

Banking & Financial Services

POLICY REPORT

HUD's Equal Access Rule: A New Chapter in Fair Lending Compliance

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For 45 years, the US Department of Housing and Urban Development (HUD) has been charged with administering the Fair Housing Act's (FHA) prohibitions on housing discrimination based on race, color, religion, sex, and national origin. In 1988, the Fair Housing Amendments Act modified the FHA to (1) prohibit discrimination based on disability or familial status, and (2) expand HUD's role from investigator and conciliator to mandatory enforcer.

The FHA does not expressly prohibit discrimination based on sexual orientation or gender identity, but on February 3, 2012, HUD addressed Gay, Lesbian, Bisexual, and Transgender (LGBT) housing discrimination by issuing the *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity Rule* (the Equal Access Rule). The Equal Access Rule applies to housing assisted or insured by HUD, thereby impacting FHA-approved lenders and others participating in HUD programs. It became effective on March 5, 2012.

This article discusses the impetus for the Equal Access Rule, its requirements, and HUD's recent activities targeting LGBT-related housing discrimination. It concludes with suggestions for lender compliance with the Equal Access Rule.

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Background of the Equal Access Rule

LGBT rights are at the forefront of the political landscape at local, state, and federal levels. In December 2013, after the New Mexico Supreme Court unanimously ruled in favor of same-sex marriage, 21 states and the District of Columbia allow same-sex marriage, civil unions, or some type of domestic partnership.¹ Twenty-one states, the District of Columbia, and more than 200 localities prohibit sexual orientation-based housing discrimination.² Additionally, 12 states prohibit discrimination based on sexual orientation in access to financial credit, credit practices, or credit generally.³ Seventeen states ban discrimination based on gender identity⁴ with Delaware (2013), Connecticut (2011), Hawaii (2011), and Massachusetts (2011) most recently adding gender identity to their pre-existing antidiscrimination laws.⁵ Washington and Illinois specifically prohibit discrimination in real estate transactions based on sexual orientation and gender identity.⁶

At the federal level, the US Supreme Court decided two cases last year bolstering LGBT-related rights,⁷ executive agencies have adopted regulations to protect LGBT rights,⁸ and the proposed Employment Non-Discrimination Act—which generally prohibits hiring and employment discrimination on the basis of sexual orientation and gender identity—received Senate approval on November 7, 2013, and is currently pending in the House of Representatives.⁹

The Equal Access Rule is consistent with other federal government efforts to protect LGBT persons from discrimination based on sexual orientation or gender identity. In July 2010, HUD released guidance on LGBT housing discrimination, noting that (1) HUD will treat discrimination most often encountered by transgender persons as

sex-based discrimination under the FHA¹⁰ and (2) that in some instances discrimination against LGBT individuals will also violate the Fair Housing Act.¹¹

In response to “evidence suggesting that [LGBT] individuals and families are arbitrarily excluded from housing opportunities in the private sector,” HUD issued its proposed Equal Access Rule for comment on January 24, 2011.¹² As proof of the need for the rule, HUD emphasized two reports on LGBT housing discrimination that uncovered widespread discrimination: A January 2007 Michigan Fair Housing Centers’ Report on Sexual Orientation and Housing Discrimination in Michigan (the Michigan Report) and a November 2009 Report from the National Gay and Lesbian Task Force and the National Center for Transgender Equality (the Task Force Report). The Michigan Report found that more than one in four LGBT couples experienced disparate treatment in the provision of housing. The Task Force Report, which surveyed more than 6,000 transgender participants, reflected that transgendered persons were subject to significant levels of housing instability and discrimination based on their gender identity.

In connection with proposing the Equal Access Rule, in 2011, HUD performed its own investigation into housing discrimination based on sexual orientation, with findings published in June 2013. Consistent with the Michigan Report findings, HUD reported disparate treatment of same-sex couples in the online rental housing market.¹³ As a result of the study’s findings and its narrow scope, HUD pledged to undertake additional research related to LGBT housing discrimination.¹⁴

HUD has indicated that preventing housing discrimination against LGBT persons is important to its mission because HUD is “charged with promoting the federal goal of providing decent housing and a suitable living environment for all.”¹⁵ Furthermore, HUD wants its policies and programs to “serve as models for equal housing opportunity.”¹⁶

What Is the Equal Access Rule?

