

September 7, 2021

Acting Director Sandra L. Thompson
Federal Housing Finance Agency
Constitution Center
400 Seventh Street, SW
Washington, DC 20219

Re: Policy Statement on Fair Lending; Comment Request 2021-N-7

Dear Acting Director Thompson,

We the undersigned civil rights and consumer advocacy organizations are writing in response to the Federal Housing Finance Agency's ("FHFA") Policy Statement on Fair Lending ("Policy Statement").¹ We applaud FHFA for seeking input on the important topic of fair lending supervision and enforcement. Our organizations believe that the responses below will help inform FHFA's policies.

Executive Summary

In order to promote financial inclusion, economic opportunity, and compliance with fair lending laws, our organizations recommend that FHFA take the following actions with respect to fair lending supervision and enforcement:

- I. Robust Fair Lending Oversight Is Critically Important at This Moment
 - A. The Office of Fair Lending Oversight should be elevated to a Division of Fair Lending Oversight that reports to the Director.
 - B. FHFA's fair lending examinations should focus on high risk policies and programs that discriminate against borrowers of color and other protected groups.
 1. Loan Level Price Adjustments
 2. Credit Scoring Systems
 3. Appraisal Activities
 4. Small Dollar Mortgage Loan Programs
- II. Legal Overview: The Policy Statement should clearly state FHFA's authority under the Affirmatively Furthering Fair Housing provisions of the Fair Housing Act.
- III. Fair Lending Oversight Considerations
 - A. Monitoring and Information Gathering
 1. Fair Lending Orders: FHFA should enhance the Fair Lending Orders to require the GSEs to submit additional information.

¹ FHFA, Policy Statement on Fair Lending, 86 Fed. Reg. 36199 (July 9, 2021), <https://www.federalregister.gov/documents/2021/07/09/2021-14438/policy-statement-on-fair-lending>.

2. Transparent Public Data: FHFA should make the data and information available in a format that is transparent and useful to the public.

B. Supervisory Examinations

1. The Policy Statement should provide more specific language regarding FHFA's fair lending supervision authority.
2. The Policy Statement should more clearly describe the supervisory activities that FHFA will conduct, including:
 - a. Types of supervisory activities
 - b. Less discriminatory alternatives
 - c. Reports of Examination
 - d. Matters Requiring Attention
 - e. Ratings
3. FHFA should issue public fair lending examination procedures as soon as possible.
4. FHFA should annually release a comprehensive report on the GSEs' compliance with the federal fair lending laws.

- C. Enforcement: Where appropriate, FHFA should not hesitate to issue a public enforcement action to enforce the fair lending laws.

IV. Additional Considerations

A. Appraisal Data and Research

B. Programs that Support Fair Housing and Fair Lending

1. Special Purpose Credit Programs
2. Affirmatively Furthering Fair Housing
3. Artificial Intelligence and Technology
4. Pilot Mortgage Loan Programs
5. Federal Home Loan Banks

C. Duty to Serve Plans

1. Shared Equity Programs
2. Affirmatively Furthering Fair Housing
3. Meaningful Goals for Racially or Ethnically Concentrated Areas of Poverty

I. Robust Fair Lending Oversight Is Critically Important at This Moment

Homeownership has long been a path into the middle class and economic security for families in America. Unfortunately, America's long history of discriminatory housing policies has created distinct advantages for White families, leading to massive homeownership, credit, and wealth gaps that persist today. Since the Great Recession, the gap between the Black and White homeownership rates in the United States has increased to its highest level in 50 years, from 28.1 percentage points in 2010 to 30.1 percentage points in 2017.² Most alarmingly, this gap is wider than it was when race-based discrimination against homebuyers was legal. Similarly, White

² Jung Hyun Choi, *Breaking Down the Black-White Homeownership Gap*, Urban institute (Feb. 21, 2020), <https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap>.

wealth has soared while Black wealth has remained stagnant. In 2019, White median family wealth was valued at \$188,200 while Black families' median net worth was only \$24,100.³

In order to grow America's middle class, fair lending oversight must ensure access to mortgage credit on fair terms for all creditworthy borrowers, regardless of their race, gender, national origin, disability, familial status, or other protected characteristics. Such non-discrimination is required under existing statutes and regulations and is essential to closing the homeownership and wealth gaps that have long plagued America's housing finance system.

Ensuring a fair and equitable national housing finance market also makes good business sense. The demographics of the nation are undergoing a dramatic shift and the majority of new households formed over the next decade will be households of color. In other words, future housing demand will be driven by people of color. A robust housing market, both for new homebuyers seeking to purchase homes and for existing homeowners seeking to refinance or sell their homes, cannot exist in the absence of access to mortgage credit on fair and equal terms for all creditworthy borrowers.

