Department of Professional and Occupational Regulation

*In accordance with § 2.2-4002.1 of the Code of Virginia, this **proposed** guidance document conforms to the definition of a guidance document in § 2.2-4101.*

PROPOSED Guidance Document

HOUSING DISCRIMINATION ON THE BASIS OF SOURCE OF FUNDS

Adopted by: Real Estate Board on January 20, 2020
Effective upon conclusion of public comment period required pursuant to § 2.2-4002.1 of the Code of Virginia.

As a means of providing information or guidance of general applicability to staff and the public, the Real Estate Board and Fair Housing Board issue this guidance document to interpret the requirements of 18 VAC 135-50 (Fair Housing Regulations).

The purpose of this guidance document is to address issues regarding housing discrimination based on lawful "source of funds," particularly what actions or inactions by housing providers may or may not constitute unlawful discrimination under the Virginia Fair Housing Law.

Introduction

The Virginia Real Estate and Fair Housing Boards ("Boards"), through the Virginia Fair Housing Office ("VFHO"), are jointly responsible for enforcing the Virginia Fair Housing Law (the "VFHL"), which prohibits discrimination in housing on the basis of race, color, religion, sex, disability, elderliness, familial status, national origin, source of funds, sexual orientation, gender identity, or status as a veteran.[1]

As of July 1, 2020, VFHO is responsible for investigating allegations of discrimination on the basis of the source of funds of a buyer or renter of housing. Because the "source of funds" protected class is new to Virginia, many questions have been raised regarding what may constitute this type of discrimination.

This guidance provides technical assistance regarding what actions, behaviors, policies, and procedures likely do and do not violate the Virginia Fair Housing Law's prohibition on discrimination on the basis of one's lawful source of funds.

Background

House Bill 6, sponsored by Delegate Jeffrey Bourne, passed the 2020 Session of the General Assembly and was signed into law by Governor Ralph Northam on March 27, 2020.[2] The law defines "source of funds" as:

> any source that lawfully provides funds to or on behalf of a renter or buyer of housing, including any assistance, benefit, or subsidy program, whether such program is administered by a governmental or nongovernmental entity.[3]

[1] Va. Code §§ 36-96.1, *et seq*.
[2] 2020 Acts Ch. 477.
[3] Va. Code § 36-96.1:1.

The new law adds "source of funds" to all of the unlawful discriminatory practices that appear in Virginia Code § 36-96.3, including prohibitions on, for example: (1) refusing to rent or sell based on someone's source of funds; (2) imposing terms, conditions, or privileges of the sale or rental of a dwelling based on one's source of funds; (3) placing advertisements that express a preference or limitation for certain sources of funds; and (4) representing that, based on someone's source of funds, a dwelling is unavailable for inspection, sale, or rental.[4]

According to the patron, the primary impetus for the bill was to protect prospective renters and buyers from discrimination if they intend to pay for housing using a Housing Choice Voucher ("HCV," commonly referred to as "Section 8" or "Section 8 rental assistance"). Local public housing agencies ("PHAs") receive federal funds from the U.S. Department of Housing and Urban Development ("HUD") to administer the HCV program. HUD summarizes the program as follows:[5]

> It is the federal government's major program for assisting very low-income families to afford decent, safe, and sanitary housing in the private market. A voucher holder is free to choose any housing that meets the requirements of the program and is not limited to units that are located in subsidized housing projects.
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> A housing subsidy is paid to the landlord directly by the PHA on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.

Stakeholders have raised questions about how the new source-of-funds provision applies to certain existing policies and procedures often followed in the housing market. To provide clarity, promote compliance, and avoid unnecessary litigation, this guidance addresses these issues below.

Analysis

The policy of the Commonwealth is to prohibit discriminatory practices with respect to residential housing on the basis of source of funds[6]—not to prevent non-discriminatory consideration of financing during housing transactions.

Sellers may consider financial terms and conditions from prospective purchasers.

Oftentimes, home sellers will receive multiple offers to buy their home. In order to decide which to accept, the seller will review and weigh the financial terms of each contract. Nothing in the text or legislative history of the source-of-funds law suggest that such non-discriminatory consideration

[4] Va. Code § 36-96.3(A)(1), (2), (3), and (4), respectively.
[5] *See,* U.S. Dep't of Housing and Urban Dev., *Housing Choice Vouchers Factsheet*, available at: https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet, last visited December 4, 2020.
[6] Va. Code § 36-96.1.

should be prohibited. Therefore, it is not unlawful under the VFHL for a seller of a dwelling to consider the financial terms and conditions, including the loan amount, loan program or type of loan, of a real estate purchase contract from a prospective purchaser.

