job-specific fair lending.
  - effective training of loan closing staff: The bank regularly trains its loan closing employees in job-specific fair lending.
  - effective training of post-closing, servicing, and management staff: The bank regularly trains its loan servicing and other post-closing employees in job-specific fair lending training. Training should include handling loan modifications, foreclosures, and other loss mitigation programs.
  - effective training of servicing staff: The bank regularly provides fair lending training to debt collection staff in relation to their responsibilities.
  - effective risk management of third parties: The bank has effective risk management practices for third-party originators and servicers.

- After identifying and evaluating the risk management controls for each product, assign a rating for the quality of risk management as strong, satisfactory, insufficient, or weak for each product.

**b. Assign aggregate product risk ratings.**

- Considering the quantity of risk and quality of risk management, assign a rating for the overall aggregate fair lending risk associated with each loan product. Determine whether risk management practices elevate or lower fair lending risk for each product. Also refer to supporting documentation to inform the ratings.
  - Consider the product risk ratings and the supporting documentation. Determine which product features or parts of the loan cycle may have a greater weight in assigning the product risk rating because they elevate, or have the potential to elevate, fair lending risk.
  - Consider the bank’s risk management practices. Determine whether the bank’s current risk management practices effectively address risks present for each product.
  - Based on the bank’s current level of fair lending risk and the bank’s risk management practices, determine an aggregate risk rating for each loan product.

## Risk Assessment Summary

**a. Assign the bank’s overall fair lending risk ratings.**

- Assign the appropriate risk ratings for quantity of fair lending risk, quality of fair lending risk management, aggregate fair lending risk, and direction of fair lending risk. Direction of fair lending risk refers to whether the overall risk profile for the bank is improving, holding steady, or deteriorating, based on the trends in the lending portfolio that may expose the bank to additional risk. For example, the direction of risk may be stable (or decreasing) if management is no longer considering adding new products, the bank’s lending personnel are well trained and have low turnover, and the audit department has scheduled a comprehensive review of the bank’s fair lending program in the next 12 months. These risk ratings should be assigned for the bank as a whole, and the rationale behind those ratings should be explained. The options for
  - the quantity of fair lending risk are low, moderate, or high.
  - the quality of fair lending risk management are strong, satisfactory, insufficient, or weak.
  - the aggregate fair lending risk are low, moderate, or high.
  - the direction of fair lending risk are decreasing, stable, or increasing.
- If a bank-prepared fair lending risk assessment was evaluated, provide comments regarding the adequacy of the risk assessment. A good baseline is to compare the bank’s risk assessment with the components of a fair lending risk assessment as outlined in this booklet.

## Future Supervision

### **a. Submit recommendations for future supervisory activities.**

- Provide recommendations for future supervisory activities based on the current assessment and incorporate the results of the risk assessment into planning for ongoing supervision. In general, future supervision should include products and services, and categories or geographies identified where fair lending risk is moderate to high and risk management processes are satisfactory to weak. List the lines of business or loan products that should be considered for inclusion in future supervisory activities and the rationale for any prescribed supervisory activities.

## Appendix B: Fair Lending Risk Factors

This appendix contains risk factors relating to compliance management, overt discrimination, underwriting, pricing, steering, HELOC modifications, redlining, marketing, servicing and loss mitigation, and OREO practices. Examiners should use these risk factors as a resource to inform their risk assessments (refer to appendix A) and in planning for fair lending examinations.<sup>47</sup>

### Compliance Program Deficiency Risk Factors

- C1: Overall bank compliance record is seriously or critically deficient.<sup>48</sup>
- C2: Government monitoring information required by applicable law and regulation is inaccurate or incomplete.
- C3: Data or record-keeping problems compromised reliability of previous examination reviews.
- C4: Fair lending problems were previously found in one or more bank products or in bank subsidiaries.
- C5: The bank has not developed and maintained an effective compliance management system that is appropriate for the size, complexity, or risk profile of its operations. The compliance management system should consist of board of directors and management oversight and a compliance program that includes all applicable consumer compliance-related laws and regulations. Refer to appendix C.<sup>49</sup>
- C6: The bank has not updated compliance policies and procedures to reflect changes in law or agency guidance.
- C7: Fair lending training is nonexistent, weak, or not consistently required for all employees involved in the loan life cycle.

In addition, the following characteristics may implicate the fair lending laws, and the OCC treats them as risk factors:

- Bank compliance management related to unfair or deceptive acts or practices,<sup>50</sup> truth in lending (Regulation Z), or real estate settlement procedures (Regulation X) is weak.
- Bank use of third parties, failure to adopt and implement a comprehensive program of oversight that includes
  - planning to manage the relationship.
  - due diligence before selecting a third party, including review of the third party's processes for legal and regulatory compliance and training.

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<sup>47</sup> These risk factors, including numbering, are based on those in the “Interagency Fair Lending Examination Procedures” and have been updated to reflect legal, regulatory, and market developments.

<sup>48</sup> Refer to the “Compliance Management Systems” booklet of the *Comptroller’s Handbook*.

<sup>49</sup> Ibid.

<sup>50</sup> Refer to the “Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices” booklet of the *Comptroller’s Handbook*.

- negotiation of contracts that clearly define expectations and responsibilities.
- ongoing monitoring.
- plans for termination of the relationship.
- throughout the relationship, provides for
  - oversight and accountability.
  - documentation and reporting.
  - independent reviews.
- In assessing a bank’s compliance management process, use the checklist in appendix C of this booklet to assist in the review. The checklist may also be used to structure interviews with compliance personnel, plan the overall level of review required during a fair lending examination, and determine whether the sample size in a file review may be reduced because of the quality of the bank’s compliance management.

## Overt Discrimination Risk Factors

- O1: Including explicit PB identifiers in the bank’s written or oral policies and procedures (for example, underwriting criteria and pricing standards).
- O2: Collecting information, conducting inquiries, or imposing conditions contrary to express requirements of ECOA and the FH Act.
- O3: Including variables in a credit scoring system that constitute a basis or factor prohibited by Regulation B or, for residential loan scoring systems, the FH Act. (If a credit scoring system scores age, refer to appendix D.)
- O4: Statements made by the bank’s officers, employees, or agents that constitute an express or implicit indication that one or more such persons have engaged or do engage in discrimination on a PB in any aspect of a credit transaction.
- O5: Employee or bank statements that evidence attitudes based on PB prejudices or stereotypes.

## Underwriting Discrimination Risk Factors

- U1: Substantial disparities among the approval and denial rates for applicants by PB characteristic (especially within income categories).
- U2: Substantial disparities among the application processing times for applicants by PB characteristic (especially within denial reason groups).
- U3: Substantially higher proportion of withdrawn or incomplete applications from PB group applicants than from other applicants.
- U4: Vague, unduly subjective, or inconsistent (e.g., across branches) underwriting criteria.
- U5: Lack of clear guidance on making exceptions to underwriting criteria, including credit scoring overrides.
- U6: Lack of clear loan file documentation of reasons for any exceptions to standard underwriting criteria, including credit scoring overrides.
- U7: Relatively high percentages of either exceptions to underwriting criteria or overrides of credit score cutoffs.

- U8: Loan officer or broker compensation based on loan volume or loan amount (especially loans approved per period of time).
- U9: Consumer complaints alleging discrimination in loan processing or approving or denying residential and nonresidential loans.

## Pricing (Interest Rates, Fees, or Points) Discrimination Risk Factors

- P1: Bank incentives for loan officers or brokers to charge higher prices (including interest rate, fees, and points). Special attention should be given to situations when financial incentives are accompanied by broad pricing discretion, such as through the use of overages or yield spread premiums.<sup>51</sup>
- P2: Presence of broad discretion or lack of standardized pricing (including interest rate, fees, and points), such as through overages, underages, or yield spread premiums. Such discretion may be present even when banks provide rate sheets and fee schedules if loan officers or brokers deviate from those rates and fees without clear and objective criteria.
- P3: Use of risk-based pricing that is not based on objective criteria or applied consistently.
- P4: Substantial disparities among prices being quoted or charged to applicants who differ as to their PB characteristics.
- P5: Consumer complaints alleging discrimination in residential and nonresidential loan pricing.
- P6: Disparities in mortgage pricing correlated with PB characteristics as reported in HMDA data (Regulation C, 12 CFR 1003).
- P7: A loan program that contains only borrowers from a PB group or has significant differences in the percentages of PB groups, especially in the absence of an SPCP under ECOA.

Be alert for indications of risk related to other terms or conditions (such as cosigners, collateral, or length of term). For example, broad discretion and vague standards for collateral are viewed as risk factors. Adapt transaction comparison techniques to examine such situations.

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<sup>51</sup> For most closed-end consumer credit transactions secured by a dwelling, loan originators generally may not receive (and no person may pay directly or indirectly) compensation based on a term of the transaction, the terms of multiple transactions, or the terms of multiple transactions by multiple individual loan originations. Refer to 12 CFR 1026.36(d). For these types of products, Regulation Z also provides protections against steering consumers to products that result in greater compensation to the loan originator regardless of the PB group characteristics of the consumer. 12 CFR 1026.36(e). Refer to the “Truth in Lending Act” booklet of the *Comptroller’s Handbook*.



In addition, the following are abusive (or predatory) lending practices that may also implicate violations of fair lending laws and that the OCC treats as risk factors:<sup>52</sup>

- Collateral or equity stripping: Loans relying on the liquidation value of the borrower's home or other collateral, rather than the borrower's independent ability to repay, with the possible or even intended result of foreclosure or the need to refinance under duress.<sup>53</sup>
- Interest rates or fees that far exceed the true risk and cost of making the loan.
- Inadequate disclosure of the true costs and risks of loan transactions.
- Lending practices that are fraudulent, coercive, unfair, deceptive, or otherwise illegal.
- Loan terms and structures, such as negative amortization, designed to make it more difficult or impossible for borrowers to reduce their indebtedness.
- Padding or packing: Charging customers unearned, concealed, or unwarranted fees.
- Balloon payment loans that may conceal the true burden of the loan financing and may force borrowers into costly refinancing or foreclosure situations.
- Flipping: Frequent and multiple refinancings, usually of mortgage loans, requiring additional fees, which strip equity from the borrower.
- Collection of up-front, single-premium credit insurance: For example, life, disability, or unemployment insurance, when the consumer does not receive a net tangible financial benefit.

## Discriminatory Steering Risk Factors

- S1: Lack of clear, objective, and consistently applied standards for (1) referring applicants to subsidiaries, affiliates, or lending channels within the bank; (2) classifying applicants as prime, nonprime, or subprime borrowers (or any analogous credit risk categories used by the bank); or (3) deciding what kinds of alternative loan products should be offered or recommended to applicants (product placement).
- S2: Financial incentives for loan officers or brokers to place applicants in products with alternative or nontraditional features (i.e., negative amortization, interest only, or payment option adjustable-rate mortgages) or higher cost products.
- S3: For a bank that offers different products based on credit risk levels, any significant differences in percentages of PB groups in each of the alternative loan product categories.
- S4: Significant differences in the percentage of PB group applicants in loan products or products with specific features relative to control group applicants. Special attention is given to products and features that have potentially negative consequences for applicants

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<sup>52</sup> Loans with these features may also implicate the provisions of other laws and regulations. Refer to 15 USC 45 (Federal Trade Commission Act); 12 USC 5536(a)(1)(B) (Consumer Financial Protection Act); 12 CFR 1026 (Regulation Z, implementing the Truth in Lending Act); 12 CFR 30, appendix C (OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices); 12 CFR 7.4008(b), (c), 34.3(b), (c) (national banks only); 12 CFR 160 (lending authorities of federal savings associations). Also refer to OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices," and OCC Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices."

<sup>53</sup> In general, Regulation Z prohibits a creditor from making most types of mortgage loans secured by a dwelling unless the creditor makes a good faith determination that the consumer will have a reasonable ability to repay the loan according to its terms (12 CFR 1026.43(c)(1)).

(i.e., nontraditional mortgages, prepayment penalties, lack of escrow requirements, or credit life insurance).

- S5: For a bank that has one or more subprime mortgage subsidiaries or affiliates, any significant differences for similar types of loan products in the percentage of PB group applicants of the bank compared with the percentage of PB group applicants of the subsidiary(ies) or affiliate(s).
- S6: For a bank that has one or more lending channels that originate the same loan product, any significant differences in the percentage of PB group applicants in one of the lending channels compared with the percentage of PB group applicants in the other lending channel.
- S7: For a bank that has one or more lending channels that originate the same loan product or similar types of loan products with different costs across the channels, the absence of policies, procedures, and practices to determine that the lower-cost channel does not refer customers initially applying to that channel to the higher-cost channel when the customer meets the criteria for the product from the lower-cost channel.
- S8: Consumer complaints alleging discrimination in residential and nonresidential loan pricing or product placement.
- S9: For a bank with subprime mortgage subsidiaries, a concentration of those subsidiaries' branches in identifiable racial or national origin geographic areas relative to the bank's other branches or offices.

In addition, the following characteristics may implicate the fair lending laws, and the OCC treats them as risk factors:

- One-way referrals: For example, a prime lender refers subprime applicants to its subprime subsidiary, but the subprime subsidiary does not refer prime applicants to the prime lender; or
- Significant differences in the proportion of loans made predominantly in identifiable racial or national origin geographic areas between a prime lender and its subprime subsidiary.

## Discriminatory Home Equity Line of Credit Modification Risk Factors

- H1: Significant value decline methodology not clearly supported, objectively determined, or consistently applied.
- H2: Process to establish that borrower's financial condition significantly deteriorated beyond ability to repay not reasonable, objectively supportable, or clearly documented.
- H3: Soft or deteriorating market determinations not based on reasonable economic criteria, supportable standards, consistently applied, or clearly documented.
- H4: The absence of consistent monitoring for market value declines or other changes in financial conditions with potential disparate impact or redlining implications.

- H5: Regulation Z, Regulation B, and Fair Credit Reporting Act change in terms or adverse action disclosure process, as applicable, is not timely or does not exist.<sup>54</sup>
- H6: Under Regulation B, limitations regarding change in marital status, age, or retirement or additional creditworthiness information not considered.<sup>55</sup>
- H7: Market area determinations based on zip codes or census tracts rather than metropolitan statistical areas or larger geographical subdivisions.
- H8: Borrower appeal process on how to initiate an appeal not readily available, consistently provided, or clearly explained.

## Discriminatory Redlining Risk Factors

- R1: Significant differences from lending peers in the proportion of applications received, withdrawn, approved but not accepted, and closed for incompleteness, or loans originated in those areas in the bank's market that have relatively high concentrations of minority group residents compared with areas with relatively low concentrations of such minority group residents.
- R2: Significant differences between approval and denial rates for all applicants in areas with relatively high concentrations of minority group residents compared with areas with relatively low concentrations of such minority group residents.
- R3: Significant differences between denial rates based on insufficient collateral for applicants from areas with relatively high concentrations of minority group residents and those areas with relatively low concentrations of such minority group residents.
- R4: Significant differences in the proportion of originations of higher-priced loans or loans with potentially negative consequences for borrowers (e.g., nontraditional mortgages, prepayment penalties, and lack of escrow requirements) in areas with relatively high concentrations of minority group residents compared with areas with relatively low concentrations of such minority group residents.
- R5: The Bank's CRA assessment area(s) appears to have been drawn to exclude areas with relatively high concentrations of one or more particularly minority group residents.
- R6: Explicit demarcation of credit product markets that excludes whole or partial metropolitan statistical areas, metropolitan divisions, political subdivisions, census tracts, or other geographic areas within the bank's lending market or CRA assessment areas that have relatively high concentrations of minority group residents.
- R7: Difference in services available or hours of operation at branch offices in areas with concentrations of minority group residents when compared with branch offices in areas with low concentrations of such minority group residents.
- R8: Policies or practices on receipt and processing of applications, pricing, conditions, or appraisals and valuation or on any other aspect of providing residential and nonresidential credit that vary between areas with relatively high concentrations of minority group residents and those areas with relatively low concentrations of such minority group

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<sup>54</sup> Failure to comply with the disclosure requirements of Regulation Z, Regulation B, and the Fair Credit Reporting Act could give rise to separate violation findings.

<sup>55</sup> Ibid.

residents. If there are indications of potential discrimination in appraisal practices, then contact the supervisory office.<sup>56</sup>

- R9: Employee statements that reflect an aversion to doing business in areas with relatively high concentrations of minority group residents.
- R10: Complaints or other allegations by consumers or community representatives that the bank excludes or restricts access to credit for areas with relatively high concentrations of minority group residents.
- R11: A bank that has most of its branches in predominantly low-minority neighborhoods at the same time that the bank's subprime mortgage subsidiary has branches that are primarily in predominantly minority neighborhoods.

Additionally, the OCC treats the following situation as a risk factor:

- R12: Differences in the number of branches, loan production offices, or brokers that correlate with the predominant racial or ethnic group characteristics of the geographies in question.

## Discriminatory Marketing Risk Factors

Examiners should be cognizant that discriminatory marketing is often present when discriminatory redlining is occurring.

- M1: Advertising patterns or practices that a reasonable person would believe indicate PB customers are less desirable.
- M2: Advertising only in media serving particular minority or only low-minority areas of the market.
- M3: Marketing through brokers or other agents that the bank knows (or has reason to believe) would focus on serving only one or more particular racial or national origin group(s) to the exclusion or disfavoring of others in the market.
- M4: Use of marketing programs or procedures for residential and nonresidential loan products that exclude one or more regions or geographies within the bank's assessment or marketing area that have significantly higher percentages of residents of a particular minority group than the remainder of the assessment or marketing area.
- M5: Using mailing or other distribution lists or other marketing techniques for prescreened or other offerings of residential and nonresidential loan products that exclude or target:
  - Groups of prospective applicants on a PB; or
  - Geographies (e.g., census tracts and zip codes) within the bank's marketing area that have significantly higher percentages of residents of a minority group than the remainder of the marketing area.

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<sup>56</sup> Refer to 12 CFR 128.9(a), "Guidelines Relating to Nondiscrimination in Lending," applicable to federal savings associations. Refer also to 12 CFR 128.2 ("No savings association may discourage, or refuse to allow, receive, or consider, any application, request, or inquiry regarding a loan or other service, or discriminate in imposing conditions on, or in processing, any such application, request, or inquiry on the basis of the age or location of the dwelling. ...").

- M6: Proportion of PB group applicants for the bank's loan products is significantly lower than that group's representation in the total population of the market area.
- M7: Consumer complaints alleging discrimination in advertising or marketing loans.
- M8: Targeting aggressive marketing tactics for high-cost or abusive loan products to persons, such as the elderly, women, minorities, and persons living in low- or moderate-income areas, who are perceived to be less financially sophisticated or otherwise vulnerable.

## Discriminatory Loan Servicing and Loss Mitigation Risk Factors

The mortgage servicing rules that became effective in January 2014 have substantially or partially addressed many of these risk factors for mortgage loans covered by the rules. Refer to 12 CFR 1024, subpart C.

- L1: Substantial disparities among loss mitigation servicing options by PB group characteristic.
- L2: Substantial disparities in decision processing times by PB group characteristic.
- L3: Substantial disparities in the completion of foreclosure actions once legal process is initiated by PB group characteristic.
- L4: Lack of clear loan file documentation for servicing or loss mitigation decisions, granting policy exceptions, or reasons for fee waivers.
- L5: Weak or nonexistent process, controls, and auditing to determine ongoing fair lending compliance, including that of third-party relationships.
- L6: Lack of clear guidance on determining appropriate loss mitigation options, making policy exceptions, or granting fee waivers.
- L7: Internal audits, compliance reviews, or monitoring reports identifying significant weaknesses or violations in handling exceptions, fee waivers, incorrect credit agency reporting, or complying with bank policies and procedures.
- L8: Consumer complaints alleging discrimination in servicing or loss mitigation practices.
- L9: High volume of policy exceptions or fee waivers by PB group characteristic.
- L10: Significant level of litigation alleging discrimination in loan servicing or loss mitigation practices.
- L11: Broad employee discretion in determining loan servicing and loss mitigation actions.
- L12: Employees collecting information, conducting inquiries, or imposing conditions inconsistent with ECOA or FH Act requirements.
- L13: Collection practices not based on delinquency status or not consistently applied (lack of oversight, monitoring, collection, or other loan servicing or loss mitigation determinations and actions).
- L14: Employee compensation based on workout, loss mitigation, or foreclosure strategy.
- L15: Lack of clear consumer disclosures on loss mitigation options available, the costs of each option, and the risks involved.
- L16: Lack of clear procedures for determining a borrower's ability to repay when selecting loss mitigation options.

- L17: Vague or subjective criteria for property inspections, broker price offers, appraisals, or other valuations. Note the specific questions regarding appraisal practices in appendix L. If there are indications of potential discrimination in appraisals, then the supervisory office should be contacted.

In addition, the following practices may implicate violations of fair lending laws and the OCC treats them as additional risk factors.

- Loss mitigation policies or procedures that vary on a PB group characteristic or contain factors that could treat applicants differently on a PB.
- Lack of policies and procedures to determine compliance with the provisions of Regulation X and Regulation Z pertaining to servicing.

## Discriminatory OREO Practices Risk Factors

- OR1: Variations in OREO policies, procedures, or management correlated with PB group characteristics of geographies where properties are located.
- OR2: Lack of adequate training in fair housing principles for staff or third parties assigned to OREO functions.
- OR3: Complaints from individuals, community organizations, regulators, or law enforcement agencies regarding disparities in the marketing, maintenance, or disposition of OREO correlated with PB group characteristics of geographies where the property is located.
- OR4: Failure to adequately and appropriately address complaints or other information indicating unequal marketing, maintenance, or disposition of OREO correlated with PB group characteristics of geographies where the property is located.

## Appendix C: Compliance Management Checklist

Examiners may use this checklist to assist in assessing the quality of the bank's fair lending risk management, in structuring interviews with compliance personnel, in planning the overall level of review required during a fair lending examination, and in determining whether the sample size in a file review may be reduced because of the quality of the bank's compliance risk management.

### Preventive Measures

Determine whether policies and procedures exist that tend to prevent unlawful discrimination in the transactions to be examined. In general, there is no legal or OCC requirement for banks to conduct the specific activities listed herein, and the absence of any of these policies and practices is not, by itself, a violation of the fair lending laws.

If the transactions within the proposed scope are covered by a listed preventive measure, check the box in the left column. Examiners may reduce the sample size of the planned comparative file review to the degree that the preventive measures cover transactions within the proposed scope, assuming no exacerbating risk factors are present. Document findings in sufficient detail to justify any resulting reduction of the file review sample.

Examiners are not required to learn whether preventive measures apply to specific products outside the proposed scope. If the information obtained shows that the preventive measure is a general practice of the bank, check the box in the left column to assist future examination planning.

