Fair Lending Compliance for Mortgage Lenders: An ESG Approach

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Mortgage lenders of all sizes are paying closer attention to environmental, social and governance ("ESG") issues as they face inquiries from their investors and customers as well as increased scrutiny from regulators. Given the relatively new focus on ESG and the lack of a standardized approach to address such concerns, decisionmakers at financial institutions must consider long and short-term ESG issues and adjust their business practices accordingly.

To tackle ESG concerns head on, many mortgage lenders have announced public commitments in each of the E, S and G categories. For example, several lenders have focused on environmental sustainability ("E") — including efforts to limit greenhouse gas emissions and promote resiliency of their real estate investments. Some mortgage lenders have established ESG initiatives that include implementing affordable housing initiatives to generate positive social impact ("S") and setting forth updated governance ("G") policies, such as promoting diversity and inclusion in board composition and leadership.

This article discusses the recent trend of increased regulatory scrutiny of mortgage lenders under fair lending laws and offers lenders an approach to advance the social and governance aspects of ESG with preemptive compliance measures in light of the latest anti-discrimination enforcement actions by federal regulators.

I. Fair Lending Laws

More than fifty years after the federal Fair Housing Act ("FHA")[1] banned racial discrimination in residential real estate transactions, members of Black and Latino communities continue to be routinely denied conventional mortgage loans at rates far higher than their white counterparts. This practice, historically known as "redlining," refers to a New Deal-era practice in which the Federal Housing Administration mapped and color-coded every metropolitan area in the country to indicate where it was "safe" to insure mortgages.[2] Black communities and adjacent neighborhoods were colored red to indicate to appraisers that these neighborhoods were too risky and that the property value of the homes in these areas were likely to decline due to their racial composition. In 1977, the Community Reinvestment Act[3] supplemented the Fair Housing Act to further combat redlining practices by requiring federal banking regulators to encourage financial institutions to meet the credit needs of the communities in which they conduct business, including low- and moderate-income ("LMI") neighborhoods.[4]

The Equal Credit Opportunity Act ("ECOA"),[5] enacted in 1974, also made it unlawful for a lender to discriminate on a prohibited basis, including race, color and national origin, in any aspect of a credit transaction. Collectively, the prohibitions on discrimination under the ECOA, the FHA and the Consumer Financial Protection Act of 2010 ("CFPA")[6] apply to the extension of credit for any residential real estate transaction, including sales and rentals of residential properties. As a result, recent regulatory enforcement actions under the ECOA and FHA extend to the commercial real estate context, particularly multifamily housing and single-family rental ("SFR") properties, which continue to be strong asset classes for investment and lending despite widespread market volatility.

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1 42 U.S.C. §§ 3601 – 3619.

2 Terry Gross, A 'Forgotten History' of How the U.S. Government Segregated America, NPR (May 3, 2017, 12:47 PM).

3 12 U.S.C. § 2901.

4 Community Reinvestment Act (CRA), Federal Reserve Board (last updated Aug. 24, 2022).

5 15 U.S.C. §§ 1691–1691f.

6 12 U.S.C. § 5536(a)(1)(A).

II. Renewed Focus on Enforcement

On October 22, 2021, the U.S. Department of Justice ("DOJ") announced its "Combatting Redlining Initiative," which the DOJ described as an "aggressive and coordinated" approach to enforce fair lending laws.[7] Working with the Consumer Financial Protection Bureau ("CFPB") and the Office of the Comptroller of the Currency ("OCC"), the DOJ simultaneously announced an agreement to resolve lending discrimination allegations against Trustmark National Bank ("Trustmark").[8] In *Trustmark*, the DOJ and CFPB alleged that Trustmark violated the FHA, the ECOA and the CFPA by engaging in a pattern or practice of deliberately avoiding marketing, offering or originating home loans in majority-Black and Latino neighborhoods.[9] The settlement required Trustmark to pay a US$5 million civil penalty and to implement remedial measures, including investing US$3.85 million over five years in a loan subsidy fund to increase mortgage lending to majority-minority areas and devoting resources to advertising, community outreach and credit and financial education services in those communities.[10]