FHFA has a uniquely powerful role to play in ensuring an equitable national housing finance market. Consistent with the statutory mission of the GSEs, one of FHFA's principal duties is to ensure that "the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets (including activities relating to mortgages on housing for low- and moderate-income families, and neighborhoods of color involving a reasonable economic return that may be less than the return earned on other activities)."⁴ In October 2020, FHFA issued its Strategic Plan: Fiscal Years 2021-2024 ("Strategic Plan"), which emphasized the mandate to serve the whole of the market by stating: "Achieving a liquid, resilient housing finance market throughout the country also requires improved access to responsible mortgage credit across different market segments of creditworthy borrowers."⁵

Given the importance of fair lending oversight to the national housing finance market, we commend FHFA for recognizing in the Policy Statement its authority for fair lending supervision and enforcement, and for clearly stating that Fannie Mae and Freddie Mac (collectively, the "Government Sponsored Enterprises" or "GSEs") are subject to the fair lending laws, including the Fair Housing Act,⁶ the Equal Credit Opportunity Act ("ECOA"),⁷ and the Federal Housing

³ Neil Bhutta, Jesse Bricker, Andrew Chang, et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106(5) Federal Reserve Bulletin (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3716339.

⁴ 12 U.S.C. § 4513 (a)(1)(B). See also Fannie Mae Charter, 12 U.S.C. § 1716; Freddie Mac Charter, 12 U.S.C. § 1451 note (Statement of Purpose). Although communities of color do not necessarily consist of low- and moderate-income families, there can be overlap between these communities.

⁵ FHFA, Strategic Plan: Fiscal years 2021-2024 (Sept. 22, 2020), <https://www.fhfa.gov/AboutUs/Reports/Pages/FHFA-Strategic-Plan-Fiscal-Years-2021-2024.aspx>.

⁶ 42 U.S.C. § 3601 *et seq.* See also, 24 C.F.R. Part 100 (regulations promulgated by the U.S. Department of Housing and Urban Development ("HUD") implementing the Fair Housing Act).

⁷ 15 U.S.C. § 1691 *et seq.* See also, 12 C.F.R. Part 1002 (regulations promulgated by the Consumer Financial Protection Bureau ("CFPB") implementing the ECOA).

Enterprises Financial Safety and Soundness Act (“Safety and Soundness Act”).⁸ We offer the following recommendations to further strengthen FHFA’s fair lending program.

A. The Office of Fair Lending Oversight Should Be Elevated to a Division of Fair Lending Oversight That Reports to the Director

Although the current Office of Fair Lending Oversight (“OFLO”) has made effective decisions since its inception in 2018, its critically-important mission deserves to be elevated from a small office within the Division of Housing, Mission, and Goals, to a fully-staffed Division that reports to the Director. FHFA’s fair lending mission should be co-equal with its safety and soundness mission, which would begin with creating a Division of Fair Lending Oversight that is co-equal to the Division of Enterprise Regulation (which oversees the safety and soundness mission).

FHFA’s currently inferior treatment of the fair lending mission is evident on its website and documentation. At this time, the “Leadership and Organization” page of FHFA’s website contains the following robust description of the supervisory duties of the Division of Enterprise Regulation:

Division of Enterprise Regulation (DER) led by Deputy Director Paul Miller provides management oversight, direction, and support for all examination activity involving the Enterprises, the development of supervision findings, and preparation of the annual reports of examination. The division monitors and assesses the financial condition and performance of the Enterprises and their compliance with regulations through annual on-site examinations and periodic visits. An examiner-in-charge leads examination activity at each Enterprise. Examination teams will expand further as DER continues to build towards a post-conservatorship future.⁹

However, the website’s description of the Division of Housing, Mission, and Goals - where OFLO is currently housed - does not mention fair lending *at all*. Similarly, the most recent annual report provides one short sentence about the fair lending mission within the Division of Housing, Mission, and Goals, while providing the following complete description of the supervisory and policy duties of the Division of Enterprise Regulation:

The Division of Enterprise Regulation (DER) supervises the Enterprises and evaluates the safety and soundness of their financial condition and operations. World-class supervision of the Enterprises is critical to fulfilling the Agency’s mission of fostering competitive, liquid, efficient, and resilient (CLEAR) national housing finance markets, and to preparing the Enterprises to responsibly exit the conservatorships. Using a risk-based supervisory approach, DER examiners conduct oversight through targeted examinations, ongoing monitoring and analysis activities, and issuing supervisory guidance to the Enterprises. DER prepares annual ROEs, which communicate DER’s supervisory assessments of the Enterprises. The ROE assigns composite and component

⁸ 12 U.S.C. § 4501 *et seq.* See also, 24 C.F.R. Part 81 (regulations promulgated by HUD implementing the Safety and Soundness Act).

⁹ FHFA, Leadership and Organization, available at: <https://www.fhfa.gov/AboutUs/Pages/Leadership-Organization.aspx>.

ratings in accordance with FHFA’s supervisory rating system and communicates the principal examination conclusions and findings for the supervisory cycle. The division also provides support and advice to the Agency on supervisory issues, development of FHFA policy, and internal FHFA management activities.¹⁰

Presumably, FHFA would like to create a strong and effective fair lending supervision program to ensure that the GSEs equitably serve the whole of the national housing finance market. At this point, however, FHFA has failed to place sufficient priority on ensuring that the GSEs do not discriminate. This problem requires a structural solution, one that sends a strong signal about the importance of ensuring that the market operates in a nondiscriminatory way, creates the mechanism for accountability, and places that mechanism in a prominent place within the agency to make sure that it receives the resources and attention it requires.

