October 31, 2022

Submitted via webform at FHFA.gov
Federal Housing Finance Agency
Office of Financial Technology
400 7th Street SW, 5th Floor
Washington, D.C. 20219

RE: 2022 Fintech in Housing Finance RFI

To Whom It May Concern,

The NAACP Legal Defense and Educational Fund, Inc. (LDF) writes in response to the Fair Housing Finance Agency's (FHFA) request for information (RFI) on the role of technology in housing finance. Companies are increasingly relying on new financial technologies, or "fintech," for the production or provision of financial products and services in the housing market. Unfortunately, as other federal agencies have recognized,[1] fintech can replicate and exacerbate longstanding systemic biases, disadvantaging people of color. In some cases, according to artificial intelligence expert Frank Pasquale[2], algorithmic bias or discrimination–the systematic and repeatable errors in a computer system that create "unfair" outcomes or discriminatory outcomes[3]is hidden behind subtle manipulations that are nearly impossible to discern for ordinary citizens not privy to the internal computer code.[4] As FHFA considers action on fintech, it should not only seek to prevent housing discrimination, but also to affirmatively further fair housing, consistent with its obligations under the Fair Housing Act.[5] As such, FHFA should consider proactive steps to monitor and regulate the use of fintech in the housing space to eliminate algorithmic bias.

[1] U.S. Department of Treasury, *Opportunities and Challenges in Online Marketplace Lending*, May 10, 2016, "While data-driven algorithms may expedite credit assessments and reduce costs, they also carry the risk of disparate impact in credit outcomes and the potential for fair lending violations. Importantly, applicants do not have the opportunity to check and correct data potentially being used in underwriting decisions." https://home.treasury.gov/system/files/231/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf; Consumer Financial Protection Bureau, *CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms*, May 26, 2022, "The U.S. Consumer Financial Protection Bureau has told firms it regulates that federal anti-discrimination law extends liability for banks and other lenders in their use of algorithmic models used in credit decisions." https://www.consumerfinance.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms/
[2] Frank Pasquale, Professor of Law, Brooklyn Law School, currently serves on the U.S. National Artificial Intelligence Advisory Committee (NAIAC), which advises the President and the National AI Initiative Office at the Department of Commerce.
[3] Florida State University Library Guide. Algorithmic Bias. June 15th, 2016. https://guides.lib.fsu.edu/algorithm
[4] Winnie F. Taylor, *Fintech and Race-Based Inequality in the Home Mortgage and Auto Financing Markets*, Loyola Consumer Law Review, March 2021 https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2076&context=lclr
[5] 42 U.S.C. 3608(e)(5).

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Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization. LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality, including redlining. For more than 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for Black Americans and other people of color. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society.

Since its inception, LDF has worked to combat racial segregation and promote racial integration in housing. Some of Thurgood Marshall's early victories in the Supreme Court came in *Shelley v. Kramer*, 334 U.S. 1 (1948), and *McGhee v. Sipes*, 334 U.S. 1 (1948), which held that the state enforcement of racially restrictive covenants violated the Equal Protection Clause. In the decades since those victories, LDF has continued to challenge public and private policies and practices that deny Black Americans housing opportunities and isolate Black communities. Through our economic justice practice, LDF fights for increased fairness and equal opportunity for Black Americans in all aspects of the economy, including combating algorithmic bias.

Black Americans have long experienced discrimination that has denied them fair housing and blocked their ability to accumulate wealth. Redlining—the practice of outlining areas with sizable Black populations in red ink on maps as a warning to mortgage lenders—effectively isolated Black people in areas that would suffer significantly lower levels of investment than their white counterparts.[6]

Today, people of color continue to encounter discriminatory lending practices. An investigation of 61 metro areas across the country found that people of color were more likely to be denied a conventional mortgage than their white counterparts, even when they made the same amount of money, tried to borrow the same amount of money, and wanted to buy in the same neighborhood.[7] Similarly, a 2022 FDIC study found that Black borrowers are more likely to be denied home loans and pay higher interest rates than white borrowers, even when controlling for other factors.[8] Lenders have also targeted Black communities and other communities of color with predatory loans and steered Black borrowers to subprime mortgage loans that carried high interest rates and fees, even when the borrowers qualified for lower-cost and more favorable prime loans based on their objective credit characteristics.[9] Many of these borrowers lost their homes during the Great