#### 1. Lending practices and standards

##### a. Lending policy issues:

Yes No

- |                          |                          |   |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Are the bank's underwriting standards clear, objective, and generally consistent with industry standards?                                       |
| <input type="checkbox"/> | <input type="checkbox"/> | Are the bank's pricing policies clear, objective, and generally consistent with industry standards?   |
| <input type="checkbox"/> | <input type="checkbox"/> | Is the bank's pricing policy within reasonably confined ranges with guidance linking variations to risk or cost factors?                        |
| <input type="checkbox"/> | <input type="checkbox"/> | Are the bank's pricing terms communicated to loan officers and lending staff in a consistent fashion, such as through rate sheets?              |
| <input type="checkbox"/> | <input type="checkbox"/> | Does bank management monitor the level, nature, and frequency of exceptions to board-approved standards?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Are the bank's denial reasons accurately and promptly communicated to unsuccessful applicants?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Does the bank have clear and objective standards for (i) referring applicants to subsidiaries, affiliates, or other lending channels within the |

bank, (ii) classifying applicants as prime or subprime borrowers (or any similar categories used by the bank), or (iii) deciding what kinds of alternative loan products should be offered or recommended to applicants?

- Are the bank’s loan officers or brokers and correspondents required to document any deviation from the rate sheet?
- Does bank management monitor, communicate to the board, and appropriately address consumer complaints alleging discrimination or unfairness in loan pricing or underwriting?

**Note:** The items in step 1 are not compliance measures, but they are fundamental features of lending that tend to work against disparate treatment.

b. Does training, application-processing aids, and other guidance correctly and adequately describe:

Yes No

- PB under ECOA and the FH Act?
- Other Regulation B substantive credit access requirements (e.g., spousal signatures, improper inquiries, and protected income)?

c. Is it specifically communicated to employees that they must not, on a PB:

Yes No

- Refuse to deal with individuals inquiring about credit?
- Discourage inquiries or applicants by delays, discourtesy, or other means?
- Provide different, incomplete, or misleading information about the availability of loans, application requirements, and processing and approval standards or procedures (including selectively informing applicants about certain loan products while failing to inform them of alternatives)?
- Encourage or more vigorously assist only certain inquirers or applicants?
- Refer some or all credit seekers to other lenders, more costly loan products, or loan products with potentially onerous features?
- Refer some or all credit seekers to nontraditional products (e.g., negative amortization, interest only, or payment option adjustable-rate mortgages) when they could have qualified for traditional mortgages?
- Waive or grant exceptions to application procedures or credit standards?
- State a willingness to negotiate?
- Use different procedures or standards to evaluate applications?
- Use different procedures to obtain and evaluate appraisals or other valuations?
- Provide applicants with differing levels of assistance, opportunities to correct or explain adverse or inadequate information, or opportunities to provide more information?



- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Accept alternative proofs of creditworthiness?           |
| <input type="checkbox"/> | <input type="checkbox"/> | Require cosigners?                                       |
| <input type="checkbox"/> | <input type="checkbox"/> | Offer or authorize loan modifications?                   |
| <input type="checkbox"/> | <input type="checkbox"/> | Suggest or permit loan assumptions?                      |
| <input type="checkbox"/> | <input type="checkbox"/> | Impose late charges and reinstatement fees, for example? |
| <input type="checkbox"/> | <input type="checkbox"/> | Initiate collection or foreclosure?                      |

d. Has the bank taken specific initiatives to prevent the following practices:

Yes No

- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Basing credit decisions on assumptions derived from racial, gender, and other stereotypes, rather than facts?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Seeking or favoring consumers from a particular minority, ethnic, or religious group, or of a particular gender, to the exclusion of other types of consumers, on the basis of how comfortable the employees may feel in dealing with those different from them? |
| <input type="checkbox"/> | <input type="checkbox"/> | Limiting the exchange of credit-related information or the bank's efforts to qualify an applicant on a PB?   |
| <input type="checkbox"/> | <input type="checkbox"/> | Drawing the bank's CRA assessment or other marketing area to exclude particular minority or national origin group areas?   |
| <input type="checkbox"/> | <input type="checkbox"/> | Targeting certain applicants or borrowers or areas with less advantageous products?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Establishing or maintaining its network of branches or loan production offices in a manner that correlate poorly with the racial or ethnic group characteristics of the geography in question?   |

e. Does the bank have procedures to determine that it does not:

Yes No

- |                          |                          |   |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | State or imply racial or ethnic limitations in advertisements?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Employ code words or use photos in advertisements that convey racial or ethnic limitations or preferences?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Place advertisements that could be interpreted as indicating specific PB group consumers are less desirable?  |
| <input type="checkbox"/> | <input type="checkbox"/> | Advertise predominantly (or differently) in media serving areas of the market that are composed of a particular minority or ethnic group?                     |
| <input type="checkbox"/> | <input type="checkbox"/> | Conduct other forms of marketing differently in areas of racial or national origin group characteristics of the market?                                       |
| <input type="checkbox"/> | <input type="checkbox"/> | Market through brokers, real estate agents, and other sources of loan applications known to serve only or primarily one racial or ethnic group in the market? |
| <input type="checkbox"/> | <input type="checkbox"/> | Use a PB or proxy in any prescreened solicitation for credit?   |
| <input type="checkbox"/> | <input type="checkbox"/> | Provide financial incentives for loan officers to place applicants in nontraditional products or higher-cost or predatory products?                           |

## 2. Compliance audit function: Does the bank attempt to detect prohibited disparate treatment by self-test or self-evaluation?

**Note:** A self-test is any program, practice, or study that is designed and specifically used to assess the bank's compliance with ECOA and the FH Act. It creates data or factual information that is not otherwise available and cannot be derived from loan, application, or other records related to credit transactions.<sup>57</sup> The report, results, and many other records associated with a self-test are privileged unless a bank voluntarily discloses the report or results or otherwise forfeits the privilege.<sup>58</sup>

A self-evaluation, while generally having the same purpose as a self-test, does not create any new data or factual information, but uses data readily available in loan or application files and other records used in credit transactions and, therefore, does not meet the self-test definition.

The following items are intended to obtain information about the bank's approach to self-testing and self-evaluation. While examiners may request the results of self-evaluations, examiners should not request the results of self-tests or any of the information listed in 12 CFR 1002.15(b)(2) and 24 CFR 100.142(a) and should request assistance from the Chief Counsel's Office before proceeding. Complete the following checklist for each self-evaluation and each self-test that the bank voluntarily discloses. Evaluating the results of self-evaluations and voluntarily disclosed self-tests is described in appendix K.

**Mark the appropriate box if the answer is yes or no for the transactions within the scope.**

- a. If the bank has independent audits or reviews in place that require reviewing transactions

Yes No

- Do the audits or reviews report objective results?  
  Do the audits or reviews demonstrate an adequate level of expertise?  
  Do the audits or reviews produce written conclusions?

- b. Does the bank's approach for self-evaluations and self-tests call for

Yes No

- Attempting to explain major patterns shown in the HMDA data?  
  Determining whether actual practices and standards differ from stated ones and basing the evaluation on the actual practices?

<sup>57</sup> Refer to 12 CFR 1002.15(b)(1) and 24 CFR 100.141.

<sup>58</sup> Refer to 12 CFR 1002.15(b)(2) and 24 CFR 100.142.

- Evaluating whether the reasons cited for denial are supported by facts relied on by the decision maker at the time of the decision?
- Comparing the treatment of PB group applicants with control group applicants?
- Obtaining explanations from decision makers for any unfavorable treatment of the PB group that departed from policy or customary practice?

Covering significant decision points in the loan process when disparate treatment might occur, including:

- the approve or deny decision?
- pricing?
- other terms and conditions?
- Covering at least as many transactions as examiners would independently by using the “Fair Lending Sample Size Tables” in appendix F for a product with the application volumes of the product to be evaluated?
- Maintaining information concerning personal characteristics collected as part of a self-test separately from application or loan files?
- Analyzing the data on a timely basis?
- Taking appropriate and timely corrective action?

c. In the bank’s plan for comparing the treatment of PB group applicants with that of control group applicants

Yes No

- Are control and PB groups the same as those listed in ECOA or the FH Act and defined clearly to isolate that PB for analysis?
- Are appropriate data obtained to document treatment of applicants and the relative qualifications vis-à-vis the requirement in question?
- Do the data obtained reflect the information decisions were based on, not later or irrelevant information?
- Does the denied applicants’ qualifications related to the stated reason for denial compare with the corresponding qualifications for approved applicants?
- Are comparisons designed to identify instances when PB group applicants were treated less favorably than control group applicants who were no better qualified?
- Is the evaluation designed to determine whether control and PB group applicants were treated differently in the application processes, such as whether the bank treated applicants differently in terms of the amount of help given to applicants to overcome obstacles or enhance their qualifications?
- Are responses and explanations sought for any apparent instances of unlawful discrimination?

- Are reasons cited by credit decision makers to justify or explain instances of apparent discrimination to be verified?
- d. For self-tests under ECOA that involved collecting applicant personal characteristics, did the bank develop a written plan that describes or identifies the

Yes No

- Specific purpose of the self-test?  
  Methodology to be used?  
  Geographic area(s) to be covered?  
  Type(s) of credit transactions to be reviewed?  
  Entity that will conduct the test and analyze the data?  
  Timing of the test, including start and end dates or the duration of the self-test?  
  Other related self-test data that are not privileged?
- e. Did the bank disclose at the time that applicant characteristic information is requested that

Yes No

- The applicant will not be required to provide the information?  
  The creditor is requesting the information to monitor its compliance with ECOA?  
  Federal law prohibits the creditor from discriminating on the basis of this information or on the basis of an applicant's decision not to furnish the information?  
  If applicable, certain information will be collected based on visual observation or surname if not provided by the applicant?

### 3. Systems for Corrective Measures

- a. Determine whether the bank's policies and procedures provide systems for taking appropriate corrective action and providing adequate relief to victims for any violations.
- Who is to receive the results of a self-evaluation or self-test?
  - What decision process is supposed to follow delivery of the information?
  - Is feedback to be given to staff whose actions are reviewed?
  - What types of corrective action may occur?
  - Are consumers to be:

Yes No

- Offered credit if they were improperly denied?  
  Compensated for any damages, both out of pocket and compensatory?

Notified of their legal rights?

b. Other corrective action:

Are bank policies or procedures that may have contributed to the discrimination to be corrected?

Are employees involved to be trained and disciplined?

Is the need for community outreach programs, changes in marketing strategy, or changes in loan products to better serve areas of a minority or national origin group in the bank's market to be considered?

Are audit and oversight systems to be improved to determine there is not a recurrence of any identified discrimination?

## Appendix D: Considering Credit Scoring Systems and Overrides of Underwriting and Pricing Policies

These procedures are designed to help examiners draw and support fair lending conclusions for banks that use credit scoring risk factors and apply human judgment to override underwriting and pricing policies for credit scoring risk factors and other systematically applied criteria.<sup>59</sup>

### Background

Regulation B defines a credit scoring system as “a system that evaluates an applicant’s creditworthiness mechanically based on key attributes of the applicant and aspects of the transaction, and that determines, alone or in conjunction with an evaluation of additional information about the applicant, whether the applicant is deemed creditworthy.” The OCC also uses the terms “scoring models” and “scorecard” to describe a credit scoring system.

The fair lending risk inherent to a credit scoring system depends in part on its complexity and the data it uses. For example, a credit scoring system that uses a small number of attributes, simple decision rules, or data with a concrete nexus to creditworthiness may be lower risk than one that uses a larger number of attributes, modeling methods involving equations, algorithms, or complex decision rules, and data that are novel, proxied, or do not have a concrete nexus to creditworthiness. Highly complex scoring systems, such as those based on machine learning or data not widely used for credit decisions, generally have the highest inherent fair lending risk. For the comparative analyses described here, examiners should learn how the scoring, underwriting, and pricing policies and requirements for unscored factors, and human judgment—including overriding policy—influence the credit decision and interact in the bank’s underwriting and pricing process.

In the planning phase of an examination, include economists from CRAD as consultants on the examination when appropriate. CRAD can review a credit scoring model for potential disparate treatment or disparate impact and can evaluate the bank’s controls against these risks. In addition, CRAD can review scorecard development, monitoring, and validation materials to judge whether the scoring system meets the requirements in Regulation B that apply when age is scored (i.e., the requirements for empirically derived, demonstrably statistically sound systems).

**Objective:** Gain an understanding of the structure and organization of the scoring system the bank uses.

1. For each credit scoring system customized by or for the bank for any product, or for any credit scoring system used in connection with a product held in the portfolio, identify and obtain

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<sup>59</sup> This appendix is based on the appendix titled “Considering Automated Underwriting and Credit Scoring” in the “Interagency Fair Lending Examination Procedures,” adapted to reflect guidance unique to the OCC.

- the number and interrelationship of models or scorecards applied to a particular product.
  - the purposes for which each scorecard is employed (e.g., approval decision, set credit limits, set pricing, determine processing requirements).
  - the developer of each scorecard (e.g., in-house department, affiliate, independent vendor), the development process, and description of the development population used.
  - the type of methodology used to construct the scorecard (e.g., machine learning methods).
  - the types of monitoring reports, including data integrity checks generated (including front-end, back-end, account management and any disparate impact analyses), the frequency of generation, and recent copies of each.
  - all policies applicable to the use of credit scoring.
  - training materials and programs on credit scoring for employees, agents, and brokers involved in any aspect of retail lending.
  - any action taken to revalidate or recalibrate any model or scorecard used during the examination period and the reason(s).
  - the process, criteria, and authority for overrides, how override decisions are documented, what reports are available on override activity, and the number of all high-side and low-side overrides for each type of override occurring during the examination period and any guidance given to employees on their ability to override.
  - all cutoffs used for each scorecard throughout the examination period and the reasons for the cutoffs and any change made during the examination period.
  - all variables scored by each product's scorecard(s) and the values that each variable may take. (The variables themselves are not proprietary information, although how they are weighted may be. Consult with the Chief Counsel's Office if the bank or its vendor declines to provide requested information on this basis.)
  - the method used to select for disclosure those adverse action reasons arising from application of the model or scorecard.
  - steps an application goes through before and after scoring.
  - how, and by whom, applicant data are obtained and characterized before being entered for credit scoring, including whether any applicant data are proxied or estimated.
  - what types of assistance, if any, can be given to help applicants improve their qualification data.
  - any other way that intervention by the bank can affect the applicant's score or the outcome.
2. For each judgmental underwriting and pricing system that includes as a criterion a nationally recognized score from a credit bureau or secondary market credit score, identify
- the vendor or developer of each credit score and any vendor recommendation or guidance on how the bank should use the score.

- the bank’s basis for using the particular bureau or secondary market score, the cutoff standards for each product’s underwriting and pricing system, and the reasons for the cutoffs and any changes to the same during the examination period.
- the number of exceptions or overrides made to the credit score or other systematically applied underwriting or pricing criteria and the basis for those exceptions or overrides, including any guidance given to employees on their ability to depart from the standards for those criteria.
- types of monitoring reports generated on the judgmental system or its credit scoring component (including front-end, back-end, differential processing and disparate impact analyses), the frequency of generation and recent copies of each.

**Note:** During fair lending examinations of a particular bank, examiners typically need not inquire into the activities of the credit bureaus or the accuracy of scores the bureaus calculated from the applicants’ credit histories. If a policy states that a credit bureau score at a certain level should have certain consequences, determine whether control group and PB applicants at those levels received similar consequences.

**Objective:** Determine the accuracy of denial reasons based on credit scores used in adverse action notices.

1. Determine the methodology used to select the reasons that adverse action was taken on a credit application denied on the basis of the applicant’s credit score.
  - Consider comparing the methodology used with the examples cited in CFPB’s Commentary for 12 CFR 1002.9, “Notifications,” comment 9(b)(2)-5, and decide acceptability against that standard.
2. Identify any applicant requests for reconsideration of credit score denial reasons and review the action taken by management for consistency across applicant groups.
3. When a credit score is used to differentiate application processing, and an applicant is denied for failure to attain a judgmental underwriting standard that would not be applied if the applicant had received a better credit score (thereby being considered in a different—presumably less stringent—application processing group), determine that the adverse action notice also discloses the bases on which the applicant failed to attain the credit score required for consideration in the less stringent processing group.

**Objective:** Consider disparate treatment in the application of credit scoring programs

Scoring systems should be examined for both types of evidence of disparate treatment—overt and comparative. For any instances of apparent disparate treatment, the bank may respond in the same ways as discussed in appendix E. Evaluate the responses in the same manner.



## Overt Evidence of Disparate Treatment

The only permissible consideration of a PB in a credit scoring system is provided in Regulation B, which permits banks to consider age, if

- persons over 62 are not treated less favorably than those under 62.
  - the scoring system is certified to be empirically derived and demonstrably and statistically sound per 12 CFR 1002.6 (b)(2)(ii).
1. How to determine those two facts is explained in the last objective in this appendix. In addition, examiners should determine whether the system makes any other overt distinctions on a PB. For example, there would appear to be a violation if the scoring system assigns different credit limits depending on the marital status of the applicant(s) or uses a different cutoff score on a PB for applicants. The bank should know and provide the factors included in any scoring system it uses in credit decisions. In that way, the bank and the OCC can confirm that no prohibited factors are scored and that age, when scored, is treated in compliance with Regulation B.
  2. If there is overt evidence that applicants in a credit scoring system are treated less favorably on a PB (other than age), ask the bank to respond in writing, and evaluate the response in the same way as for any other overt evidence of disparate treatment.

## Comparative Evidence of Disparate Treatment

Comparative analysis may be appropriate to evaluate possible disparate treatment when pre-scoring and post-scoring underwriting and pricing activity has the potential to affect credit decisions or terms. Comparative analysis can be done with judgmental interpretation or inference from statistical modeling. Consult with CRAD.

When two applications differ in the attributes used by the credit scoring system, they are **not** similarly situated **if**

- the credit scoring system is the sole basis for pricing or granting credit,
- there is no variation in pre-scoring treatment, and
- the bank's use of the credit scoring system complies with fair lending laws and regulations.

There is no disparate treatment if the different results are commensurate with the difference in attributes and those applicants have otherwise been treated similarly.

1. Determine what controls and policies management has implemented to determine that the bank's credit scoring models or credit score criteria are not applied in a discriminatory manner, in particular

- review bank guidance for using the credit scoring system, handling overrides, and processing applicants and determine how well that guidance is understood by employees and monitored by management.
- review bank policies that permit overrides or that provide for different processing or underwriting and pricing requirements based on geographic identifiers or borrower score ranges to assure that these policies do not treat PB group applicants differently than other similarly situated applicants.

Other override policies and practices that indicate the existence of broad discretion that might be applied discriminatorily are

- excessive overrides.
  - judgmental elements or subjective reviews that could reverse the result called for by the score.
  - multiple judgmental criteria for overrides without explicit weighting or guidance as to which of these is most important.
  - numerous rules that could lead underwriters to reverse the result called for by the score.
  - overlays of the scorecard and underwriting policies (for example, income and debt were scored variables but there is also a maximum debt-to-income requirement).
  - frequent use of categories such as “other” or “miscellaneous” as the reason for override.
2. As called for in steps 3 and 4, focus on judgmental decisions to approve or deny applications, such as overrides of the result indicated by the score. High-side overrides are denials for which the applicant met the credit score and all other systemically applied criteria for underwriting, and low-side overrides are approvals for which the applicant did not meet the credit score or any other systematically applied underwriting criteria. For pricing, a high-side override is when a borrower received a higher price than that which the bank’s policy indicates the borrower would have received based on the borrower’s credit score and other systematically applied pricing criteria, while a low-side override is when a borrower received a lower price than that which the bank’s policy indicates the borrower should have received based on the borrower’s credit score and other systematically applied pricing criteria. Before initiating steps 2 and 3, consult the appropriate Compliance SME, CRAD, and Policy about developing a preliminary statistical analysis to show whether overrides were used in similar proportions within the control and PB groups and applied consistently to control and PB group applications with similar characteristics.

If the overall pattern of overrides raises concerns, the OCC determines whether to use statistical modeling to evaluate disparities. Consult with CRAD. If a statistical model is used, the steps involving manual comparative file review are not used.

The role and complexity of human judgment in the underwriting process influences whether statistical modeling is appropriate. A manual comparative file review probably is sufficient if the underwriters’ use of the score and other data is governed by

straightforward guidelines, decisions are well documented, and there is not a particularly large volume of transactions. Examiners may be directed to review files to determine whether legitimate, nondiscriminatory reasons exist for any differences identified through the preliminary statistical analysis.

3. Determine whether any of the bases for granting a low-side override to control group applicants are applicable to any PB group applicants whose credit score or other attributes were as good or better than the worst score or other attributes among the low-side overrides. If such cases are identified, determine whether such different treatment is a fair lending violation, including documenting any explanation by management.
4. Determine whether any of the bases for high-side overrides for any PB group applicants are applicable to any control group applicants whose credit score or other attributes were as good or worse than the best score or other factors among the PB high-side overrides. If such cases are identified, determine whether such different treatment is a fair lending violation, including documenting any explanation by management.
5. If credit scores are used to segment applicants into groups that receive different processing or are required to meet additional underwriting requirements (e.g., tiered risk underwriting), perform a comparative file review or analyze the results and adequacy of management's comparative file review that evaluates whether all applicants within each group are treated equally.
6. Conduct pre-scoring comparative analysis. The analysis focuses on whether disparate treatment occurred in collecting, classifying, or documenting data before being entered for credit scoring, and whether assistance was given selectively to improve qualifications. This typically is conducted by a manual file review and judgmental comparison. The scoring system's database may help to identify marginal applicants for such a comparison.
  - Select 50 denied applicants from the PB group who have scores marginally below the cutoff.
  - Select 50 approved applicants from the control group who have scores marginally above the cutoff.
  - Compare the two groups to determine whether qualifications were characterized and assistance was provided consistently.

If the volume of applications is large, consult with CRAD about assistance in selecting the sample.

**Objective:** Evaluate disparate impact and credit scoring algorithms.

The risk of disparate impact may be elevated when a bank uses complex methods (e.g., machine learning) or novel data (e.g., alternative credit data). In these cases, evaluating the conditions below may require sophisticated mathematical or statistical methods. In these or other circumstances when a straightforward consideration of these conditions is not possible,

consult with CRAD to assess potential disparate impact issues relating to the credit scoring algorithms.

**Objective:** Evaluate credit scoring systems that include an applicant’s age

Regulation B expressly requires initial validation and periodic revalidation of a credit scoring system that considers an applicant’s age. There are two ways a credit scoring system can consider age: (1) the system can be split into different scorecards depending on the age of the applicant; and (2) age may be directly scored as a variable. Both features may be present in some systems. Regulation B requires credit scoring systems that use age to be empirically derived and demonstrably and statistically sound. This means that such systems must fulfill the requirements of 12 CFR 1002.2(p)(1)(i) – (iv).

**Age-split scorecards:** If a system is split into two cards only and one card covers a wide age range that encompasses elderly applicants (applicants aged 62 or older), the system is treated as considering, but not scoring, age. Typically, the younger scorecard in an age-split system is used for applicants under a specific age between 25 and 30. The scorecard de-emphasizes factors such as the number of trade lines and the length of employment and increases the negative weight of any derogatory information on the credit report. Systems such as these do not raise the issue of assigning a negative factor or value to the age of an elderly applicant. If age is scored as a variable directly (whether or not the system is age-split), or if elderly applicants are included in a card with a narrow age range in an age-split system, the system is treated as scoring age.

**Scorecards that score age:** If a scorecard scores age directly, in addition to meeting the empirically derived and demonstrably and statistically sound requirement, the bank must determine that the age of an elderly applicant is not assigned a negative factor or value. (Refer to the staff commentary at 12 CFR 1002.2(p) and 1002.6(b)(2)). A negative factor or value means using a factor, value, or weight that is less favorable than the bank’s experience warrants or is less favorable than the factor, value, or weight assigned to the most favored age group below the age of 62 (12 CFR 1002.2(v)). In addition, a credit scoring system that disfavors younger consumers but is not empirically derived and demonstrably and statistically sound is inconsistent with Regulation B.

