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Fannie Mae

June 26, 2023

By Electronic Delivery to FHFA Website

Clinton Jones, Esq.
General Counsel
Federal Housing Finance Agency
400 Seventh Street, S.W.
Washington, DC 20219

Re: Comments/RIN 2590-AB29
Fair Lending, Fair Housing, and Equitable Housing Finance Plans

Dear Mr. Jones:

Fannie Mae appreciates the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") proposed rule on Fair Lending, Fair Housing, and Equitable Housing Finance Plans (the "Proposed Rule").[1] The Proposed Rule would codify in regulation and expand on many of FHFA's existing fair lending and fair housing oversight requirements for Fannie Mae and Freddie Mac (collectively, the "Enterprises") and the Federal Home Loan Banks (the "Banks") (the Enterprises and the Banks collectively, "Regulated Entities"). The Proposed Rule would add oversight of unfair or deceptive acts or practices under 15 U.S.C. § 45 (sometimes referred to as "UDAP") to FHFA's fair lending and fair housing oversight programs, require additional certifications of compliance, and expand board of director responsibilities related to fair lending, fair housing, and the prohibition on UDAP. The Proposed Rule would also codify and make changes to existing requirements for the Enterprises to maintain Equitable Housing Finance Plans ("EHFPs") and requirements for the Enterprises to collect and report certain data related to fair lending and fair housing.

Fannie Mae shares FHFA's objectives concerning compliance with fair lending and fair housing laws and the prohibition on unfair or deceptive acts or practices, as well as addressing barriers to equitable and sustainable housing opportunities for underserved communities. We also generally support efforts to appropriately memorialize FHFA's important supervisory and conservatorship practices in these areas.

Notwithstanding our strong support for the Proposed Rule's underlying objectives, we worry that specific provisions in the Proposed Rule may not fit squarely into the overall supervisory framework FHFA has so carefully crafted. Our observations and recommendations focus on the new certification requirements and board responsibilities in Subpart B, the establishment of equitable housing finance planning as a prudential standard in Subpart C, and harmonization of existing practices with the proposed new reporting requirement in Subpart D. We also respond to several of the specific questions posed by FHFA.

We believe that addressing our comments will make the Proposed Rule stronger and more effective, while at the same time minimizing risks of unintended consequences to the broader supervisory framework and our corresponding compliance management system.

[1] 88 Fed. Reg. 25293 (April 26, 2023).

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I. Fair Housing and Fair Lending Compliance

The Proposed Rule's commentary posits that establishing "enhanced standards and transparency" for fair housing and fair lending, such as the new certification requirements and board responsibilities, could provide "greater market assurance with respect to the regulated entities' compliance with applicable laws, thereby supporting liquidity in the secondary mortgage market."[2] We respectfully question the basis for this hypothesis. Fannie Mae believes that current robust expectations established and enforced by FHFA's Office of Fair Lending Oversight ("OFLO") and the U.S. Department of Housing and Urban Development ("HUD") – combined with the prospect of referral for enforcement by the U.S. Department of Justice – are more than adequate to ensure the Enterprises' compliance with fair housing and fair lending laws.[3] Further, we equally are concerned that Subpart B would elevate fair housing and fair lending laws above the many other important laws to which the Enterprises are subject, including our Charter Act and laws relating to the Enterprises' mission and safety and soundness.

A. Enterprise certifications under the final rule should be no broader than the certifications currently required by FHFA in connection with fair housing and fair lending reporting

Fannie Mae currently provides FHFA, through OFLO, quarterly reports on fair housing and fair lending compliance and monitoring activities, in accordance with FHFA's *Order on Fair Lending Compliance and Report Submission.*[4] These reports are certified by a Fannie Mae officer regarding their truth and correctness in compliance with 12 U.S.C. § 4514(a)(4).[5] In addition, Fannie Mae submits a weekly log and memos of the fair lending analyses it performs on models, policy changes, and initiatives. Weekly Fannie Mae-FHFA fair lending meetings provide the opportunity to discuss and collaborate on issues of interest or concern.

Under proposed Section 1293.12(b), the required certifications would go well beyond the truth and correctness of specific information contained in Enterprise reports to include "compliance with fair housing and fair lending laws and with [the prohibition on unfair or deceptive acts or practices under 15 U.S.C. § 45]." Given the robust oversight FHFA and HUD already have in this area, we do not understand what additional benefit the new certification would provide. There is no additional level of confidence that would be gained, nor liquidity created, as lenders, investors, and consumer advocates are aware of FHFA's and HUD's comprehensive and ever-evolving supervision of the Enterprises' fair lending and fair housing activities.