Creating a Division of Fair Lending Oversight is also consistent with FHFA’s Strategic Plan.¹¹ Issued in October 2020, the Strategic Plan established goals and objectives related to the GSEs, the national housing finance markets, and the agency. In particular, Objective 2.2 of the Strategic Plan is to “[e]nsure that the regulatory entities fulfill their statutory missions to support affordable housing, community development, and diversity and inclusion requirements.” The Strategic Plan states that FHFA plans to use the following Means and Strategies to achieve the objective:

- Monitor and promote compliance with fair lending laws at the regulated entities.
- Promote financial inclusion and economic opportunity through fair access for, and fair treatment of, mortgage borrowers at the regulated entities.

Elevating and fully staffing a Division of Fair Lending Oversight would help achieve these goals.

The recommendations below related to Supervisory Examinations also provide more details about how FHFA can enhance the fair lending supervision program to ensure that it is at least as strong as the safety and soundness supervision program.

B. FHFA’s Fair Lending Examinations Should Focus on High Risk Policies and Programs that Discriminate against Borrowers of Color and Other Protected Groups

The GSEs have long had an abysmal record of purchasing mortgages from Black and Brown borrowers, and even those that were purchased often had higher costs for these borrowers than the mortgages for White borrowers.¹² Consistent with FHFA’s risk-focused approach to

¹⁰ FHFA, *Report to Congress 2020* at 5 (June 15, 2021), <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual-Report-to-Congress-2020.pdf>.

¹¹ FHFA, *Strategic Plan: Fiscal years 2021-2024* (Sept. 22, 2020), <https://www.fhfa.gov/AboutUs/Reports/Pages/FHFA-Strategic-Plan-Fiscal-Years-2021-2024.aspx>.

¹² In 2019, 4.8% of Fannie Mae and 3.6% of Freddie Mac home purchase loans were from Black borrowers, and 4.1% and 3.7% of refinance loans. See FHFA *Annual Housing Report* at 11, Table 6 (October 2020), <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual-Housing-Report-2020.pdf>. See also Jung Hyun Choi *et al.*, *Explaining the Black-White Homeownership Gap*, at 33 (Oct. 2019).

supervision, FHFA’s fair lending examinations should focus on high risk policies and programs that discriminate against Black and Brown borrowers and other protected groups, including the following:

1. Loan Level Price Adjustments: In the wake of the Great Recession, Fannie Mae and Freddie Mac began charging lenders upfront guarantee fees known as Loan Level Price Adjustments (“LLPAs” or “delivery fees”) that are based on certain attributes of the borrower or the loans (e.g., LTV/credit-score grid, cash-out refinance, investor properties, secondary financing at origination, jumbo conforming loan).¹³ Most lenders convert the LLPAs into the interest rate on the mortgage, which means that the borrowers must pay the increased cost over time. As Black and Brown borrowers tend to have lower credit scores and less wealth to apply to a down payment due to exclusionary housing policies, this type of pricing scheme tends to have a disparate impact on these borrowers, and in some cases may price them out of the mortgage market altogether.
 - a. Notably, the key business justifications for the LLPAs do not hold up under scrutiny. The factors upon which the LLPAs rely (loan-to-value ratio and credit score) are not related to the key risk features of the majority of the loans that experienced massive defaults in the foreclosure crisis. Those loans failed due to the combination of poor underwriting, little or no documentation, high fees, exploding interest rates, risk layering, and negative amortization. The Truth in Lending Act’s Ability to Pay/Qualified Mortgage rule already addresses most of these risks.¹⁴
 - b. The LLPAs are also flawed as a mechanism for shrinking the government’s footprint in the mortgage market. While they may reduce the number of loans sold to the GSEs, instead of encouraging the re-entry of private capital, they appear to be increasing the number of borrowers seeking loans insured by FHA. Those loans expose the government and the taxpayer to 100% of the credit risk.
 - c. Moreover, the LLPA pricing framework is inherently unfair as it places the burden of the nation’s and the GSEs’ financial recovery on Black, Latino, Asian American and Pacific Islander, and Native American borrowers, even though they were the victims, not the cause.¹⁵ Notably, the GSEs needed a financial rescue from the federal government mostly due to Alt-A loans from borrowers who were wealthier and mostly White.¹⁶ The

https://www.urban.org/sites/default/files/publication/101160/explaining_the_black-white_homeownership_gap_a_consumer_look_at_disparities_across_local_markets_0.pdf (finding that the GSEs’ portfolio share of loans to Black borrowers has remained well below 5 percent of total mortgage acquisitions despite several decades of housing goals).

¹³ See FHFA, Fact Sheet: Result of Fannie Mae and Freddie Mac Guarantee Fee Review (April 17, 2015), <https://www.fhfa.gov/media/publicaffairs/pages/results-of-fannie-mae-and-freddie-mac-guarantee-fee-review.aspx>. See also, Fannie Mae LLPA Matrix, available at <https://www.fanniemae.com/content/pricing/llpa-matrix.pdf>.

¹⁴ 12 C.F.R. § 1026.43.

¹⁵ See Michelle Aronowitz, Edward L. Golding, and Jung Hyun Choi, *The Unequal Costs of Black Homeownership* (Oct. 1, 2020), <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>.

