that the statute's prohibitions extend beyond intentional discrimination. The Senate Report states that Congress intended to proscribe ''policies and practices, including inappropriate underwriting guidelines, [which] may *unintentionally* yield discriminatory patterns in mortgage lending.'' [47] The Senate Committee report cited testimony that ''. . .there are other business practices of the enterprises which have the *effect of discriminating* against minorities . . . .'' [48] Examples cited by the Senate Report included differential pricing and fee structures for mortgage products which effectively discouraged lending in minority and low-income communities.[49]

However, HUD has taken into account the considerable comments it received from the GSEs and others, and has determined to track the statutory prohibition as enacted by Congress.

In response to the GSEs' comments regarding a lack of guidance, the disparate impact (or discriminatory effect) theory is firmly established by Fair Housing Act case law. That law is applicable to all segments of the housing marketplace, including the GSEs. All of the circuit courts, except for the D.C. Circuit which has not considered the issue, have held that the Fair Housing Act includes claims based upon the disparate impact theory.[50]

All the Federal financial regulatory and enforcement agencies recognize the role that disparate impact analysis plays in scrutiny of mortgage lending. In the Interagency Policy Statement, the bank, thrift, and credit union regulators, the Justice Department, Treasury, OFHEO, Federal Trade Commission (FTC), and HUD jointly recognized the disparate impact standard as a means of proving lending discrimination under the Fair Housing Act and ECOA. The disparate results assessment requirement included in this final rule mirrors the statutory requirement and is consistent with the Interagency Policy Statement, which explicitly applies a similar ''disparate impact'' standard to proving violations of the Fair Housing Act and ECOA.[51]

Congress, in enacting FHEFSSA, expressly stated that it was concerned with the subtle, often ''*unintentional*'' forms of discrimination that are the hallmark of present-day unlawful conduct, and that the law was enacted to ensure that the enterprises would in no way contribute to the continuance of such discrimination in mortgage lending.[52]

Prohibitions Against Discrimination

Freddie Mac objected to the use, in § 81.42(b)(1) of the proposed rule, of the term ''*based on* race, color . . .'' (etc.), suggesting that the statutory phrase ''because of'' be substituted. This final rule, which now mirrors the language of the statute, incorporates this suggestion. Section 81.43 of this final rule also follows the language of the statute in requiring assessments ''based on'' protected status. In the context of this rule, HUD considers the terms ''based on'' and ''because of'' to be synonymous.

Appraisals

Freddie Mac found the proposed rule's treatment of age and location troubling, even where the purpose of the rule was to set forth specific exemptions allowing consideration of such factors. Freddie Mac stated that the listed exemptions might be limiting and that the exemption as set out conflicted with the appraisal exemption in the Fair Housing Act. Freddie Mac also asked that the age/location-related exemption be removed from this final rule, asserting that the use of age or location in underwriting is appropriate so long as it is not used to discriminate.

In this final rule, § 81.42 parallels the language of the statute and no longer contains the list of examples of location factors which may properly be considered in an appraisal and in other aspects of the underwriting process. Section 805(c) of the Fair Housing Act, 42 U.S.C. 3605(c) addresses appraisals. The HUD regulation which implements this section provides that ''nothing in this section prohibits a person engaged in the business of making or furnishing appraisals of residential real property from taking into account factors other than race, color, religion, sex, handicap, familial status or national origin.'' 24 CFR 100.135. It is HUD's view that the Fair Housing Act and FHEFSSA allow the consideration of the age or location of a dwelling as long as that consideration is not used in a manner that discriminates unlawfully.

Assessment of Disparate Results

Both GSEs objected to conducting a disparate results assessment as part of the Annual Housing Activities Report (AHAR) required by FHEFSSA, a report further discussed in § 81.63 of subpart E. Both GSEs objected to the manner in which the disparate results assessment would have been implemented by § 81.43 of the proposed rule, insofar as that section would have required the GSEs to set forth fully the basis for their conclusions that a business necessity exists for any policies and practices which yield disparate results. Freddie Mac contended that the Secretary has no authority to require the assessments. Freddie Mac also stated that the business practices assessment requirement would result in a massive diversion of resources from Freddie Mac's core business activities and detract from its abilities to fulfill its mission.

Fannie Mae stated that the proposed rule, as well as HUD administrative law decisions, suggest that Fannie Mae must accompany the demonstration of business necessity with a showing that no less discriminatory alternative exists for serving that business necessity, and that this would involve proving a negative assumption. Similar objections were stated with reference to the provisions requiring the GSEs to assess their underwriting and appraisal guidelines. Fannie Mae also claimed that the proposed rule provided no effective guidance to the GSEs concerning how to apply this test to their operating procedures and how to measure whether facially-neutral policies have a disparate impact on a protected class.

The GSEs further asserted that the business practices assessment and underwriting appraisal guidelines requirements place an excessive burden on the GSEs and that HUD underestimated this burden in its Regulatory Impact Analysis. Fannie Mae and Freddie Mac both objected to what they perceived as a shift in responsibility for analysis of data and enforcement from HUD to the GSEs.

MBA opposed the inclusion of the ''less discriminatory alternative'' prong of the disparate impact analysis set out in the rule, arguing that making it the GSE's burden to establish this prong would be unfair and inconsistent with case law on which the theory is based. Although opposing any requirements for GSEs to develop fair lending plans, and joining the objections to the disparate impact provisions, MBA nevertheless saw it as the proper function of the GSEs to develop a business practices assessment along the lines required by subpart D.

Finally, Freddie Mac claimed that the system of ''self-testing'' required by the business practices assessment conflicts with the clear trend set by the

[47] S. Rep. at 43 (emphasis added).

[48] Id. at 31 (emphasis added).

[49] *See id.*

[50] No courts have ever held in Fair Housing Act or ECOA cases that the disparate impact standard does not apply to lenders.

[51] Additionally, the Federal Reserve, in its Regulation B, recognizes the role of disparate impact analysis under ECOA. 12 CFR 202.6(a)(2); Federal Reserve System Handbook at 1–24.

[52] S. Rep. at 42–43.