

September 7, 2019

SUBMITTED VIA Regulations.gov and RegComments@fhfa.gov

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

RE: Policy Statement on Fair Lending; Comment Request: (2021-N-7)

We write as former officials of the U.S. Department of Housing and Urban Development (HUD) to offer comments in response to the Federal Housing Finance Agency (FHFA) Policy Statement on Fair Lending, published in the Federal Register on July 9, 2021, with a request for public comment.

We commend FHFA for recognizing the centrality of fair lending to the U.S. housing finance system, and for expressing its commitment to ensuring the Government-Sponsored Enterprises (Fannie Mae and Freddie Mae, collectively the Enterprises or GSEs) provide fair, equitable, and nondiscriminatory access to credit and housing. Strong and effective fair lending enforcement in the secondary market requires the full engagement of HUD and FHFA, with the agencies working together, each acting to the full extent of its respective authorities and powers, as established by Congress. However, we are concerned that FHFA's Policy Statement may blur the lines between FHFA's and HUD's respective authorities and responsibilities for ensuring fair housing compliance by the GSEs. We are not confident that FHFA has the authority to independently enforce the fair lending provisions of the Safety and Soundness Act, nor do we believe FHFA can formally accept a referral HUD until HUD updates its regulations implementing its enforcement authority under the Safety and Soundness Act. This does not take away from FHFA's independent power, as the conservator and prudential regulator of the Enterprises, to take action to ensure their safe, sound, equitable, and legal operation.

Nonetheless, we are encouraged by FHFA's willingness to support HUD in its enforcement of the fair lending provisions of the Safety and Soundness Act. We hope this cooperation will include an open data-sharing policy between the agencies. We urge FHFA to expand public access to these data, which will supplement HMDA data reported by lenders and facilitate greater research and fair lending enforcement by private parties, institutions, and government offices.

We notice the Policy Statement on Fair Lending does not acknowledge FHFA's duty to affirmatively further fair housing, as mandated by the Fair Housing Act. The Policy Statement does, however, indicate the possibility of future rulemaking for FHFA's regulated entities. We welcome this possibility and hope it will include rulemaking to express FHFA's commitment to affirmatively furthering fair housing and identify affirmative fair housing requirements for its regulated entities. The racial homeownership gap has widened under FHFA's watch, and the dual mortgage market has become more entrenched. The GSEs have served a disproportionately higher proportion of White borrowers than they did during their years under HUD supervision,

and since then, a disproportionately higher proportion of Black and Latinx borrowers have obtained FHA/VA-insured mortgage loans. FHFA approved GSE policies that unreasonably exclude credit-worthy borrowers, limiting their choices to the FHA/VA-insured markets, which often result in higher costs and less flexibility in purchasing a house. The share of GSE loan purchases for Black households has yet to reach the levels of 2004/5.

While we applaud FHFA's commitment to ensuring nondiscrimination in lending, the Fair Housing Act demands more. It imposes on FHFA and the other federal housing agencies and their participants and regulated entities an affirmative duty to disestablish the segregated systems put in place by the federal government (e.g., the dual mortgage market), and eliminate their vestiges (the racial homeownership gap).

Background

FHFA was established in the wake of the 2008 financial crisis to take over from the Office of Federal Housing Enterprise Oversight (OFHEO) within HUD the role of regulating and supervising the GSEs. The Housing and Economic Recovery Act 2008 (HERA) established FHFA and authorized it to place the Enterprises into conservatorship. One office of FHFA acts as the regulator of the GSEs and another office acts as their conservator. In relaying HUD as the prudential regulator of the GSEs, HERA expressly retained HUD's fair housing oversight role over the GSE.¹ Section 1325(1) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("Safety and Soundness Act"), now part of HERA, provides that HUD shall,

by regulation, prohibit each enterprise from discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a discriminatory effect.²

Section 1325(6) of the Safety and Soundness Act provides that HUD shall,

periodically review and comment on the underwriting and appraisal guidelines of each enterprise to ensure that such guidelines are consistent with the Fair Housing Act and this section.³

Section 1325 also requires HUD to take certain actions to ensure the lenders with which the GSEs do business are not discriminating. For this, Congress gave HUD the authority to require the GSEs to comply with HUD data requests and HUD demand that the GSEs sanction discriminating lenders.⁴ Accordingly, HUD regulations require the GSEs, upon request, to

¹ 12 U.S.C. § 4545. HUD regulation implementing its fair lending authority under the Safety and Soundness Act are located at 24 CFR 81.41, et seq.

² 12 U.S.C. § 4545.

³ 12 U.S.C. § 4545(6).