1. Obtain documentation from the developer of the scoring system and refer to the OCC’s most recent guidance to determine empirical derivation and statistical soundness. The OCC has provided guidance to banks on evaluating the soundness of credit scoring systems in OCC Bulletin 2011-12, “Sound Practices for Model Risk Management: Supervisory Guidance on Model Risk Management.” Also refer to the “Model Risk Management” booklet of the *Comptroller’s Handbook*.
2. Determine whether the bank has reviewed the performance of its credit scoring system periodically and whether the product scored has operated in a changing economic and customer environment. If so, it is even more important that the bank has performed a review. If the bank scores age but has not conducted a review despite changes that call

the predictive value of the system into question, consult with the appropriate Compliance SME and CRAD.

If the scoring system does not use age as a factor and does not split scorecards by age, the bank is not required to review the performance of the system or to revalidate it for fair lending compliance. Examiners should remind the bank that it is prudent to review and revalidate the system so that it operates at optimal predictability, but that is not a fair lending issue.

The OCC may evaluate the variables used in a validated credit scoring system to determine whether they act as a proxy for age, or any other PB, or if they have a disparate impact on a PB. A variable may be justified by business necessity, provided that the bank can show that it considered other variables achieving the same necessity and that there is no less discriminatory alternative.

## Appendix E: Evaluating Bank Responses to Evidence of Disparate Treatment

This appendix discusses a bank’s possible responses to comparative evidence of disparate treatment and overt evidence of disparate treatment.<sup>60</sup>

**Note:** This section does not apply when the evidence of disparities is based on statistical analysis, including modeling, of lending data.

### Bank Responses to Comparative Evidence of Disparate Treatment

The following are responses that a bank may offer—separately or in combination—in an attempt to explain that the appearance of illegal disparate treatment is misleading and that no violation has occurred.<sup>61</sup> The responses—if credible, documented, and related to creditworthiness—may rebut the appearance of disparate treatment, depending on the weight of the evidence. Evaluate the validity and credibility of the responses and consult with the appropriate Compliance SME, Chief Counsel’s Office, and Policy regarding how to weigh the evidence. Some of the types of responses include lists of responses of each type that examiners often encounter; the lists are examples only, and banks may offer explanations not on the lists.

1. The bank’s personnel were unaware of the PB identity of the applicant(s).
  - If the bank states that it was unaware of the PB identity (e.g., race) of an applicant or neighborhood, ask the bank to show that the application in question was processed in such a way that the bank’s staff, who made the decisions, could not have learned the PB identity of the applicant.
  - If the product is one for which the bank maintains PB monitoring information,<sup>62</sup> assume that all employees could have taken those facts into account. Assume the same when there was face-to-face or video contact between any employee and the applicant.
  - If other facts exist about the application from which an ordinary person would have recognized the applicant’s PB identity (for example, an easily recognizable surname such as a Hispanic one), assume that the bank’s staff drew the same conclusions. If an address is in a community with a generally known racial characteristic, ask the bank

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<sup>60</sup> Appendix E is based on the appendix titled “Evaluating Responses to Evidence of Disparate Treatment” in the “Interagency Fair Lending Examination Procedures,” adapted to reflect guidance unique to the OCC. This section does not address the situation when the comparative evidence is based on statistical analysis of lending data; in this situation, examiners should consult with CRAD and Chief Counsel’s Office.

<sup>61</sup> Evaluation of bank responses to instances of potential disparate impact are covered in appendix J.

<sup>62</sup> Examiners should determine that the bank limits its requests for government monitoring information to only those transactions as required by HMDA. Refer to the Federal Financial Institutions Examination Council’s “A Guide to HMDA Reporting: Getting It Right!” Also refer to 12 CFR 1002.5(a)(2); 12 CFR 1003, appendix B.

to provide persuasive evidence of what would prevent its staff from knowing the racial characteristic of any community in its service area.

2. The difference in treatment was justified by differences in the applicants (i.e., applicants not similarly situated).

- Ask the bank to account for the difference in treatment by pointing out a specific difference between the applicants' qualifications, some factor whether or not captured in the application (but still considered by the bank) that legitimately makes one applicant more or less attractive to the bank, or some nonprohibited factor related to the processing of their applications. The difference identified by the bank must be important enough to justify the difference in the treatment in question.
- The factors commonly cited to show that applicants are not similarly situated fall into two groups: those that can be evaluated by how consistently they are handled in other transactions, and those that cannot be evaluated.

a. Verifying not similarly situated explanations by consistency.

The appearance of disparate treatment remains if a factor provided by the bank to justify favorable treatment for a control group applicant also exists for an otherwise similar PB group applicant who was treated unfavorably. Similarly, the appearance of disparate treatment remains if a factor provided by the bank to justify unfavorable treatment for a PB group applicant also exists for a control group applicant who received favorable treatment. If this is not so, ask the bank to document that the factor provided in its explanation was used consistently for control group and PB group applicants.

Among the responses that should be evaluated this way are

- **customer relationship:** Ask the bank to document that a customer relationship was also considered consistently to the benefit of PB group applicants or that its absence worked consistently against control group customers.
- **loan not saleable or insurable:** If file review is still in progress, be alert for loans approved despite the claimed fatal problem. At a minimum, ask the bank to produce the text of the secondary market or insurer's specific requirement. Also ask the bank for examples of control group applicants denied for the same reason.
- **differences in standards or procedures between branches or underwriters:** Ask the bank to provide transactions documenting that, for two or more branches or underwriters at issue, each applied its standards or procedures consistently to PB and control group applications it processed, and that each served similar proportions of the PB group. If the branches serve communities with differing racial, ethnic, or other PB characteristics, examiners should consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy for further guidance.

- **differences in applying the same standard (differences in strictness) between underwriters and branches, for example:** Ask the bank to provide transactions documenting that the stricter employee or branch was strict for both PB and control group applicants and that the other was lenient for both, and that each served similar proportions of the PB group. The best evidence of this would be PB group applicants who received favorable treatment from the lenient branch and control group applicants who received less favorable treatment from the strict branch.
  - **standards or procedures changed during review period:** Ask the bank to provide transactions documenting that during each time period the standards were applied consistently to both PB and control group applicants.
  - **employee misunderstood standard or procedure:** Ask the bank to provide transactions documenting that the misunderstanding influenced both PB and control group applications. In all those situations, the bank’s best response would be to show that the treatment in question occurred for both groups in proportion to their representation among otherwise comparable applicants.
- b. Evaluating not similarly situated explanations by other means.

If consistency cannot be evaluated, examiners may consider an explanation favorably even without examples of its consistent use if all of the following are present:

- The factor is documented to consistently exist in (or be absent from) the transactions, whether or not as part of the bank’s policies, as claimed by the bank.
- A nondiscriminatory, prudent loan officer would consider the factor consistent with the bank’s policies and procedures.
- File review found no evidence that the factor is applied selectively on a PB (in other words, the bank’s explanation is “not inconsistent with available information”).<sup>63</sup>
- The bank’s description of the transaction generally is consistent and reasonable and is also consistent with available documentation.

Some factors that may be impossible to compare for consistency are

- **unusual underwriting standard:** Ask the bank to show that the standard is prudent. If it is prudent and is consistent with other information, accept this explanation provided that the bank could provide documentation demonstrating that it is used consistently among PB and control group applicants.
- **close calls:** The bank may claim that underwriters’ opposite decisions on similar applicants reflects legitimate discretion that examiners should not

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<sup>63</sup> Additional file review may be appropriate in some circumstances when the bank provides an explanation that goes beyond the original file review.



second-guess. That is not an acceptable explanation when applicants with the same or similar characteristics have different results, but it may be acceptable when the applicants have differing strengths and weaknesses that different underwriters might reasonably weigh differently. Do not accept this explanation if these strengths or weaknesses appear to be counted or ignored selectively on a PB.

- character loan: Expect the bank to identify specific facts or a specific history that make the applicant who is treated favorably a better risk than those treated less favorably.
- accommodation loan: There are legitimate reasons that may make a transaction appealing to a bank apart from the familiar qualifications demanded by the secondary market and insurers. For example, an applicant may be related to or referred by an important customer, be a celebrity who would bring prestige to the bank, or be an employee of an important business customer. Making a loan to an otherwise unqualified control group applicant with such attributes while denying a loan to an otherwise similar PB group applicant without those attributes may not be illegal discrimination. Be skeptical when the bank cites reasons for accommodations that an ordinary, prudent loan officer would not value.
- gut feeling: Be skeptical when a bank justifies an approval or denial by a general perception or reaction to the consumer. Such a perception or reaction may be linked to a racial or other stereotype that legally must not influence credit decisions. Ask whether any specific event or fact related to creditworthiness generated the reaction. If the loan officer can cite something specific tied to legitimate creditworthiness considerations that made them confident or uncomfortable about the consumer and that explanation is credible and consistent with available documentation, then determine whether this additional information demonstrates that the bank did not treat applicants differently on a PB.
- inadvertent error: If the bank states that an identified error such as a miscalculation or misunderstanding caused the favorable or unfavorable result in question, determine whether the facts support the assertion that such an event occurred. If the bank states that an “unidentified error” caused the favorable or unfavorable result in question, the bank is expected to provide evidence that discrimination is inconsistent with its demonstrated conduct and, therefore, that discrimination is the less logical interpretation of the result. Consider the context when evaluating isolated, ambiguous instances of apparent disparate treatment. Find no violation when circumstances contradict the interpretation that the bank intended to treat applicants from the PB group less favorably. For example, discrimination is doubtful as the cause of an isolated, ambiguous lending decision or inconsistency when the bank clearly is receptive toward applicants from the PB group (for example, as evidenced by frequent loans or aggressive advertising to the PB group) and has a record of training and other substantive efforts to comply with anti-discrimination laws.

3. The apparent disparate treatment on a PB is a misleading portion of a larger pattern of random inconsistencies.
  - Ask the bank to provide evidence that the unfavorable treatment is not limited to the PB group and that the favorable treatment is not limited to the control group. Without such examples, do not accept the bank's unsupported claim that otherwise inexplicable differences in treatment are distributed randomly.
  - If the bank can document that similarly situated PB group applicants received the favorable treatment in question about as frequently and in comparable degree as the control group applicants, conclude that there is no violation.

**Note:** Transactions are relevant to random inconsistency only if they are similarly situated to those apparently treated unequally.

- If the volume of applications is sufficient and credit application and decision data are available, CRAD's statistical analysis may be useful in analyzing whether apparent disparate treatment is the result of random inconsistencies. Consult with CRAD for help with statistical analysis.
  - If a bank succeeds in demonstrating that its treatment of applicants is random, inform the bank that its inconsistent practices create the risk of future disparate treatment and raise concerns about the adequacy of its controls.
4. The differences in loan terms and conditions are the result of different borrower risks or costs.
    - The same analyses described in the preceding sections about decisions to approve or deny loans also apply to pricing differences. Risks and costs are legitimate considerations in setting prices and other terms and conditions of loan products. Generalized reference by the bank to cost factors is insufficient to explain pricing differences.
    - If the bank states that specific borrowers received different terms or conditions because of cost or risk considerations, ask the bank to identify specific risk or cost differences between those borrowers and identify contemporaneous, supporting documentation of these differences.
    - If the bank states that specific borrowers received different terms or conditions because they were not similarly situated as negotiators, determine whether application records provide relevant evidence. If the records are not helpful, consider seeking authorization to contact borrowers to learn whether the bank behaved comparably toward PB and control group borrowers. Contact borrowers only after consulting the appropriate Compliance SME and Chief Counsel's Office. The contacts would be to learn such information as the bank's opening quote of terms to the borrower and the progress of the negotiations.

**Note:** Consult with the appropriate Compliance SME, CRAD, Policy, EIC, or the supervisory office, as appropriate, about the use of pre-application, matched-pair testing to document the bank's treatment of potential applicants.

- If the bank responds that an average price difference between the control and PB groups is based on cost or risk factors, ask the bank to identify specific risk or cost differences between individual control group applicants with the lowest rates and PB group applicants with the highest rates that are significant enough to justify the pricing differences between them. If the distinguishing factors cited by the bank are legitimate and verifiable, as described in this section, remove those applications from the average price calculation. If the average prices for the remaining control group and PB group members still differ, consult with CRAD about obtaining an analysis of whether the difference is statistically significant.

## Bank Responses to Overt Evidence of Disparate Treatment

### 1. Personal opinions versus lending considerations

- If an employee involved with credit availability states unfavorable views regarding a racial group or gender, for example, but does not explicitly relate those views to credit decisions, review that employee's credit decisions for possible disparate treatment or discouragement of the PB group described unfavorably. If no instances of apparent disparate treatment or discouragement exist, treat the employee's views as evidence warranting further investigation. Inform the bank that such views create a risk of future violations.

### 2. Stereotypes related to credit decisions

- An apparent violation may exist when a prohibited factor influences a credit decision through a stereotype related to creditworthiness, even if the action based on the stereotype could be interpreted as well-intended—for example, a loan denial because “a single woman could not maintain a large house.” If the stereotyped beliefs are offered as explanations for unfavorable treatment, regard such unfavorable treatment as apparent illegal disparate treatment. If the stereotype is only a general observation unrelated to particular transactions, review that employee's credit decisions for possible disparate treatment of, or disparate impact on, the PB group in question. Inform the bank that such views create a risk of future violations.

### 3. Indirect reference to a prohibited factor

- If negative views related to creditworthiness are described in nonprohibited terms, consider whether the terms would be understood commonly as surrogates for prohibited terms. If so, treat the situation as if explicit PB terms were used. For example, treat a bank's statement that “It's too risky to lend north of 110th Street” as a refusal to lend because of race if that portion of the bank's lending area north of 110th Street is predominantly Black and the area south is predominantly low-minority.

#### 4. Lawful use of a prohibited factor

##### a. Special purpose credit program (SPCP)

- If a bank states that its use of a prohibited factor is lawful because it is operating an SPCP, ask the bank to document that its program conforms to the requirements of Regulation B. An SPCP must be established and administered pursuant to a written plan that existed before the bank made any decisions on loan applications under the program.<sup>64</sup> The written plan must
  - describe the class of people the program is intended to benefit.
  - provide procedures and standards under which the program will be administered. (The program must be administered to extend credit to a class of persons that, under the bank’s customary standards of creditworthiness, probably would not receive credit or would receive credit on less favorable terms than ordinarily available to other applicants).
  - identify the time period for the program or state the time when the need for the program will be reevaluated.
  - describe the analysis supporting the need for the program; in other words, it must explain that the program will benefit a class of people that, under the organization's customary standards of creditworthiness, would have otherwise been denied credit or received it on less favorable terms than others applying to that creditor for a similar type and amount of credit.

No provision of an SPCP should deprive people who are not part of the target group of rights or opportunities they otherwise would have. An extension of credit under an SPCP that complies with the requirements of Regulation B does not violate ECOA and generally would not violate the FH Act.<sup>65</sup>

On December 21, 2020, the CFPB issued an advisory opinion on SPCPs “with the hope that more creditors will offer SPCPs and increase access to credit to underserved groups. Specifically, the CFPB seeks to clarify the content that a for-profit organization must include in a written plan that establishes and administers an SPCP under Regulation B. The advisory opinion also clarifies the type of research and data that may be appropriate to inform a for-profit organization’s determination that an SPCP would benefit a certain class of people.”<sup>66</sup>

On December 6, 2021, HUD’s Office of General Counsel issued further guidance on the interrelation of ECOA and the FH Act, declaring that “a nonprofit organization’s special purpose credit program established to serve an

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<sup>64</sup> Refer to 12 CFR 1002.8(a)(3).

<sup>65</sup> Refer to HUD, “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” (December 6, 2021).

<sup>66</sup> Refer to CFPB, “Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs,” 86 Fed. Reg. 3762 (January 15, 2021).

economically disadvantaged class of persons or a for-profit bank’s special purpose credit program designed and implemented in compliance with ECOA and Regulation B generally do not violate the [Fair Housing] Act.”<sup>67</sup>

On December 7, 2021, the HUD Office of Fair Housing and Equal Opportunity (FHEO) also issued a statement encouraging lenders to use SPCPs as a remedy for disparities in access to homeownership. Referring to the December 6, 2021, HUD guidance, the FHEO statement “encourages lenders to seriously consider establishing SPCPs that are consistent with the anti-discrimination and affirmative provisions of ECOA, Regulation B, and the Fair Housing Act.” The FHEO statement provides that “[s]uch programs, if constructed thoughtfully and in accordance with the CFPB’s regulations and guidance, can be a significant step towards bridging the racial and ethnic homeownership and wealth gaps that exist throughout the United States.”<sup>68</sup>

b. Second review program

- Second review programs are permissible if they are designed and implemented to determine that lending standards are applied fairly and uniformly to all applicants. For example, it is permissible to review the proposed denial of applicants who are members of a PB group by comparing their applications with the approved applications of similarly qualified individuals who are in the control group to determine whether the applications were evaluated consistently.
- Ask the bank to demonstrate that the program does not involve underwriting terms or practices that are preferential on a PB.
- Statements indicating that the mission of the program is to apply different standards or efforts on behalf of a minority or other group constitutes overt evidence of disparate treatment, unless the bank’s program meets the requirements of an SPCP. Similarly, an apparent violation exists if comparative analysis of applicants who are approved for credit through the second review and those who are not discloses that differential underwriting criteria are being applied on a PB.

c. Affirmative marketing or advertising program

- Affirmative advertising and marketing efforts that do not involve applying different lending standards are permissible under ECOA and the FH Act. For example, special outreach to a traditionally underserved community is permissible. Advertising and marketing that suggest, on a PB, that applications are not welcome violates ECOA, the FH Act, and Regulation B’s prohibitions against discouraging applicants.

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<sup>67</sup> Refer to HUD, “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” (December 6, 2021).

<sup>68</sup> Refer to HUD, “FHEO’s Statement by HUD’s Office of Fair Housing and Equal Opportunity on Special Purpose Credit Programs as a Remedy for Disparities in Access to Homeownership” (December 7, 2021).

## Appendix F: Fair Lending Sample Size Tables

The purpose of selecting manual samples of PB denied group and control group approved applicants or borrowers is to assist in identifying potential discriminatory outcomes in credit-related decisions. The sample serves as the basis for a comparative file review to assist in determining whether outcomes varied on a PB.<sup>69</sup> Examiners should refer to the following tables and select a sample size within the appropriate range for the application universe.

For banks and focal points selected using the results of the screening analysis, the **maximum sample size for the range** should be used unless a review of the bank’s compliance risk management processes indicates that a smaller sample is appropriate.

The sample would first be taken from the larger universe of applications or loans that are part of the selected focal point at issue, and then an overlap analysis would be undertaken.

In general, examiners should not select a focal point for a comparative analysis when the number of observations for the PB group or control group during the 12-month period to be reviewed do not meet the minimums in the sample size tables. When the minimums in the sample size tables are not met, examiners considering focal points for comparative analysis based on other indicators of heightened risk should consult with CRAD.

If the identified focal point has enough volume of control group and PB group applications for statistical modeling or if it involves disparities in assistance, examiners should contact CRAD to discuss requesting assistance with the examination. In examinations involving high volume focal points, files will be compared primarily using statistical modeling.

### Table 1: Underwriting (Approve or Deny) Comparisons

Table 1 presents the sample size recommendations for underwriting. If there are fewer than five PB group denials or 20 control group approvals, refer to the “Selecting Focal Points” section of this booklet.

#### Sample 1: PB Group Denials

Number of denials	5–50	51–150	>150
Minimum to review	All	51	75
Maximum to review	50	100	150

#### Sample 2: Control Group Approvals

Number of approvals	20–50	51–250	>250
Minimum to review	20	51	100
Maximum to review	5x PB group sample (up to 50)	5x PB group sample (up to 125)	5x PB group sample (up to 300)

<sup>69</sup> The sample size tables in this appendix are based on the appendix titled “Fair Lending Sample Size Tables” in the “Interagency Fair Lending Examination Procedures,” with instructions for using the tables applicable to OCC supervisory staff.

## Table 2: Pricing (Terms and Conditions) and Steering Comparisons

Table 2 presents sample size recommendations when comparing pricing (terms and conditions) across groups. Conduct a file review over a time range when the pricing policies were constant. The time range should be large enough to obtain sample sizes at least as large as those listed in table 2. For steering, compare PB group approvals for products with potentially negative consequences for applicants (e.g., with alternative or nontraditional features or higher costs) with control group approvals for products that do not have potentially negative consequences for applicants, as described in appendix B.

If there are fewer than five PB group approvals or 20 control group approvals, refer to the “Selecting Focal Points” section of this booklet.

### Sample 1: PB Group Approvals

Number of approvals	5–25	26–100	>100
Minimum to review	All	26	50
Maximum to review	25	50	75

### Sample 2: Control Group Approvals

Number of approvals	20–50	51–250	>250
Minimum to review	20	40	60
Maximum to review	5x PB group sample (up to 50)	5x PB group sample (up to 75)	5x PB group sample (up to 100)

## Explanatory Notes to Sample Size Tables

Base the size for the sample on the level of risk identified during scoping and the conclusions of the most recent fair lending risk assessment or other compliance management system review. Once the sample size has been determined, select individual transactions (denied and approved applicants who were not either clearly qualified or unqualified, i.e., marginal transactions) judgmentally (refer to the procedures in appendix G). If the minimum number of files called for review exceeds the maximum available (as calculated using the table), select the entire population of applicable files for review.

If two PB groups (e.g., race and sex) are being compared against one control group, select a control group that is five times greater than the larger PB group sample, up to the maximum.

If the number of marginal PB group files available for sampling is small or if the bank’s or the OCC’s screening or fair lending risk assessment identifies significant discrepancies in withdrawal or incomplete activity between the control group and PB group, consider supplementing samples by applying the following rules:

If PB group applicant withdrawals or incompletes occur after the applicant has received an offer of credit that includes pricing terms, this is a reporting error under Regulation C (the bank should have reported the application as approved but not accepted), and, therefore, these applications should be

included as PB group approvals in an approve/denial comparative file analysis.

If PB group incomplete applications occur because of lack of an applicant response with respect to an item that would give rise to a denial reason, then include these incompletes as denials when conducting an underwriting comparative file analysis.

In general, select the sample from the 12-month period immediately preceding the examination. This sample size can be expanded to an earlier period; however, examiners should consult with the appropriate Compliance SME and Policy. In addition, transactions or classes of transactions of particular interest may be identified to include in the sample. Further, the sample can be expanded when examiners find problems or concerns with data integrity or potential disparate treatment in the original sample. For banks and mortgage companies included in the final fair lending screening results each year, use the HMDA data for the year that was the basis for generating the screening results. For banks and mortgage companies included on the final redlining and marketing screen, use the HMDA data and any other data useful for conducting a redlining and marketing analysis for the year used to develop the screening list.