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[2] *Id.* at 25299.

[3] While Subpart B is applicable to all Regulated Entities, Fannie Mae is limiting the scope of its comments to the Enterprises. We express no views with regard to the Federal Home Loan Banks.

[4] FHFA's Order on Fair Lending Compliance and Report Submission available at https://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Documents/Orders/FNM-Final-Order-re-Fair-Lending-Reporting.pdf.

[5] Every report submitted by an Enterprise under 12 U.S.C. § 4514(a) must contain an officer's declaration that the report is "true and correct to the best of such officer's knowledge and belief." 12 U.S.C. § 4514(a)(4).

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The commentary seeks comment on possible language to implement this expanded certification to cover not only processes and procedures but also general compliance with law.[6] In the limited areas where Fannie Mae currently certifies to compliance with processes and procedures, such as under the Sarbanes-Oxley Act, the undertaking is complicated, requiring multiple layers of assurance, sub-certifications, and certifications. But even the Securities and Exchange Commission does not take the additional leap of requiring public company officers to certify more broadly to compliance with law.

To provide the proposed certification, Fannie Mae would need to construct an internal certification process that goes beyond adherence to an established, extensive compliance risk management program. This is very different, and far more demanding and resource-intensive, than any certification processes it deploys today. And even then, the continuously evolving interpretations of fair lending and fair housing laws and the prohibition on UDAP would preclude full comfort that the certifications are in fact accurate. This is particularly true for UDAP given the "elusive" nature of the standard for unfairness and deception,[7] the Federal Trade Commission's broad powers to declare that a company's practices violated that standard,[8] and the limited amount of written interpretive guidance. In short, we believe the certification proposed in the commentary would create significant burden for Fannie Mae without providing any additional compliance or supervisory benefit to FHFA.

We believe the proposed certification approach lacks a truly analogous precedent. The commentary's examples of certifications in other contexts[9] are all readily distinguishable and highlight the novelty of FHFA's proposal.

> *Contractual Representations and Warranties Between Private Parties*. In discussing the proposed requirement, FHFA states that both Enterprises require their lenders and servicers to attest to compliance with fair lending laws. This is not wholly accurate. It is true that Fannie Mae has an annual certification requirement that covers a variety of operational and compliance matters. For example, a lender must certify that it has "policies and procedures, including regular training for employees and contractors, to facilitate compliance with" a detailed list of consumer protection laws, including the Fair Housing Act and the Equal Credit Opportunity Act.[10] However, the limited focus on policies and procedures, and employee training, make this a very different certification from one of compliance with law.

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[6] "[Regulated entity] complies and has complied in all material respects with, and maintains policies, procedures, and internal controls to assure compliance with fair housing and fair lending laws and the prohibition on unfair or deceptive acts or practices." 88 Fed. Reg at 25302.

[7] *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under [15 U.S.C § 45] is, by necessity, an elusive one").

[8] *See FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 242 (1972) ("the Commission has broad powers to declare trade practices unfair"; internal quotations omitted).

[9] 88 Fed. Reg. at 25301-25302.

[10] *See* Fannie Mae Lender Record Information Form 582 ("Monitoring Legal Compliance"). A sample Form 582 is available at https://singlefamily.fanniemae.com/media/6841/display.

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The annual certification also addresses lender compliance with Fannie Mae's lender contracts, including the Selling and Servicing Guides. These contracts require lenders to make representations and warranties regarding their compliance with laws, including consumer protection laws, in connection with loans sold to Fannie Mae.[11] Mortgage lenders and servicers must comply with a plethora of laws and regulations at the federal, state, county, and even municipal levels. Our contractual provisions allow us to hold our lenders accountable while assigning the burden of legal and regulatory compliance to those parties closest to the origination, underwriting, and servicing processes. Such requirements and their corresponding contractual remedy are fundamentally different from a certification to a government agency.

Promises by grant applicants regarding their intended performance. The Proposed Rule commentary also mentions certifications in connection with federal housing block grants. These too are distinguishable from the type of certification FHFA proposes. Unlike the certifications in proposed Section 1293.12(b), the certifications that HUD requires of States and local governments that receive community development block grants ("CDBG") address *future* behavior, that is, that "the grant *will* be conducted and administered in conformity with [the Fair Housing Act, Civil Rights Act of 1964, and implementing regulations]"[12] and that "the jurisdiction *will* comply with applicable laws".[13] Thus, the CDBG-related certifications are effectively covenants – *i.e.,* promises – not attestations or affirmations that the certifying entity is then in compliance with law, and are not comparable to a certification of fact given to a regulator by a regulated entity subject to a comprehensive and detailed supervisory and enforcement regime.