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[6] Andre Perry & David Harshbarger, *America's formerly redlined neighborhoods have changed, and so must solutions to rectify them,* Brookings Institute, Oct. 2019, https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/

[7] *The Community Reinvestment Act: Assessing the Law's Impact on Discrimination and Redlining: Hearing Before the Subcomm. on Consumer Prot. and Fin. Insts. of the H. Comm. on Fin. Servs.,* 116th Cong. 14-15 (2019) (statement of Aaron Glantz, Senior Reporter, Reveal from the Center for Investigative Reporting).

[8] Stephen Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study Using 2020 Expanded HMDA Data*, FED. DEPOSIT INS. CO. (June 2022), https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

[9] *See* Complaint, *United States v. Wells Fargo Bank*, No. 1:12-cv-01150 (D.D.C. July 12, 2012) [hereinafter Wells Fargo Complaint]; Complaint, *United States v. Countrywide Financial Corp.*, No. 11-cv-10540-PSGAJW (C.D. Cal. Dec. 21, 2011).

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Recession.[10] This long and ongoing history of discrimination in the housing and lending sectors has resulted in a persistent and widening gap in the Black-white homeownership rate[11]. In fact, according to National Community Reinvestment Coalition the Black-white homeownership gap is wider today than it was in 1968, when Congress passed the Fair Housing Act.[12]

We applaud FHFA for examining the role that fintech can play in exacerbating racial bias and discrimination in the housing market and working to facilitate responsible innovation and use of fintech. As FHFA explores future actions on fintech and financial institutions that use fintech, the agency should be guided by the need to enforce fair housing and fair lending requirements, but also its duty to affirmatively furthering fair housing, as required by the Fair Housing Act of 1968.[13] This duty requires federal agencies and grantees, including FHFA, to do more than simply refrain from discriminating but requires that they also take meaningful actions that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics, such as race.[14] Fulfilling this obligation requires that FHFA take proactive steps, including potentially halting the use of fintech that exacerbates existing disparities in the housing market. FHFA's RFI asks several questions regarding the risks of algorithmic bias in fintech and how to address those risks. We appreciate the opportunity to respond to those questions, which are discussed in turn below.

Question C1: What new fintech tools and techniques are emerging that could further equitable access to mortgage credit and sustainable homeownership? Which offer the most promise? What risks do the new technologies present?

The utilization of new fintech poses several risk factors that could exacerbate equitable access to mortgage credit and sustainable homeownership. While advocates of fintech argue that it can expand credit opportunities for communities who have been unable to access mortgage credit, and that it is less biased than human lenders, research has repeatedly demonstrated that fintech can replicate and exacerbate systemic bias, harming communities of color.

Proponents argue that fintech can help expand equitable access to credit and sustainable homeownership by allowing homebuyers to demonstrate creditworthiness through non-traditional

[10] *See, e.g.*, Wells Fargo Complaint, *supra* note 27, at 1-2, 4-5.

[11]Dedrick Asante-Muhammad, et al, *60% Black Homeownership: A Radical Goal For Black Wealth Development*, March 2, 2021 https://www.ncrc.org/60-black-homeownership-a-radical-goal-for-black-wealth-development/#elementoraction%3Aaction%3Dpopup%3Aopen%26settings%3DeyJpZCI6IjkwMjg2IiwidG9nZ2xlIjpmYWxzZX0%3D

[12] BRAD BLOWER ET AL., NATIONAL COMMUNITY REINVESTMENT COALITION, *ADDING ROBUST CONSIDERATION OF RACE TO COMMUNITY REINVESTMENT ACT REGULATIONS: AN ESSENTIAL AND CONSTITUTIONAL PROPOSAL (2021*), https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/#ftnref7

[13] 86 Fed. Reg. 30779 (07/31/2021)

[14] Press Release, White House, *Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies,* January 26, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/