> ***EXAMPLE:*** Mary is selling her home at a listing price of $300,000. She's excited to move to Senegal as soon as possible to join her daughter who has just gotten employment abroad. After only two days on the market, her real estate agent presents Mary with three offers to purchase the home. Each offer has slightly different terms.
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> - **Offer 1**: $300,000; 20% down payment; conventional loan for the remainder; close in 60 days as long as the prospective buyer sells her current home.
> - **Offer 2**: $310,000; 10% down payment; VA loan for the remainder; close in 45 days.
> - **Offer 3**: $290,000 all cash; close in 21 days.

Mary and her real estate agent discuss the offers. Mary does not violate the VFHL prohibition on source-of-funds discrimination by taking into consideration how each offeror will pay to buy her home.

Housing providers can ask about income on an application and verify same.

It is axiomatic that every housing provider has a legitimate business interest in assuring tenants can pay rent. That assurance often necessitates verification of income: a longstanding, rational industry practice. Accordingly, housing providers may ask about and verify sources of funds, as long as they do so in a non-discriminatory manner. It does not constitute discrimination based on source of funds to make a written or oral inquiry concerning the amount or source of income.

The prohibition against source-of-funds discrimination does not prohibit a housing provider from determining the ability of any potential buyer or renter to pay a purchase price or pay rent by verifying—in a commercially reasonable manner—the source and amount of income, including any payments or portions that will be made by other individuals, organizations, or voucher and rental assistance payment programs.

However, housing providers are cautioned not to read a sense of permanency into the definition of "source of funds" that is plainly absent. Nothing in the definition addresses the duration of the source of funds in question; rather, "source of funds" means any source that lawfully provides funds. (For instance, one-time assistance grants or temporary income such as unemployment benefits are covered.) Accordingly, housing providers may not refuse lawful sources of income based on the duration or nature of such funds without potentially violating the VFHL.

Income qualifying criteria must be applied fairly.

Many housing providers require a tenant to meet an income threshold in order to qualify for housing. To be sure, landlords have a strong interest in assuring their tenants can afford to pay rent. This policy is not problematic in and of itself, unless it is applied in a discriminatory manner (e.g. making the threshold higher for those who have a particular source of funds). Housing providers should be careful to ensure this otherwise neutral criteria is not applied in a manner that results in the automatic disqualification of HCV holders who, by definition, have a portion of their rent paid by a third party.

To determine if a tenant can afford the rent, the relevant factor for a landlord's risk assessment is the *tenant's portion* of rent, not the total rent. The voucher portion of the rent is secured under a contract with the administrative agency that has already qualified the HCV holder. The landlord's reasonable focus should be on whether the tenant can afford the tenant's share of the rent. Therefore, to avoid source-of-funds discrimination liability, housing providers should subtract any source of funds from a rental assistance program (like the HCV) from the total of the monthly rent prior to calculating whether the tenant satisfies the income criteria.[7]

Subtracting the HCV portion from the total rent leaves the amount for which the tenant will be responsible. It is that figure against which the prospective tenant's other income should be compared. Housing providers who add the voucher payment to a tenant's other income and then use that total to determine if criteria are met improperly treat the voucher portion.

> ***EXAMPLE 1:*** A housing provider requires all tenants, regardless of their source of funds, to demonstrate that they have income that is three times the amount of the monthly rent. The monthly rent for the unit in question is $1,000. The tenant earns employment income of $800 per month. Under the terms of their HCV, the tenant pays $240 per month towards rent (30% of their income), and the HCV agency pays the remainder, or $760.
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> The housing provider subtracts the HCV portion from the total rent to get the tenant's share of rent: $1,000 - $760 = $240. The housing provider then determines that the tenant meets the income-qualifying standard because the tenant's employment income ($800) is at least three times as much *as the tenant's share of* the monthly rent, $240 when multiplied by three is $720. This application of income-qualifying criteria does not discriminate against HCV holders who apply to live in this complex.

[7] Other states articulate this calculation method in their source-of-funds anti-discrimination statutes. *See*, e.g. Washington: "If a landlord requires that a prospective tenant or current tenant have a certain threshold level of income, any source of income in the form of a rent voucher or subsidy must be subtracted from the total of the monthly rent prior to calculating if the income criteria have been met." WAST 59.18.255(3); and California: "It shall be unlawful … In instances where there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant." CA GOVT 12955 (o).

EXAMPLE 2: A landlord requires all tenants, regardless of their source of funds, to demonstrate that they have income that is three times the amount of the monthly rent. The monthly rent for the unit in question is $1,000. The tenant earns employment income of $800 per month. Under the terms of their HCV, the tenant pays $240 per month towards rent (30% of their income), and the HCV agency pays the remainder, or $760.

