FAQs: Legal Issues

What are our legal risks with a Special Purpose Credit Program?

It is important to consult with in-house or outside counsel to understand the risks as they relate to a particular company's circumstances and the facts relevant to any specific SPCP.

With that in mind, there are three broad areas of liability to consider and be aware of:

1) The first is the possibility that a government enforcement or regulatory action would come from an SPCP in their federal oversight. Currently, the relevant federal regulators have expressed strong support for SPCPs, when designed properly, and have invited interested regulated entities to contact them to discuss how to best implement an SPCP. It would therefore seem unlikely that they would take action against a good faith SPCP that was well-designed, particularly after the program was previewed with the appropriate regulators. Finally, there is some concern that a change in political control would raise SPCP risk. This is a consideration worth monitoring but is mitigated by Constitutional due process and fair notice requirements as well as the fact that a properly designed SPCP is time-limited to some degree. It is also mitigated by intersectional broad-based support from the financial services, real estate, fair housing, and other non-profit communities.

2) The next area of liability risk would come from investors or purchasers of loans under their program requirements or purchase agreements. For GSEs and FHA loans, the relevant regulatory agencies (HUD and FHFA) are very supportive of

SPCPs. The GSEs will likely release guidance on SPCPs soon. The relevant depository regulators are also supportive and will likely offer assistance for those that wish to hold these loans on portfolio. Privately securitized SPCP loans raise interesting questions around the design of the SPCP, as well as the representations around the sale and securitization of the loans.

3) The final general area of liability is a challenge from a private litigant who was denied the opportunity to participate in the SPCP. SPCPs are permissible under ECOA and Regulation B, and the CFPB has issued an Advisory Opinion interpreting these provisions. There is a strong safe harbor in the statute for conduct done in good faith reliance on an interpretation or regulation even if the interpretation or regulation is later amended, rescinded, or deemed invalid. ECOA also contains language around preemption of certain state credit laws, though careful analysis of the framework in any state where the SPCP is active is prudent. Liability under the Fair Housing Act is perhaps a higher risk than ECOA, but the recent HUD opinion offers a useful rationale to suggest why such liability is inappropriate. Finally, though some uncertainty around the application of 42 USC §§ 1981 and 1982 to SPCPs remains, all the arguments that apply in the analysis of why Congress intended for them to be permitted under the Fair Housing Act would apply and weigh in favor of the conclusion that SPCPs would also not violate Sections 1981 or 1982. Note that the design of the SPCP can also limit this risk and is an excellent area for discussion with counsel.

Hopefully this can guide some discussions with appropriate legal counsel on how to gauge liability under an SPCP. All lending entails some level of risk, SPCPs included, that need to be measured and appropriate guardrails must be put in place in order to appropriately design and focus SPCPs. Other areas of this toolkit hopefully help in the development of these guardrails.

Finally, we are happy to help with this discussion! Please reach out to Justin Wiseman, Managing Regulatory Counsel at MBA at JWiseman@mba.org or Morgan Williams, General Counsel at NFHA at mwilliams@nationalfairhousing.org with questions.

What about state laws as they relate to SPCPs?

This Special Purpose Credit Program Toolkit focuses on federal law. A review of all 50 state laws is beyond the scope of this toolkit.

That said, Regulation B codifies agency determinations that specific state laws are preempted to the extent they would prohibit requesting and considering information required for eligibility for SPCPs. 12 C.F.R. part 1002, Supp. I, 1002.11(a)-1, -2. Accordingly, a SPCP that meets the requirements of ECOA and Regulation B would likely not violate state law because ECOA and Regulation B should preempt state laws that prohibit credit discrimination but do not contain explicit provisions for SPCPs.

For more information on the interplay between SPCPs and state law, please see the section of this toolkit on SPCPs & Anti-Discrimination Laws and Regulatory Guidance on SPCPs. You should also consult with counsel to analyze the application of specific state credit discrimination laws to a SPCP.

How can a lender identify eligibility criteria, and what protections exist from individuals claims or lawsuits?

You can choose to create an SPCP targeted by race or ethnicity, and by geography based on majority-minority, greatest disparities, and greatest need. Monitoring the program will provide data and feedback to ensure it reaches the intended beneficiaries, which would include race and/or ethnicity among other program data.

Eligibility can be based on demographic (e.g., racial or ethnic) status of the borrower themselves. Alternatively, eligibility could be place-based—meaning based on the racial/ethnic composition of a borrower's or property's geographic location. The determination whether to base a program on individual characteristics or geographic characteristics depends in part on the data demonstrating the need for the program, in part on the specific goals of the lender, and in part on the lender's risk tolerance.

A lender instituting a place-based program should consider monitoring through its HMDA data the race and national origin of SPCP borrowers to guard against gentrification risks by ensuring that benefits are not disproportionately being afforded to non-target populations. Lenders should also take steps to ensure the applicant pool is diverse, for example through affirmative marketing and partnering with local housing groups likely to reach target populations. Finally, a lender might consider designing eligibility criteria to focus on the geographic location of the applicant's residence prior to purchase, rather than the geographic location of the dwelling securing the loan. This design could expand housing choice, allowing borrowers to choose to move to high-opportunity areas.

The lender also will need to decide the scope of eligibility—in other words, should the SPCP be open to all borrowers of color, or limited to some subset (e.g., Black borrowers only, Black and Hispanic borrowers, etc.; or majority-Black, majority-Black and/or Hispanic, etc. census tracts). If comparable disparities exist for borrowers in different groups, a lender might include all such groups in the program. Relatedly, the lender might instead tailor a program more specifically to certain identified disparities.

In addition to demographic eligibility, other eligibility criteria might be included, with an eye towards ensuring responsible lending and identifying a group of borrowers most likely to benefit from the SPCP. Such limitations may be particularly helpful to counteract some concerns about gentrification or to help establish that the program will benefit borrowers who otherwise would not have access to credit, or would not have access to credit on favorable terms. Wealth and income disparities exist within protected classes, and access to credit can vary based on credit score and other borrower characteristics.

Depending on the specifics of the program and the need to be filled, as well as the "nexus" the lender has shown with its own credit standards, it could be appropriate to include income limitations (which need not map on to income limits for LMI programs) or other eligibility criteria to target the SPCP within potentially eligible populations.

A lender may choose to establish additional eligibility criteria, such as limiting its SPCP to buyers who will occupy the home as their primary residence, first-time or first-generation homebuyers, or particular property types (including or excluding multi-unit properties, for example). These are criteria that should be clearly defined in the written plan and easily accessible to potential borrowers. While ECOA and Regulation B do not require SPCPs to incorporate any of these

criteria, doing so can help to demonstrate the need for the program and ensure that the benefits reach the intended class of persons.

Properly documenting your SPCP and communicating it to your regulators beforehand may provide some protection. Always be ready and able to show your written plan and defensible rationale for your specific SPCP. There is no need to serve one specific race or ethnicity over another or a need to serve all/more than one race/ethnicity. Your design should relate to the population’s needs in your service area.

Related Resources

Why SPCPs are needed

Background, historical perspective, changing demographics, and current gaps.

Compliance and Monitoring

Sample checklist, resources, and case study for SPCP using market and lender data.

Data Analysis Examples

Sample checklist, resources, and case study for SPCP using market and lender data.