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means. Traditional forms of credit scoring frequently disadvantage communities of color. A study by the Brookings Institute, for example, found that white homebuyers have credit scores 57 points higher than Black homebuyers, and 33 points higher than Latinx homebuyers.[15] The racial disparities in credit scores are due to a variety of factors of systematic discrimination, including the racial wealth gap, decades of redlining and housing segregation, and historical and present-day employment discrimination.[16] Increasing credit access for marginalized communities by considering items which are typically excluded from traditional credit score calculations, such as utility payments, rent payments, and other sources are ways in which financial institutions that use fintech can further equitable access to mortgage credit. In December 2021, the Urban Institute published a study that detailed an increase in mortgage and credit approvals when utility and telecom data was added that was substantially larger for consumers who were Black, Hispanic, low income, and renters.[17]

Some studies also suggest that fintech produces a less discriminatory result than face-to-face lending practices. A 2019 study by researchers at the University of California at Berkley showed that fintech algorithms discriminate 40% less than face-to-face lenders.[18] While that is welcome news, that same study found that fintech still offered worse terms to Black and Latinx borrowers.[19] Researchers found that Latinx and Black borrowers paid 5.3 basis points more in interest for purchase mortgages and 2.0 basis points for refinance mortgages originated on fintech platforms due to algorithmic bias.[20] A 2021 study from a PhD student at Columbia found that Black and Hispanic borrowers are more likely, relative to similarly qualified white borrowers, to be given subprime loans at both lenders who used fintech and traditional lenders.[21]

Despite some evidence that financial institutions that use fintech are less biased than human lenders, studies have shown that algorithmic bias in lending is persistent and pervasive.[22] For example, a recent investigation by The Markup found that lenders were more likely to deny home loans to people of color: 80% of Black applicants are more likely to be rejected by their mortgage-

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[15] Aaron Klein, *Reducing bias in AI-based financial services*, Brookings Institute, July 2020, https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/

[16] Chi Chi Wu & Carolyn Carter, *No Silver Bullet: Using Alternative Data for Financial Inclusion and Racial Justice*, National Consumer Law Center, June 1, 2022, https://www.nclc.org/wp-content/uploads/2022/08/IB_Alt_Data_Is_No_Silver_Bullet-1.pdf

[17] Kelly Cochran & Michael Stegman*, Utility, Telecommunications, and Rental Data in Underwriting Credit,* Urban Institute, December 2021 (Corrected March 2022), https://www.urban.org/sites/default/files/2022-06/utility-telecommunications-and-rental-data-in-underwriting-credit_0.pdf

[18] Robert Bartlett, et al, *Consumer-Lending Discrimination in the FinTech Era*, November 2019 https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf

[19] Id.

[20] Id.

[21] Tyler Haupert, *Racial and Spatial Disparities in Fintech Mortgage Lending in the United States*, Columbia University Press, May 3, 2021, https://academiccommons.columbia.edu/doi/10.7916/d8-p33e-vq65

[22] Robert Bartlett, et al, *Consumer-Lending Discrimination in the FinTech Era*, November 2019 https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf

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lending algorithms than white people with similar financial characteristics.[23] Similarly, researchers found that for 30-year fixed purchase loans between 2008 and 2012, Black and Latinx borrowers were charged 0.08% higher interest rate than other fintech borrowers.[24]

Examination of the various uses of fintech demonstrates that there are several ways that algorithmic bias can occur:

(1) First, some algorithms may explicitly discriminate based on the race of the applicant, which is purposefully included in the algorithm. This would be direct disparate treatment of someone because of their race. An example of this can be found in HUD's recent lawsuit against Meta, the parent company of Facebook. HUD alleged Facebook's algorithm allowed housing advertisers to target users based on race, among other characteristics. Financial institutions that use fintech could similarly target advertisements on the basis of race or look for social media content that includes markers of the borrower's race and include that data in their algorithm.[25]

(2) Second, algorithm designers may choose a variable that is correlated with race and has a disparate impact on protected groups. LDF has seen first-hand how this kind of algorithmic bias can disparately impact people of color. In 2020, the Student Borrower Protection Center (SBPC) tested a lending algorithm developed by a company called Upstart.[26] SBPC found that the algorithm developed by Upstart divided colleges and universities into categories based on SAT and ACT scores.[27] The higher the incoming class's average standardized test scores, the higher the school's category and the more favorable the terms offered. [28] Because students of color often perform worse on standardized tests, schools with higher percentages of students of color were assigned to lower categories.[29] For example, "only nine percent of Black students, eight percent of Indigenous American students, and twelve percent of Latino students attend America's most elite public universities."[30] These elite public universities have higher than average standardized test