Since *Trustmark*, the DOJ and CFPB have brought at least three other lawsuits against bank and non-bank mortgage lenders with similar allegations and settlements.[11] In July 2022, the DOJ filed its first non-bank complaint against Trident Mortgage Company ("Trident"), alleging violations of the FHA, the ECOA and the CFPA due to marketing and sales practices that discouraged prospective applicants in the greater Philadelphia area's minority neighborhoods from applying for mortgage loans.[12] Trident ultimately settled the claims and agreed, among other things, to pay a US$4 million penalty to the CFPB's victim relief fund, to invest US$20 million to increase credit opportunities in minority neighborhoods, and to contribute US$18.4 million towards a loan subsidy fund for loan applicants in minority neighborhoods.[13]

III. Internal Governance and Compliance

The *Trustmark* and *Trident* examples provide key lessons to aid both bank and non-bank mortgage lenders in navigating the current anti-discrimination enforcement landscape. While the DOJ and CFPB so far have focused predominantly on residential mortgage lending, commercial real estate lenders must also be mindful that strong anti-discrimination compliance programs matter and should be adopted preemptively. The good news is that compliance programs can be implemented in conjunction with a lender's ongoing ESG initiatives.

Drawing from *Trustmark*, *Trident* and other recent anti-discrimination cases in the last year, internal governance is clearly a key component of any effective fair lending compliance program, and such programs should cover the following:

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7 Press Release 21-1039, Dep't of Just., Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021), [hereinafter DOJ Press Release 21-1039].

8 *Id.*

9 Complaint at 1, *United States v. Trustmark National Bank* (W.D. Tenn.) (Oct. 22, 2021) [hereinafter *Trustmark* Complaint].

10 DOJ Press Release 21-1039, supra note 7

11 *See* Dep't of Just., Recent Accomplishments of The Housing and Civil Enforcement Section (updated Jan. 4, 2023).

12 Press Release 22-805, Dep't of Just., Justice Department and Consumer Financial Protection Bureau Secure Agreement with Trident Mortgage Company to Resolve Lending Discrimination Claims (July 27, 2022), [hereinafter DOJ Press Release 22-805]

13 *Id.*

- *Employee Hiring and Training*: Lenders are responsible for training their employees on fair lending practices and will be held accountable for failure to properly train their staff.[14] In addition to training, a renewed focus on hiring diverse talent and promoting minority employees into leadership positions, which also often aligns with ESG goals, will reduce the likelihood of both overt discrimination and disparate impact in credit decisions.

  In recent years, racial equity audits have become commonplace as either investors or customers call for ESG accountability for financial institutions. These audits, which can occur under the protection of privilege if done correctly, offer institutions an opportunity to assess racial equity concerns both internally (e.g., with respect to internal training and leadership composition) as well as externally (e.g., with respect to the services and offerings to customers) to identify and address areas for improvement. For example, in 2021, Citigroup ("Citi") undertook a third-party racial audit that included input from various stakeholders, such as Citi employees, other financial institutions and partners that directly benefited from or were involved with implementing Citi's Action for Racial Equity initiative, and civil rights organizations representing the views of the customers and communities affected by the initiative.[15]

- *Internal Monitoring and Reviews*: Internal monitoring will be deemed inadequate when lenders do not establish appropriate review policies, such as fair lending oversight committees, or fail to improve lending practices when statistics or data show disproportionate lending to minority communities. For example, the *Trident* complaint alleged that Trident took no meaningful action after it received at least six separate third-party reports indicating that it was consistently underserving minority neighborhoods.[16] FDIC guidance suggests that denied commercial loan applications should be analyzed on a quarterly basis to determine whether the data show any concerning trends, such as a high number of denied applications for properties located in minority communities or which are or appear to be owned by women or minorities.[17] Notably, the *Trident* litigation clarified that the definition of minority communities has widened, capturing a wide population of "minorities" defined as 50% or more "Black, Hispanic, Asian, Native American, Native Hawaiian, or Pacific Islander" in the U.S. Census.[18]