Certifications required as part of settlement agreements and consent orders. The Proposed Rule commentary also mentions certifications in connection with consent decrees and settlement agreements in housing and lending discrimination cases. These certifications are also very different from the certifications in proposed Section 1293.12(b). Because such decrees and settlements result from asserted violations of fair lending and fair housing laws, the parties being sanctioned are sometimes required to affirm their commitment to these laws. As with the CDBG certifications, these are forward-looking promises to abide, not certifications of current compliance with the law. Moreover, affirmations required to address apparent violations of law should not be repurposed as a day-to-day regulatory standard.

Finally, and perhaps most importantly, beyond lacking precedent and imposing a substantial burden on the Enterprises for little or no material benefit, the proposed "compliance with law"

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[11] *See, e.g.,* Fannie Mae *Selling Guide* Section A3-2-01 (lender agrees to "comply with, all federal, state, and local laws (e.g., statutes, regulations, ordinances, directives, codes, administrative rules and orders that have the effect of law, and judicial rulings and opinions) that apply to any of its origination, selling, or servicing practices, including laws and regulations on consumer credit, equal credit opportunity and truth-in-lending, and borrower privacy."). This is the provision cited in footnote 77 to the Proposed Rule commentary, at 88 Fed. Reg. 25301. Fannie Mae and Freddie Mac added this version of the provision in 2014 at FHFA's alignment direction in connection with the Enterprises' Representation and Warranty Framework.

[12] 24 C.F.R. §§ 91.225(b)(6) and 91.325(b)(5) (emphasis added).

[13] *Id*. §§ 91.225(b)(8) and 91.325(b)(7) (emphasis added).

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certifications would create a troubling hierarchy among the laws to which the Enterprises are subject. In the commentary to the Proposed Rule, FHFA asserts that the certification requirements "would provide additional incentive to the boards and management of the regulated entities to ensure compliance with fair housing and fair lending laws in their operations."[14] But merely the *impression* that FHFA prioritizes compliance with fair housing, fair lending, and UDAP above all other applicable laws and regulations is inherently problematic.

The certifications FHFA currently requires in connection with fair lending and fair housing reporting, coupled with its extensive oversight and ability to escalate to enforcement, provides a strong compliance framework and incentive. As such, any certification required by the Proposed Rule need not be any broader than what is currently required of the Enterprises.[15]

B. Proposed Section 1293.11 creating special board responsibilities is unnecessary and may complicate Enterprise compliance management

Fannie Mae is concerned that proposed Section 1293.11(c)'s language requiring the Board to direct the operations of the regulated entity in conformity with fair housing and fair lending laws and the prohibition on UDAP is duplicative of existing requirements imposed on the Board to oversee compliance with all laws and regulations, and – like the "compliance with law" certification requirement in proposed Section 1293.12(b) – could create incentives for the Enterprises to prioritize compliance with fair housing, fair lending, and UDAP above other laws.

Board members are already obligated to oversee Fannie Mae's compliance risks and compliance program by existing FHFA regulations and guidance, and by their fiduciary duties under Delaware law. Those duties are summarized well in FHFA's 2019 Advisory Bulletin on Compliance Risk Management:

> The board should have an appropriate understanding of the types of compliance risks to which the Enterprise is exposed. The board is responsible for exercising reasonable oversight to ensure that the compliance program is designed, implemented, reviewed, and revised in an effective manner. The compliance program must be headed by a compliance officer with the appropriate qualifications, experience, authority, accountability, and independence. It should also be aligned with the enterprise-wide risk management program and board-approved risk appetites, including limits restricting exposures to third-party providers. The board and senior management should ensure that the compliance officer and the compliance program have adequate resources, including well-trained and capable staff.[16]

Concurrently, FHFA's corporate governance rule requires Fannie Mae Board members to carry out their duties as directors in a manner they believe to be in the best interest of Fannie Mae, and with

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[14] 88 Fed. Reg. at 25301.

[15] If the final rule significantly modifies current certification requirements, Fannie Mae will need time to update our internal compliance systems.

[16] AB 2019-05, available at https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/Compliance-Risk-Management.aspx (footnotes omitted).

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such care as is required under Delaware law.[17] Delaware courts have made it clear that directors' fiduciary duties obligate them to cause the company to comply with law, which would include fair housing and fair lending laws, as well as the prohibition on UDAP. Directors would risk breaching their fiduciary duties by not doing so.