¹⁶ See John Griffith, Seven Things You Need to Know about Fannie Mae and Freddie Mac, Center for American Progress (Sept. 6, 2012),

failures of regulators, the GSEs, and lenders to identify risk and prevent foreclosures, even after repeated warnings from consumer advocates, should not fall on the shoulders of the borrowers most burdened by the financial fallout and historic and current structural discrimination produced by federal housing policies.

- d. LLPAs are not necessary for safety and soundness reasons or to recoup the GSEs' lost capital. Lender use of these fees has been focused on profitability. Now that the GSEs have fully repaid the government for the 2008 bailout, the less discriminatory alternative is to eliminate the fees.
2. Credit Scoring Systems: Fannie Mae and Freddie Mac have long required lenders to use the Classic FICO credit score model even though this model has a disparate impact and less discriminatory alternatives exist. Civil rights and consumer advocates have repeatedly sounded the alarm that the Classic FICO model is antiquated and has a disparate impact on borrowers of color and other protected groups.¹⁷ Despite these urgent concerns, on November 10, 2020, FHFA announced that the GSEs validated and approved the Classic FICO credit score model for use, in accordance with FHFA's final rule on credit score model approvals.¹⁸ FHFA should ensure that the process for validating and approving other less discriminatory credit score models moves as quickly as possible.¹⁹ In addition, FHFA should ensure that approved credit score models are included in fair lending examinations for periodic reviews of disparate impact and less discriminatory alternatives.
 3. Appraisal Activities: FHFA is in a unique position to identify and address any potential discrimination in the appraisal system. The GSEs are exempt from the appraisal requirements set forth in Title XI of the Financial Institution

<https://www.americanprogress.org/issues/economy/reports/2012/09/06/36736/7-things-you-need-to-know-about-fannie-mae-and-freddie-mac/>; Testimony of Nikitra Bailey, Executive Vice President, Center for Responsible Lending, Hearing: Sustainable Housing Finance: Private Sector Perspectives on Housing Finance Reform, Subcommittee on Housing and Insurance, U.S. House Committee on Financial Services (Oct. 25, 2017), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-bailey-remarks-written-hfs-c-subcommittee-housinginsurance-oct2017.pdf>.

¹⁷ See, e.g., Comment of National Consumer Law Center et al. to Request for Input on Fannie Mae and Freddie Mac Credit Score Requirement (March 30, 2018), <https://www.fhfa.gov/AboutUs/Contact/Pages/input-submission-detail.aspx?RFID=986> (describing the disparate impact of Classic FICO's treatment of medical debt on borrowers of color).

¹⁸ See FHFA, *Credit Scores*, <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Credit-Scores.aspx>. FHFA's final rule (12 C.F.R. Part 1254) implemented the requirements in Section 310 of the Economic Growth, Regulatory Relief, and Consumer Protection Act, which was enacted on May 24, 2018. The final rule requires credit score model developers to address in the application the model's compliance with federal fair lending requirements (12 C.F.R. § 1254.6(2)) and requires the GSEs to conduct an Enterprise Business Assessment, which includes a fair lending risk and impact assessment (12 C.F.R. § 1254.8(2)).

¹⁹ We do, however, commend Fannie Mae for its recent announcement to allow lenders, with the applicant's permission, to use bank account data to include 12 months of consistent rental payments in underwriting and assessing eligibility for a mortgage. See Hugh Frater, *Helping Renters Unlock the Door to Homeownership*, Fannie Mae Perspectives Blog (Aug. 11, 2021), <https://www.fanniemae.com/research-and-insights/perspectives/helping-renters-unlock-door-homeownership>.

Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”),²⁰ which means that FHFA’s oversight can be instrumental in addressing decades of bias in the appraisal system for the large portion of the mortgage market covered by the activities of the GSEs. FHFA has the authority to supervise the GSEs for compliance with the Fair Housing Act, which clearly prohibits discrimination in appraisals.²¹ Thus, the GSEs face a compliance risk with respect to any appraisal activities that may potentially violate the Fair Housing Act or other fair lending laws. Given the important role that appraisals play for communities of color, FHFA should ensure that it conducts robust oversight of the GSEs appraisal activities to mitigate any potential fair lending risk and any potential harm to people and communities of color.

4. Small Dollar Mortgage Loan Programs: The lack of liquidity for small dollar mortgage loans has a disparate impact on borrowers of color, who are more likely to need and apply for these loans.²² Moreover, such programs actually support one of the key business justifications of the GSEs, which is to provide liquidity for mortgages for low- and moderate-income families even if the return is less than that earned on other activities.²³ Accordingly, the less discriminatory alternative would be for FHFA to encourage the significant expansion of GSE support for small dollar mortgage loan programs.

²⁰ FIRREA, Pub. L. 101-73, Title XI, codified at 12 U.S.C. § 3331 *et seq.*

²¹ See Fair Housing Act, 42 U.S.C. § 3605. HUD’s implementing regulation states that prohibited practices include “[u]sing an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.135(d)(1).

²² See Ben Eisen, *Dearth of Credit Starves Detroit’s Housing Market*, Wall Street Journal (Oct. 29, 2020), <https://www.wsj.com/articles/a-broken-mortgage-market-strands-detroits-black-residents-11603984218> (finding low property values to be the main driver of the dearth of mortgages in Detroit as lenders earn little profit on small dollar mortgages).