[23] Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms,* AP News, Aug. 15, 2021, https://apnews.com/article/lifestyle-technology-business-race-and-ethnicity-mortgages-2d3d40d5751f933a88c1e17063657586

[24] Robert Bartlett, et al, *Consumer-Lending Discrimination in the FinTech Era*, November 2019 https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf

[25] Carol A. Evans, *Keeping Fintech Fair: Thinking About Fair Lending and UDAP*, Consumer Compliance Outlook, 2017, https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/

[26] Student Borrower Protection Center*, Educational Redlining*, February 2020, https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf

[27] NAACP Legal Defense Fund & Student Borrower Protection Center, (June 30, 2020). [Demand letter, Potential Discrimination in Upstart Lending Platform] https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf

[28] Id.

[29] Id.

[30] See Aryn Bussey, *Educational Redlining? The use of education data in underwriting could leave HBCU and MSI graduates in the dark*, Student Borrower Prot. Ctr (July 24, 2019), https://protectborrowers.org/educationalredlining.

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scores.[31] In comparison, 73.8% of HBCU students are Black and 5% of HBCU students are Latino.[32] Ninety-five percent of HBCUs were in the bottom rankings; just two were in the top tier.[33] This kind of bias has led to the type of discrimination in mortgage lending that black communities have had to endure for decades in the housing sector, we must ensure that the same discrimination is not repeated and/or exacerbated by using new technology.

In July of 2020, LDF and the Student Borrower Protection Center sent a demand letter to Upstart outlining how its algorithm likely violated the Equal Credit Opportunity Act and the Fair Housing Act.[34] LDF and the Student Borrower Protection Center ultimately entered into an agreement with Upstart.[35] Under the agreement, the parties are collaborating on a review of Upstart's lending model and to assess best practices in the use and testing of alternative data in fintech credit models.[36]

(3) Third, algorithmic discrimination can occur when machine learning or artificial intelligence identifies a variable in a given data set that it believes is correlated with loan performance that is also correlated with race. Algorithms that rely on existing historical or geographical data to build their model can encode systemic racism and reproduce biased outcomes. For example, as discussed above, redlining and other discriminatory practices created persistent patterns of housing segregation. As a result, zip codes remain strongly correlated with race. Similarly, repayment history may be correlated with race, as "the historic practice of redlining by conventional lenders, combined with the fact that predatory lenders are more likely to target minorities, make it more difficult for minorities to build a strong history of repayment."[37] Moreover, some existing data sets may lack diversity, which can reduce the predictive power of algorithms for groups that are not represented.[38]

[31] Anthony P. Carnevale, et al, *Our Separate & Unequal Public Colleges: How Public Colleges Reinforce White Racial Privilege and Marginalize Black and Latino Students,* Georgetown University Center for Education and the Workforce, 2018, https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/SAUStates_FR.pdf

[32] American Council on Education, *Spotlight on Minority Serving Institutions*, 2016, https://www.equityinhighered.org/wp-content/uploads/2019/02/REHE-Chapter-9-SA.pdf

[33] NAACP Legal Defense Fund & Student Borrower Protection Center, (June 30, 2020). [Demand letter, Potential Discrimination in Upstart Lending Platform] https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf

[34] NAACP Legal Defense Fund & Student Borrower Protection Center, (June 30, 2020). [Demand letter, Potential Discrimination in Upstart Lending Platform] https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf

[35] Relman Colfax. Fair Lending Monitorship of Upstart Network's Lending Model, November 10, 2021. https://www.relmanlaw.com/media/news/1182_PUBLIC%20Upstart%20Monitorship_2nd%20Report_FINAL.pdf

[36] Id.