⁴ 12 U.S.C. § 4545(2), (3), (5).

submit information to the Secretary to assist Fair Housing Act or ECOA investigations.”⁵ Also, “pursuant to a final adjudication on the record, and after opportunity for an administrative hearing, in accordance with subchapter II of chapter 5 of title 5,” Congress gave HUD the authority to sanction GSE lenders for violating the Fair Housing Act or ECOA.⁶

HUD’s GSE regulations thus afford HUD two paths for remedying GSE fair housing violations: one for violations of Section 1325 and HUD’s GSE regulations, and another for Fair Housing Act violations. For the former, HUD’s GSE regulations provide that the HUD Secretary shall refer potential GSE violations of Section 1325 and HUD regulations to OFHEO (a former office within HUD) for enforcement.⁷ HUD’s Fair Housing Act enforcement authority over the GSEs, as with its fair housing enforcement authority over other private and government entities, includes subpoena power subject to fines and criminal penalties for noncompliance⁸ and either administrative adjudication or prosecution in federal court by the Department of Justice.⁹

I. FHFA does not have the authority to formally accept HUD referrals to enforce the fair lending provisions of the Safety and Soundness Act.

FHFA’s Policy Statement on Fair Lending asserts that HUD’s implementing regulation at 24 CFR 81.47(a) “anticipates HUD referring violations and potential fair housing violations covered by the Safety and Soundness Act to FHFA for enforcement.”¹⁰ FHFA’s Policy Statement asserts that “FHFA will conduct a full review of HUD’s referral of a violation or potential violation and all evidence submitted as part of the referral and resolve the matter appropriately and in accordance with FHFA’s enforcement policy and in consultation with HUD.”

The HUD-FHFA MOU confirms that FHFA intends to act in its sole discretion with respect to any HUD referral under 4545:

With respect to complaints and other matters referred by HUD to FHFA, FHFA, at its sole discretion, may use its regulatory, supervisory, and administrative enforcement authority to address violations or potential violations in accordance with applicable FHFA enforcement authority and policy. FHFA may also determine, at its sole discretion, to take action as conservator to resolve identified issues during the term of any conservatorship of an Enterprise.¹¹

HUD’s GSE fair housing regulations contemplate a referral from HUD’s Office of Fair Housing and Equal Opportunity (FHFA) to another HUD office, OFHEO. The referral provision

⁵ 24 C.F.R. 81.44.

⁶ 12 USC § 4545(5); 24 C.F.R. 81.44.

⁷ 24 C.F.R. § 81.47(a).

⁸ 42 U.S.C § 3611.

⁹ 42 U.S.C § 3612(o).

¹⁰ 86 Fed. Reg. 36199, 36201 (July 9, 2021).

¹¹ HUD-FHFA MOU Regarding Fair Housing and Fair Lending Coordination, Section VI(b).

in 24 CFR § 81.47(a) requires HUD to refer violations and potential violations of Section 1325 to the Director of OFHEO. OFHEO's role was not to reinvestigate HUD's fair housing concerns, but to enforce HUD's fair housing findings. To the extent there were any disagreements between OFHEO and FHFA, they would have been resolved by the HUD Secretary, to which both HUD components reported.

HUD has yet to update the referral provision in its GSE regulations to account for the substitution of FHFA for OFHEO, although OFHEO's enforcement authorities were transferred to FHFA and strengthened. Still, the Safety and Soundness Act requires HUD to act through regulation to prohibit the GSEs from discriminating. Thus, FHFA cannot claim the authority to accept and act on HUD Section 1325 referrals absent regulatory authority to do so from HUD. Neither an FHFA policy statement nor HUD-FHFA MOU can substitute for the requirement that HUD act through regulation to implement its Safety and Soundness Act powers. HUD could update its GSE regulations at any time, which it should do to allow the public an opportunity to comment on how it will enforce its statutory power to ensure the GSEs are not discriminating.

As spelled out in the Policy Statement, FHFA has independent authority to require legal compliance by the GSEs, which includes regular monitoring, examination, and enforcement. In fact, regulators can hold regulated institutions to even higher standards to guard against the risk of noncompliance. But FHFA's supervisory authority does not include the power to resolve, modify, or reject HUD's fair housing findings. To allow FHFA to alter or ignore HUD's findings would make FHFA the prudential regulator, the conservator, and effectively the sole fair housing oversight authority for the GSEs. This is not consistent with the plain language or the statutory framework of HERA, which demonstrates Congress' intent to leave fair housing compliance under the Safety and Soundness Act with HUD, even as it shifts the remaining oversight authority over the GSEs to FHFA.

Eventually, HUD may issue regulations directing section 4545 referrals to FHFA for enforcement. But to do informally, absent notice and comment rulemaking, without an opportunity to specify standards or constraints for how the referrals would be processed by FHFA, does not create a stable, fair, and legal process for holding the GSE's accountable for fair lending violations.