²³ Fannie Mae and Freddie Mac Charters: “The Congress declares that the purposes of this title are to establish secondary market facilities for residential mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to...(3) provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.” 12 U.S.C. § 1716 (Fannie Mae); 12 U.S.C. § 1451 note (Freddie Mac).

II. Legal Overview

The Policy Statement Should Clearly State FHFA's Authority under the Affirmatively Furthering Fair Housing Provisions of the Fair Housing Act

While the Policy Statement's Legal Overview section clearly states FHFA's authority for the non-discrimination provisions of the fair lending laws, FHFA can improve this section by clearly stating its authority and obligation under the Affirmatively Furthering Fair Housing provisions of the Fair Housing Act. This provision states:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (**including any Federal agency having regulatory or supervisory authority over financial institutions**) in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary [of Housing and Urban Development] to further such purposes.²⁴

Although FHFA is an independent agency, the statute clearly covers any agency having regulatory or supervisory authority over financial institutions. Moreover, FHFA has already acknowledged this authority in its recent Orders on Fair Lending Compliance and Report Submission ("Fair Lending Orders") and the Memorandum of Understanding between FHFA and HUD, which include references to this provision.²⁵

III. Fair Lending Oversight Considerations

A. Monitoring and Information Gathering

We commend FHFA for clearly stating its authority to gather data and information and to monitor GSE activities for fair lending risk. FHFA's position was further strengthened by immediately issuing the Fair Lending Orders, which now require the GSEs to submit fair lending data and information every quarter.²⁶ We offer the following recommendations in connection with the Monitoring and Information Gathering section of the Policy Statement.

²⁴ 42 U.S.C. § 3608(d) (emphasis added).

²⁵ See FHFA, Order on Fair Lending Compliance and Report Submission, Order No. 2021-OR-FNMA-2 (July 1, 2021) (Fannie Mae), FHFA, Order on Fair Lending Compliance and Report Submission, Order No. 2021-OR-FHLMC-2 (July 1, 2021) (Freddie Mac)

<https://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Pages/Orders.aspx>; Memorandum of Understanding by and between HUD and FHFA regarding Fair Housing and Fair Lending Coordination ("MOU"), https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-HUD-MOU_8122021.pdf. We note, however, that the MOU could be improved by explicitly referencing the "affirmative" responsibility by using the following language from the statute and the Fair Lending Orders: "Under 42 U.S.C. § 3608(d), the Fair Housing Act provides that all agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively* to further the purposes of the Fair Housing Act." (Emphasis added.)

²⁶ See e.g., FHFA, Order on Fair Lending Compliance and Report Submission, Order No. 2021-OR-FHLMC-2 (July 1, 2021), <https://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Documents/Orders/FRE-Final-Order-re-Fair-Lending-Reporting.pdf>.

1. Fair Lending Orders: FHFA should enhance the Fair Lending Orders by requiring the GSEs to submit the following information. (The numbers are those used in the Fair Lending Orders, for ease of reference.)

#1: Description of any changes to fair lending policies or fair lending program procedures. Change management is critical to preventing consumer harm. FHFA should require a list of any documentation and fair lending analysis related to the change, including any documentation of potential less discriminatory alternatives. FHFA should reserve the right to request these additional documents.

#2: Annual fair lending risk assessment. It may not be feasible for the GSEs to review every program and policy every year for fair lending risk. FHFA should require the GSEs to describe which programs and policies were and were not included for a given year.

#4: Fair-lending related consumer complaint summary information. Complaints can be essential in risk-focusing an exam. FHFA should ensure that “consumer” is defined broadly to include not just individual consumers but also lenders and consumer advocates. In addition, FHFA should define “complaint” broadly to include not just formal complaints that come in through a complaint portal, but press articles, social media, concerns raised by consumer advocates, investigations, and litigation.²⁷ Finally, FHFA should set up a complaint portal so that consumer advocates, individual consumers, and lenders can submit complaints directly to FHFA to ensure that the concerns are considered during a risk-focused exam.²⁸

#10-12: Underwriting and acquisition data. In addition to underwriting and acquisition data, FHFA should require the GSEs to submit pricing data, including pricing broken out by specific fees and disaggregated by the borrower’s credit profiles.

Fair lending reporting categories. FHFA should require the GSEs to submit information by census tract to determine whether certain geographies are being discriminated against on a prohibited basis.

2. Transparent Public Data: Whenever possible, FHFA should make the data and information available in a format that is transparent and useful to the public. Public data should be made available in its entirety. Nonpublic personal information should be made available in aggregate form. The format should

²⁷ See, e.g., Federal Reserve, Community Bank Risk-Focused Consumer Compliance Supervision Program at 32, CA Letter 13-19 (Nov. 18, 2013), <https://www.federalreserve.gov/supervisionreg/caletters/caltr1319.htm> (defining “complaints” broadly).

²⁸ Currently, FHFA’s webpage regarding complaints simply directs the complainant to Fannie Mae or Freddie Mac, see <https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/Issue-with-Fannie-Mae-or-Freddie-Mac.aspx>. Other federal financial regulators have complaint portals for submitting complaints directly to the regulator.

be accessible to consumer advocates and local governments with limited resources and capacity.