[37] Janine S. Hiller & Lindsay S. Jones, *Who's Keeping Score?: Oversight of Changing Consumer Credit Infrastructure*, American Business Law Journal, April 6, 2022, https://onlinelibrary.wiley.com/doi/10.1111/ablj.12199

[38] Nicol Turner Lee, Paul Resnick, & Genie Barton, *Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms,* Brookings Institute (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/

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> In some cases, these algorithms focus on variables with a spurious nexus with creditworthiness, increasing the fair lending risk.[39] For example, academic data professionals at Duke University built a model using non-standard data that found substantial predictive power about whether a loan was repaid in whether that person's email address contained their name.[40] It is difficult to explain why having an email address containing your name should be related to your ability to repay. If these spurious correlations do not accurately identify a borrower's ability to repay, they could also increase the risks to the lender. The study showed that people who used their own name in their email address were less likely to default than people who did not.[41] Initially, this may seem like a non-discriminatory variable within a person's control. However, economists have shown that Black people with names heavily associated with their race face substantial discrimination compared to using race-blind identification.[42] Hence, it is quite possible that there is bias in using what seems like an innocuous variable such as whether your name is part of your email address.

Algorithmic bias is particularly harmful and difficult to combat using current legal tools because many of fintech's models to make decisions lack "explainability." As Federal Reserve Governor Lael Brainard has noted, "Depending on what algorithms are used, it is possible that no one, including the algorithm's creators, can easily explain why the model generated the results that it did."[43] The absence of "explainability" in fintech credit assessment tools may make it more difficult for consumers and advocates to demonstrate race-based lending discrimination claims in the home mortgage market and beyond. As a result, civil rights organizations may not be able to identify the variable causing a disparate impact, explain it to our communities, and find ways to change the variable to stop the discrimination.

Question C.2 What emerging techniques are available to facilitate or evaluate fintech compliance with fair lending laws? What documentation, archiving, and explainability requirements are needed to monitor compliance and to facilitate understanding of algorithmic decision-making?

FHFA could utilize a number of techniques to evaluate whether financial institutions utilizing algorithms are complying with fair lending laws and to strengthen fair lending enforcement.

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[39] Carol A. Evans, *Keeping Fintech Fair: Thinking About Fair Lending and UDAP*, Consumer Compliance Outlook, 2017, https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/

[40] Tobias Berg, et al, *On the Rise of Fintechs – Credit Scoring Using Digital Footprints,* National Bureau of Economic Research, April 2018, Revised July 2018, https://www.nber.org/papers/w24551

[41] Id.

[42] Aaron Klein, *Reducing bias in AI-based financial services*, Brookings Institute, July 2020, https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/

[43] Id.

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- Independent auditing: Algorithms and other technologies utilized should be continually assessed at every stage of their model's lifecycle. Many financial institutions that use fintech as well as companies that produce the fintech change their algorithmic models continuously. Each time they change their model, that model should be assessed for algorithmic bias before it is introduced to the public. The National Fair Housing Alliance proposed a structure for auditing algorithmic systems which calls for monitoring at the pre-development, development, and post-development stages. This framework provides an approach for establishing internal controls and mitigating risks that may be inherent in algorithmic systems and harm consumers.[44] Similarly, Upstart has agreed to assessments that involve ongoing analysis of whether its model causes an adverse impact on any protected classes and, if so, whether there are less discriminatory alternative practices that maintain the model's predictiveness.[45] Other fintech companies and financial institutions should actively engage in these same regular/periodic assessments using independent law firms or other monitoring agencies. Audit reports should be filed with FHFA and made public.

  For compliance monitoring, FHFA should use methodologies aligned with well-established principles found in antidiscrimination jurisprudence.[46] At a high level, such analyses often include: (1) ensuring that models do not include protected classes or close proxies for protected classes, such as race and zip code; and (2) assessing whether a facially-neutral model is likely to disproportionately lead to negative outcomes for a protected class, and if such negative impacts exist, ensuring the model serves legitimate business needs and evaluating whether changes to the model—for example removal or substitution of variables— would result in less of a disparate effect while maintaining model performance.[47] These audits should also require companies to provide data and a plain-language explanation demonstrating the validity of the model—for example, the evidence that a particular variable is correlated with a borrower's likelihood of repayment.

