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**Department of Financial Services**

## Industry Guidance

### Sexual Orientation Discrimination in Mortgage Lending

**To: All Supervised Institutions and their Affiliates Engaged in Mortgage Lending**

#### I. Introduction

The New York State Department of Financial Services (“DFS” or the “Department”) is issuing this guidance to assist supervised institutions and their affiliates engaged in mortgage lending in New York (“Mortgage Lenders”) to develop and implement compliance programs designed to ensure adherence to New York’s fair lending law, Executive Law § 296-a (the “Fair Lending Law”). This guidance, which applies to all Mortgage Lenders, supplements guidance issued by Department, and its predecessor, the New York State Banking Department, regarding the Fair Lending Law.<sup>[1]</sup>

New York’s Fair Lending Law prohibits discrimination in, among other things, the granting, withholding, extending, or renewing, or in the fixing of the rates, terms, or conditions of any form of credit on the basis of sexual orientation. N.Y. Exec. L. § 296-a(1)(b). Risk-based factors are permissible in New York provided those factors are not based on protected class status. Id. § 296-a(3). The Superintendent is authorized to enforce state and federal fair lending laws. Id. § 296-a(8), N.Y. Banking L. § 9-d, N.Y. Fin. Servs. L. § 408(a)(1)(B).

The Department conducted an analysis which revealed the existence of disparities in approvals and denials and terms of credit between same-sex and opposite-sex pairs in mortgage lending. Based on a review of mortgage loan applications and mortgage loan terms from five large

mortgage lenders (four non-depository lenders and one bank) for the years 2016, 2017, and 2018, the Department determined that, in all but two of the fifteen data sets reviewed, same-sex pairs of applicants were denied mortgage loans at significantly higher rates than opposite-sex pairs of applicants. In addition, for six of the data sets, same-sex pairs received between 9 and 17 basis points higher average annual percentage rates than opposite-sex pairs.<sup>[2]</sup> Because any given same-sex pair does not necessarily consist of LGBTQI individuals (e.g., a father and son, two sisters, or two business partners of the same sex), the Department was unable to determine with certainty whether discrimination based on sexual orientation occurred as to any particular same-sex pair within the data set. However, the Department's findings raise sufficient concern of the possibility of discrimination against LGBTQI mortgage applicants that the Department is providing this guidance to assist Mortgage Lenders in reducing risk of such discrimination.

Although the Department's analysis was based primarily on data from non-depository Mortgage Lenders, this Industry Letter provides all Mortgage Lenders guidance on how to reduce the risk of discrimination based on sexual orientation. .

## II. Guidance

The Department hereby provides a list of potential actions for Mortgage Lenders<sup>[3]</sup> to reduce risks of discrimination based on sexual orientation:

1. Vest the Board of Directors and senior management with responsibility for developing a fair lending plan and ensuring that the Mortgage Lender's practices comply with the plan's provisions.
2. Monitor implementation of the fair lending plan and adherence to the plan's policies and procedures, continually addressing application and underwriting processes as well as pricing policies.
3. Implement a training program for new hires, current employees and management. At least semi-annually, provide lending personnel updates on fair lending issues. Compliance personnel should administer and conduct the training program, and participants should certify that they understand and commit to upholding the principles of fair lending laws and the policies and procedures contained in the fair lending plan.
4. Ensure automatic and timely review by a higher-level supervisor of all rejected or withdrawn applications for loans from same-sex pairs who indicated that they would live together in the mortgaged property.
5. Extend, in writing, the principles of the fair lending plan to the Mortgage Lender's refinancing and collection practices.

6. Periodically review and update the fair lending compliance program and fair lending plan, including periodic review by senior management, to ensure that they remain current.

The Department also recommends that Mortgage Lenders ensure they take the following compliance actions:

1. Update policies and procedures to address sexual orientation anti-discrimination efforts.
2. Utilize rate sheets and exception logs to document applications from same-sex pairs who indicated that they would live together in the mortgaged property that are denied for any reason other than a failure to meet the institution's written underwriting standards. Likewise, document approved loans for which same-sex pair applicants who indicated that they would live together in the mortgaged property receive credit terms less favorable than the applicable rate sheets would otherwise determine.
3. Monitor loan portfolio for compliance with fair lending policies and procedures. Depending on the size and complexity of the lender, this may require conducting regular statistical and regression analyses of loan data. As part of this analysis, the Mortgage Lender should consider identifying those loan applications from, and loans made to, same-sex pairs who indicated that they would live together in the mortgaged property, and distinguishing such applications and loans from those applications from, and loans made to, same-sex pairs who do not consist of two individuals who indicated that they would live together in the mortgaged property (such as loans involving a co-signer not intending to occupy the mortgage property, or individuals planning to use the property as an investment rather than as a personal residence).
4. Regularly assess marketing and advertising strategies to ensure compliance with the principles and provisions of fair lending laws and the fair lending plan, especially in relation to discrimination on the basis of sexual orientation.
5. Investigate and attempt to identify the causes of any unexplained disparities in underwriting and pricing between same-sex and opposite-sex pairs who indicated that they would live together in the mortgaged property.

### **III. Conclusion**

This Industry Letter is intended to provide non-exhaustive guidelines for developing a robust fair lending compliance program that avoids credit discrimination on the basis of sexual orientation, and is not intended to limit the scope or applicability of any law or regulation. The Department will continue to conduct fair lending examinations to review lending programs where appropriate and to take any other supervisory or enforcement actions necessary to ensure that lending in New York State complies with all applicable fair lending laws.

Sincerely,

Shirin Emami, Acting Superintendent  
New York State Department of Financial Services

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<sup>[1]</sup> See [Fair Lending Plan Requirements](#) (July 19, 1999); [Fair Lending Plan Guidelines](#) (Feb. 18, 2000); [Indirect Automobile Lending, Advice for Financial Institutions](#) (Feb. 15, 2001); [Indirect Automobile Lending, Advice for Sales Finance Companies](#) (Feb. 15, 2001); [Indirect Automobile Lending and Compliance with New York’s Fair Lending Statute](#) (Aug. 23, 2018).

<sup>[2]</sup> Although DFS found that, in some data sets, same-sex pairs of applicants were denied credit at higher rates than opposite-sex applicants and/or received inferior interest rates, these findings were not consistent among data sets and not always statistically significant. In addition, it was impossible, based on a review of HMDA data alone, to isolate and rule out other variables that could be the cause of such disparities, or to identify which (or even the overall percentage of which) same-sex pairs actually consisted of lesbian, gay, bisexual, transgender, queer, or intersex (“LGBTQI”) individuals.

<sup>[3]</sup> Although the Department’s analysis was based primarily on data from non-depository Mortgage Lenders, this Industry Letter provides all Mortgage Lenders guidance on how to reduce the risk of discrimination based on sexual orientation.

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