The Equal Access Rule:

- Requires that housing assisted or insured by HUD is made available without regard to actual or perceived sexual orientation, gender identity, or marital status;

- Clarifies that the terms “family” and “household” include persons regardless of actual or perceived sexual orientation, gender identity, or marital status;
- Prohibits owners or operators of HUD-funded or insured housing from inquiring about an applicant’s or occupant’s sexual orientation or gender identity to determine eligibility or otherwise make housing available. Inquiries about sex are allowed only for limited purposes, for example, to determine the number of bedrooms to which a household may be entitled under a housing program, or to comply with voluntary or anonymous local, state, or federal government data collection requirements; and
- Prohibits FHA lenders from considering actual or perceived sexual orientation or gender identity in determining the adequacy of a potential borrower’s income to qualify for a mortgage loan.¹⁷

For the Equal Access Rule’s definition of “sexual orientation,” HUD referenced an Office of Personnel Management publication, *Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights*. The publication reflects the federal government’s commitment to equal employment opportunities for LGBT individuals in federal civil service. “Sexual orientation” is defined as “homosexuality, heterosexuality, or bisexuality.”¹⁸ The Equal Access Rule’s definition of “gender identity” was taken from the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, enacted in 2009. The term is defined as “actual or perceived gender-related characteristics.”¹⁹ It is intended to include transgender persons and “gender related characteristics not stereotypically associated with a person’s designated sex at birth.”²⁰

Although the FHA expressly prohibits discrimination based on race, color, national origin, religion, sex, disability, and familial status, HUD takes the position that the term “sex” prohibits discrimination against LGBT persons in certain circumstances, including those involving nonconformity with gender stereotypes.²¹ In addressing the National Association of Gay and Lesbian Real Estate Professionals, HUD Secretary Donovan explained that “housing discrimination because of nonconformity with gender stereotypes—essentially gender identity discrimination—is sex discrimination under the Fair Housing Act.”²² Notwithstanding the Secretary’s comments, some district courts have found that the FHA does not prohibit discrimination based on sexual orientation.²³

Like other discrimination complaints, complaints of noncompliance with the Equal Access Rule are to be filed with HUD's Office of Fair Housing and Equal Opportunity. According to Secretary Donovan, "when HUD receives a fair housing complaint that alleges discrimination because someone looks in a way or conducts him or herself in a manner that does not conform to gender stereotypes, HUD now begins a formal investigation under the [FHA]."²⁴ HUD and its state and local partners in fair housing enforcement have investigated more than 150 discrimination complaints under this authority.²⁵

Equal Access Rule Enforcement and LGBT Focus

The first and only public settlement to date related to the Equal Access Rule was reported on January 2, 2013.²⁶ It involved allegations that a lender denied a Federal Housing Administration mortgage loan to a Florida couple because of their sexual orientation and marital status. On their loan application, the partner that was not employed listed her partner's mother as a co-applicant. The applicants worked with the lender for several weeks to provide necessary loan documentation and were assured they were likely to receive the loan. On the business day before closing, the lender denied the loan because it did not consider the unmarried applicants to be directly related.

Under the settlement, the lender was required to (1) pay HUD \$7,500, (2) communicate the settlement terms to its residential mortgage loan originators, processors, and underwriters, (3) include details of HUD's Equal Access Rule in its fair lending training program, and (4) communicate the updates to the fair lending training program to applicable employees during the next scheduled fair lending training.

In a press release, HUD General Counsel Helen Kanovsky said "HUD will vigorously enforce its Equal Access Rule," while John Trasviña, HUD Assistant Secretary for Fair Housing and Equal Opportunity, underscored that "the housing industry should take note of this settlement agreement." Kanovsky commended the lender for taking immediate corrective action following HUD's notification of the violation.²⁷

Achieving Equal Access Rule Compliance

HUD is committed to curbing LGBT housing discrimination. According to Secretary Donovan, HUD will continue to "aggressively investigate and prosecute" LGBT-related discrimination, and study and monitor trends in fair

housing.²⁸ Given the regulatory, litigation, and reputational risks of actual or perceived noncompliance, housing providers, including mortgage lenders, must be mindful of legal protections for LGBT persons and maintain an appropriate compliance infrastructure.

We offer the following suggestions for lender compliance with the Equal Access Rule:

- Integrate Equal Access Rule requirements into fair lending policies and procedures;
- Provide training on the Equal Access Rule to all employees to whom it may be applicable, including employees involved in loan origination, processing, underwriting, and those engaged in servicing and Real Estate Owned (REO) asset management;
- Update policies and procedures and provide training on the updates, to the extent prudent, as the Equal Access Rule and its enforcement develops;
- Include Equal Access Rule requirements in policies, procedures, and training materials that are applicable to third parties performing loan origination, processing, underwriting, and servicing functions;
- Encourage employees and relevant third parties to identify and remedy variances or potential variances from Equal Access Rule-related policies;
- Maintain an infrastructure for reporting variances from Equal Access Rule-related policies "up-the-chain" and ensure that management appropriately addresses any issues;
- Test compliance with the Equal Access Rule in accordance with the lender's audit and self-testing protocol; and
- Promptly remedy any actual or potential Equal Access Rule violations, and self-report to HUD as necessary or appropriate.

