

Source of Funds & Sales Transactions

On July 1, 2020, the Virginia Fair Housing Act had four new protected categories added: sexual orientation, gender identity, status as a veteran, and source of funds.

“Source of funds” is defined in the law 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.” Note that unlike in some jurisdictions, where the protection only applies in rentals, this definition includes sales transactions.

Because of this definition, we have gotten a number of questions about just what exactly this means in sales transactions:

“Can a seller select a cash offer over a financed offer?”

“Are sellers required to accept certain offers that have a specific loan program?”

“Can listing agents explain the different types of loan programs and what they might mean to sellers?”

“If a listing agent knows that a particular loan program will not finance a unit or house, can/should that be disclosed?”

These are all great questions, and we want to provide some additional guidance to help you navigate advising your clients while adhering to Fair Housing.

First, there is no law, including Fair Housing, which requires the seller to take a particular offer over any others. Offers contain numerous provisions and are rarely the exact same. Sellers are allowed to select the offer that contains the combination of terms that best fit their needs. This may mean taking an offer with a lower sales price if the combination of contingencies, settlement date, and other terms is the best fit.

But if you do have two offers that are truly identical in all ways except for how the buyer is planning to pay for the property, does Fair Housing dictate which offer must be selected? No, Fair Housing simply says that you cannot discriminate on the basis of the buyer’s source of funds. But what does that mean? It means that sellers cannot say “I will not consider offers that contain [fill in loan program type] financing.” By making such a statement, the seller is refusing to sell based on the source of funds.

This leads to the next logical question of “What if I, as the listing agent, know that the Condo project won’t meet the VA requirements? Can I advertise that?” There is nothing in Fair Housing that would prohibit a listing agent from including a statement stating that the building is not currently on the approved list; however, the statement should be focused on present status, not future status, and should not say anything about not submitting an offer with a particular loan program.

Finally, real estate licensees have a fiduciary duty to explain the terms of the contract to their client. This means explaining what different loan programs could require in terms of contingencies or standards. While you have an obligation to explain the loan programs to clients, you should not provide commentary such as “This contract is better because it has X loan type,” or “Contracts with Y loan type are typically difficult to work with.”