  Concerns about internal review policies can be addressed by creating standardized operating procedures to review customer applications, and for underwriting and pricing standards and policies. Such internal review policies should also assess the demographics of the communities served and include comparisons to peer lenders. In evaluating fair lending compliance, regulators compare a

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14 *See* Complaint at 6, *United States v. Evolve Bank and Trust* (W.D. Tenn.) (Sep. 29, 2022) [hereinafter Evolve Complaint] (alleging Evolve Bank "did not have any guidance, standards or training for [Loan Production Officers] and loan officers about how to apply concessions; did not require documentation of any kind for the concessions offered; and did not require corporate oversight or approval of concessions"); Complaint at 10-11, *United States v. Lakeland Bank* (D.N.J.) (Sep. 29, 2022) [hereinafter *Lakeland* Complaint] (deeming Lakeland's internal fair-lending policies and procedures inadequate); Complaint at 8, *United States v. Trident Mortgage Company, Inc.* (E.D. Pa.) (July 27, 2022) [hereinafter *Trident* Complaint] (alleging Trident "failed to train or incentivize its almost exclusively white loan officers to lend in majority-minority areas"); *Trustmark* Complaint, *supra* note 9, at 2, 9 (alleging Trustmark did not establish internal fair lending governance or oversight committees); Complaint at 9, *United States v. Cadence Bank, N.A.* (N.D. Ga.) (Aug. 30, 2021), [hereinafter *Cadence* Complaint] (alleging Cadence Bank failed to direct or train its loan officers and staff to better serve the needs of majority-Black and Latino areas).

15 Citi, 2021 Environmental, Social, & Governance Report 66, 68 (2022); Edward Skyler, Citi's Commitment to Transparency and Accountability: The Results of Our Racial Equity Audit, CITI (Dec. 19, 2022).

16 *Trident* Complaint, *supra* note 14, at 17.

17 Fed Deposit Ins. Corp., FDIC Consumer Compliance Examination Manual, Section IV, 1.18 (Mar. 2021) [hereinafter FDIC Manual].

18 *Trident* Complaint, *supra* note 14, at 5.

lender's performance to "peer lenders," defined as "similarly-situated financial institutions that received between 50 percent and 200 percent of the Bank's annual volume of home mortgage loan applications."[19] The DOJ applied this standard to Trident as a non-bank lender,[20] which shows that non-bank lenders are subject to comparison with peer lenders, including banks, and vice versa.

- *Marketing and Outreach Practices*: A lender's marketing, outreach and advertising are also subject to regulatory scrutiny. In multiple complaints, regulators have focused on a lender's concentrated outreach and marketing to majority-white areas over majority-minority areas.[21] Trustmark, for example, had only four of its twenty-five branches in majority-Black and Latino communities, even though 50% of census tracts were made up of majority-Black and Latino constituents.[22] Trustmark also did not staff any mortgage loan officers in the four branches serving the majority-Black and Latino communities.[23]

  A few banks have outlined clear ESG strategies to address this concern. For example, Wells Fargo noted in its 2021 ESG Report that it is pursuing a five-pillar strategy to advance home ownership, which includes recruiting and retaining diverse talent among its staff, being present in minority communities through marketing and outreach, and creating paths to homeownership through homebuyer education and down payment assistance grants.[24] As recently as this month, Wells Fargo committed to investing US$100 million toward its goal of promoting minority homeownership and placing more mortgage consultants in branches located in diverse and LMI communities.[25]

- *Third-Party Liability*: Because the FHA prohibition on discrimination extends to brokers, appraisers and servicers of residential real estate, working with a third party in violation of fair lending laws could expose a mortgage lender to liability.[26] Following multiple studies that show majority-Black and Latino neighborhoods are more likely to be undervalued in comparison to white neighborhoods, the Biden Administration formed an interagency initiative known as the Task Force on Property Appraisal and Valuation Equity ("PAVE") to combat bias in home valuations, which released an extensive action plan in March 2022.[27] Multiple complaints alleging discrimination in property appraisals, seeking relief from the appraiser as well as exposing the lenders to potential liability when acting upon the appraisal, have

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19 *Cadence* Complaint, *supra* note 14, at 11.