If no HMDA–LAR for the product exists, request that the bank estimate or count the numbers of racial and national origin group applications for home purchase or refinance loans. Alternatively, examiners themselves may count them. (This is feasible because Regulation B requires monitoring information for home purchase and refinance applications.) For banks selected using risk assessment criteria, or when the examination involves a product other than mortgages, consult with CRAD for support in identifying PB group applicants through the use of proxies and setting the sample size using appendix F. The more risk factors identified during the fair lending risk assessment or examination scoping and the weaker the compliance management process, the larger the sample should be within the range.

**Note:** Regardless of application volume or sample size, any clear instance of potential disparate treatment—even if the comparison consists of only two files—must be treated as an apparent violation and must be referred on that basis if it is a violation of the FH Act.



## Appendix G: Identifying Marginal Transactions

This guidance is intended to help examiners identify denied and approved applicants who were not either clearly qualified or unqualified, i.e., marginal transactions.<sup>70</sup>

### Marginal Denials

Denied applications with any or all the following characteristics are marginal. Such denials are compared with marginal approved applications. Marginal-denied applications include those that

- were close to satisfying the requirement that the adverse action notice said was the reason for denial.
- were denied by the bank's rigid interpretation of technical or inconsequential processing requirements.
- were denied quickly for a reason that normally would take a longer time for an underwriter to evaluate.
- involved an unfavorable subjective evaluation of facts that another person might reasonably have interpreted more favorably (for example, whether late payments showed a pattern, or whether an explanation for a break in employment was credible).
- resulted from the bank's failure to take reasonable steps to obtain necessary information.
- received unfavorable treatment because of a departure from customary practices or stated policies. For example, if it is the bank's customary practice or stated policy to request an explanation of derogatory credit information, failure to do so for a PB applicant would be a departure from customary practices or stated policies even if the derogatory information seems to be egregious.
- were like an approved control group applicant who received unusual consideration or service, but were not provided such consideration or service.
- received unfavorable treatment (for example, were denied or given various conditions or more processing obstacles) but appeared to fully meet the bank's stated requirements for favorable treatment (for example, approval on the terms sought).
- received unfavorable treatment related to a policy or practice that was vague, or the file lacked documentation on the applicant's qualifications related to the reason for denial or another factor.
- met common secondary market or industry standards although failing to meet the bank's more rigid standards.
- had a strength that a prudent loan officer might believe outweighed the weaknesses cited as the basis for denial.
- when the examination involves mortgage lending, had a history of previously meeting a monthly housing obligation equivalent to or higher than the proposed debt.
- were denied for an apparently serious deficiency that may have been overcome easily. For example, an applicant's total debt ratio of 50 percent may appear to exceed grossly

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<sup>70</sup> This appendix is based on the appendix titled "Identifying Marginal Transactions" in the "Interagency Fair Lending Examination Procedures" and is adapted to reflect guidance unique to the OCC.

the bank's guideline of 36 percent, but this may be easily corrected if the application lists enough assets to pay off sufficient nonhousing debts to reduce the ratio to the guideline, or if the bank were to count excluded part-time earnings described in the application.

## Marginal Approvals

Approved applications with any or all of the following characteristics are marginal. Such approvals are compared with marginal denied applications. Marginal approvals include those that

- satisfied the bank's stated lending standards but very narrowly.
- bypassed stated processing requirements (such as verifications or deadlines).
- had stated creditworthiness requirements relaxed or waived.
- fell short of common secondary market or industry lending standards or those where the bank's own standards were not clear.
- a prudent, conservative loan officer might have denied.
- had qualifications raised to a qualifying level by assistance, proposals, counteroffers, favorable characterizations, or revised qualifications, for example.
- in any way received unusual assistance, service, or consideration that facilitated obtaining the credit.

## Appendix H: Suggested Request for Information

Examiners should select information to review based on the nature and scope of the examination.<sup>71</sup>

For examinations of banks identified for fair lending examinations through the OCC's risk assessment or screening processes, the focal points have often been predetermined. Refer to the "Selecting Focal Points" section in this booklet for more information on selecting focal points and other scoping considerations. The information request usually should be restricted to the focal point(s) identified. Examiners should not request items that have already been collected for OCC fair lending risk assessments or other supervisory activities.

Examiners should request information from the bank with sufficient time for bank personnel to compile and submit the information (e.g., generally 30 to 45 days before the start of the supervisory activity).

If CRAD is involved in the examination, then CRAD should contact the EIC to request the items necessary for their work. In some cases, this could be months in advance.

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<sup>71</sup> This appendix is based on the appendix titled "Potential Scoping Information" in the "Interagency Fair Lending Examination Procedures" and is adapted to reflect guidance unique to the OCC and updated to reflect legal, regulatory, and market developments.

## Appendix I: Sample Fair Lending Request Letter

This appendix provides a sample fair lending request letter. Examiners and their respective supervisory office should tailor the letter to the specific bank and examination and should be careful not to request items that have already been collected for OCC fair lending risk assessments or other supervisory activities. All internal “notes” [in brackets] must be edited or deleted before sending the letter to the bank. Examiners should refer to the “Compliance Management Systems” booklet of the *Comptroller’s Handbook* for suggested request letter items related to compliance management systems. For complex fair lending examinations, consult with the appropriate Compliance SME and Policy for assistance developing request letter items.

Date

Name of Bank

Title

Address

City, State Zip

Subject: Request Letter—Fair Lending Examination

Dear [ ]:

The OCC will commence a review of your bank’s compliance with the anti-discrimination requirements of the Fair Housing Act, [for banks \$10 billion or less in total assets: the Equal Credit Opportunity Act, and Regulation B] on [DATE]. Examiners plan to focus on possible discrimination against [PB group(s) at issue] [applicants/borrowers]. Examiners will ask you to explain any apparent disparities and inconsistencies in treatment of [applicants/borrowers] from the groups compared and to explain any other apparent evidence of violations.

Examiners plan to review [as applicable, policies and procedures, branching patterns and practices, CRA assessment area delineations, marketing, underwriting, providing assistance, pricing, other terms and conditions, appraisals/valuations or servicing, and fair lending complaints, for example] for [CREDIT PRODUCT] during the period from [DATE] to [DATE] (referred to in this letter as the examination period).

To determine early, prompt, and clear communication on any fair lending matters that need explanation, designate a bank representative to serve as the fair lending liaison. Provide the requested items enclosed no later than close of business on [DATE] unless otherwise indicated. The examiners may request more information during the examination.

### **Make copies of or make available for review the following information:**

All bank responses to this request should be loaded to the OCC’s BankNet site using the BankNet Large File Transfer Tool (LFT). The LFT allows bankers to securely transmit request letter information (and other sensitive documents) to OCC examiners. BankNet is available only to OCC-supervised banks and is not accessible by the public.

Bankers can access and register on BankNet by clicking on the BankNet link on the home page (<https://www.banknet.gov/entrance/default.html>). Once logged in, bankers can refer to the “Quick-Start Guide” or the LFT user guide or obtain assistance by calling (800) 641-5925.

Using the LFT for this request, [XYZ] should email the following at the OCC:

lead examiner@occ.treas.gov  
additional.resource1@occ.treas.gov  
additional.resource2@occ.treas.gov

[As applicable, request a general description of the bank’s underwriting or pricing criteria for the product, an explanation concerning the use of any credit scores or credit scoring models used in evaluating applications, any relevant changes to the products or evaluation criteria during the period being reviewed, and an explanation of any other factors bearing on the appropriateness of file comparisons within the scope of the examination.]

#### **A. Policies and Procedures**

1. Fair lending policy and date of last review and approval by the board.
2. Policies and procedures relating to [as applicable: marketing, underwriting, providing assistance, pricing, other terms and conditions, and servicing, for example] for [product] during the examination period.
3. Any other evaluation criteria relating to [as applicable: marketing, underwriting, providing assistance, pricing, other terms and conditions, and servicing, for example] for [product] during the examination period.
4. Any changes to the policies, procedures, or evaluation criteria relating to [focal point/product] during the examination period.

#### **B. Personnel**

5. Provide name, job description, and experience for the employee who is or employees who are responsible for fair lending compliance.
6. Provide contact information for the bank official(s) responsible for managing [as applicable: marketing, underwriting, providing assistance, pricing, other terms and conditions, and servicing, for example] related to [product] during the examination period.
7. Provide information regarding the delivery channels, including brokers and correspondent lenders, their location and products offered, and their underwriting and pricing practices.

### **C. Controls**

8. Include a brief description of any internal controls designed to determine compliance with fair lending regulations, i.e., board review and approval of new products, changes to forms before use, lender peer review of approved/denied applications or second review processes.
9. Copies of compliance reviews or audits related to fair lending compliance [and, as applicable: HMDA data integrity] regarding [product/focal point, including year of examination] since [last fair lending examination or during target date of examination and any management response].
10. Compliance or audit reviews planned, but not completed in the past 12 months for fair lending, including an explanation for cancellation of any review, if applicable.
11. Procedures used for development and implementation of the fair lending risk assessment(s).
12. Procedures used for compliance testing for fair lending. Work papers are not required at this time, but, if needed, will be requested during the examination.
13. Describe process for management to stay abreast of regulatory changes.

### **D. Data and Files**

14. Loans under the scope of the focal point.
15. As applicable, include information identifying the loan files the bank should have available for on-site review.

### **E. Complaints**

16. All consumer complaints related to fair lending and unfair or deceptive acts or practices complaints during the examination period and bank responses.
17. Tracking/management reports related to complaints during the examination period.

### **F. Training**

18. Information on all fair lending training during the examination period, including a description of the training and copies of any training materials, a list of employees or job descriptions required to take the training, a list of employees or third parties who received the training, the schedule for providing training, e.g., annually, and any exceptions to training requirements.

## G. Questionnaire

19. Ensure that the attached Lending Operations Interview Guide for [focal point] is completed and uploaded by [date—a couple of days before the on-site examination starts].

## H. Redlining Examination List of Items

[The following items should be included in a request letter if performing a redlining examination:]

20. Maps of the bank's CRA assessment area (including a list of branches and number of loan officers and mortgage officers in each) and a list of the tracts included in the bank's CRA assessment area. If the list includes entire counties, however, the list of tracts is not needed for those counties.
21. A list of mortgage products (first and subordinate lien) the bank offers in the [area(s) in the focal point], including mortgage products that are held on portfolio and sold on the secondary market.
22. A description and timeline of fair lending and CRA initiatives implemented by the bank for 20XX, 20XX, and 20XX year-to-date in the [area(s) in the focal point].
23. A description and timeline of marketing campaigns and initiatives implemented by the bank for the examination period in the [area(s) in the focal point].
24. Description of all marketing campaigns deployed by the bank during the review period, including target audience/market and dates/frequencies. Please address the following media usage/forms of marketing:
  - TV/radio ads: Include names of stations and written transcripts and audio.
  - Print ads: Newspapers, magazines, billboards, etc.
  - Digital ads: Banners, search engines, third-party referrals, etc.
  - Cold-call and employee call campaigns by internal staff.
  - Prescreen solicitations: Including screening criteria.
  - Self-produced promotional materials: Discounts, fee incentives, etc.
  - Telemarketers: Including bank staff and hired third parties.
  - Third-party referrals: Including lists of names of real estate agents, brokers, dealers, and primary markets/demographics served.
  - Mailing campaigns: Including hard-copy mailers, email solicitations, text solicitations.
  - Advertising partnerships with affordable housing organizations, nonprofit organizations, community groups, etc.
  - Any other media used by the bank but not mentioned above.
  - Annual and monthly marketing budgets and expenses for the review period institution-wide and in the metropolitan statistical area/metropolitan division.

- Please itemize the budget based on type of media used (e.g., how much was spent annually and monthly overall per radio station, TV network/channel).

### **I. Bank's Compliance Program**

25. Organization charts identifying persons who have lending responsibilities or compliance, HMDA, or CRA responsibilities, with descriptions for each job position.
26. Lists of any pending or settled private or public litigation, administrative proceedings, or agency findings or pending investigations concerning fair lending or unfair or deceptive acts or practices.
27. Results of self-evaluations or self-tests (when the bank chooses to share self-test results) and copies of audit or compliance reviews of the bank's program for compliance with fair lending laws and regulations, including internal and independent audits.

[**Note:** The request should advise the bank that it is not required to disclose the report or results of any self-tests of the type protected under ECOA and the FH Act.]

28. Complaint reports.
29. Fair lending policies and procedures.
30. Records detailing policy exceptions or overrides, exception reporting, and monitoring processes.
31. Any major policy or institutional changes since the last supervisory cycle and policies covering counteroffers and assistance provided to applicants.
32. A copy of the most recent fair lending risk assessment.

### **J. Lending Policies and Loan Volume**

33. Lending policies and underwriting standards for all consumer and commercial loan products [If guidelines or policies differ by branch or other geographic location, or changed during the time period, request copies of each variation].
34. A description of any credit scoring system(s) for [the product being examined] during the [stated time period].

[**Note:** Ask whether a third party or in-house system is used; the date of the last independent validation; the factors relied on to construct any in-house system; and, if applicable, judgmental criteria used in conjunction with the scoring system.]

35. Pricing policies for each loan product and for direct and indirect loans.



[**Note:** The examiner should ask the bank whether its pricing policies for any loan products allow overages or underages. The request should also ask whether the bank offers any subprime or other nonprime loan products or otherwise uses any form of risk-based pricing. A similar inquiry should be made regarding the use of any cost-based pricing.<sup>72</sup> If any of these three approaches are or have been in use since the last examination, the bank should provide pricing policy and practice details for each affected product, including the criteria for differentiating between each risk or cost level and any policies regarding overages or underages. Regarding indirect lending, the examiners should ask the bank to provide any forms of agreement (including compensation) with brokers, dealers, or correspondents, with a description of the roles that the bank and the broker, dealer, or correspondent play in each stage of the lending process.]

36. A description of each form of compensation plan for all lending personnel and managers.

[**Note:** The fair lending laws do not prescribe or prohibit particular compensation programs.<sup>73</sup> Determine whether the compensation program creates incentives for the originator or loan officer that might affect the applicant's or borrower's access to credit or terms of credit. Also determine whether target pricing policies or processes are used that might affect the terms of credit for borrowers served by particular loan officers. Determine whether a comparative analysis can be conducted in such a case.]

37. Advertising copy for all loan products.

38. The most recent HMDA–LAR, and additional loan data, if available. Information should be provided in electronic format, if possible.

[**Note:** The integrity of the bank's HMDA–LAR data should be verified before the pre-examination analysis. Verification should take place approximately two to three months before the on-site phase of the examination.]

39. Any existing loan registers, trial balances, or other bank reports for each loan product, other than those reported under HMDA.

[**Note:** Request loan registers for the one-year period preceding the date of the examination, with any available lists of declined loan applicants for the same period. Registers or lists should contain, to the extent available, the complete name and address of loan applicants and applicable loan terms, including loan amount, interest rate, fees, repayment schedule, and collateral codes.]

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<sup>72</sup> This practice would involve adding additional noninterest costs to the loan.

<sup>73</sup> For most closed-end consumer credit transactions secured by a dwelling, loan originators generally may not receive (and no person may pay directly or indirectly) compensation based on a term of the transaction, the terms of multiple transactions, or the terms of multiple transactions by multiple individual loan originations. Refer to 12 CFR 1026.36(d). For these types of products, Regulation Z also provides protections against steering consumers to products that result in greater compensation to the loan originator regardless of the PB group characteristics of the consumer. Refer to 12 CFR 1026.36(e). Also refer to the "Truth in Lending Act" booklet of the *Comptroller's Handbook*.

**Note:** Even though banks are not required to maintain—for fair lending purposes—registers of lending activity other than the HMDA–LAR, ask whether such records exist for the focal point selected. This information may help in selecting samples and time periods.]

40. A description of any application or loan-level databases maintained for each loan product (HMDA and non-HMDA), including a description of all data fields within the database or data that can be linked at the loan level.

41. Forms used in the application and credit evaluation process for each loan product.

[**Note:** At a minimum, this request should include all types of credit applications, forms requesting financial information, underwriter worksheets, any form used for collecting monitoring information, and any quality-control or second-review forms or worksheets.]

42. Lists of service providers.

[**Note:** Service providers may include brokers, real estate agents, real estate developers, appraisers, underwriters, servicers, home improvement contractors, private mortgage insurance companies, and property management companies. Request the full name, address, and geographic area served by each provider. Also, request documentation for any fair lending requirements imposed on, or commitments required of, each of the bank’s service providers.]

43. Addresses of any internet site(s).

[**Note:** Websites or similar sites that a bank may post on the internet may provide information concerning the availability of credit, or the means for obtaining it. All such information must comply with the anti-discrimination requirements of the fair lending laws. In view of the increasing capacity to conduct transactions on the internet, review a bank’s internet sites to determine that all the information or procedures set forth therein comply with any applicable provisions of the fair lending laws and regulations. Also request information regarding any changes to internet sites during the relevant time period. If any material on the internet raises concerns, retain copies or screenshots as work papers at the time any concerns are identified and note the date when such material was identified.]

## **K. Self-Evaluations Completed by the Bank**

44. The OCC may be able to facilitate the examination if your bank has conducted a self-evaluation or a self-test. A “self-evaluation” (as distinguished from a “self-test” defined in 12 CFR 1002.15 and 24 CFR 100.141) is an analysis that you derived from loan or application files, or other records related to credit transactions. Please provide to this office any self-evaluations you conducted during the period [     to     ]. A self-test creates data or factual information that is not available and cannot be derived from loan or application files or other records related to credit transactions. The bank is not required

to provide privileged self-testing information. Please refer to 12 CFR 1002.15 and 24 CFR 100.140–100.148 for more information.

### **Closing Information**

The OCC is conducting this examination under the authority of 12 USC 481. It also constitutes, however, an investigation within the meaning of section 3413(h)(1)(A) of the Right to Financial Privacy Act (RFPA), 12 USC 3401, et seq. Therefore, in accordance with section 3403(b) of the RFPA, the undersigned hereby certifies that the OCC has complied with the RFPA. Section 3417(c) of the act provides that good faith reliance upon this certification relieves your bank and its employees and agents of any possible liability to the customer in connection with the disclosure of the requested information.

*“This document is the property of the OCC, and its contents are strictly confidential. Unauthorized disclosure of the contents of this document, including component and composite ratings, is generally prohibited. However, when necessary or appropriate for bank business purposes, a national bank is allowed to disclose the contents of this document to a person or organization officially connected with the bank as officer, director, employee, attorney, auditor, or independent auditor. Disclosure may also be made to the bank’s holding company and, under certain conditions, to a consultant employed by the bank. These exceptions to the general prohibition on disclosure are described in OCC regulations, 12 CFR 4.37(b)(2). Any other disclosure of this document or its contents without the OCC’s prior approval is a violation of 12 CFR 4.37(b) and subject to criminal penalties in 18 USC 641 for conversion of U.S. government property.”*

Sincerely,

Name  
Title

## Appendix J: Other Types of Discrimination Analyses

The information in this appendix is intended to assist examiners who encounter indications of potential disparate impact, discriminatory pre-application screening, and possible discriminatory marketing.<sup>74</sup>

### Potential Disparate Impact Violations

When examiners encounter policies that potentially result in disparate impact, review the five conditions listed in this section. The five conditions are not intended as authoritative statements of the legal elements of a disparate impact claim; rather, they are intended to give practical information for situations that call for more scrutiny.

The risk of disparate impact may be elevated when a bank uses complex methods (e.g., machine learning) or novel data (e.g., alternative credit data). In these cases, evaluating the conditions below may require sophisticated mathematic or statistical methods. In these or other circumstances when a straightforward consideration of these conditions is not possible, consult with CRAD.

The fact that a policy has a disparate impact on a PB is not enough to establish a violation of fair lending laws and regulations. If the policy or criterion is related to predicting creditworthiness and is used in a way that is commensurate with its relationship to creditworthiness or is obviously related to some other basic aspect of prudent lending, the policy may be legally justified. Examples may include relying on credit reports or using debt-to-income ratios in a way that appears consistent with industry standards and with a prudent evaluation of credit risk. If it appears that a policy or criterion causes a disparate impact on a PB (condition 3), consult with the appropriate Compliance SME, CRAD, Chief Counsel's Office, and Policy for guidance in evaluating the bank's business justification and whether less discriminatory alternative practices exist that would serve the bank's business needs.

### Conditions

1. A specific policy or criterion is involved.
  - The policy or criterion suspected of producing a disparate impact on a PB should be clear enough that the nature of the action needed to correct the situation can be determined.
2. The policy or criterion on its stated terms is neutral for PB. (A policy or criterion that is not neutral with respect to a PB may raise issues of overt discrimination or disparate treatment.)

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<sup>74</sup> This appendix is based on the appendix titled "Special Analyses" in the "Interagency Fair Lending Examination Procedures" and is adapted to reflect information unique to the OCC and updated to reflect legal, regulatory, and market developments.

3. The policy or criterion has a disproportionately adverse effect on applicants or borrowers of a PB group.

- Consult with CRAD for assistance with determining whether the disparate impact is statistically significant.

**Note:** Gross HMDA denial or approval rate disparities are not sufficient to show disproportionate adverse impact analysis because they typically cannot be attributed to a specific policy or criterion.

4. There is a causal relationship between the policy or criterion and the adverse result.

- The link between the policy or criterion and the harmful or exclusionary effect must not be speculative. It must be clear that changing or terminating the policy or criterion would reduce the disparity at issue. The policy in question can include credit scoring models.

5. One of the following conditions exists:

- The challenged policy or criterion does not have a business justification or is not required by law. The policy or criterion has no clear and demonstrable rationale, appears to exist merely for convenience or to avoid a minimal expense, or is inconsistent with standard industry underwriting considerations or lending practices.
  - The legal doctrine of disparate impact provides that the policy or criterion that causes the impact must be justified by a valid or legitimate business need if the bank is to avoid a violation. For example, the rationale generally is not clear for basing credit decisions on such factors as location of residence, income level (per se, rather than relative to debt), or accounts with a finance company. For example, if PB group applicants were denied loans significantly more frequently than control group applicants because they failed a bank's minimum income requirement, it would appear that the first four conditions plus this condition existed. Consult with CRAD and the Chief Counsel's Office about obtaining possible additional analysis.
- Alternatively, although a sound justification for the policy may exist, an effective alternative exists as well for accomplishing a similar objective with a smaller disproportionate adverse impact.
  - The law does not require a bank to abandon a policy or criterion that is demonstrably the most effective method of accomplishing a legitimate business objective. If an effective alternative is available that may cause a less severe disparate impact without imposing materially greater costs or burdens on the bank, the policy or criterion in question may constitute a violation. Consult with CRAD to assist with determining whether such an alternative may exist. Consult with the Chief Counsel's Office about obtaining and evaluating the bank's response, as described in the following section.

## Requesting the Bank's Response

1. At any stage of the analysis of possible disproportionate adverse impact, if such an alternative appears to exist and the first four conditions plus either of the fifth conditions exist, the examiner consults with the appropriate Compliance SME, Chief Counsel's Office, CRAD, Policy, EIC, or the supervisory office, and then generally solicits more information from the bank regarding the policy with potential disproportionate adverse impact (there is no reason to solicit additional information if the requisite conditions are not met). When soliciting such information, examiners should generally consider including in the communication
  - the specific neutral policy or criterion that appears to cause a disparate impact.
  - how widely examiners understand the policy or criterion to be implemented.
  - how strictly examiners understand the policy or criterion to be applied.
  - the PB the impact occurs on.
  - the estimated magnitude of the impact.
  - the nature of the potential injury to consumers.
  - the data from which the injury was computed.
  - any alternative policies the examiner may have identified.
2. The communication should request that the bank provide information supporting any business justification for the policy, any alternative policies the bank considered, and any other information that the bank wants the OCC to consider in evaluating the apparent disparate impact.