While it is unclear what purpose proposed Section 1293.11 would serve, it could send a message that, in exercising oversight of the Enterprises and their business activities, the Enterprise boards should focus on fair housing, fair lending, and UDAP compliance above all other laws and regulations. This would be a departure from existing compliance risk management policy and practice.

II. Enterprise Equitable Housing Finance Planning

A. Equitable housing finance planning is an important mission goal but should not be established or enforced as a prudential standard

Fannie Mae submitted its first annual EHFP to FHFA in December 2021, pursuant to instructions from FHFA acting as our conservator. Subpart C of the Proposed Rule seeks to "codify FHFA's current requirements for the [EHFPs]," so that under the rule "requirements would be substantially the same as FHFA's current requirements for the Enterprises' [EHFPs], but would establish additional public disclosure and reporting requirements and expanded program requirements."[18]

From the initial instruction to create an EHFP, through its first year and during the current year, Fannie Mae and FHFA have worked closely together to deliver important and impactful measures to address prevailing inequities in housing. Creating the EHFP, both as a living document and as an ongoing and dynamic part of Fannie Mae's business strategy, has been a highly collaborative project. The EHFP was informed by stakeholder engagement at both the national and local levels, incorporating the voices and views of consumer groups, civil rights organizations, real estate professional organizations, mortgage lenders, independent researchers, and others. Among the most valuable collaborations was Fannie Mae's engagement in 2022 and 2023 with FHFA, particularly OFLO. Throughout the year-and-a-half process of drafting the first EHFP, updating it, and reporting on its progress, FHFA has been a vital partner and collaborator in our shared goals. Fannie Mae greatly values and looks forward to the continuation of FHFA's engagement in our equitable housing efforts.

Fannie Mae appreciates FHFA's efforts to take an approach that is generally Enterprise-driven. For example, the Proposed Rule would provide for FHFA review and feedback on Fannie Mae's EHFP plans and updates, but would expressly exclude any new authority to approve of plans, updates, or activities under them.[19] During a June 15, 2023 FHFA-sponsored listening session, a number of organizations made similar suggestions for a more granular rule to, as several speakers said, "hold the Enterprises accountable," including, among other things, an FHFA right to reject an Enterprise's

[17] 12 C.F.R. § 1239.3(b)(1). Per this provision, Fannie Mae elected to be governed by the corporate law of the State of Delaware.

[18] 88 Fed. Reg. at 25298.

[19] *Id.* at 25308 (proposed Section 1293.22(f)).

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proposed EHFP, *in toto* or by specific elements, and a detailed evaluation and rating system similar to that required under FHFA's Duty to Serve rule, 12 C.F.R. Part 1287, Subpart C.[20] We view these suggestions as well-intentioned but problematic. An Enterprise-driven approach is superior in this context to a rigid, prescriptive mandate because it preserves flexibility, adaptability, and particularly innovation, builds on the existing collaborative relationship between FHFA and Fannie Mae, and mitigates the risk of a potential conflict with the Congressional reservation of exclusive authority in 12 USC § 4565(c) to establish new categories of Duty to Serve markets.[21]

While Fannie Mae is committed to maintaining an EHFP and has firmly integrated this important initiative into our business, nevertheless we hold serious reservations regarding the proposal to make the planning and implementation of an EHFP a prudential standard under 12 U.S.C. § 4513b. We believe tools designed to remedy prudential risks are not well suited to accomplish mission goals.

Enacted as part of HERA, 12 U.S.C. § 4513b(a) directs FHFA to establish prudential standards with respect to ten specified categories of risk and internal controls relating to financial safety and soundness.[22] While the statute also authorizes FHFA to promulgate "such other operational and management standards as the Director determines to be appropriate,"[23] Fannie Mae has always understood that authorization to pertain to matters of the same general character as the ten specified categories, *i.e.,* prudential, not mission, matters. Consistent with that understanding, since their original promulgation in 2012, FHFA's prudential standards – whether established as guidelines[24] or by regulation[25] – have been addressed exclusively to threats to the Enterprises' financial stability.

Fannie Mae's understanding is informed by four key considerations.

> *Plain meaning of "prudential"*. First, 12 U.S.C. § 4513b authorizes FHFA to promulgate and enforce "prudential" standards. In the context of regulation of financial institutions,

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[20] *See* Duty to Serve Evaluation Guidance 2020-4, available at https://www.fhfa.gov/PolicyProgramsResearch/Programs/Documents/Revised-Evaluation-Guidance-March-2020.pdf.