To determine whether this prospective tenant meets the income criteria, the landlord adds the tenant's employment income to the monthly HCV funds: $800 + $760 = $1,560. The landlord declines to rent to the prospective tenant because $1,560 is not at least three times the monthly rent ($3,000). This method of calculating income discriminates against HCV holders.

Justifying a refusal to rent to HCV holders based on "administrative burdens" is not a defense.

In jurisdictions that have source of funds protections, courts have long held that refusing to rent to a HCV holder because of "administrative burdens" still blocks housing opportunities for applicants who would otherwise qualify. Housing providers that allow objections about administrative requirements, HCV regulations, or specific housing authorities to form the basis for a refusal to rent (other than the statutory exemption discussed below) risk liability for source-of-funds discrimination against HCV holders. To aid this guidance, we reference the following court decisions from other jurisdictions that have analyzed these issues:

- "Interpreting [source-of-funds protections] to allow an exception to its antidiscrimination provisions for those landlords who refuse to use the required section 8 lease would eviscerate the basic protection envisioned by the statute. It would lead to the unreasonable result that while the legislature mandated that landlords may not reject tenants because their income included section 8 assistance, the legislature at the same time also intended that landlords might avoid the statutory mandate by refusing to accede to a condition essential to its fulfillment. Such a result is untenable. Statutes are to be construed in a manner that will not thwart [their] intended purpose or lead to absurd results." *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 250 Conn. 763, 778, 739 A.2d 238, 248 (1999).

- "The only rationale [the housing provider] has suggested for its [no-HCV] policy is that it did not want to accept vouchers because the voucher program's requirements are burdensome, particularly the requirement that the landlord execute an initial lease or ratification with the tenant. Were we to accept that excuse, however, we would render the [D.C.] Human Rights Act's definition of 'source of income' nugatory. The Act expressly defines 'source of income' as encompassing the Section 8 program; indeed, Section 8 vouchers are the source-of-income provision's paradigm case. Permitting [the housing provider] to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate that definition and the legal safeguard it was intended to provide." *Feemster v. BSA Ltd. P'ship*, 383 U.S. App. D.C. 376, 383, 548 F.3d 1063, 1070 (2008).

- "To permit a landlord to decline participation in the Section 8 program in order to avoid the 'bureaucracy' of the program would create the risk that '[i]f all landlords . . . did not want to 'fill out the forms' then there would be no Section 8 housing available." *Franklin Tower One v. N.M.*, 157 N.J. 602, 621, 725 A.2d 1104, 1114 (1999) (citing *Templeton Arms v. Feins*, 220 N.J. Super. 1, 9, 531 A.2d 361 (App.Div.1987)).

- "The case review board […] concluded that administrative burden was not a proper defense in any event, that '[i]f a landlord could avoid the mandate of the County's fair housing law with the defense of 'administrative burden,' then landlords could easily thwart the Council's intent underlying the law." *Montgomery Cty. v. Glenmont Hills Assocs.*, 402 Md. 250, 276, 936 A.2d 325, 340 (2007).

Exemptions Related to Source of Funds

The General Assembly articulated two specific exemptions from VFHL coverage in the context of source-of-funds discrimination. Note that in keeping with longstanding fair housing case law, the burden to raise and prove exempt status lies with the person or entity claiming the exemption.[8]

The first exemption applied a provision initially codified in 2020 to remove smaller, non-professional owners and landlords from VFHL coverage.[9] The second balanced the interests of HCV holders seeking housing with the substantial interest of housing providers in reducing unit vacancy times. Given that units must pass inspection before a voucher can be approved, landlords raised concerns about losing rental income during the time in which a unit is kept off the market until approved for HCV tenancy. In weighing those interests, the General Assembly struck a balance in the second exemption that reads:

> It shall not be unlawful under this chapter for an owner or an owner's managing agent to deny or limit a person's rental or occupancy of a rental dwelling unit based on the person's source of funds for that unit if such source is not approved within 15 days of the person's submission of the request for tenancy approval.[10]

For purposes of determining if this exemption applies, two specific events must be identified so that the time between them can be accurately calculated. First, the "submission of the request for the tenancy approval" ("RFTA") is the date on which a *complete* RFTA package is mailed, emailed, or delivered to the voucher administrator (by either the housing provider or prospective tenant). Note that sometimes an incomplete set of documents is submitted, to which voucher administrators respond by requesting complete information. It may take some time for a complete package to be submitted, but none of that

[8] *Commonwealth ex rel. Real Estate Board v. Tutt Taylor & Rankin Real Estate, LLC,* 102 Va. Cir. 125, 136 (Loudoun Cir. Ct., May 9, 2019).
[9] Va. Code § 36-96.2(I), exempting from the prohibition on source-of-funds discrimination, an "owner or an owner's managing agent" so long as such "owner does not own more than four rental dwelling units in the Commonwealth at the time of the alleged discriminatory housing practice."
[10] Va. Code § 36-96.2(J).

elapsed time triggers the 15-day clock for purposes of this exemption. The second event, or when the source of funds is considered "approved," is the date that the unit passes inspection as indicated on the inspection report.