II. FHFA does not have the authority to independently enforce the fair lending provisions of the Safety and Soundness Act.

The FHFA Policy Statement on Fair Lending states that FHFA "may also independently pursue administrative enforcement actions for any violations of section 4545 of the Safety and Soundness Act."¹² We recommend FHFA clarify that it is not proposing to independently enforce section 4545, which it does not have the authority to do. Section 4545 (Section 1325 of the Safety and Soundness Act) outlines HUD's authority to prohibit the GSEs and their lenders from discriminating. The role of FHFA's predecessor agency, OFHEO, in addressing section 4545 fair housing violations was created by HUD regulation and limited to HUD referrals. Section 4545 afforded OFHEO, and thus FHFA, no independent enforcement role.

¹² 86 Fed. Reg. 36199, 36201 (July 9, 2021).

Nonetheless, the MOU states that “FHFA engages in comprehensive fair lending oversight to ensure Enterprise compliance with the Fair Housing Act, ECOA, and the fair lending provisions of the Safety and Soundness Act.”¹³ But unlike the Fair Housing Act and ECOA, which embody generally applicable prohibitions, widely enforceable by any injured party as well a multitude of federal, state, and local government agencies including HUD, DOJ, and CFPB, the fair lending provisions of the Safety and Soundness Act is a specific grant of authority to HUD, to prohibit the GSEs and their seller/services from discriminating.

Moreover, there appears to be no practical reason for FHFA to independently enforce the fair lending provisions of the Safety and Soundness Act. FHFA has the supervisory authority and conservatorship powers to enable it to identify and resolve any actual or potential fair lending violation or correct any risk of noncompliance with the fair lending laws. But section 4545 is not a law FHFA can directly enforce because places no obligations on the GSEs beyond compliance with HUD’s authorized demands.

III. FHFA should promulgate a formal regulating describing how it and its regulated entities will affirmatively further fair housing.

FHFA’s Policy Statement on Fair Lending and its MOU with HUD regarding fair housing and fair lending coordination fail to mention FHFA’s obligation to affirmatively further fair housing. Redlining and discrimination in lending are primary reasons the affirmative fair housing mandate was included in the Fair Housing Act. A statement on fair lending by FHFA cannot be complete or adequate without acknowledging its commitment to affirmatively further fair housing in all of its supervisory and regulatory activities. FHFA also should issue a formal notice-and-comment rule that binds itself and the GSEs to their respective AFFH obligations.

A. FHFA is covered by the AFFH mandate

The Fair Housing Act prohibits housing discrimination in the private market and by government entities. The Fair Housing Act also includes an affirmative mandate applicable only to the federal government:

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 [HUD] to further such purposes.¹⁴

¹³ HUD-FHFA MOU Regarding Fair Housing and Fair Lending Coordination, Section II(a).

¹⁴ 42 U.S.C. § 3608(d).

Congress added this affirmative mandate so the Fair Housing Act not only would end redlining and segregation caused by the federal government but would undo their effects.

In 1994, the president signed Executive Order 12892, a five-page executive order implementing the Fair Housing Act's affirmative fair housing requirement.¹⁵ Like the Fair Housing Act, the 1994 executive order highlights the inclusion of federal financial regulators in the AFFH mandate:

As used in this order, the phrase “programs and activities” shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).¹⁶

FHFA unquestionably regulates and supervises federal financial institutions, namely, Fannie Mae and Freddie Mac, which buy and sell mortgages. FHFA's programs and activities thus include supervising and regulating loans (the buying and selling of loans), contracts (contracts to buy and sell loans), guarantees (implicit guarantee of loan), and insurance (requiring insurance to protect against defaulting loans).

Although HUD plays a coordinating role in ensuring all agencies are fulfilling their AFFH obligations,¹⁷ and each agency is required to cooperate with HUD in that effort,¹⁸ HUD's coordinating role does not eliminate or lessen the AFFH obligation each agency is required to pursue:

The head of each executive agency [here, FHFA], is responsible for ensuring that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing as required by section 808 of the Act [42 U.S.C. 3608] and for cooperating with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act.¹⁹

¹⁵ Executive Order 12892 of January 17, 1994, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁶ Executive Order 12892 of January 17, 1994, Section 1-102, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁷ Executive Order 12892 of January 17, 1994, Section 2-102, 3-303, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁸ Executive Order 12892 of January 17, 1994, Section 3-304, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁹ Executive Order 12892 of January 17, 1994, Section 2-202, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

Each federal housing agency also is required to ensure its regulated entities and program participants are themselves affirmatively furthering fair housing:

In carrying out the responsibilities in this order, the head of each executive agency shall take appropriate steps to require that all persons or other entities who are applicants for, or participants in, or who are supervised or regulated under, agency programs and activities relating to housing and urban development shall comply with this order.²⁰

B. The Policy Statement on Fair Lending and MOU fail to recognize FHFA's obligation to affirmatively further fair housing.