20 *See Trident* Complaint, *supra* note 14, at 14 (alleging that Trident underperformed in generating mortgage applications as compared to its "peer lenders").

21 *See Lakeland Bank* Complaint, *supra* note 14, at 11, (alleging that Lakeland failed to provide meaningful outreach and marketing in majority-Black and Latino neighborhoods); *Trident* Complaint, *supra* note 14, at 9-11 (alleging that Trident's marketing targeted majority-White neighborhoods); *Trustmark* Complaint, *supra* note 9, at 1 (alleging that Trustmark structured its outreach efforts to avoid majority-Black and Latino neighborhoods); *Cadence* Complaint at 9 (alleging that Cadence Bank avoided marketing and outreach in majority-Black and Latino neighborhoods).

22 *Trustmark* Complaint, *supra* note 9, at 6.

23 *Id*. at 6-7

24 Wells Fargo, Environmental, Social, and Governance Report 40 (July 2021), [hereinafter WF 2021 ESG Report].

25 Hugh Son, Wells Fargo, Once the No. 1 Player in Mortgages, Is Stepping Back from the Housing Market, CNBC (Jan. 10, 2023).

26 FDIC Manual, *supra* note 17, at 1.6.

27 Action Plan to Advance Property Appraisal and Valuation Equity (March 2022).

already been filed.[28] Lender liability in connection with broker arrangements may depend on the extent to which credit decision-making, such as review of loan applications, credit terms and/or pricing, is delegated to the broker as well as broker compensation arrangements.[29] Mortgage lenders should take steps to have appropriate policies and procedures in place to screen a third party in a transaction for compliance with anti-discrimination regulations as well as to identify and correct potential issues as they arise.

In addition to a strong internal governance program addressing the above concerns, lenders can also rely on ESG initiatives to promote policies that include participants from underserved communities to demonstrate a focus on compliance with fair lending laws. For example, in 2021, Morgan Stanley's Global Capital Markets business served as "Diversity and Inclusion Coordinator" for 11 investment-grade bond transactions, including a US$25 billion senior notes offering by Verizon and an US$18.5 billion senior notes offering by Amazon, which resulted in significant deal allocations to minority-owned, veteran-owned and woman-owned underwriters.[30] In July 2022, Citi included three Black-owned banks (Industrial Bank, First Independence Bank, and Mechanics and Farmers Bank) in a US$1.23 billion syndicated corporate loan to Science Applications International Corp. as part of Citi's effort to connect minority-owned banks to new and unique business opportunities.[31] In addition, Citi's three-year Action for Racial Equity initiative, which has already invested US$1 billion in various strategic initiatives to help close the racial wealth gap in its first year, oversaw the creation of a Diverse Financial Institutions Group to develop relationships with diverse broker-dealers and asset managers.[32]

IV. Commitments to Social Finance

Implementing outward-facing initiatives that directly benefit minority communities could also help mitigate overt discrimination liability and avoid heightened regulatory scrutiny of lenders of real estate loans when looking at the financial institution as a whole. The ECOA generally prohibits lenders from requesting and/or collecting personal information about an applicant that has no direct relation to the applicant's ability or willingness to repay the requested loan.[33] However, under Regulation B (12 C.F.R. Part 1002), the CFPB has carved out a broad exception for special purpose credit programs ("SPCPs"), which are loan programs designed to address the needs of historically disadvantaged communities. To qualify, an SPCP must include one of the following:

- Any credit assistance program authorized by federal or state law for the benefit of an economically disadvantaged class of persons;

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28 *See* FHFA Could Further Combat Appraisal Bias by Ensuring That Complaints Are Filed with State Authorities and Ensuring the Enterprises Use Appraisals That Comply with Federal Law, FHFA OIG, 9 (Dec. 20, 2022), (pointing out that the DOJ filed a "Statement of Interest" in a private civil lawsuit where plaintiffs alleged racial discrimination in the appraisal they received in violation of the Fair Housing Act); Press Release, NCRC Files HUD Complaints Against Appraisers Who Discriminated Against Black Homeowners In Recent Investigation, NCRC (Nov. 4, 2022), (describing two recently filed complaints against appraisers with the Department of Housing and Urban Development alleging racial discrimination by the appraisers).