## Evaluating the Bank's Response

1. The analyses of legitimate or valid business need and less discriminatory alternative tend to converge because of the close relationship of the questions of what purpose the policy or criterion serves and whether it is an effective means to accomplish that purpose.
2. Determine whether the bank's response persuasively contradicts the existence of the significant disparity or establishes a business justification. Always consult with the appropriate Compliance SME, Chief Counsel's Office, CRAD, and Policy to evaluate the bank's response in this situation.

## Discriminatory Pre-Application Screening

1. When examiners encounter possible discriminatory pre-application screening, obtain an explanation for
  - withdrawals by applicants in PB groups without documentation of intent to withdraw.
  - denials of applicants in PB groups without documentation of applicant qualifications.
  - on a PB, selectively quoting unfavorable terms (for example, high fees or down payment requirements) to prospective applicants or quoting unfavorable terms to all

- prospective applicants but waiving such terms for control group applicants. (Evidence of this might be found in withdrawn or incomplete files.)
- delays between application and action dates on a PB.
2. If the bank cannot explain the situations, consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy and consider obtaining authorization to contact the applicants to verify the bank's description of the transactions. Information from the applicants may help determine whether a violation occurred.

## Possible Discriminatory Marketing

**Note:** Refer also to the "Determine potential for discriminatory marketing practices" objective in the "Examination Procedures" section.

1. When encountering possible discriminatory marketing,
  - obtain full documentation of the nature and extent, with management's explanation, of any
    - PB limitations stated in advertisements.
    - code words or photos in advertisements that convey prohibited limitations.
    - advertising patterns or practices that a reasonable person would believe indicate PB consumers are less desirable or only eligible for certain products.
2. Obtain full documentation as to the nature and extent, with management's explanation, for any situation when the bank, despite the availability of other options in the market,
  - advertises only or predominantly in media serving areas of a minority or national origin group within its market.
  - markets through brokers or other agents that the bank knows, or could reasonably be expected to know, to serve only or predominantly one racial or ethnic group in the market.
  - uses mailing or other distribution lists or marketing techniques for prescreened or other offerings of residential loan products that
    - explicitly exclude groups of prospective borrowers on a PB.
    - exclude geographies (e.g., census tracts and zip codes) within the bank's marketing area that have demonstrably higher percentages of minority residents than does the remainder of the area, but which have income and other credit-related characteristics similar to the geographies that were targeted for marketing.
    - offers different products to such geographies, especially if subprime products are marketed primarily to racial or ethnic minorities.

**Note:** Prescreened solicitation of potential applicants on a PB is covered by the FH Act. Consequently, analyses of this form of potential marketing discrimination should be limited to residential loan products subject to coverage under the FH Act.

3. Evaluate management's response particularly regarding the credibility of any nondiscriminatory reasons offered as explanations for any of the foregoing practices. Refer to appendix E for more information.



## Appendix K: Leveraging Bank Self-Tests and Self-Evaluations

Banks may find it advantageous to conduct self-tests or self-evaluations to measure or monitor their compliance with fair lending laws and regulations.<sup>75</sup> A self-test is any program, practice, or study that is designed and specifically used to assess the bank's compliance with fair lending laws and regulations, provided the self-test creates data not available or derived from loan, application, or other records related to credit transactions.<sup>76</sup> For example, using testers to determine whether there is disparate treatment in the pre-application stage of credit shopping may constitute a self-test. A self-evaluation, while generally having the same purpose as a self-test, is not a self-test because it does not create any new data or factual information. Instead, a self-evaluation uses data readily available in loan or application files and other records used in credit transactions.

Examiners should not request any information privileged under 12 CFR 1002.15(b)(2) and 24 CFR 100.142(a) related to self-tests. If the bank voluntarily discloses self-tests or has performed self-evaluations, and examiners can confirm the reliability and appropriateness of self-tests or self-evaluations (or parts thereof), examiners need not repeat those tasks that the bank has performed appropriately.

**Note:** When the term “self-evaluation” is used in this appendix, it is meant to include self-tests in which the bank has voluntarily disclosed the report or results.

Determine whether the research and analysis of the planned examination would duplicate the bank's own efforts. If the answers to questions 1 and 2 are both yes, each successive yes answer to questions 3 through 12 indicates that the bank's work up to that point can serve as a basis for eliminating steps for the examiners.

If the answer to question 1 or 2 is no, the self-evaluation cannot serve as a basis for eliminating examination steps. Examiners should, however, still use the remaining questions to assess the self-evaluation and communicate the findings to the bank so it can improve its self-evaluation process.

1. Did the transactions covered by the self-evaluation occur less than two years before the examination? If the self-evaluation covered more than two years before the examination, results from transactions made more than two years ago may be considered to assess pattern or trends over time.
2. Did the self-evaluation cover the same product, PB, decision center, and stage of the lending process (for example, underwriting and setting of loan terms) as the planned examination?

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<sup>75</sup> This appendix is based on the appendix titled “Using Self-Tests and Self Evaluations to Streamline the Examination” in the “Interagency Fair Lending Examination Procedures” and is adapted to reflect guidance unique to the OCC and updated to reflect legal, regulatory, and market developments.

<sup>76</sup> Refer to 12 CFR 1002.15(b)(1) and 24 CFR 100.140-100.148.

3. Did the self-evaluation include comparative file review?

**Note:** One type of comparative file review is statistical modeling to determine whether control group and PB group applicants were treated similarly. If a bank offers self-evaluation results based on a statistical model, consult with the appropriate Compliance SME, CRAD, and Policy about how to proceed.

4. Were control and PB groups defined accurately and consistently with ECOA or the FH Act?

- To answer questions 5, 6, and 7, for the bank's control group sample and each of its PB group samples, request to review 10 percent (generally not more than 50 for each group) of the transactions covered by the self-evaluation. For example, if the bank's self-evaluation reviewed 250 control group and 75 PB group transactions, plan to verify the data for 25 control group and seven PB group transactions.

5. Were the transactions selected for the self-evaluation chosen to focus on marginal applicants or, in the alternative, selected randomly? If the transactions were selected randomly, less weight should be placed on the self-evaluation.

6. Were the data analyzed (whether abstracted from files or obtained from electronic databases) accurate? Were those data actually relied on by the credit decision makers at the time of the decisions?

7. Did the 10 percent sample reviewed for question 6 also show that customer assistance and bank judgment that assisted or enabled applicants to qualify were recorded systematically and accurately and were compared for differences on any PB?

8. Were PB group applicants' qualifications related to the underwriting factor in question compared with corresponding qualifications of control group approvals? Specifically, for self-evaluations of approve or deny decisions, were the denied applicants' qualifications related to the stated reason for denial compared with the corresponding qualifications for approved applicants?

9. Did the self-evaluation sample cover at least as many transactions at the initial stage of review as examiners would initially have reviewed using the sampling guidance in appendix F?

- If the bank's samples are significantly smaller than those in the sampling guidance but its methodology otherwise is sound, review additional transactions until the numbers of reviewed control group and PB group transactions equal the minimums for the initial stage of review in the sampling guidance.
- The sample size tables set the number of files that should be reviewed. Neither examiners nor the bank are expected to analyze in detail every file in the sample set from the tables. If examiners need to review additional transactions, they should follow the file review steps in these procedures; that is, a quick first review to select

marginal transactions, identification of benchmarks and overlaps (encompassing both the bank's data and the supplemental data collected by the examiners), and abstracting detailed data only from certain marginal files. If there were such instances, proceed to question 10 and evaluate how the bank handled them.

10. Did the self-evaluation identify instances when PB group applicants were treated less favorably than control group applicants who were no better qualified?
  - If all the previous questions have been answered affirmatively, examiners should be able to tell from the bank's spreadsheet or other work papers whether applicants appear to have been treated inconsistently with their qualifications and whether there are differences in treatment between control and PB group applicants. If there were no such instances of apparent disparate treatment, incorporate the findings of the self-evaluation into the examination findings and indicate that those findings are based on verified data from the bank's self-evaluation.
11. Were explanations solicited for any such instances from the persons responsible for the decisions?
12. Were the reasons cited by credit decision makers to justify or explain instances of apparent disparate treatment supported by legitimate, persuasive facts or reasoning?
  - If not all the questions in this section are answered yes, resume the examination procedures at the point that the bank's reliable work would not be duplicated. In other words, use the reliable portion of the self-evaluation and correspondingly reduce independent comparative file review. For example, if the bank conducted a comparative file review that compared applicants' qualifications without considering the reasons they were denied, use the qualification data abstracted by the bank (if accurate) with the proviso of constructing independent comparisons structured around the reasons for denial.

### **Self-Evaluation by Statistical Model**

- If a bank has self-evaluation results based on a statistical model, consult with the appropriate Compliance SME and CRAD. CRAD may be able to assess the bank's self-evaluation and determine the reliability of the bank's statistical model.

### **Evidence of Violations**

- If the bank's self-evaluation identified apparent violations, attempt to verify using the procedures in this booklet whether the violations occurred rather than relying on the bank's conclusions. If the violations are verified, document fully how the violations were identified and verified and prepare to forward the information to be considered for appropriate review. Consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy in such cases. The results of self-evaluations are not exempt from legal requirements that the OCC refer fair lending violations to the DOJ or notify HUD.

- Do not suggest corrective action to the bank or characterize its corrective actions to date as adequate or inadequate at this time. Rather, document whether any bank corrective action alleviated the violations and particularly note whether the bank responded to any apparent violations it identified as called for in the “Policy Statement on Discrimination in Lending” (appendix P question 6), including
  - Identifying customers whose applications may have been processed inappropriately, offering to extend credit to applicants who were improperly denied, compensating them for any damages (both out of pocket and compensatory), and notifying them of their legal rights.
  - Correcting any bank policies or procedures that may have contributed to the discrimination.
  - Identifying and training or disciplining the employees involved.
  - Considering the need for community outreach programs or changes in marketing strategy or loan products to better serve segments of a particular racial or national origin group within the bank’s market.
  - Improving compliance management systems to determine that the discrimination does not recur.
- Determine whether the effectiveness of corrective action has been compromised by any bank delays in taking the corrective action.

## Appendix L: Lending Operations Interview Guide

Bank name: \_\_\_\_\_ Examiner: \_\_\_\_\_

Examination date: \_\_\_\_\_ Product: \_\_\_\_\_

This interview guide may be submitted to the bank ahead of the examination or it may be used on site, depending on the operating procedure adopted by the OCC’s business lines. As necessary, ask follow-up questions until it is clear how requirements or procedures apply to the files to be examined and until the rationales for unusual policies are understood. Items in **bold** are apparent violations if not carried out as prescribed in Regulation B. Examiners may conduct a second interview to discuss inconsistencies found during file reviews.

If the bank’s standards are unclear or if loan files lack data on applicants’ or borrowers’ qualifications:

- Request specific reasons for denying PB group applicants cited on the notices of adverse action.
- Using specific files, ask the bank about any apparent differences in treatment.
- Use file comments (if any) that characterize qualifications as, for example, good, adequate, or weak as points of reference.

### General Practices

1. Obtain from the chief underwriter an overview of the underwriting procedures and standards. Review, for example, written policies, procedures, and standards.	
2. Do underwriting policies differ across the different loan products within the loan purpose categories of the focal points for this examination? If yes, how?	
3. Do underwriting policies differ by lien status, occupancy, property type, loan purpose, or documentation type?	
4. Does your bank apply different standards in any of the geographical areas within the proposed scope of the examination? If so, why?	
5. Does your bank apply different standards based on the size of the loan or the value of the property securing the loan requested?	
6. Does your bank apply different standards based on the amount of the applicant’s income?	
7. Are there any factors we have not addressed that might make it inappropriate to compare some transactions within the proposed scope with others?	
8. Provide all policy manuals and underwriting guidelines for the products included in the focal points for this examination.	
9. Were there any policy changes during the period under review? If yes, are there changes that would preclude combining the data for the entire time period	

(i.e., prevent comparison over the entire time period)? Provide a summary of all policy changes.	
10. Are there any other reasons any two applications in the focal point could not be compared?	
11. If the focal point covers home improvement loans, are home improvement loans underwritten differently from home equity loans?	
12. Are any of the second lien home purchase or refinance loans piggyback loans? If so, how are underwriting policies different if it is a piggyback loan versus a stand-alone second lien loan?	
13. What creditworthiness factors does the bank consider when making underwriting decisions for these products?	
14. How are creditworthiness factors used? For example, do you use ranges of values for the credit score or LTV and apply different underwriting policies based on tiers that applicants fall into? Or do you use an absolute cutoff for values of the credit score, LTV, or debt to income?	
15. Obtain any exception reports maintained on loans approved despite failing to meet requirements. Learn who approves exceptions.	
<b>16. How does the bank determine that all information related to an application for credit is retained for 25 months after notifying the applicant of action taken, pursuant to 12 CFR 1002.12(b) of Regulation B?</b>	
17. Find out if a credit scoring system is used. If so, obtain information and follow guidance as called for in appendix D.	
18. Obtain copies of any consumer guidance on the loan process (such as how to develop a viable application).	
19. Obtain copies of any checklists, log sheets, or other loan-processing aids used by bank personnel.	

### Bank Structure

*(Omit this section if examiners have no questions after preparing the fair lending risk assessment)*

1. Could you explain the bank's organization in terms of channels, for example, wholesale, retail, internet, and correspondent banking? Are there any differences in underwriting or pricing across channels?	
2. What are the bank's primary markets or geographic areas of operation?	
3. Where are the service centers for each business unit or channel?	
4. Could you explain how an applicant gets channeled to a particular business unit?	
5. Could you explain the relationships the bank has with brokers and other third parties? What kind of discretion do brokers and other third parties have in underwriting or pricing?	

6. Provide a list of the specific products and programs within the loan purpose category of the focal point for this examination.	
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**Application Process**

1. Could you walk us through the application and counteroffer process for each of the relevant products in each channel or business unit? Include any third-party channels.	
2. Where are applications accepted? Who handles them?	
3. Which bank or subsidiary staff meets face-to-face with applicants?	
4. Which bank staff reviews or has access to the applications with completed monitoring information?	
<b>5. For a home purchase or refinance loan, how is government monitoring information obtained to comply with 12 CFR 1002.13 of Regulation B?</b>	
<b>6. For other loans, how are staff directed not to obtain prohibited information?</b>	
7. If the product is covered by HMDA, when and how are data entered on the LAR?	
8. What applicant information verifications are obtained? When and how?	
9. What happens if there is a problem obtaining verifications or if they are inconsistent with the application data?	
10. Is the applicant asked if assistance is needed with the borrowing process or explanation of loan terms?	
11. Is there a “conditional approval” stage in the process?	
12. Do files document conditions and attempts to resolve them?	
13. How long are terms locked in by a written or oral agreement?	
14. Under what circumstances are lock-ins extended?	
<b>15. How does the bank determine whether married applicants intend to apply jointly or individually?</b>	
16. Do you discuss with applicants all loan products they qualify for or only the product they requested?	
17. In which portfolios is the bank using algorithms with limited human input to create complex models or decision rules (referred to as machine learning)?	
18. What is the extent of automation in underwriting?	
a. How is the risk level of an applicant determined?	
b. Are any artificial intelligence or machine learning systems used in the underwriting process?	
c. Are the products being analyzed here eligible for automated underwriting?	

d. Does the bank use the Desktop Underwriter, Loan Prospector, or some customized system?	
e. If applications are automatically decided, would the loan officer only be involved to verify information? If information cannot be verified, what is the next step?	
f. Who has discretion during the underwriting process?	
g. What controls are in place to monitor this discretion?	
h. What percent of applications are automatically approved or automatically denied without additional manual review?	
i. If there are no automatic approvals or denials, what percent of applications that are on the path to approval after risk level determination are eventually denied, and what percent of applications on the path to denial are eventually approved?	
j. If there are no automatic approvals or denials, what is the nature of the manual review? Is it primarily verification of information?	
k. Are there second reviews for denials? Explain what denials are subject to second review. Are there any second reviews for approvals? Explain what approvals are subject to second review. Explain what factors are considered during these second reviews.	
19. For what purpose is the bank using machine learning?	
a. Does the bank use a model or decision rule based on machine learning as the sole or partial determinant of a credit decision? If so, under what circumstances is the model or decision rule the sole determinant of the credit decision? If the model or decision rule is a partial determinant, what other factors determine the credit decision?	
b. If machine learning is used to validate or guide other processes, describe these processes and the role of machine learning.	
20. Does the bank apply tools to a model or decision rule based on machine learning to make its complex structure more easily interpretable by a human or to generate adverse action notices? If so, what tools does the bank use for this purpose?	
21. Does the bank rely on a third party or vendor to develop or provide a model or decision rule based on machine learning?	
a. If so, how is the development or implementation of the model or decision rule customized to the bank?	
22. What model risk management practices does the bank have in place to manage the risks associated with machine learning?	



a. What is the focus of these model risk management practices (e.g., model accuracy, rank-order, disparate impact)?	
b. Does the bank rely on a third party or vendor to implement these model risk management practices?	
23. Are there any other aspects to the application process that we should keep in mind during our analysis?	
24. If an applicant is denied a loan for the product the applicant was applying for, does the lender try to offer other loan products that are more suitable? Explain this process. Does the lender offer to refer the application to another lender? What is the nature of the relationship with the other lender? Is there any financial compensation provided to the referring lender from the second lender?	
25. Which loans are sold in the secondary market? Are different underwriting guidelines used for these loans?	
26. Is there a certain time limit to receiving required documentation? After the time limit has elapsed, would the application be denied automatically?	
27. Is the applicant given guidance when there is documentation outstanding? If the loan officer follows up with the borrower, how many contacts are expected to be made?	

### Credit History

1. Which credit report is used?	
2. When multiple credit scores are obtained, which score is used—lowest or middle?	
3. Does management use any custom score products, either the bank's own or from a vendor? Could you describe the elements used in the custom score?	
4. Are the credit scores of both the primary applicant and co-applicant used in the credit decision? If yes, how?	
5. Review with the underwriter a copy of each type of credit report used. Obtain copies of any code sheets or other guidance on using the credit report(s).	
6. At what stage of the transaction is a credit report obtained?	
7. Does the bureau send a copy of the report (or abstract) to applicants? Obtain a copy of the transmittal letter.	
8. Do you look at details in the credit report? If so, for all or only marginal applicants? Could you give examples?	
9. Do you consider compensating factors if creditworthiness factors are not satisfactory? Can you provide some examples?	

10. Does the bank require that corrected information come from the bureau, or will it accept corrected information directly from the applicant?	
11. What constitutes enough credit history on which to make a decision?	
12. Is a minimum number of accounts reported required?	
13. Is a minimum length of reported credit history required?	
14. Has the bank made loans to persons who did not meet these standards?	
15. In such a case, what evidence of creditworthiness substituted for the bureau report?	
16. How does the bank evaluate additional information when an applicant seeks to correct or explain credit information from another source?	
<b>17. How does the bank evaluate joint spousal accounts when a married person applies for individual credit?</b>	
<b>18. How does the bank treat unmarried joint applicants in terms of evaluating their creditworthiness?</b>	
<b>19. How does the bank evaluate accounts held jointly with a former spouse that an applicant for individual credit asks to be considered to show their own creditworthiness?</b>	
20. What credit history deficiencies would cause denial?	
21. Does a mortgage payment defect negate otherwise good credit? Does a good mortgage payment record offset other credit defects?	
22. How far into the past is derogatory information relevant?	
23. Does it matter whether the debt has been paid?	
24. Is minor derogatory information ignored? What kinds?	
25. Does the bank solicit explanations? In what circumstances? Obtain the form letter to the applicant if one exists. If the mode of contact is by phone rather than letter, are these noted in the file?	
26. What constitutes a "good" explanation?	
27. Is the failure to disclose serious derogatory information on the application fatal?	
28. Is derogatory information associated with a medical problem in the applicant's household treated differently than other derogatory information?	
29. How does the bank view judgments, repossessions, and collections?	
30. Under what circumstances would the bank lend to a customer with a bankruptcy in their record?	
31. How does the bank view inquiries? Would the bank ever deny a loan solely based on inquiries?	

**Funds to Close**

1. What items must be covered by funds for closing?	
2. How many months of cash reserves are needed?	
3. When are funds from undocumented sources acceptable?	
4. Are applicants with inadequate or marginal cash to close advised on how gift funds may be applied?	
5. Are grants acceptable as gifts? From what sources?	
6. How does the bank ensure that applicants are advised uniformly regarding the use of grants?	
7. May family or household cash be pooled for closing?	
8. How are funds to close documented by the applicant?	

**Employment and Income**

1. How many years on the job are required for income to be deemed stable? How many years in the line of work?	
2. What length of gap or frequency of changes in employment is regarded as negative? Are explanations routinely requested for employment negatives?	
3. How is stable income defined?	
4. Do loan originators routinely ask for verifiable unstable sources of income, such as overtime and seasonal work?	
5. How is stability of nonemployment income judged, if it is counted at all?	
6. Is rent paid by household members counted as income?	
7. Do loan originators routinely ask about rent paid by household members?	
8. Is any or all nontaxable income grossed up?	
9. Are applicants routinely asked whether they expect their income to rise? What type of documentation is needed to establish a projected increase?	
10. How is part-time income handled?	
<b>11. How is annuity, pension, or retirement income handled?</b>	
<b>12. How is income from alimony, child support, and separate maintenance handled? How is income from public assistance handled?</b>	
13. How is disability income handled in comparison with wage and other types of income?	
14. How is an applicant's or borrower's parental leave from employment handled? Under what circumstances is an applicant asked about parental leave?	

**Projected Housing Costs and Debts**

1. What types of debts are included or excluded from ratio calculations?	
2. Are certain types of accounts viewed more negatively than others, for example, revolving debt?	
3. Under what circumstances would an applicant be advised to pay down debts?	
4. Would the bank specify which debts should be paid off?	

**Debt Ratios**

1. What maximum housing debt and total debt ratios are used?	
2. What is the source or rationale for them?	
3. What would justify approving an application with a ratio higher than the requirement?	
4. Are applicants with qualifying ratios ever refused because of debt considerations?	

**Guarantors**

1. Under what circumstances would a guarantor materially increase an applicant's likelihood of approval (e.g., if the applicant had bad ratios, poor credit history)?	
2. Are applicants with such weak qualifications routinely told that a guarantor would increase the likelihood of approval?	
3. What procedures are in place to determine that the bank is not improperly requiring spouses to serve as guarantors?	

**Denials**

1. Obtain a list of the reasons for denial and review it with the interviewee.	
2. How is the adverse action notice prepared? Review it with the interviewee.	
3. How does the bank document the timely provision of adverse action notices?	
4. Are all denied applicants given a second review? If not, which denied applicants are given a second review? Describe the review process.	