B. Supervisory Examinations

We commend FHFA for stating its authority for supervisory fair lending examinations, but strongly recommend strengthening this section to clarify that FHFA’s supervisory authority for fair lending is at least on par with its authority for safety and soundness and diversity and inclusion supervision. While it is commendable that FHFA spent several paragraphs describing its enforcement powers, we recognize that enforcement actions are rare and that the supervisory process is often the most efficient way to prevent discrimination and consumer harm. For that reason, FHFA should be clear about its fair lending supervisory authority. We offer the following recommendations in connection with the Supervisory Examinations section of the Policy Statement.

1. Authority: Paragraph 1 of the Supervisory Examinations Section of the Policy Statement appropriately explains FHFA’s broad supervisory fair lending authority under 12 U.S.C. 4511(b)(1) and 12 U.S.C. 4511(b)(2), but FHFA should improve this explanation by re-stating the more specific language used in the Fair Lending Orders using a 3-part description:
 - a. Under 12 U.S.C. 4511(b)(2): “The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.”
 - b. Under 12 U.S.C. 4513(a)(1)(B)(v): “The principal duties of the Director shall be...to ensure that...the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest.”
 - c. The Director finds that ensuring compliance by the GSEs with the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, the Equal Credit Opportunity Act, 15 U. S. C. § 1691, *et seq.*, and section 1325 of the Safety and Soundness Act, 12 U. S.C. § 4545, is in the public interest.²⁹
2. Description of Supervisory Activities: FHFA should improve Paragraph 2 of the Supervisory Examinations Section of the Policy Statement by more clearly describing the supervisory activities that FHFA will conduct in connection with its fair lending supervisory authority, including:

²⁹ See FHFA, Order on Fair Lending Compliance and Report Submission, Order No. 2021-OR-FNMA-2 (July 1, 2021) (Fannie Mae), FHFA, Order on Fair Lending Compliance and Report Submission, Order No. 2021-OR-FHLMC-2 (July 1, 2021) (Freddie Mac)
<https://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Pages/Orders.aspx>.

- a. *Types of Supervisory Activities*: FHFA should clearly state that it will conduct fair lending risk assessments (not just review the GSE’s own assessments), ongoing monitoring, and targeted exams.
- b. *Less Discriminatory Alternatives*: FHFA should clearly state that when reviewing matters under a disparate impact standard, FHFA will conduct a robust analysis of less discriminatory alternatives. FHFA should also clarify that it expects the GSEs to also conduct a robust analysis of less discriminatory alternatives as part of a strong compliance management system.
- c. *Reports of Examination*: FHFA should clearly state that it will issue a detailed Report of Examination to the GSEs at the conclusion of an exam. The Report of Examination is critical in communicating the principal examination conclusions and findings for the supervisory cycle to the GSE’s board and senior management.
- d. *Matters Requiring Attention (“MRAs”)*: FHFA should explicitly state that it has the authority to and will issue MRAs in connection with fair lending examinations, where appropriate. Typically, the MRAs are documented in the Report of Examination. MRAs are the backbone of a supervisory program as they clearly identify the regulator’s priorities for remediation by the regulated entity and ensure that the regulator can track and assess whether and to what extent a regulated entity responded to deficiencies and weaknesses identified during an exam. In some instances, MRAs provide a clear foundation for later taking stronger action, such as an enforcement action or ratings downgrade. In addition, FHFA should clearly state that its policy for adverse examination findings applies to fair lending supervision and provide a cross-reference to the policy (FHFA Advisory Bulletin: Classifications of Adverse Examination Findings, AB 2017-01 (March 13, 2017)).
- e. *Ratings*: FHFA should clearly state that it will issue ratings in connection with fair lending examinations. Typically, the ratings are documented in the Report of Examination. FHFA already issues ratings in connection with the safety and soundness exam and the diversity and inclusion exam.³⁰ FHFA should look to the Uniform Interagency Consumer Compliance Rating System issued by the federal financial regulators for a

³⁰ For the safety and soundness exam, FHFA utilizes the CAMELSO rating, which reflects the components of the rating: Capital, Asset quality, Management, Earnings, Liquidity, Sensitivity to market risk, Operational risk. See FHFA CAMELSO, <https://www.fhfa.gov/SupervisionRegulation/ExaminerResources/Pages/CAMELSO.aspx>. For the diversity and inclusion exam, FHFA reviews the following components: board diversity, board oversight, enterprise risk management, strategic planning, organizational framework, workforce, procurement, finance, data management, compliance, internal audit. See FHFA, Diversity and Inclusion Examination Manual (Dec. 2020), <https://www.fhfa.gov/SupervisionRegulation/ExaminerResources/Documents/FHFA-Diversity-Inclusion-Examination-Manual-122020.pdf>. For both ratings systems, the composite rating is based on a scale of 1 (best - the lowest degree of supervisory concern) to 5 (worst - the highest level of supervisory concern).

framework that assesses the rating based on board and management oversight, the compliance management system, violations of law and consumer harm, and self-identification and prompt correction of violations of law.³¹

3. Fair Lending Examination Procedures: FHFA has been conducting fair lending examinations for some time but has yet to release public fair lending examination procedures. FHFA has already publicly released the diversity and inclusion as well as the safety and soundness examination procedures.³² FHFA should issue public fair lending examination procedures as soon as possible, which may also include a discussion of the less discriminatory alternatives analysis under the disparate impact standards, the Report of Examination template, and ratings guidance.
4. Comprehensive Annual Report: FHFA should release a comprehensive report on the GSEs' compliance with the nation's fair housing and fair lending laws that is at least as detailed as the information provided regarding the safety and soundness exam and the diversity and inclusion exam, which are documented in the annual report.³³ Currently, the fair lending exam is the only exam not detailed in the annual report or other comprehensive report. In particular, FHFA should ensure that the report provides specific information on the race and ethnicity of the borrowers sorted by product lines so key stakeholders can determine the extent to which the GSEs are serving the whole of the national housing finance market..