29 FDIC Manual, *supra* note 17, at 1.6.

30 Morgan Stanley, 2021 Diversity and Inclusion Report 3.

31 Citigroup Enlists Black-Owned Banks in Rare US$1.2 Billion Loan Deal, BLOOMBERG (July 29, 2022).

32 Press Release, Citi, Citi's Action for Racial Equity Initiative Invests US$1 Billion to Address the Racial Wealth Gap in the U.S. (Nov. 9, 2021).

33 CFPB Advisory Opinion, No. 4810-AM-P, available at https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

- Any credit assistance program offered by a not-for-profit organization for the benefit of its members or an economically disadvantaged class of persons; or

- Any credit assistance program offered by a for-profit organization, or in which such an organization participates to meet special social needs, if it meets certain standards prescribed in regulation by the CFPB, including a written plan that identifies the class of persons the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.[34]

SPCPs can help mortgage lenders effectively signal to regulators and the public that they are committed to equitable access to credit. In recent years, a number of large financial institutions have developed innovative and socially conscious lending practices that may qualify as SPCPs and which overlap with their respective ESG goals, including:

- *Bank of America*: In March 2021, Bank of America announced it would increase its prior commitment to advance racial equality and economic opportunity to US$1.25 billion over five years. As of its 2021 Annual Report, Bank America had already committed US$450 million to twenty-two minority depository institutions ("MDIs") and community development financial institutions ("CDFIs") and invested more than US$300 million in minority and women entrepreneurs.[35] Bank of America also committed US$60 million to support a five-year initiative intended to increase access to capital and career opportunities for Black, Indigenous and People of Color ("BIPOC") leaders developing multi-family, affordable and supportive housing across the country.[36]

- *Citigroup*: Citi's US$500 billion social finance goal has been furthered by its Community Capital lending platform, which provided approximately US$5.6 billion to finance affordable housing projects in 2021.[37] As a result, Citi has been recognized as the top affordable housing lender for 12 consecutive years.[38]

- *Freddie Mac and Fannie Mae*: Under their Equitable Housing Finance Plans for 2022-2024 (the "Plans"), the government-sponsored Freddie Mac and Fannie Mae enterprises are aiming to address systemic barriers experienced by BIPOC renters and homeowners by adopting SPCPs. In addition, the Plans cover consumer education initiatives for renters and homeowners, credit reporting practices that will help tenants build credit profiles and provide better access to financial services, and a counseling program to support housing stability.[39]

- *Goldman Sachs*: As an early mover in socially conscious lending, Goldman Sachs formed its Urban Investment Group in 2001, an investing and lending platform that provides over US$1 billion annually in community and economic development, including through real estate projects, social enterprises and

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34 12 U.S.C. §1002; *see also* Tim Lambert, Using Special Purpose Credit Programs to Serve Unmet Credit Needs, Consumer Finance Protection Bureau (July 19, 2022).

35 Bank of America, Driving Responsible Growth – now and going forward 34, 36 (2022); Bank of America, Bank of America Increases Commitment to Advance Racial Equality and Economic Opportunity to US$1.25 Billion (Mar. 30, 2021, 11:00 AM).

36 Enterprise Community Partners, Bank of America Providing US$60 Million Fund for BIPOC Affordable Housing Developers (Apr. 28, 2021).