**Fatal Flaws and Derogatories**

1. Are there any fatal values for factors that would result in an automatic decline? Is there any written guidance for the same?	
2. Would a bankruptcy in the past six months be fatal? If not, what would be a compensating factor? Are there any other fatal flaws, e.g., LTV less than 125 or debt to income less than 100?	
3. What is the time frame considered for derogatory factors? Is the magnitude of delinquencies considered as well? (e.g., x number of 30-day delinquencies compared with y number of 90-day delinquencies?) Also, within the time frame considered, would newer derogatories get more weight than older ones (e.g., if the time frame for bankruptcies is six months, would a bankruptcy that is one month old get more weight than a five-month-old bankruptcy?)	
4. Are there any compensating factors that can make up for derogatory information? Please provide examples.	

**Secondary Market Considerations**

1. To whom does the bank principally sell loans?	
2. Arrange to have copies of the loan purchasers' guidance available during file review.	
3. In what ways are bank standards different from those loan purchasers require?	
4. What have been the lender's experiences in attempting to persuade loan purchasers to reconsider refusals to purchase?	

**Portfolio Lending**

1. Does the bank lend for its own portfolio?	
2. How do the requirements for this differ from those for loans to be sold?	
3. Does the bank hold loans to season them until sale? What features would cause a loan to be handled this way?	

**Exceptions and Overrides**

1. Are there any exceptions to the bank's stated requirements? Can you provide examples? When would they be made?	
2. Does the bank produce (for its management's use) an exceptions report that lists all loans made that do not meet the bank's stated requirements? Who reviews the overrides? Has any corrective action been made to bank processes based on the	

exceptions report? Obtain any such report for the period being examined in the fair lending review.	
3. At what level in the bank can loans be approved that fail to meet requirements?	
4. Are there any overrides? Do you generate a report or list of overrides or flag them?	
5. Is there written guidance on exceptions and overrides? If so, please provide.	
6. Who authorizes exceptions and overrides?	
7. Is any special consideration given based on customer relationship with the bank? If so, please explain.	

### Compensating and Offsetting Factors

1. Do strong qualifications in certain areas overcome an applicant's failure to meet requirements in others?	
2. Describe specific factors that operate to overcome particular deficiencies (e.g., projected income compensates for excessive total debt ratio)?	
3. Are compensating factors formal or informal? (Obtain any written guidance.)	
4. If customer relations are considered as a compensating factor, what constitutes a good customer relationship?	

### Loan Terms and Conditions

1. How are prices set?	
2. Why would prices differ? Which aspects of pricing are fixed, and which are discretionary?	
3. How are loan terms set? Why would loan terms vary?	
4. How is the down payment set? Why would requirements vary?	
5. How are escrow amounts set? Why would they vary?	
6. Provide a copy of each of the rate sheets you use. If rates change often, a set of rate sheets for one or a small number of dates would be sufficient.	
7. Are pricing guidelines for the products included in the focal points? If yes, how?	
8. Does pricing vary across channels or geography? If yes, how?	
9. Does pricing differ during the period under review? If yes, how? Could you provide a list of these changes?	
10. Were there any special promotions during the period under analysis? If yes, please explain.	

11. How do brokers or other third parties price loans? Do they have different rate sheets? Are any rate sheets specific to individual third parties?	
12. What are the reasons that interest rates would be lower or higher than what appears on the pricing sheets?	
13. Can you provide some examples of these reasons?	
a. Is loan officer compensation tied to pricing? If so, please explain.	
b. How is pricing influenced by brokers or other third parties?	
c. How are brokers or other third parties compensated?	
d. Is there any discretion in charging fees?	
14. Are there maximum and minimum fees? Any exceptions?	
15. Do any fees vary by state because of state-specific laws?	
16. Which fees affect the APR?	
17. Are loan customers allowed to buy down the interest rates by paying more in discount points? If yes, explain the criteria and provide written guidance regarding this practice.	
18. If applicable, how are origination points, discount points, and yield spread premium determined? Are there caps on each or caps on totals?	
19. How are pricing policies different if a product is a piggyback loan versus a stand-alone second lien loan?	
a. Are first and second lien loans as part of a combo loan priced independently?	
20. How are pricing policies different if the corresponding first lien is held with another bank?	
21. Are days for processing both approvals and denials monitored between different applicant groups, and is assistance level monitored for applications that are withdrawn or closed for incompleteness?	

### File Documentation

1. How are contacts with the consumer documented?	
2. How are in-bank conferences (or other face-to-face encounters) with the applicant documented?	
3. What work sheets should be found in the typical file?	

**Electronic Data**

1. Can automatic approvals and denials be identified in the electronic data? That is, are there identifiers for automated approvals or denials, or identifiers for the output from an automated system?	
2. Can document type be identified in the electronic data?	
3. Is product name available in the electronic data?	
4. Are applicant names and addresses available in the electronic data?	
5. Can piggyback loans be identified in the electronic data? If yes, can one also identify whether the first lien is from this bank or from another bank?	
6. Can individual loan officers or brokers be identified in the data?	
7. Is there electronic information on any of the following: number of trade lines; number of 30-60-90-day "lates" and the time period in which those "lates" occurred; incidence of bankruptcy or foreclosure; combined LTV; combined debt to income; years in job; years in occupation; loan term; identifier for whether applicant uses Automated Clearing House; override codes; collateral value; customer relationship; employment type (salaried or self-employed); any measure of stable income; indicator for first-time home buyer?	
8. Is there electronic information on any additional pricing variables that can be incorporated into the dataset, such as overages; underages; broker fees; total broker compensation; yield spread premium; any other points and fees; rate lock date or period (15-30-45-60 days, for example)?	
9. Could you also provide explanations for the variables provided in the electronic dataset?	
10. If you update debt to income, LTV, or other credit variables during the underwriting process, does the updated information appear in the data?	

**Collateral/Appraisals**

1. <b>Are appraisals and other written valuations provided to applicants in accordance with Regulation B for credit to be secured by a first lien on a dwelling?</b>	
2. Does the bank employ its own appraisers or others who prepare a valuation? If so, does the bank take appropriate steps to prevent the improper influencing of such in-house appraisers and affiliated appraisers, appraisal company, appraisal management companies, or others preparing a valuation?	
3. Review the guidance the bank provides appraisers, whether employed by the bank or independent.	
4. What rules govern adjustments to initial appraised values?	



<p>5. Who reviews appraisals or performs other valuation management functions (e.g., selecting an appraiser, reviewing an appraisal or other valuation)? Does the bank take appropriate steps to prevent the improper influencing of employees who perform valuation management functions?</p>	
<p>6. When is private mortgage insurance (PMI) required?</p>	
<p>7. What does the bank do if a PMI company refuses to insure the loan?</p>	
<p>8. On adverse action notices and HMDA-LAR “reasons for denial,” does the bank report PMI denials as “denied for PMI,” or does it merely repeat the substantive reason that the PMI company cited?</p>	
<p>9. Under what circumstances would a lender order a second appraisal?</p>	

## Appendix M: Regulation B Compliance Checklist

This checklist<sup>77</sup> can be used for reviewing audit work papers, evaluating bank policies, performing transaction testing, and evaluating bank training, as appropriate. Only complete those aspects of the checklist that specifically relate to the scope of the examination.

Review compliance with these Regulation B provisions in all fair lending examinations that include review of files. Examiners may choose to use the checklist as part of a regularly scheduled supervisory activity during the supervisory cycle. Examiners should review the checklist before conducting the comparative file review.

As the file review proceeds, note any violations observed on one master checklist (not checklists for individual transactions).

Obtain explanations for any apparent violations from the bank staff responsible for the transactions. Some violations on the checklist are not stated in terms of a PB; these are violations simply if the bank treated applicants other than as prescribed. Nevertheless, determine also whether the violations occurred selectively on a PB.

If there are multiple recurring violations, consult with the appropriate Compliance SME, Chief Counsel's Office, and Policy to determine whether any violations represent a pattern or practice. If so, the root causes must be determined, the violations must be presented to management, and commitments for corrective action must be obtained.

When reviewing audit or evaluating bank policies, a no answer indicates a possible deficiency and should be explained in the work papers. When performing transaction testing, a no answer indicates a possible violation and should be explained in the work papers.

### Underline the Applicable Use: Audit / Bank Policies / Transaction Testing

#### General Rules

Apparent violation (if no)	Yes	No	Basis for conclusion
1. Do the bank's marketing or advertising materials <u>exclude</u> any information that would discourage, on a PB, a reasonable person from making or pursuing an application? (12 CFR 1002.4(b))			
2. Are written applications used for home purchase and refinance transactions? (12 CFR 1002.4(c))			
3. Are written disclosures clear, conspicuous and, except for those required by 12 CFR 1002.5 and			

<sup>77</sup> For banks with more than \$10 billion in total assets, Regulation B is under CFPB jurisdiction and those banks are not under OCC technical supervision, and this checklist should not be completed in such a scenario.

Apparent violation (if no)	Yes	No	Basis for conclusion
1002.13, in a form the applicant can retain? (12 CFR 1002.4(d)(1))			
a. If disclosures are provided electronically, are they provided in compliance with the applicant's affirmative consent, and other applicable provisions of the E-Sign Act? (12 CFR 1002.4(d)(2))			
b. If disclosures required by 12 CFR 1002.5(b)(1), 1002.5(b)(2), 1002.5(d)(1), 1002.5(d)(2), 1002.13, and 1002.14(a)(2) accompany an application that is accessed by the applicant in electronic form, were the required application-related disclosures provided in electronic form on or with the application form?			

### Rules Concerning Requests for Information

Apparent violation (if no)	Yes	No	Basis for conclusion
1. Do guidance and forms <u>exclude</u> requests for information relative to birth control practices, childbearing abilities, or childbearing or child-rearing intentions of the applicant, including taking maternity leave, and does the loan file indicate that the bank did <u>not</u> otherwise inquire about these topics? (12 CFR 1002.5(d)(3))			
2. Does the loan file indicate that the bank did not request information about spouses or former spouses except for transactions in which			
a. the spouse will be permitted to use the account;			
b. the spouse will be contractually liable on the account;			
c. the applicant is relying on the spouse's income as a basis for repaying the credit requested;			
d. the applicant resides in a community property state or is relying on property in such a state for repayment; or			
e. the applicant relies on alimony, child support, or separate maintenance payments from the spouse or former spouse to repay the debt? (12 CFR 1002.5(c))			
3. In the case of individual unsecured credit, does the loan file suggest that the bank made inquiries about the marital status of the applicant only when			

Apparent violation (if no)	Yes	No	Basis for conclusion
the applicant resides in a community property state or when community property is a basis for repaying the debt, and do guidance and forms for unsecured individual loans include only these inquiries related to marital status? (12 CFR 1002.5(d)(1))			
4. For loans other than individual unsecured credit, are inquiries into marital status phrased only in terms of the applicant's status as married, unmarried, or separated? (12 CFR 1002.5(d)(1))			
5. If the loan file indicates that information was requested regarding whether income on the application is derived from alimony, child support, or separate maintenance payments, do guidance and forms determine that the applicant is informed that such income need <u>not</u> be revealed if the applicant does <u>not</u> want the bank to consider the information in determining the applicant's creditworthiness? (12 CFR 1002.5(d)(2))			
6. Has the bank established and administered any SPCP to target economically disadvantaged classes of individuals as authorized under ECOA? (12 CFR 1002.8)			
7. If the bank collects information (in addition to required government monitoring information) on the race, color, religion, national origin, or sex of the applicant for purposes of a self-test,			
a. does the self-test meet the requirements of 12 CFR 1002.15?			
b. does the bank disclose to the applicant, orally or in writing, when requesting the information that			
i. the applicant is not required to provide information?			
ii. the bank is requesting information to monitor its compliance with ECOA?			
iii. federal law prohibits the bank from discriminating on the basis of this information, or on the basis of an applicant's decision not to furnish the information?			
iv. if applicable, certain information will be collected based on visual observation or surname if not provided by the applicant or other person? (12 CFR 1002.5(b))			

Apparent violation (if no)	Yes	No	Basis for conclusion
8. When a title, such as Ms., Miss, Mrs., or Mr., is requested on the application, does the form disclose that such designation is optional, and does the application form otherwise use only terms neutral as to sex? (12 CFR 1002.5(b)(2))			

### Rules Concerning Evaluation of Applications

Apparent violation (if no)	Yes	No	Basis for conclusion
1. In a judgmental system, if the bank considers the applicant's age or income derived from public assistance, is this information considered only for the purpose of determining a pertinent element of creditworthiness? (12 CFR 1002.6(b)(2)(iii)) <sup>78</sup>			
2. When evaluating the applicant's creditworthiness, does the bank not consider aggregate statistics or assumptions relative to the likelihood of bearing or rearing children? (12 CFR 1002.6(b)(3))			
3. Does the bank count (and not discount or exclude) income derived from part-time employment or a retirement benefit? (12 CFR 1002.6(b)(5))			
4. If an applicant relies on income from alimony, child support, or separate maintenance payments in applying for credit, does the bank consider such payments as income when they are likely to be consistently made? (12 CFR 1002.6(b)(5))			
5. To the extent it considers credit history, does the bank consider			
a. the credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use or for which both are contractually liable? (12 CFR 1002.6(b)(6)(i))			

<sup>78</sup> For information on the use of age in credit scoring models, refer to appendix N, "Alternative Fair Lending Analyses," of this booklet. If questions about the use of age or proxies for age in a credit scoring model arise in an examination, examiners should consult with the appropriate Compliance SME and Policy.

Apparent violation (if no)	Yes	No	Basis for conclusion
b. at the applicant's request, information from the applicant indicating that past credit performance does not accurately reflect the applicant's creditworthiness? (12 CFR 1002.6(b)(6)(ii))			
c. at the applicant's request, any credit history in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness? (12 CFR 1002.6(b)(6)(iii))			
6. Are married and unmarried applicants evaluated by the same standards? (12 CFR 1002.6(b)(8))			
7. Are joint applicants treated in the same manner regardless of existence, absence, or likelihood of a marital relationship? (12 CFR 1002.6(b)(8))			

#### Rules Concerning Extensions of Credit

Apparent violation (if no)	Yes	No	Basis for conclusion
1. Does the bank allow an applicant to open or maintain an account in birth-given names or combinations of birth-given and married names, if requested? (12 CFR 1002.7(b))			
2. Does the bank permit holders of open-end accounts to retain their accounts and not change the account terms despite the account-holder's retiring, or changes in age, name, or marital status? (12 CFR 1002.7(c)(1))			
3. If the bank requires reapplication for an open-end account based on a change in marital status of the applicant when the original credit decision was based, in whole or in part, on the income of the spouse, does the bank only require such reapplication when it has information available indicating that the applicant's income may not support the amount of credit currently available? (12 CFR 1002.7(c)(2))			
4. If jointly owned property is relied on to satisfy the standards of creditworthiness in the case of unsecured credit, are nonapplicant joint owners required to sign only			

Apparent violation (if no)	Yes	No	Basis for conclusion
instruments related to collateral? (12 CFR 1002.7(d)(2))			
5. Is an applicant who qualifies individually allowed to obtain credit without a spouse's or other person's signature (other than situations in which the applicant was submitted for joint credit), or if an additional party is needed to support the credit requested, is the applicant allowed to provide a person other than the spouse to serve as the additional party? (12 CFR 1002.7(d) (1) and (5))			
6. Does the bank grant credit even if credit life, health, accident, or disability insurance is not available because of the applicant's age? (12 CFR 1002.7(e))			
7. For joint applications, do application files indicate an applicant's intent to apply for joint credit at the time of application? (12 CFR 1002, Supplement I, Comment 7(d)(1)-3)			

#### Notifications

Apparent violation (if no)	Yes	No	Basis for conclusion
1. If the bank received more than 150 applications in the preceding year, do files show that the bank notified noncommercial applicants in writing of			
a. action taken, whether approval, counteroffer, or adverse action within 30 days of receipt of a completed application, unless the application is approved and the parties contemplated that the applicant would inquire about the status of the application, but did not do so within 30 days after applying (in which case the application should have been treated as withdrawn)? (12 CFR 1002.9(a)(1)(i) and 1002.9(e))			
b. either adverse action because of incompleteness or, within 30 days of receipt of the incomplete application, provided a notice of missing information and that the information must be provided within a designated reasonable period for the application to be considered? (12 CFR 1002.9(a)(1)(ii) and (c)(2))			

Apparent violation (if no)	Yes	No	Basis for conclusion
c. adverse action within 30 days of taking such action on existing accounts? (12 CFR 1002.9(a)(1)(iii))			
d. adverse action within 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered (unless the creditor sends a combined counteroffer and adverse action notice)? (12 CFR 1002.9(a)(1)(iv); comment 9(a)(1)-6)			
2. Do adverse action notices in denied files (as applicable) contain			
a. a written statement of action taken and the name and address of the bank? (12 CFR 1002.9(a)(2))			
b. a written statement substantially similar to that in 12 CFR 1002.9(b)(1)?			
c. a written statement of specific reasons for the action taken or written disclosure as specified in 12 CFR 1002.9(a)(2)(ii) of the applicant's right to such a statement? (1002.9(a)(2)(i) and (ii))			
3. In connection with credit other than an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, for businesses with revenues of \$1 million or less in the preceding fiscal year, when the reasons were not given orally or in writing when adverse action was taken (under time frames in 12 CFR 1002.9(a)(1)), was the disclosure of the right to a statement of reasons given in writing at the time of application in accordance with 12 CFR 1002.9(a)(3)(i)(B)?			
4. For businesses with revenues of more than \$1 million in the preceding fiscal year, or for extensions of trade credit, credit incident to a factoring agreement, or other similar types of business credit, was the notification of action taken communicated within a reasonable time orally or in writing, and were reasons for denial and ECOA notice provided in writing in response to a written request for the reasons by the applicant within 60 days of the bank's notification? (12 CFR 1002.9(a)(3)(ii)(B))			



Apparent violation (if no)	Yes	No	Basis for conclusion
5. Does the statement of reason(s) for adverse action required by 12 CFR 1002.9(a)(2)(i) contain the principal and specific reason(s) for the action? (12 CFR 1002.9(b)(2))			
6. When an application involves multiple applicants, does the bank provide notification of action to the primary applicant when one is readily apparent? (12 CFR 1002.9(f))			
7. When an application is made to multiple creditors by a third party, and either no credit is offered by any of the creditors or the applicant does not expressly accept or use the credit offered, does the bank determine that the applicant is properly informed of the action taken? (12 CFR 1002.9(g))			

#### Furnishing Credit Information

Apparent violation (if no)	Yes	No	Basis for conclusion
1. If the bank furnishes information,			
a. does the bank designate any new account to reflect the participation of both spouses if the applicant's spouse is permitted to use or is contractually liable on the account (other than as a guarantor, surety, endorser, or similar party) and any existing account within 90 days of the receipt of a request from one of the spouses for the designation? (12 CFR 1002.10(a))?			
b. Does the bank furnish joint account information to consumer reporting agencies in a manner that provides access to such information in the name of each spouse? (12 CFR 1002.10(b))			
2. When the bank responds to an inquiry for credit information regarding a joint account, is the information furnished in the name of the spouse for whom the information is requested? (12 CFR 1002.10(c))			

**Record Retention**

<b>Apparent violation (if no)</b>	<b>Yes</b>	<b>No</b>	<b>Basis for conclusion</b>
1. Does the bank retain application files for 25 months (12 months for business credit applications from businesses with gross revenues of \$1 million or less in the previous fiscal year, except an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit) after date of notice of action taken or notice of incompleteness for any of the following (as applicable) that include			
a. the application and any other written or recorded information used in evaluating the applicant and not returned to the applicant at the applicant's request? (12 CFR 1002.12(b)(1)(i))			
b. all information obtained for monitoring purposes? (12 CFR 1002.12(b)(1)(i))			
c. the notification of action taken, if written, or any notation or memorandum by the bank, if made orally? (12 CFR 1002.12(b)(1)(ii)(A))			
d. a statement of specific reasons for adverse action, if written, or any notation or memorandum by the bank, if made orally? (12 CFR 1002.12(b)(1)(ii)(B))			
e. Any written statement submitted by the applicant alleging a violation of ECOA or Regulation B? (12 CFR 1002.12(b)(1)(iii))			
2. Does the bank retain application files in connection with existing accounts for 25 months (12 months for business credit applications from businesses with gross revenues of \$1 million or less in the previous fiscal year, except an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit) after date of notice of action taken containing			
a. any written or recorded information concerning the adverse action? (12 CFR 1002.12(b)(2)(i))			
b. any written statement submitted by the applicant alleging a violation of ECOA or Regulation B? (12 CFR 1002.12(b)(2)(ii))			

Apparent violation (if no)	Yes	No	Basis for conclusion
3. Does the bank retain application files for other applications for which 12 CFR 1002.9's notification requirements do not apply (e.g., for withdrawn applications) for 25 months (12 months for business credit applications from businesses with gross revenues of \$1 million or less in the previous fiscal year, except an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit) after the date when the bank receives the application, containing all written or recorded information in its possession concerning the applicant, including any notation of action taken? (12 CFR 1002.12(b)(3))			
4. For business credit applications from businesses with gross revenues of more than \$1 million in the previous fiscal year, or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, does the bank retain records for at least 60 days after notifying the applicant of the action taken, or for 12 months after notifying the applicant of the action taken if the applicant requests within the 60-day time period the reasons for denial or that the records for the denial be retained? (12 CFR 1002.12(b)(5))			
5. For prescreened solicitations, does the bank retain for 25 months (12 months for business credit except for businesses with gross revenues of more than \$1 million in the previous fiscal year, or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit) after the offer of credit was made			
a. the text of any prescreened solicitation;			
b. the list of criteria the bank used to select potential recipients of the solicitation; and			
c. any correspondence related to complaints (formal or informal) about the solicitation? (12 CFR 1002.12(b)(7))			
6. If the bank has notice of an investigation, enforcement proceeding, or civil action under ECOA, was information subject to record retention requirements retained until final disposition of the matter? (12 CFR 1002.12(b)(4))			

Apparent violation (if no)	Yes	No	Basis for conclusion
7. If the bank conducts a self-test pursuant to 12 CFR 1002.15, does it, after completion of the test, retain all written and recorded information:			
a. For 25 months?			
b. Until final disposition of the ongoing investigation, enforcement proceeding, or civil action if the bank has actual notice that it is under investigation or subject to enforcement proceedings or a civil action? (12 CFR 1002.12(b)(6))			

### Information for Monitoring Purposes

Apparent violation (if no)	Yes	No	Basis for conclusion
1. Do files for purchase and refinance loans for primary residences that are secured by the dwelling show that the bank requested monitoring information (12 CFR 1002.13(a) and (b)) and that it noted this information on the application form or on a separate form referring to the applicant's (12 CFR 1002.13(b)):			
a. Ethnicity, using the categories Hispanic or Latino, and Not Hispanic or Latino?			
b. Race, using the categories American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White, and allowing applicants to select more than one racial designation? (12 CFR 1002, Supplement I, Comment 13(b)-1)			
c. Sex? <sup>79</sup>			
d. Marital status, using the categories married, unmarried, and separated?			
e. Age?			
2. Does the form used to collect monitoring information contain written notice that it is for federal government monitoring of compliance with federal statutes prohibiting discrimination on those bases, and that the bank must			

<sup>79</sup> Refer to CFPB's March 9, 2021, interpretative rule titled "Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity," which clarified that, with respect to any aspect of a credit transaction, the prohibition against sex discrimination in ECOA and Regulation B, which implements ECOA, encompasses sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations.