Implicit in this 15-day approval exemption is an expectation that the housing provider participates in good faith with the home seeker and voucher administrative agency to consummate the housing transaction. The RFTA package requires the landlord to compile minimal documentation for submission: lease and lease addendum; ownership verification, W-9, and direct deposit form; and lead-based paint certification. Moreover, the inspection process requires cooperation by the landlord (e.g., providing timely access to the unit).

To the extent a landlord unreasonably delays or postpones RFTA submittal or inspection, that behavior may evince an intent to refuse to rent to someone based on their source of funds in contravention of the source-of-funds fair housing protections.[11] However, where a landlord *does* cooperate in good faith with the potential tenant and the agency administering the voucher, but more than 15 days elapse between the submitted RFTA and unit-inspection approval, that landlord may decline to rent to the HCV holder on that basis and not face liability for source-of-funds discrimination.

> ***EXAMPLE 1*:** A prospective tenant approaches a landlord about an available, vacant apartment advertised by the landlord. The prospective tenant otherwise qualifies for the unit. When the prospective tenant tells the landlord she will be using a HCV to help pay her rent, the landlord grows concerned. Knowing that he cannot deny this prospective tenant the chance to rent the unit just because she uses a HCV, he does not respond to her or the voucher administrator's request to complete the RFTA package. Once he finally does, he misses three appointments for inspection of the unit, allowing three weeks to go by before the unit eventually passes inspection. Even though 21 days may have elapsed between the RFTA submission and inspection approval, this landlord did not cooperate in good faith and cannot claim the exemption.
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> ***EXAMPLE 2*:** The property manager of a large apartment building in a hot market helped a prospective tenant submit the RFTA to live in the complex. The voucher administrator did not schedule the unit inspection until a week later. That inspector cancelled. The administrator scheduled the second inspection appointment 21 days after the RFTA was submitted. Because this property manager has participated in good faith in the process, she may claim the 15-day approval exemption and decline to rent to the prospective tenant without being liable for source-of-funds discrimination.

[11] Seattle, Washington explicitly prohibits this in its source-of-funds anti-discrimination ordinance: "It is an unfair practice for a person to fail to: cooperate with a potential or current occupant in completing and submitting required information and documentation for the potential or current occupant to be eligible for or to receive rental assistance from Section 8 or other subsidy program […]." S.M.C § 14.08.020(H).

Conclusion

Through its amendments to the VFHL during the 2020 Session, the General Assembly affirmed the state's official policy:

> . . . to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of [. . .] source of funds [. . .], and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons, in order that the peace, health, safety, prosperity, and general welfare of all the inhabitants of the Commonwealth may be protected and ensured.[12]

As with all other protected classes enumerated in the VFHL, the source-of-funds provision requires liberal construction so that the law has its fullest remedial effect. A statute that is remedial in nature is "liberally construed so that the purpose intended may be accomplished," and is to be "read so as to promote the ability of the enactment to remedy the mischief at which it is directed."[13]

Simply put, the new law requires housing providers to treat all tenants, applicants, prospective purchasers, clients, etc. equally, *regardless of their source of income*.

Aligned with that principle, housing providers should be sure not to take actions or implement policies that frustrate the purpose of the law. While housing providers may ask about income (including the source of income) and require documentation of income, they must accept all lawful sources of income equally. To avoid risk of liability for source-of-funds discrimination, housing providers should not use information about income or the source of income in a way that has either the intent or the effect of frustrating the purpose of the law.

To report potential housing discrimination, contact:
VIRGINIA FAIR HOUSING OFFICE
Phone: 804-367-8530
Toll-Free: 1-888-551-3247
TDD: Virginia Relay 711
FAX: 866-480-8333
Email: FairHousing@dpor.virginia.gov

[12] Va. Code § 36-96.1.
[13] *Bd. of Supervisors of Richmond Cty. v. Rhoads*, 294 Va. 43, 51, 803 S.E.2d 329, 333 (2017) (citing *Manu v. GEICO Cas. Co.*, 293 Va. 371, 389, 798 S.E.2d 598, 608 (2017)).