37 Citi, Environmental and Social Policy Framework 3, 26 (2022).

38 Citi, Citi Ranked Number One Affordable Housing Lender for 12th Straight Year (Mar. 30, 2022).

39 Fed. Hous. Finance Agency, FHFA Announces Equitable Housing Finance Plans for Fannie Mae and Freddie Mac (June 8, 2022).

lending facilities for small businesses.[40] In January 2022, the Urban Investment Group announced the launch of a US$75 million joint venture with the National Affordable Housing Trust to establish the Black Developers Initiative Affordable Housing Fund, which focuses on providing credit to Black female real estate developers.[41]

- *JPMorgan Chase*: As part of JPMorgan Chase's US$30 billion Racial Equity Commitment, the bank funded more than US$6 billion in loans to preserve more than 60,000 affordable housing and rental housing units and approved US$1 billion in lending for the new construction and rehabilitation of affordable housing for LMI households in its first year.[42] In May 2022, JPMorgan Chase reported that it had provided more than US$221 million in project financing of US$500 million overall aggregate financing in the prior year to Black-owned or -led commercial real estate developers.[43]

- *Wells Fargo*: According to its 2021 ESG Report, Wells Fargo has made a five-year commitment to provide US$150 billion in mortgage loans to minority households and US$70 billion in loans to LMI households.[44] In 2021, Wells Fargo also launched the Advancing Homeownership program, which includes a 10-year commitment to provide US$125 billion and US$60 billion in mortgage loans to Latino and Black homeowners, respectively.[45] In June 2022, the Wells Fargo Foundation announced a US$40 million commitment to various organizations focused on expanding credit access and support to BIPOC real estate developers.[46]

These public commitments to social finance are positive factors for any real estate lender from an ESG and fair lending perspective. Regulators, however, have signaled that the SPCPs and other programs specifically designed to assist certain groups — including minorities — is only one consideration in the fair lending review process.[47] A broad yet thorough internal governance program to prevent anti-discrimination in lending is equally important to safeguard against regulatory scrutiny. The combination of social and governance efforts offers a strong protective approach to handle the current fair lending enforcement environment.

V. Conclusion

Mortgage lenders, now more than ever, are presented with an opportunity to mitigate potential discrimination liability and promote fair lending practices by focusing on ESG initiatives, particularly in the "S" and "G" categories. Lenders are encouraged to implement comprehensive and proactive internal governance programs, along with outward-facing ESG initiatives that are specifically designed to assist minority communities, in order to demonstrate a commitment to fair lending. Not only will these programs help mortgage lenders comply with fair

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40 Goldman Sachs, Urban Investment Group Is Formed to Lead the Firm's Impact Investing Efforts.

41 Goldman Sachs, Sustainability Report 2021, Progress Through Performance: Advancing the Climate Transition and Inclusive Growth 58 (2021).

42 JPMorgan Chase, JPMorgan Chase Provides an Update on its US$30 Billion Racial Equity Commitment, *see also* JPMorgan Chase, Fact Sheet.

43 JPMorgan Chase & Co., 2021 Environmental Social & Governance Report 22 (2021); *see also* Imani Moise, JPMorgan Collects Data on Borrowers' Race in Push against Wealth Gap, Financial Times (May 27, 2022).

44 WF 2021 ESG Report, *supra* note 24, at 39.

45 Wells Fargo, 2022 Diversity, Equity, and Inclusion Report, Diversity, Equity, and Inclusion at Wells Fargo—Colleagues, Customers, Communities (Rev. July 2022).

46 Wells Fargo, Wells Fargo Foundation Aims to Grow Diverse Housing Developers with US$40 Million Donation (June 29, 2022).

47 FDIC Manual. *supra* note 17, at 1.9.

lending laws and preempt increased regulatory scrutiny, implementing social finance and governance programs will provide innovative and impactful steps toward building a better, more equitable mortgage lending environment. As Jerry Silva, a contributor to Forbes and ServiceNow's BrandVoice program, recently observed, "what's good for people is good for business."[48]

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[48] Jerry Silva, ESG Is Banking's Next Big Thing, FORBES (Jan. 28, 2022).

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