Apparent violation (if no)	Yes	No	Basis for conclusion
note ethnicity, race, and sex on the basis of sight or surname if the applicant chooses not to do so, or does the loan file indicate that the borrower was otherwise notified of this fact? (12 CFR 1002.13(c))			
3. Does the bank note on the monitoring form any applicants' refusals to disclose monitoring information? (12 CFR 1002.13(b))			
a. If the bank takes applications in person (including by electronic media that allows the bank to see the applicant), and if the applicant refuses to provide the monitoring information, does the bank, to the extent possible on the basis of sight or surname, note on the form the ethnicity, race, and sex of each applicant? (12 CFR 1002.13(b) and Comment 13(b)-4))			
b. If the bank receives applications by mail, telephone, or electronic media and if it is not evident on the face of the application how it was received, does the bank indicate on the form or in the loan file how it was received? (Comments 13(b)-3(iii))			

## Appendix N: Alternative Fair Lending Analyses

This appendix provides more information for examining credit card lending by banks with \$10 billion or less in total assets when a routine comparative file review for disparate treatment may not yield meaningful results.

### Credit Card Lending

Examiners may choose credit card lending as the focal point of an examination when such lending is a significant product for the bank or when the risk assessment indicates that fair lending risk for this product is high. Examiners contemplating a credit card lending examination should consult with the appropriate Compliance SME, CRAD, and Policy for guidance in determining the parameters of the examination.

Examiners should generally obtain the following information:

- The name of each product (e.g., bank card name, co-branded card names)
- Information about what population each product is targeted to (e.g., current customers, customers applying at certain retail outlets)
- Application forms for each product
- The marketing plan and any solicitation and advertising materials used for each product, including online materials
- The terms and conditions for each product
- The underwriting and pricing guidelines for each product (including information on pertinent credit scoring systems and any judgmental components that are used in addition to automated credit scoring)
- Information regarding process and accommodations concerning applications for limited English-proficient applicants.<sup>80</sup> Review how the bank markets its credit card products to different customer groups. Determine whether any marketing materials or the dissemination of those materials may indicate on a PB a preference for any group of potential or actual customers.

Review all the variables that go into each credit scorecard that the bank uses for overt use of PB (such as age) or variables that are highly correlated with PB. Examiners should be especially careful to review whether the bank's treatment of income, such as income from public assistance, retirement, and part-time employment, complies with ECOA and Regulation B. Along with reviewing credit scoring system variables, examiners should review peripheral systems that feed application information into the credit scoring systems (e.g., automated application system). Ascertain whether the bank separates or tags applicants on a PB in a manner that causes them to be processed differently by a particular scorecard (e.g., assigning them different cutoff scores or lower credit line assignments) or to be processed in a way that causes applications to be evaluated by a different, less favorable scorecard. Additionally, if judgmental systems are used in addition to credit scoring for

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<sup>80</sup> Refer to 12 CFR 1024.32 (a)(2) and 1026.27 and staff commentary.

underwriting or in setting terms and conditions, review these systems to determine whether the bank's processes are consistent with Regulation B.

The following examples illustrate how banks might employ policies that could violate Regulation B, based on marital status:

- A bank initiates an apparent difference in treatment in its credit scoring system by characterizing joint applicants as either married or individual in its automated application system. Thus, it prompts its credit scoring system to treat applicants differently based on whether they are married or unmarried joint applicants.
- A bank offers honeymoon accounts, whereby the bank gives all applicants for that credit product \$1,000 lines of credit, regardless of whether they have any credit history or a credit bureau score. The bank denies persons who do not apply under this program if they do not have a credit history or credit bureau score.
- A bank does not allow unmarried, joint applicants for credit cards but does allow married, joint applicants.

For more information related to credit scoring systems, refer to appendix D. Examiners should consult with the appropriate Compliance SME, CRAD, or Policy regarding questions about the use of proxies to identify PB status in credit card lending analysis.

## Other Alternatives to Comparative File Review

This section covers situations when the standard fair lending examination approaches described in this booklet cannot be carried out or are not likely to yield meaningful results. For example, the minimum sample sizes may not be present for the type of lending under review, examiners may have conducted comparative file reviews in recent examinations with no adverse findings, or file documentation may be poor. Examiners should consult with the appropriate Compliance SME and Policy about the appropriateness of replacing the customary comparative file review with an analysis of the bank's compliance with substantive consumer protections in Regulation B.<sup>81</sup>

In these circumstances, examiners may elect to review the bank's loan policies and procedures for compliance with requirements in Regulation B that prohibit certain practices because they could result in credit discrimination on a PB. Many of these requirements do not require a comparative file review to assess compliance. Rather, a Regulation B violation is present if the creditor failed to treat the applicant as required in the regulation. For example, a creditor that discounts or excludes retirement income from consideration will have violated Regulation B.<sup>82</sup>

Select a sample based on the level of fair lending risk of at least 10 diverse applications (different products, underwriters, and branches, for example) and complete the checklist in appendix M for each of the applications. Obtain an explanation from the bank staff

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<sup>81</sup> Refer to appendix M of this booklet.

<sup>82</sup> Refer to 12 CFR 1002.6(b)(5).

responsible for any transactions that appear to involve a violation, evaluate each bank explanation, and verify any facts provided by the bank.

When a routine comparative file review cannot be conducted because file documentation is poor or evaluation criteria are not clear, the situation should be treated as high risk.<sup>83</sup> If loan files lack data on applicants' qualifications or if the bank's standards are unclear, consult with the appropriate Compliance SME and Policy and consider the following steps:

1. Ask bank management and loan officers what specific factors formed the basis for the denial reasons cited on adverse action notices.
2. Using specific approved applicants, ask how the bank determined that they differed from denied applicants.
3. Use informal file comments (if any) that characterize qualifications as good, adequate, or weak, for example, as points of reference.
4. Track whether credit decision makers evaluated the factor(s) identified in steps 1 through 3 consistently for the control and PB groups.
5. If an unexplained difference or apparent violation is found using this alternative analysis, follow the steps in this booklet for resolving potential fair lending violations (i.e., beginning with obtaining an explanation from the bank).

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<sup>83</sup> In such situations, examiners should also consider whether the bank is in compliance with the document retention requirements of Regulation B (12 CFR 1002.12).



## **Appendix O: Equal Credit Opportunity and Fair Housing Acts Enforcement Policy Statement (November 17, 1981)**

*This appendix contains a policy statement at 46 Fed. Reg. 56500 (Nov. 17, 1981). Some references contained in the policy statement have since become outdated.*

The objective of this enforcement policy statement is to ensure that the rights of credit applicants are protected by requiring creditors to take corrective action for certain, more serious past violations of the Equal Credit Opportunity and Fair Housing Acts as well as to be in compliance in the future. In an effort to achieve that objective, the agencies will encourage voluntary correction and compliance with the Acts. Whenever violations addressed by this policy statement are discovered, the creditor will be required to take action to ensure that such violations will not recur and to correct the effects of violations discovered.

The agencies will generally require the creditor to take action to correct conditions resulting from violations occurring within 24 months prior to the discovery of violations by an agency, except for violations concerning adverse action notices for which corrective action will be required for violations occurring within six months prior to discovery.

Violations in the following areas are considered serious by the agencies and will usually be subject to retrospective corrective action:

- Discouraging applicants on a prohibited basis in violation of the Fair Housing Act or § 202.4 or § 202.5(a) of Regulation B.
- Using credit criteria in a discriminatory manner in evaluating applications in violation of the Fair Housing Act or §§ 202.4 through 202.7 of Regulation B.
- Imposing different terms on a prohibited basis in violation of the Fair Housing Act or § 202.4 or § 202.6(b) of Regulation B.
- Requiring cosigners, guarantors or the like on a prohibited basis in violation of § 202.7(d) of Regulation B.
- Failing to furnish separate credit histories as required by § 202.10 of Regulation B.
- Failing to provide an adequate notice of adverse action under § 202.9 of Regulation B.

This policy statement will neither preclude the use of any administrative authority that any of the agencies possess to enforce these laws, nor limit the agencies' discretion to take other action to correct conditions resulting from violations of these laws, nor preclude referral of cases to the Attorney General. Additionally, this policy statement does not foreclose a credit applicant's right to bring civil action under Equal Credit Opportunity or Fair Housing Acts or to file a complaint with the Department of Justice or the Department of Housing and Urban Development for violations of housing laws. Further, this policy statement does not supersede or substitute for any regulations or enforcement policies issued by any of the agencies or the Department of Housing and Urban Development under the Fair Housing Act.

By order of the Federal Financial Institutions Examination Council, November 6, 1981.

## **Appendix P: Policy Statement on Discrimination in Lending (April 15, 1994)**

*This appendix contains the 1994 Interagency Policy Statement at 59 Fed. Reg. 18266, 18267-18274 (April 15, 1994). Some references contained in the 1994 Interagency Policy Statement have since become outdated.*

The Department of Housing and Urban Development (“HUD”), the Department of Justice (“DOJ”), the Office of the Comptroller of the Currency (“OCC”), the Office of Thrift Supervision (“OTS”), the Board of Governors of the Federal Reserve System (the “Board”), the Federal Deposit Insurance Corporation (“FDIC”), the Federal Housing Finance Board (“FHFB”), the Federal Trade Commission (“FTC”), the National Credit Union Administration (“NCUA”), and the Office of Federal Housing Enterprise Oversight (“OFHEO”) (collectively, “the Agencies”) are concerned that some prospective home buyers and other borrowers may be experiencing discriminatory treatment in their efforts to obtain loans. The 1992 Federal Reserve Bank of Boston study on lending discrimination, Congressional hearings, and agency investigations have indicated that race is a factor in some lending decisions. Discrimination in lending on the basis of race or other prohibited factors is destructive, morally repugnant, and against the law. It prevents those who are discriminated against from enjoying the benefits of access to credit. The Agencies will not tolerate lending discrimination in any form. Further, fair lending is not inconsistent with safe and sound operations. Lenders must continue to ensure that their lending practices are consistent with safe and sound operating policies.

This policy statement applies to all lenders, including mortgage brokers, issuers of credit cards, and any other person who extends credit of any type. The policy statement is being issued for several reasons, including:

- To provide guidance about what the agencies consider in determining if lending discrimination exists; and
- To provide a foundation for future interpretations and rulemakings by the Agencies.

A number of federal statutes seek to promote fair lending. For example, the Home Mortgage Disclosure Act (“HMDA”), 12 U.S.C. 2801 et seq., seeks to prevent lending discrimination and redlining by requiring public disclosure of certain information about mortgage loan applications. The Community Reinvestment Act (“CRA”), 12 U.S.C. 2901 et seq., seeks affirmatively to encourage institutions to help to meet the credit needs of the entire community served by each institution covered by the statute, and CRA ratings take into account lending discrimination by those institutions. The Americans with Disabilities Act, 42 U.S.C. 12101 et seq., prohibits discrimination against persons with disabilities in the provision of goods and services, including credit services. This policy statement, however, is based upon and addresses only the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. 1691 et seq., and the Fair Housing Act (“FH Act”), 42 U.S.C. 3601 et seq, the two statutes that specifically prohibit discrimination in lending.

This policy statement has been approved and adopted by the signatory Agencies listed above as a statement of the Agencies' general position on the ECOA and the FH Act for purposes of administrative enforcement of those statutes. It is intended to be consistent with those statutes and their implementing regulations and to provide guidance to lenders seeking to comply with them. It does not create or confer any substantive or procedural rights on third parties which could be enforceable in any administrative or civil proceeding.

This policy statement will discuss what constitutes lending discrimination under these statutes and answer questions about how the Agencies will respond to lending discrimination and what steps lenders might take to prevent discriminatory lending practices.

#### A. Lending Discrimination Statutes and Regulations

1. The ECOA prohibits discrimination in any aspect of a credit transaction. The ECOA is not limited to consumer loans. It applies to any extension of credit, including extensions of credit to small businesses, corporations, partnerships, and trusts. The ECOA prohibits discrimination based on:

- Race or color;
- Religion;
- National origin;
- Sex;
- Marital status;
- Age (provided the applicant has the capacity to contract);
- The applicant's receipt of income derived from any public assistance program; and
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.

The Federal Reserve Board's Regulation B, found at 12 CFR part 202, implements the ECOA. Regulation B describes lending acts and practices that are specifically prohibited, permitted, or required. Official interpretations of the regulation are found in supplement I to 12 CFR part 202.

2. The FH Act prohibits discrimination in all aspects of residential real-estate-related transactions, including, but not limited to:

- Making loans to buy, build, repair, or improve a dwelling;
- Purchasing real estate loans;
- Selling, brokering, or appraising residential real estate; and
- Selling or renting a dwelling.

The FH Act prohibits discrimination based on:

- Race or color;
- National origin;

- Religion;
- Sex;
- Familial status (defined 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
- Handicap.

HUD's regulations implementing the FH Act are found at 24 CFR Part 100. Because both the FH Act and the ECOA apply to mortgage lending, lenders may not discriminate in mortgage lending based on any of the prohibited factors in either list.

Liability under these two statutes for discrimination on a prohibited basis is civil, not criminal. However, there is criminal liability under the FH Act for various forms of interference with efforts to enforce the FH Act, such as altering or withholding evidence or forcefully intimidating persons seeking to exercise their rights under the FH Act.

What is prohibited. Under the ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction and, under both the ECOA and the FH Act, it is unlawful for a lender to discriminate on a prohibited basis in a residential real estate related transaction. Under one or both of these laws, a lender may not, because of a prohibited factor:

- 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; or
- Use different standards for pooling or packaging a loan in the secondary market.

A lender may not express, orally or in writing, a preference based on prohibited factors or indicate that it will treat applicants differently on a prohibited basis.

A lender may not discriminate on a prohibited basis because of the characteristics of:

- A person associated with a credit applicant (for example, a co-applicant, spouse, business partner, or live-in aide); or
- The present or prospective occupants of the area where property to be financed is located.

Finally, the FH Act requires lenders to make reasonable accommodations for a person with disabilities when such accommodations are necessary to afford the person an equal opportunity to apply for credit.

## B. Types of Lending Discrimination

The courts have recognized three methods of proof of lending discrimination under the ECOA and the FH Act:

- “Overt evidence of discrimination,” when a lender blatantly discriminates on a prohibited basis;
- Evidence of “disparate treatment,” when a lender treats applicants differently based on one of the prohibited factors; and
- Evidence of “disparate impact,” when a lender applies a practice
- uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.

### **Overt Evidence of Discrimination.**

There is overt evidence of discrimination when a lender openly discriminates on a prohibited basis.

**Example:** A lender offered a credit card with a limit of up to \$750 for applicants aged 21-30 and \$1500 for applicants over 30. This policy violated the ECOA’s prohibition on discrimination based on age.

There is overt evidence of discrimination even when a lender expresses—but does not act on—a discriminatory preference:

**Example:** A lending officer told a customer, “We do not like to make home mortgages to Native Americans, but the law says we cannot discriminate, and we have to comply with the law.” This statement violated the FH Act’s prohibition on statements expressing a discriminatory preference.

### **Evidence of Disparate Treatment.**

Disparate treatment occurs when a lender treats a credit applicant differently based on one of the prohibited bases. Disparate treatment ranges from overt discrimination to more subtle disparities in treatment. It does not require any showing that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself. It is considered by courts to be intentional discrimination because no credible, nondiscriminatory reason explains the difference in treatment on a prohibited basis.

**Example:** Two minority loan applicants were told that it would take several hours and require the payment of an application fee to determine whether they would qualify for a

home mortgage loan. In contrast, a loan officer took financial information immediately from nonminority applicants and determined whether they qualified in minutes, without a fee being paid. The lender's differential treatment violated both the ECOA and the FH Act.

Redlining refers to the illegal practice of refusing to make residential loans or imposing more onerous terms on any loans made because of the predominant race, national origin, etc., of the residents of the neighborhood in which the property is located. Redlining violates both the FH Act and the ECOA.

Disparate treatment may more likely occur in the treatment of applicants who are neither clearly well-qualified nor clearly unqualified. Discrimination may more readily affect applicants in this middle group for two reasons. First, because the applications are all "close cases," there is more room and need for lender discretion. Second, whether or not an applicant qualifies may depend on the level of assistance the lender provides the applicant in preparing an application. The lender may, for example, propose solutions to problems on an application, identify compensating factors, and provide encouragement to the applicant. Lenders are under no obligation to provide such assistance, but to the extent that they do, the assistance must be provided in a nondiscriminatory way.

**Example:** A nonminority couple applied for an automobile loan. The lender found adverse information in the couple's credit report. The lender discussed the credit report with them and determined that the adverse information, a judgment against the couple, was incorrect since the judgment had been vacated. The nonminority couple was granted their loan. A minority couple applied for a similar loan with the same lender. Upon discovering adverse information in the minority couple's credit report, the lender denied the loan application on the basis of the adverse information without giving the couple an opportunity to discuss the report.

**Example:** Two minority borrowers inquired with a lender about mortgage loans. They were given applications for fixed-rate loans only and were not offered assistance in completing the loan applications. They completed the applications on their own and ultimately failed to qualify. Two similarly situated nonminority borrowers made an identical inquiry about mortgage loans to the same lender. They were given information about both adjustable-rate and fixed-rate mortgages and were given assistance in preparing applications that the lender could accept.

Both of these are examples of disparate treatment of similarly situated applicants, apparently based on a prohibited factor, in the amount of assistance and information the lender provided. The lender might also generally exercise its discretion to disfavor some individuals or favor others in a manner that results in a pattern or practice of disparate treatment that cannot be explained on grounds other than a prohibited basis.

If a lender has apparently treated similar applicants differently on the basis of a prohibited factor, it must provide an explanation for the difference in treatment. If the

lender is unable to provide a credible and legitimate nondiscriminatory explanation, the agency may infer that the lender discriminated.

If an agency determines that a lender's explanation for treating some applicants differently is a pretext for discrimination, the agency may find that the lender discriminated, notwithstanding the lender's explanation.

**Example:** A lender rejected a loan application made by a female applicant with flaws in her credit report but accepted applications by male applicants with similar flaws. The lender offered the explanation that the rejected application had been processed by a new loan officer who was unfamiliar with the bank's policy to work with applicants to correct credit report problems. However, an investigation revealed that the same loan officer who processed the rejected application had accepted applications from males with similar credit problems after working with them to provide satisfactory explanations.

When a lender's treatment of two applicants is compared, even when there is an apparently valid explanation for a particular difference in treatment, further investigation may establish disparate treatment on a prohibited basis. For example, seemingly valid explanations for denying loans to minority applicants may have been applied consistently to minority applicants and inconsistently to nonminority applicants; or "offsetting" or "compensatory" factors cited as the reason for approving nonminority applicants may involve information that the lender usually failed to consider for minority applicants but usually considered for nonminority applicants.

A pattern or practice of disparate treatment on a prohibited basis may also be established through a valid statistical analysis of detailed loan file information, provided that the analysis controls for possible legitimate explanations for differences in treatment. Where a lender's underwriting decisions are the subject of a statistical analysis, detailed information must be collected from individual loan files about the applicants' qualifications for credit. Data reported by lenders under the HMDA do not, standing alone, provide sufficient information for such an analysis because they omit important variables, such as credit histories and debt ratios. HMDA data are useful, though, for identifying lenders whose practices may warrant investigation for compliance with fair lending laws. HMDA data may also be relevant, in conjunction with other evidence, to the determination whether a lender has discriminated.

### **Evidence of Disparate Impact**

When a lender applies a policy or practice equally to credit applicants, but the policy or practice has a disproportionate adverse impact on applicants from a group protected against discrimination, the policy or practice is described as having a "disparate impact." Policies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit.

Although the precise contours of the law on disparate impact as it applies to lending discrimination are under development, it has been clearly established that proof of

lending discrimination using a disparate impact analysis encompasses several steps. The single fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation. Where the policy or practice is justified by “business necessity” and there is no less discriminatory alternative, a violation of the FH Act or the ECOA will not exist.

The existence of a disparate impact may be established through review of how a particular practice, policy or standard operates with respect to those who are affected by it. The existence of disparate impact is not established by a mere assertion or general perception that a policy or practice disproportionately excludes or injures people on a prohibited basis. The existence of a disparate impact must be established by facts. Frequently this is done through a quantitative or statistical analysis. Sometimes the operation of the practice is reviewed by analyzing its effect on an applicant pool; sometimes it consists of an analysis of the practice’s effect on possible applicants, or on the population in general. Not every member of the group must be adversely affected for the practice to have a disparate impact. Evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender that has a disparate impact is in violation of the FH Act or ECOA.

Identifying the existence of a disparate impact is only the first step in proving lending discrimination under this method of proof. When an Agency finds that a lender’s policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by “business necessity.” The justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification could include cost and profitability.

Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect.

**Example:** A lender’s policy is not to extend loans for single family residences for less than \$60,000.00. This policy has been in effect for ten years. This minimum loan amount policy is shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live. The lender will be required to justify the “business necessity” for the policy.

**Example:** In the past, lenders primarily considered net income in making underwriting decisions. In recent years, the trend has been to consider gross income. A lender decided to switch its practices to consider gross income rather than net income. However, in calculating gross income, the lender did not distinguish between taxable and nontaxable income even though nontaxable income is of more value than the equivalent amount of taxable income. The lender’s policy may have a disparate impact on individuals with disabilities and the elderly, both of whom are more likely than the general applicant pool to receive substantial nontaxable income. The lender’s policy is likely to be proven discriminatory. First, the lender is unlikely to be able to show that the policy is compelled



by business necessity. Second, even if the lender could show business necessity, the lender could achieve the same purpose with less discriminatory effect by “grossing up” nontaxable income (i.e., making it equivalent to gross taxable income by using formulas related to the applicant’s tax bracket).

Lenders will not have to justify every requirement and practice every time that they face a compliance examination. The Agencies recognize the relevance to credit decisions of factors related to the adequacy of the borrower’s income to carry the loan, the likely continuation of that income, the adequacy of the collateral to secure the loan, the borrower’s past performance in paying obligations, the availability of funds to close, and the existence of adequate reserves. While lenders should think critically about whether widespread, familiar requirements and practices have an unjustifiable disparate impact, they should look especially carefully at requirements that are more stringent than customary. Lenders should also stay informed of developments in underwriting and portfolio performance evaluation so that they are well positioned to consider all options by which their business objectives can be achieved.

### C. Answers to Questions Often Asked by Financial Institutions and the Public

Lending institutions and others often ask the Agencies questions about various aspects of lending discrimination. The Agencies have compiled this list of common questions, with answers, in order to provide further guidance.

**Q1:** Are disparities in application, approval, or denial rates revealed by HMDA data sufficient to establish lending discrimination?

**A:** HMDA data alone do not prove lending discrimination. The data do not contain enough information on major credit-related factors, such as employment and credit histories, to prove discrimination. Despite these limitations, the data can provide “red flags” that there may be problems at particular institutions. Therefore, regulatory and enforcement agencies may use HMDA data, along with other factors, to identify institutions whose lending practices warrant more scrutiny. Furthermore, HMDA data can be relevant, in conjunction with other data and information, to the determination whether a lender has discriminated.