C. *Enforcement*

We commend FHFA for its clear statement on its enforcement authority. In particular, it was instructive to see FHFA's position that FHFA's Advisory Bulletin on Enforcement Policy (AB 2013-03) covers fair lending violations and that the GSEs' conservatorship status does not preclude enforcement.³⁴ We also commend FHFA for its recent Memorandum of Understanding with HUD to coordinate oversight of the GSEs with respect to the fair lending laws, including the Fair Housing Act's Affirmatively Furthering Fair Housing mandate.³⁵

In addition, where appropriate, FHFA should not hesitate to pursue a public enforcement action to enforce the fair lending laws. Although public enforcement actions can consume additional resources, they also enhance transparency, credibility, and effectiveness. In particular, it is

³¹ Federal Financial Institution Examination Council, Uniform Interagency Consumer Compliance Rating System (Nov. 7, 2016), <https://www.ffiec.gov/press/pr110716.htm>.

³² See FHFA Examination Manual, <https://www.fhfa.gov/SupervisionRegulation/ExaminerResources/Pages/Manual-and-Supplemental-Guidance.aspx>.

³³ See e.g., FHFA, Report to Congress 2020 (June 15, 2021), at 27 (detailed report of safety and soundness exam) and 65 (detailed report of diversity and inclusion exam),

<https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual-Report-to-Congress-2020.pdf>.

³⁴ 86 Fed. Reg. 36201.

³⁵ Memorandum of Understanding by and between HUD and FHFA regarding Fair Housing and Fair Lending Coordination, https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-HUD-MOU_8122021.pdf.

important for the public to have transparent insight into the amount and manner of consumer restitution if the GSEs have violated the fair lending laws.

IV. Additional Considerations

In addition to the considerations detailed above that are directly related to fair lending oversight, we offer the following recommendations to ensure that the GSEs serve the whole of the national housing finance market to the fullest extent possible.

A. Appraisal Data and Research

It is widely-recognized that the nation's housing finance system was built on a framework that explicitly tied risk to race, redlined communities of color, and undervalued homes owned by borrowers of color or located in communities of color.³⁶ Unfortunately, many of these patterns persist to this day. The good news is that the Biden administration is leading a charge with other federal financial regulators, academics, industry, and advocates who are committed to seeking solutions to this long standing problem. Indeed, FHFA aided this effort by recently issuing a Request for Information on Appraisal-related Policies, Practices, and Processes.³⁷

1. Appraisal Data: The GSEs have collected a rich data set regarding appraisals and are proposing to further refine this dataset.³⁸ FHFA should encourage the GSEs to release the appraisal data to the public on an aggregate basis (that is not personally identifiable) to facilitate research regarding the impact of appraisals and other housing practices on communities of color.
2. Appraisal Research: FHFA should encourage and support research evaluating the impact of appraisal standards and alternative valuation services on communities of color. In addition to research by the public, FHFA should task OFLO and the new Division of Research and Statistics with conducting robust research on how the GSEs' current appraisal policies impact borrowers and communities of color and whether less discriminatory alternatives exist.

B. Programs that Support Fair Housing and Fair Lending

1. Special Purpose Credit Programs: Regulation B has long contained a provision that allows lenders to offer Special Purpose Credit Programs, but lenders have been reluctant to do so without clear guidance from the

³⁶ See Lisa Rice, *The Fair Housing Act: A Tool for Expanding Access to Quality Credit*, The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act (1st ed. 2017). See also University of Richmond, *Mapping Inequality*, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58>.

³⁷ FHFA, Request for Information on Appraisal-related Policies, Practices, and Processes (Dec. 28, 2020), <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/RFI-Appraisal-Related-Policies.pdf>. The response of the National Fair Housing Alliance and other organizations is available at: <https://www.fhfa.gov/AboutUs/Contact/Pages/input-submission-detail.aspx?RFID=1320>.