- Notice: Financial institutions should be required to notify borrowers when they are using fintech to assess them, and to notify them about why their loan was denied in plain language terms. This will help borrowers understand, why they were denied and if they need to correct any incorrect information. The CFPB recently issued similar guidance to creditors.[48] Financial institutions should also be required to notify borrowers of the results

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[44] Press Release, National Fair Housing Alliance, *The National Fair Housing Alliance Releases a New Framework for Auditing Algorithmic Systems: Purpose, Process, and Monitoring (PPM)* (Feb. 17, 2022), https://nationalfairhousing.org/the-national-fair-housing-alliance-releases-a-new-framework-for-auditing-algorithmic-systems-purpose-process-and-monitoring-ppm/

[45] Relman Colfax. Fair Lending Monitorship of Upstart Network's Lending Model, November 10, 2021. https://www.relmanlaw.com/media/news/1182_PUBLIC%20Upstart%20Monitorship_2nd%20Report_FINAL.pdf

[46] Id.

[47] Id.

[48] Consumer Financial Protection Bureau, "Consumer Financial Protection Circular: Adverse action notification requirements in connection with credit decisions based on complex algorithms," May 2022, https://files.consumerfinance.gov/f/documents/cfpb_2022-03_circular_2022-05.pdf.

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of prior audits, the location where results of prior audits can be found, and any discrimination identified by prior audits.

- Archiving: Fintech companies should be required to preserve the data sets that were used in the development and testing of their algorithm. They should also be required to preserve copies of prior iterations of an algorithm. Financial institutions should be required to preserve notices to customers regarding loan denials, and other information that can be used to assess possible fair lending violations. Fintech companies should also broaden their model risk management guidance to incorporate fair lending risk.

- Broaden Model Risk Management Guidance to incorporate fair lending risk: For years, financial regulators have articulated Model Risk Management ("MRM") Guidance, which is principally concerned with issues of model design, construction, and quality.[49] The purpose of the MRM guidance is to ensure that the algorithmic models mitigate risk for consumers and that they indeed predict what they have been promoted to predict. The current MRM Guidance does not account for or articulate principles for guarding against the risks that models cause the perpetuation of discrimination. FHFA should clearly define "model risk" to include the risk of discriminatory or inequitable outcomes for consumers rather than just the risk of financial loss to a financial institution.

Question D.3 What particular risks to consumer privacy have been associated with fintech? What practices are being used to manage these risks?

In the modern lending environment, algorithms and big data are key components of the underwriting process for financial institutions.[50] Although big data does not have a uniform definition, it generally refers to the analysis of large, complex datasets that are collected from numerous sources.[51] FHFA should be aware of the data sources financial institutions are using and financial institutions should be required to disclose if they are using consumer data from sources other than an application form submitted by the borrower. Though we would applaud using variables that can expand access to credit, such as utility payments, rent payments, and other variables, borrowers should have the ability to decide how their data is used and to correct any incorrect data. Financial institutions should also inform users when their data is being used outside of the lending platform, including if their data is being sold to other entities.

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[49] See OCC and Federal Reserve, Supervisory Guidance on Model Risk Management, SR 11-7 at 3 (Apr. 4, 2011) ("Model Risk Management Guidance"), https://www.federalreserve.gov/supervisionreg/srletters/sr1107a1.pdf (defining "model risk" to focus on the financial institution rather than the consumer by stating that "[m]odel risk can lead to financial loss, poor business and strategic decision making, or damage to a bank's reputation").

[50] Carol A. Evans, *Keeping Fintech Fair: Thinking About Fair Lending and UDAP*, Consumer Compliance Outlook, 2017, https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/

[51] Id.

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Conclusion

While proponents of fintech models often argue that they can expand access to credit, there is significant evidence that fintech models can also embed and further exacerbate discrimination through algorithmic bias. FHFA has an affirmative duty to guard against and address this discrimination which can lead to fewer black Americans being able to participate in the housing market. There are proactive steps FHFA can take to address algorithmic bias in fintech models and to strengthen enforcement of fair lending laws.

Thank you for the opportunity to submit our responses to the RFI. If you have any questions, please contact David Wheaton, Economic Justice Policy Fellow, at dwheaton@naacpldf.org, or Amalea Smirniotopoulos, Senior Policy Counsel, at asmirniotopoulos@naacpldf.org.

Sincerely,

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