**Q2:** Does a lending institution that submits inaccurate HMDA data violate lending discrimination laws?

**A:** An inaccurate HMDA data submission constitutes a violation of the HMDA, the Federal Reserve Board’s Regulation C, and other applicable laws, and may subject the lending institution to an enforcement action, which could include civil money penalties, and, if the lender is a HUD-approved mortgagee, the sanctions of the HUD Mortgagee Review Board. An inaccurate HMDA data submission, however, is not in itself a violation of the ECOA or the FH Act. However, a person who intentionally submits incorrect or incomplete HMDA data in order to cover up a violation of the FH Act may be subject, under the FH Act and federal criminal statutes, to a fine or prison term or

both. In addition, a failure to ensure accurate HMDA data may be considered as a relevant fact during a FH Act investigation or an examination of the institution's lending activities.

**Q3:** Does a second review program only for loan applicants who are members of a protected class violate laws prohibiting discrimination in lending?

**A:** Such programs are permissible if they do no more than ensure that lending standards are applied fairly and uniformly to all applicants. For example, it is permissible to review the proposed denial of applicants who are members of a protected class by comparing their applications to the approved applications of similarly qualified individuals who are not members of a protected class to determine if the applications were evaluated consistently. It is impermissible, however, to review the applications of members of a protected class in order to apply standards to those applications different from the standards used to evaluate other applications for the same credit program or to apply the same standards in a different manner, unless such actions are otherwise permitted by law, as described in Question 4.

Other types of second review programs are also permissible. For example, lenders could review the proposed denial of all applicants within a certain income range. Lenders also could review a sampling of all applications proposed for denial, or even review all such applications.

**Q4:** May a lender apply different lending standards to applicants who are members of a protected class in order to increase lending to that sector of its community?

**A:** Generally, a lender that applies different lending standards or offers different levels of assistance on a prohibited basis, regardless of its motivation, would be violating both the FH Act and the ECOA. There are exceptions to the general rule; thus, applying different lending standards or offering different levels of assistance to applicants who are members of a protected class is permissible in some circumstances. For example, the FH Act requires lenders to provide reasonable accommodation to people with disabilities. In addition, providing different treatment to applicants to address past discrimination would be permissible if done in response to a court order or otherwise in accord with applicable legal precedent. However, the law in this area is complex and developing. Before implementing programs of this sort, a lender should seek legal advice.

Of course, affirmative advertising and marketing efforts that do not involve application of different lending standards are permissible under both the ECOA and the FH Act. For example, special outreach to a minority community would be permissible.

**Q5:** Should a lender engage in self-testing?

**A:** Principles of sound lending dictate that adequate policies and procedures be in place to ensure safe and sound lending practices and compliance with applicable laws and regulations, and that a lender adopt appropriate audit and control systems to determine

whether the institution's policies and procedures are functioning adequately. This is as true in the area of fair lending as in other operations. Lenders should employ reliable measures for auditing fair lending compliance. A well-designed and implemented program of self-testing could be a valuable part of this process. Lenders should be aware, however, that data documenting lending discrimination discovered in a self-test generally will not be shielded from disclosure.

Corrective actions should always be taken by any lender that discovers discrimination. Self-testing and corrective actions do not expunge or extinguish legal liability for the violations of law, insulate a lender from private suits, or eliminate the primary regulatory agency's obligation to make the referrals required by law. However, they will be considered as a substantial mitigating factor by the primary regulatory agencies when contemplating possible enforcement actions. In addition, HUD and DOJ will consider as a substantial mitigating factor an institution's self-identification and self-correction when determining whether they will seek additional penalties or other relief under the FH Act and the ECOA. The Agencies strongly encourage self-testing and will consider further steps that might be taken to provide greater incentives for institutions to undertake self-assessment and self-correction.

**Q6:** What should a lender do if self-testing evidences lending discrimination?

**A:** If a lender discovers discriminatory practices, it should make all reasonable efforts to determine the full extent of the discrimination and its cause, e.g., determine whether the practices were grounded in defective policies, poor implementation or control of those policies, or isolated to a particular area of the lender's operations. The lender should take all appropriate corrective actions to address the discrimination, including, but not limited to:

- Identifying customers whose applications may have been inappropriately processed, offering to extend credit if they were improperly denied;
- compensating them for any damages, both out-of-pocket and compensatory; and notifying them of their legal rights;
- Correcting any institutional policies or procedures that may have contributed to the discrimination;
- Identifying, and then training and/or disciplining, the employees involved;
- Considering the need for community outreach programs and/or changes in marketing strategy or loan products to better serve minority segments of the lender's market; and
- Improving audit and oversight systems in order to ensure there is no recurrence of the discrimination.

An institution is not required to report to the Agencies a lending discrimination problem it has discovered. However, a lender that reports its discovery can ensure that the corrective actions it develops are appropriate and complete and thereby minimize the damages to which it will be subject.

**Q7:** Will a lender be held responsible for discriminatory lending engaged in by a single loan officer where the lending institution has good policies and procedures in place, is otherwise in full compliance with all applicable laws and regulations, and neither knows nor reasonably could have known that the officer was engaged in illegal discriminatory conduct?

**A:** Fair lending violations can occur even in the most well-run lending institutions that have good policies in place to ensure compliance with fair lending laws and regulations. Of course, the chances that such violations will occur can be greatly reduced by backing up those policies with proper employee training and supervision and subjecting the lending process to proven systems of oversight and review. Self-testing can further reduce the likelihood that violations may occur. Notwithstanding these efforts, a single loan officer might still improperly apply policies or, worse yet, deliberately circumvent them and manage to conceal or disguise the true nature of his or her practices for a time. It may be particularly difficult to discover this type of behavior when it occurs in the pre-application process.

In any case where discriminatory lending by a lending institution is identified, the lender will be expected to identify and fairly compensate victims of discriminatory conduct just as it would be expected to compensate a customer if an employee's conduct resulted in physical injury to the customer. In addition, such a violation might constitute a "pattern or practice" that must be referred to DOJ or a violation that must be referred to HUD.

As in other cases of discriminatory behavior, where a lender takes self-initiated corrective actions, such actions will be considered as a substantial mitigating factor by the Agencies in determining the nature of any enforcement action and what penalties or other relief would be appropriate.

**Q8:** If a federal financial institutions regulatory agency has "reason to believe" that a lender has engaged in a pattern or practice of discrimination in violation of the ECOA, the ECOA requires the agency to refer the matter to DOJ. What constitutes a "reason to believe"?

**A:** A federal financial institutions regulatory agency has reason to believe that an ECOA violation has occurred when a reasonable person would conclude from an examination of all credible information available that discrimination has occurred. This determination requires weighing the available evidence and applicable law and determining whether an apparent violation has occurred. Information supporting a reason to believe finding may include loan files and other documents, credible observations by persons with direct knowledge, statistical analysis, and the financial institution's response to the preliminary examination findings.

Reason to believe is more than an unfounded suspicion. While the evidence of discrimination need not be definitive and need not include evidence of overt discrimination, it should be developed to the point that a reasonable person would conclude that a violation exists.

**Q9:** If a federal financial institutions regulatory agency has reason to believe that a lender has engaged in a “pattern or practice” of discrimination in violation of the ECOA, the agency will refer the matter to DOJ. What constitutes a “pattern or practice” of lending discrimination?

**A:** Determinations by federal financial institutions regulatory agencies regarding a pattern or practice of lending discrimination must be based on an analysis of the facts in a given case. Isolated, unrelated or accidental occurrences will not constitute a pattern or practice. However, repeated, intentional, regular, usual, deliberate, or institutionalized practices will almost always constitute a pattern or practice. The totality of the circumstances must be considered when assessing whether a pattern or practice is present. Considerations include, but are not limited to:

- Whether the conduct appears to be grounded in a written or unwritten policy or established practice that is discriminatory in purpose or effect;
- Whether there is evidence of similar conduct by a financial institution toward more than one applicant. Note, however, that this is not a mathematical process, e.g., “more than one” does not necessarily constitute a pattern or practice;
- Whether the conduct has some common source or cause within the financial institution’s control;
- The relationship of the instances of conduct to one another (e.g., whether they all occurred in the same area of the financial institution’s operations); and
- The relationship of the number of instances of conduct to the financial institution’s total lending activity. Note, however, that, depending on the circumstances, violations that involve only a small percentage of an institution’s total lending activity could constitute a pattern or practice.

Depending on the egregiousness of the facts and circumstances involved, singly or in combination, these factors could provide evidence of a pattern or practice.

**Q10:** How does the employment of few minorities and individuals from other protected classes in lending positions--e.g., Account Executive, Underwriter, Loan Counselor, Loan Processor, Staff Appraiser, Assistant Branch Manager and Branch Manager--affect compliance with lending discrimination laws?

**A:** The employment of few minorities and others in protected classes, in itself, is not a violation of the FH Act or the ECOA. However, employment of few members of protected classes in lending positions can contribute to a climate in which lending discrimination could occur by affecting the delivery of services.

Therefore, lenders might consider the following steps, as appropriate to their institutions:

- Advertising lending job openings in local minority-oriented publications;
- Notifying predominantly minority organizations of such openings;

- Seeking employment referrals from current minority employees, minority real estate boards and local historically minority colleges and other institutions that serve minority groups in the community; and
- Seeking qualified independent fee appraisers from local minority appraisal organizations.

Similar outreach steps could be considered to recruit women, persons with disabilities, and other persons protected by the FH Act and the ECOA.

**Q11:** What is the role of the guidelines of secondary market purchasers and private and governmental loan insurers in determining whether primary lenders practice lending discrimination?

**A:** Many lenders make mortgage loans only when they can be sold on the secondary market, or they may place some loans in their own portfolios and sell others on the secondary market. The principal secondary market purchasers, Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan Mortgage Corporation (“Freddie Mac”), publish underwriting guidelines to inform primary lenders of the conditions under which they will buy loans. For example, ability to repay the loan is measured by suggested ratios of monthly housing expense to income (28%) and total obligations to income (36%). However, these guidelines allow considerable discretion on the part of the primary lender. In addition, the secondary market guidelines have in some cases been made more flexible, for example, with respect to factors such as stability of income (rather than stability of employment) and use of nontraditional ways of establishing good credit and ability to pay (e.g., use of past rent and utility payment records). Lenders should ensure that their loan processors and underwriters are aware of the provisions of the secondary market guidelines that provide various alternative and flexible means by which applicants may demonstrate their ability and willingness to repay their loans. Fannie Mae and Freddie Mac not infrequently purchase mortgages exceeding the suggested ratios, and their guidelines contain detailed discussions of the compensating factors that can justify higher ratios (and which must be documented by the primary lender).

A lender who rejects an application from an applicant who is a member of a protected class and who has ratios above those of the guidelines and approves an application from another applicant with similar ratios should be prepared to show that the reason for the rejection was based on factors that are applied consistently without regard to any of the prohibited factors.

These same principles apply equally to the guidelines of private and governmental loan insurers.

**Q12:** What criteria will be employed in taking enforcement actions or seeking remedial measures when lending discrimination is discovered?

**A:** Enforcement sanctions and remedial measures for lending discrimination violations vary depending on whether such sanctions are sought by the appropriate federal financial institutions regulatory agencies, DOJ, HUD or other federal agencies charged with enforcing either the ECOA or the FH Act. The following discussion sets out the criteria typically employed by the federal banking agencies (i.e., OCC, OTS, the Board and FDIC), NCUA, DOJ, HUD, OFHEO, FHFB, and FTC in determining the nature and severity of sanctions that may be used to address discriminatory lending practices. As discussed in Questions 8 and 9, above, in certain situations, the primary regulatory agencies will also refer enforcement matters to HUD or DOJ.

The federal banking agencies:

The federal banking agencies are authorized to use the full range of their enforcement authority under 12 U.S.C. 1818 to address discriminatory lending practices. This includes the authority to seek:

- Enforcement actions that may require both prospective and retrospective relief; and Civil money penalties (“CMPs”) in varying amounts against the financial institution or any institution-affiliated party (“IAP”) within the meaning of 12 U.S.C. 1813(u), depending, among other things, on the nature of the violation and the degree of culpability.

In addition to the above actions, the federal banking agencies may also take removal and prohibition actions against any IAP where the statutory requirements for such actions are met.

The federal banking agencies will make determinations as to the appropriateness of any potential enforcement action after giving full consideration to a variety of factors. In making these determinations, the banking agencies will take into account:

- The number and duration of violations identified;
- The nature of the evidence of discrimination (i.e., overt discrimination, disparate treatment or disparate impact);
- Whether the discrimination was limited to a particular office or unit of the financial institution or was more pervasive in nature;
- The presence and effectiveness of any anti-discrimination policies;
- Any history of discriminatory conduct; and
- Any corrective measures implemented or proposed by the financial institution.

The severity of the federal banking agencies’ enforcement response will depend on the egregiousness of the financial institution’s conduct. Voluntary identification and correction of violations disclosed through a self-testing program will be a substantial mitigating factor in considering whether to initiate an enforcement action.

In addition, the federal banking agencies may consider whether an institution has provided victims of discrimination with all the relief available to them under applicable civil rights laws.

The federal banking agencies may seek both prospective and retrospective relief for fair lending violations.

Prospective relief may include requiring the financial institution to:

- Adopt corrective policies and procedures and correct any financial institution policies or procedures that may have contributed to the discrimination;
- Train financial institution employees involved;
- Establish community outreach programs and change marketing strategy or loan products to better serve all sectors of the financial institution's service area;
- Improve internal audit controls and oversight systems in order to ensure there is no recurrence of discrimination; or
- Monitor compliance and provide periodic reports to the primary federal regulator.

Retrospective relief may include:

- Identifying customers who may have been subject to discrimination and offering to extend credit if the customers were improperly denied;
- Requiring the financial institution to make payments to injured parties;
- Restitution: This may include any out-of-pocket expenses incurred as a result of the violation to make the victim of discrimination whole, such as: fees or expenses in connection with the application; the difference between any greater fees or expenses of another loan granted elsewhere after denial by the discriminating lender; and, when loans were granted on disparate terms, appropriate modification of those terms and refunds of any greater amounts paid.
- Other Affirmative Action As Appropriate to Correct Conditions Resulting From Discrimination: The federal banking agencies also have the authority to require a financial institution to take affirmative action to correct or remedy any conditions resulting from any violation or practice. The banking agencies will determine whether such affirmative action is appropriate in a given case and, if such action is appropriate, the type of remedy to order.
- Requiring the financial institution to pay CMPs:

The banking agencies have the authority to assess CMPs against financial institutions or individuals for violating fair lending laws or regulations. Each agency has the authority to assess CMPs of up to \$5,000 per day for any violation of law, rule or regulation. Penalties of up to \$25,000 per day are also permitted, but only if the violations represent a pattern of misconduct, cause more than minimal loss to the financial institution, or result in gain or benefit to the party involved. CMPs are paid to the U.S. Treasury and therefore do not compensate victims of discrimination.



## National Credit Union Administration

For federal credit unions, NCUA will employ criteria comparable to those of the federal banking agencies, pursuant to its authority under 12 U.S.C. 1786.

## The Department of Justice

The Department of Justice is authorized to use the full range of its enforcement authority under the FH Act and the ECOA. DOJ has authority to commence pattern or practice investigations of possible lending discrimination on its own initiative or through referrals from the federal financial institutions regulatory agencies, and to file lawsuits in federal court where there is reasonable cause to believe that such violations have occurred. DOJ is also authorized under the FH Act to bring suit based on individual complaints filed with HUD where one of the parties to the complaint elects to have the case heard in federal court.

The relief sought by DOJ in lending discrimination lawsuits may include:

- An injunction which may require both prospective and retrospective relief; and,
- In enforcement actions under the FH Act, CMPs not to exceed \$50,000 per defendant for a first violation and \$100,000 for any subsequent violation.

Prospective injunctive relief may include:

- A permanent injunction to insure against a recurrence of the unlawful practices;
- Affirmative measures to correct past discriminatory policies, procedures, or practices, so long as consistent with safety and soundness, such as:
  - Expansion of the lender's service areas to include previously excluded minority neighborhoods;
  - Opening branches or other credit facilities in underserved minority neighborhoods;
  - Targeted sales calls on real estate agents and builders active in minority neighborhoods;
  - Advertising through minority-oriented media; Self-testing;
  - Employee training;
  - Changes to commission structures which tend to discourage lending in minority and low-income neighborhoods;
  - Changes in loan processing and underwriting procedures (including second reviews of denied applications) to ensure equal treatment without regard to prohibited factors; and
  - Record keeping and reporting requirements to monitor compliance with remedial obligations.

Retrospective injunctive relief may include relief for victims of past discrimination, actual and punitive damages, and offers or adjustments of credit or other forms of loan commitments.

## The Department of Housing and Urban Development

The Department of Housing and Urban Development is fully authorized to investigate complaints alleging discrimination in lending in violation of the FH Act and has the authority to initiate complaints and investigations even when an individual complaint has not been received. HUD issues determinations on whether or not reasonable cause exists to believe that the FH Act has been violated. HUD also may authorize actions for temporary and preliminary injunctions to be brought by DOJ and has authority to issue enforceable subpoenas for information related to investigations.

Following issuance of a determination of reasonable cause under the FH Act, HUD enforces the FH Act administratively unless one of the parties elects to have the case heard in federal court in a case brought by DOJ.

Relief under the FH Act that may be awarded by an administrative law judge (“ALJ”) after a hearing, or by the Secretary on review of a decision by an ALJ, includes:

- Injunctive or other appropriate relief, including a variety of actions designed to correct discriminatory practices, such as changes in loan processes or procedures, modifications of loan service areas or branching actions, approval of previously denied loans to aggrieved persons, additional record-keeping and reporting on future activities or other affirmative relief;
- Actual damages suffered by persons who are aggrieved by any violation of the FH Act, including damages for mental distress and out-of-pocket losses attributable to a violation; and
- Civil penalties of up to \$10,000 for each initial violation and up to \$25,000 and \$50,000 for successive violations within specific time frames.

HUD also is authorized to direct Fannie Mae and Freddie Mac to undertake various remedial actions, including suspension, probation, reprimand, or settlement, against lenders found to have engaged in discriminatory lending practices in violation of the FH Act or the ECOA.

## The Office of Federal Housing Enterprise Oversight

The Office of Federal Housing Enterprise Oversight is authorized to use its enforcement authority under 12 U.S.C. 4631 and 4636, including cease and desist orders and CMPs for violations by Fannie Mae and Freddie Mac of the fair housing regulations promulgated by the Secretary of HUD pursuant to 12 U.S.C. § 4545.

## The Federal Housing Finance Board

While the Federal Housing Finance Board does not have enforcement authority under the ECOA or the FH Act, in reviewing the members of the Federal Home Loan Bank System for community support, it may restrict access to long-term System advances to any member that, within two years prior to the due date of submission of a Community

Support Statement, had a final administrative or judicial ruling against it based on violations of those statutes (or any similar state or local law prohibiting discrimination in lending). System members in this situation are asked to submit to the Finance Board an explanation of steps taken to remedy the violation or prevent a recurrence. See 12 U.S.C. 1430(g); 12 CFR 936.3 (b)(5).

### The Federal Trade Commission

The Federal Trade Commission enforces the requirements of the ECOA and Regulation B for all lenders subject to the ECOA, except where enforcement is specifically committed to another agency. The FTC may exercise all of its functions and powers under the Federal Trade Commission Act (“FTC Act”) to enforce the ECOA, and a violation of any requirement under the ECOA is deemed to be a violation of a requirement under the FTC Act. The FTC has the power to enforce Regulation B in the same manner as if a violation of Regulation B were a violation of an FTC trade regulation rule.

This means that the FTC has the power to investigate lenders suspected of lending discrimination and to use compulsory process in doing so. The Commission, through DOJ or on its own behalf where the Justice Department declines to act, may file suit in federal court against suspected violators and seek relief including:

- Injunctions against the violative practice;
- Civil penalties of up to \$10,000 for each violation; and
- Redress to affected consumers.

In addition, the Commission routinely imposes recordkeeping and reporting requirements to monitor compliance.

**Q13:** Will a financial institution be subjected to multiple actions by DOJ or HUD and its primary regulator if discriminatory practices are discovered?

**A:** In all cases where referrals to other agencies are made, the appropriate federal financial institutions regulatory agency will engage in ongoing consultations with DOJ or HUD regarding each agency’s actions. The Agencies will coordinate their enforcement actions and make every effort to eliminate unnecessarily duplicative actions. Where both a federal financial institutions regulatory agency and either DOJ or HUD are contemplating taking actions under their own respective authorities, the Agencies will seek to coordinate their actions to determine that each agency’s action is consistent and complementary. The financial institutions regulatory agencies also will discuss referrals on a case-by-case basis with DOJ or HUD to determine whether multiple actions are necessary and appropriate.

## Appendix Q: Abbreviations

ALJ	administrative law judge
CFPB	Consumer Financial Protection Bureau
CFR	Code of Federal Regulations
CMP	civil money penalty
CRA	Community Reinvestment Act
CRAD	Compliance Risk Analysis Division
DOJ	U.S. Department of Justice
ECOA	Equal Credit Opportunity Act
EIC	examiner-in-charge
FDIC	Federal Deposit Insurance Corporation
Fed. Reg.	<i>Federal Register</i>
FHEO	Office of Fair Housing and Equal Opportunity
FHFB	Federal Housing Finance Board
FH Act	Fair Housing Act
FTC	Federal Trade Commission
HELOC	home equity line of credit
HMDA	Home Mortgage Disclosure Act
HUD	U.S. Department of Housing and Urban Development
IAP	institution-affiliated party
LAR	loan application register
LFT	large file transfer
LTV	loan-to-value
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
OFHEO	Office of Federal Housing Enterprise Oversight
OREO	other real estate owned
OTS	Office of Thrift Supervision
PB	prohibited basis
RFPA	Right to Financial Privacy Act
SBA	U.S. Small Business Administration
SME	subject matter expert
SPCP	special purpose credit program
USC	U.S. Code

## References

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### Laws

12 USC 2901 et seq., 12 CFR 25, “Community Reinvestment Act”  
12 USC 5301 et seq., “Consumer Financial Protection Act”  
15 USC 45, “Federal Trade Commission Act”  
15 USC 1691 et seq., “Equal Credit Opportunity Act”  
42 USC 3601-3619, “Civil Rights Act of 1968 (Fair Housing Act)”

### Regulations

12 CFR 7, “Activities and Operations”  
12 CFR 30, “Safety and Soundness Standards”  
12 CFR 34, “Real Estate Lending and Appraisals”  
12 CFR 128, “Nondiscrimination Requirements”  
12 CFR 160, “Lending and Investment”  
12 CFR 1002, “Equal Credit Opportunity Act Regulation (Regulation B)”  
12 CFR 1025, “Real Estate Settlement Procedures Act (Regulation X)”  
12 CFR 1026, “Truth in Lending (Regulation Z)”  
24 CFR 100–110, “Fair Housing Act Regulation”

### Interagency Issuances

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(November 17, 1981)  
Policy Statement on Discrimination in Lending (April 15, 1994)  
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## Comptroller's Handbook

“Bank Supervision Process”  
“Community Bank Supervision”  
“Compliance Management Systems”  
“Corporate and Risk Governance”  
“Federal Branches and Agencies Supervision”  
“Foreword”  
“Large Bank Supervision”  
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## Other Issuances

White House, Executive Order No. 12892, “Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing” (January 17, 1994)  
CFPB, “Statement Regarding the Provisions of Financial Products and Services to Consumers with Limited English Proficiency” (January 13, 2021)  
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CFPB, “Advisory Opinion on Special Purpose Credit Programs” (December 21, 2022)