³⁸ See Fannie Mae, Uniform Appraisal Dataset (UAD), <https://singlefamily.fanniemae.com/delivering/uniform-mortgage-data-program/uniform-appraisal-dataset>.

regulators and assurances of mortgage market liquidity.³⁹ FHFA should work with HUD and the federal financial regulators to establish clear criteria for lenders, and should support and encourage the GSEs to establish a program to purchase loans that lenders originate through Special Purpose Credit Programs. In addition, FHFA should encourage the GSEs to purchase loans for which the borrower gets downpayment assistance through a first-time or first-generation homebuyer program or a program that uses race-conscious targeting to create equity for historic and current discrimination in mortgage lending.⁴⁰

2. Affirmatively Furthering Fair Housing: FHFA should review how its authority and obligation to Affirmatively Further Fair Housing may create certain obligations for the GSEs. In HUD's recent interim final rule regarding the duty to Affirmatively Further Fair Housing, HUD noted that the rule is consistent with decades of case law that have held that "funding recipients, to meet their [Affirmatively Furthering Fair Housing] obligations, must, at a minimum, ensure that they make decisions informed by preexisting racial and socioeconomic residential segregation. The courts have further held that, informed by such information, funding recipients must strive to dismantle historic patterns of racial segregation; preserve integrated housing that already exists; and otherwise take meaningful steps to further the Fair Housing Act's purposes beyond merely refraining from taking discriminatory actions and banning others from such discrimination."⁴¹ While the GSEs do not receive funds directly from FHFA, the GSEs receive certain benefits from an implicit guarantee and from conservatorship, and now receive an explicit guarantee through the Preferred Stock Purchase Agreement.⁴²
3. Artificial Intelligence/Technology: FHFA should embrace innovative technologies designed to significantly reduce, and ultimately eliminate, bias in algorithmic-based systems. In addition, FHFA should enhance its capacity to conduct supervision of the GSEs and bring enforcement actions concerning the use of artificial intelligence and other technologies that enable or perpetuate housing or lending discrimination.

³⁹ See Regulation B, 12 C.F.R. § 1002.8. See also Lisa Rice, Using Special Purpose Credit Programs to Expand Equality, National Fair Housing Alliance (Nov. 4, 2020), <https://nationalfairhousing.org/using-speeps-blog/>.

⁴⁰ See U.S. House Committee on Financial Services, *Fact Sheet: The Downpayment Toward Equity Act of 2021*, https://financialservices.house.gov/uploadedfiles/downpayment_toward_equity_act_fact_sheet.pdf. See also National Fair Housing Alliance and Center for Responsible Lending, *First Generation: Criteria for a Targeted Down Payment Assistance Program* (May 21, 2021), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-nfha-first-generation-jun21.pdf>.

⁴¹ HUD, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, Interim Final Rule, 86 Fed. Reg. 30779, 30780 (June 10, 2021).

⁴² See U.S. Department of the Treasury, Treasury Department and FHFA Amend Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac (Jan. 14, 2021), <https://home.treasury.gov/news/press-releases/sm1236>.

4. Pilot Mortgage Programs: FHFA should require the GSEs to develop pilot mortgage programs that allow the use of nontraditional credit criteria like rental housing payment information, residual income, and housing payment shock and that include consumer default-prevention mechanisms to expand affordable credit access to underserved borrowers.
5. Federal Home Loan Banks: FHFA should require the Federal Home Loan Banks to develop programming to steepen their support of fair housing activities and affordable housing development.

C. *Duty to Serve Plans*

1. Shared Equity Programs: FHFA should include more robust support for Shared Equity programs to support the development of affordable housing in the Duty to Serve Plans. In addition, FHFA should require the GSEs and the Federal Home Loan Banks to increase standardization in the process for underwriting loans that support Shared Equity Programs, expand educational awareness of the programs, develop pilot programs to explore best practices, and help develop tools to increase their use.
2. Affirmatively Furthering Fair Housing: FHFA should adjust the GSEs' Duty to Serve Plans to include an emphasis on Affirmatively Furthering Fair Housing in every goal and undertake activities to expand housing opportunities for groups disproportionately experiencing housing discrimination. Under the current rule, FHFA may provide extra credit for residential economic diversity activities.⁴³ One approach to strengthening the framework would be for FHFA to clarify in the Evaluation Guidance that extra credit may be provided for residential economic diversity activities that fulfill the goal of Affirmatively Furthering Fair Housing.⁴⁴
3. Meaningful Goals for Racially or Ethnically Concentrated Areas of Poverty: FHFA should require the GSEs to adopt meaningful and significant goals to expand credit access and address housing inequities in Racially or Ethnically Concentrated Areas of Poverty in their Duty to Serve Plans.

⁴³ See 12 C.F.R. § 1282.36(c)(3).

⁴⁴ See e.g., FHFA, *Duty to Serve Evaluation Guidance*, Guidance 2020-4 at 15 (March 11, 2020), <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Documents/Revised-Evaluation-Guidance-March-2020.pdf>.

Thank you for considering our views. If you have any questions, please contact Nikitra Bailey, Senior Vice President of Public Policy (nbailey@nationalfairhousing.org), or Maureen Yap, Senior Counsel (myap@nationalfairhousing.org) at the National Fair Housing Alliance.

Sincerely,

Americans for Financial Reform Education Fund

Center for Community Progress

Consumer Action

Integrated Community Solutions, Inc.

Leadership Conference on Civil and Human Rights

Long Island Housing Services, Inc.

MICAH- Metropolitan Interfaith Council on Affordable Housing

Mountain State Justice

National Association of Real Estate Brokers, Inc.

National CAPACD

National Coalition For The Homeless

National Community Reinvestment Coalition (NCRC)

National Consumer Law Center (on behalf of its low-income clients)

National Fair Housing Alliance

National Urban League

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