Additional resources on compliance with the Equal Access Rule are located on HUD's LGBT Fair Housing Web site which includes examples of LGBT housing discrimination, information on state laws banning LGBT housing discrimination and state enforcement agencies, and a link to HUD's Housing Discrimination Complaint Portal.²⁹

Notes

1. Freedom to Marry, *Winning the Freedom to Marry: Progress in the States*, <http://www.freedomtomarry.org/states/> (last visited May 5, 2014) (reflecting that the following 17 states—plus Washington, DC – provide the right to marry for same-sex couples: California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland,

- Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. Additionally, four other states grant alternative options: Colorado allows civil unions, Oregon and Nevada offer broad domestic partnerships, and Wisconsin provides a more limited domestic partnership).
2. Human Rights Campaign, *Statewide Housing Laws and Policies* (2013), online at http://www.hrc.org/files/assets/resources/housing_laws_062013.pdf (last visited May 5, 2014) and 77 *Fed. Reg.* 5662 (Feb. 3, 2012).
 3. IREM Institute of Real Estate Management, *Laws Prohibiting Discrimination Based on Sexual Orientation and Gender Identity* (Legislative White Paper, Aug. 12, 2013), online at <http://www.irem.org/File%20Library/Public%20Policy/Anti-discrimination.pdf> (last visited May 5, 2014).
 4. *Id.*
 5. National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.* (2013), online at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf (last visited May 5, 2014).
 6. *Id.*
 7. *United States v. Windsor*, 133 S. Ct. 1521, 185 L. Ed. 2d 570 (2013) held that it is unconstitutional to restrict the federal interpretation of “marriage” and “spouse” to apply only to unions between a man and a woman; rather, the federal government must recognize same-sex unions when approved by the states. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013) essentially sanctioned same-sex marriages in California because the Court declined to decide the case, finding that the proponents of a California initiative barring same-sex marriage lacked Article III standing.
 8. By way of example, in January 2011, the Centers for Medicare and Medicaid Services issued regulations, which apply to Medicare- and Medicaid-participating hospitals, prohibiting hospitals from denying visitation rights based on sexual orientation (among other things) and clarifying that patients may choose who can make medical decisions on their behalf regardless of sexual orientation. See 75 *Fed. Reg.* 70831 (Nov. 19, 2010).
 9. Jacqueline Klimas, “Senate Passes Gay-Rights Bill to Prevent Workplace Discrimination,” *The Washington Times*, (Nov. 7, 2013), online at <http://www.washingtontimes.com/news/2013/nov/7/senate-passes-non-discrimination-bill/> (last visited May 5, 2014).
 10. *U.S. Department of Housing and Urban Development v. Toone*, Charge of Discrimination (2013), online at <http://portal.hud.gov/hudportal/documents/huddoc?id=13HUDVTOONE.PDF> (last visited May 5, 2014) (alleging a violation of the prohibition against sex-based discrimination under the FHA arising from a transgender woman’s eviction from an RV park in Athens, Texas).
 11. U.S. Department of Housing and Urban Development, Fair Housing LGBT Page, online at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited May 5, 2014).
 12. 76 *Fed. Reg.* 4194 (Jan. 24, 2011).
 13. Office of Policy Development and Research, U.S. Department of Housing and Urban Development, *An Estimate of Housing Discrimination Against Same-Sex Couples 14-16* (2013), online at http://www.huduser.org/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf (last visited May 5, 2014).
 14. Office of Policy Development and Research, U.S. Department of Housing and Urban Development, *Executive Summary of An Estimate of Housing Discrimination Against Same-Sex Couples 5* (2013), online at http://www.huduser.org/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_exec_summ_v2.pdf (last visited May 5, 2014) (noting that the “study serves as the initial step toward future research on same-sex housing discrimination”).
 15. 77 *Fed. Reg.* 5662 (Feb. 3, 2012).
 16. *Id.*
 17. *Id.* at 5663 (Feb. 3, 2012); see also Press Release, U.S. Department of Housing and Urban Development, “HUD Secretary Donovan Announces New Regulations to Ensure Equal Access to Housing for All Americans Regardless of Sexual Orientation or Gender Identity” (Jan. 30, 2012), online at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-014 (last visited May 5, 2014).
 18. 77 *Fed. Reg.* 5662, 5665.
 19. *Id.*
 20. *Id.*
 21. U.S. Department of Housing and Urban Development, Fair Housing LGBT Page http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited May 5, 2014).
 22. Shaun Donovan, U.S. Secretary for Housing and Urban Development, Address Before the National Association of Gay and Lesbian Real Estate Professionals at the National Association of Realtors Midyear Meeting (May 15, 2013) http://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2013/Speech_051513 (last visited May 5, 2014).
 23. See *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp. 2d 1, 4 (D.D.C. 1999) (discrimination based on sexual orientation not covered under the FHA); accord *Swinton v. Fazekas*, No. 06-CV-6139T (MAT), 2008 WL 723914, at 5 (W.D.N.Y. Mar. 14, 2008) and *Ordelli v. Mark Farrell & Associates*, No. 3:12-cv-1791, 2013 WL 1100811, at 2 (D. Ore. Mar. 15, 2013).
 24. Donovan, *supra*, n.22.
 25. *Id.*
 26. Press Release, “U.S. Department of Housing and Urban Development, HUD Announces Agreement to Settle LGBT Discrimination Claim” (Jan. 1, 2013), online at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-001 (last visited May 5, 2014).
 27. *Id.*
 28. Donovan, *supra*, n.22.
 29. HUD, *supra*, n.26.