FHFA's Policy Statement on Fair Lending and MOU with HUD do not mention FHFA's AFFH obligation. The affirmative mandate is contained in section 3608(d) of the Fair Housing Act. The MOU quotes from this provision of the Act, leaving out the affirmative language:

Section 3608(d) of the Fair Housing Act requires Federal agencies having regulatory or supervisory authority over financial institutions to "cooperate with the [HUD] Secretary to further [the] ... purposes" of the Fair Housing Act.²¹

Section 3608(d) reads:

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 this subchapter and shall cooperate with the Secretary to further such purposes.

The word "affirmatively," the defining feature of section 3808(d), was omitted. Section 3808(d) requires agencies like FHFA "to administer their programs and activities ... in a manner affirmatively to further the purposes of [the Fair Housing Act], in cooperation with HUD. This would imply, for example, the elimination of policies that result in the relegation of minority homebuyers to the FHA/VA market, such as risk-based pricing, loan-level pricing adjustments, and overly restrictive underwriting requirements.

The MOU also selectively quotes from Executive Order 12892, leaving out its title ("Leadership and Coordination of Fair Housing in Federal Programs: **Affirmatively Furthering Fair Housing**"). The MOU use ellipses to avoid reference to the affirmative mandate:

Executive Order 12892 requires HUD to "develop memoranda of understanding ... to provide for consultation and coordination of Federal efforts to further fair housing ... including coordination of the investigation of complaints."

²⁰ Executive Order 12892 of January 17, 1994, Section 2-203, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

²¹ HUD-FHFA MOU Regarding Fair Housing and Fair Lending Coordination, Section II(b).

That provision of the executive order actually states:

....develop memoranda of understanding and any necessary implementing procedures among executive agencies designed to provide for consultation and the coordination of Federal efforts to further fair housing **through the affirmative administration of programs and activities** relating to housing and urban development, including coordination of the investigation of complaints or other information referred to the [HUD] as required by section 2–204 of this order that would constitute a violation of the Act or, where relevant, other Federal laws. Existing memoranda of understanding shall remain in effect until superseded.

We understand that the Policy Statement and MOU are both focused on procedures for enforcing the nondiscrimination requirements of the Fair Housing Act. But the Fair Housing Act requirement is clear. The affirmative mandate is pervasive. It is relevant to every aspect of a federal housing agency’s administration of its programs and activities relating to housing. The lengths the MOU goes to avoid using the word “affirmative” does not instill confidence that FHFA has a strong commitment to recognizing and acting on its affirmative fair housing obligations, such as disestablishing the dual mortgage market and closing the racial homeownership gap.

C. FHFA should issue regulations addressing its own AFFH commitment and the AFFH obligation of those it regulates.

From its inception in 2008, FHFA has presided over the continuation and in some ways strengthening of the dual mortgage market.²² It is incumbent on FHFA, as part of its affirmative fair housing mandate, to disestablish the dual mortgage market, where often lower-priced, easy to obtain conventional loans are made available primarily for white borrowers, and unreasonable barriers are imposed that limit the choices of many people of color to FHA/VA-insured mortgages that are often higher priced and sometimes more difficult to use for purchasing a house.²³

FHFA should start to dismantle the dual mortgage market by at a minimum:

- Eliminating most risk-based pricing by GSEs and lenders, particularly those based on borrower characteristics;
- Eliminating GSE and lender overlays, e.g., credit score and debt-to-income ratio;

²² National Association of Real Estate Brokers 2020 Report on the State of Housing in Black America. https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf. As used here, the dual mortgage market refers to the conventional conforming market, whose guidelines are established and enforced by the Enterprises versus the FHA/VA mortgage insurance market, which is often more costly for borrowers and limits their choices which affects homeownership rates.

²³ See Aronowitz, M., E. Golding, & J. Hyun Choi (2020). *The unequal costs of Black homeownership*. National Association of Real Estate Brokers 2020 Report on the State of Housing in Black America. https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf.

- Updating the GSE duty-to-serve requirements to incorporate FHFA's and the Enterprises' AFFH obligations;
- Requiring fair housing training for GSE board members and the addition of GSE board members with substantive, consumer-focused fair housing experience and expertise.

Conclusion

Thank you for the opportunity to comment. Our letter offers specific recommendations that will allow you to better achieve your goal of a housing finance system that is free from the effects of discrimination.

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