[21] Early versions of the bill that became the Housing and Economic Recovery Act of 2008 ("HERA") would have authorized the FHFA Director to extend the Duty to Serve beyond the three underserved markets identified in the legislation, to "any other underserved market for very low-, low-, and moderate-income families that the Director identifies as lacking adequate credit through conventional lending sources, which underserved markets may be identified by borrower type, market segment, or geographic area." One week before enactment, the House struck this language and added the Congressional reservation of authority that was ultimately codified at 12 U.S.C. § 4565(c). Compare Congressional Record—House, July 23, 2008, at H6866 (text of Senate amendment) with *id.* at H6931 (text of House amendment), available at https://www.congress.gov/110/crec/2008/07/23/CREC-2008-07-23-pt1-PgH6854-2.pdf.

[22] 12 U.S.C. § 4513b(a)(1)-(10).

[23] *Id.* § 4513b(a)(11).

[24] 12 C.F.R. Part 1236, Appendix.

[25] *See* 12 U.S.C. §§ 1240.1(e)(3) (regarding capital requirements) and 1242.1(b) (regarding resolution planning).

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"prudential" has a well-understood meaning as a matter of usage and regulatory practice: it involves matters of financial risk.[26] Important as it is to Fannie Mae's mission, the "duty to engage in equitable housing finance planning and to take meaningful actions to support underserved communities," as articulated in Section 1293.21(a) of the Proposed Rule, is unrelated to financial risk. FHFA has a wide range of powers available to it, including powers to require Fannie Mae to support underserved communities, but not all of FHFA's powers involve prudential regulation, and Fannie Mae respectfully urges FHFA to avoid a potentially confusing regulatory precedent of denominating as prudential an entirely different type of regulation.

Ejusdem generis. Second, under the *ejusdem generis* principle, a catchall "and other" phrase at the end of a detailed list encompasses only matters similar in character to the enumerated items.[27] All the items listed in 12 U.S.C. § 4513b(a)(1)-(10) involve classic prudential standards – risk and internal controls issues that relate directly to financial safety and soundness. Again, the EHFP requirement is of an entirely different nature.

Structural considerations. Third, Congress, FHFA, and other regulators have always distinguished between prudential standards and mission requirements, and provided different mechanisms for enforcing them. For example, in HERA, Congress chose not to apply prudential standard treatment to the two main mission-related programs – housing goals and Duty to Serve. And consistent with that legislative scheme, FHFA has itself not treated the regulatory obligations for housing goals or Duty to Serve as prudential standards. Similarly, key mission-related obligations of banks under the Community Reinvestment Act[28] and its implementing regulations[29] are not part of the OCC's, FRB's, or FDIC's prudential standards.

Enforcement considerations. Fourth, the structural separation between prudential standards and mission requirements serves important goals. Congress provided different

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[26] Relevant literature sometimes differentiates between "microprudential" and "macroprudential" regulation, but both concern financial stability – whether of individual institutions or the broader market. *See, e.g.,* Daniel Tarullo, *Rethinking the Aims of Prudential Regulation* (2014), available at https://www.federalreserve.gov/newsevents/speech/tarullo20140508a.htm. Other federal and state "prudential" regulatory schemes consistently focus on issues of financial stability. *See, e.g.*, 12 U.S.C. § 5365(b) (authorization for Federal Reserve Bank prudential standards for non-bank holding companies); 12 C.F.R. Part 252 (Federal Reserve Bank standards pursuant to that authorization); Conference of State Bank Supervisors (CSBS), *Final Model State Regulatory Prudential Standards for Nonbank Mortgage Servicers* (approved by CSBS Board of Directors July 23, 2021).

[27] *See, e.g., Federal Maritime Com. v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (noting "familiar canon of statutory construction" that "final, comprehensive category" is "to be read as bringing within a statute categories similar in type to those specifically enumerated").

[28] 12 U.S.C. § 2901 *et seq*.

[29] Three federal banking agencies oversee implementation and enforce compliance with the CRA: the Office of the Comptroller of the Currency ("OCC"); the Board of Governors of the Federal Reserve System ("FRB"); and the Federal Deposit Insurance Corporation ("FDIC"). Their CRA regulations can be found at 12 C.F.R. Part 25 (OCC); 12 C.F.R. Part 228 (FRB); and 12 C.F.R. Part 345 (FDIC).

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> enforcement regimes tailored to each type of requirement,[30] and the statutory enforcement mechanisms available for violations of prudential standards are a poor fit for the EHFP requirement. Under Part 1236, violations of prudential standards may ultimately be enforced by, among other things, financial restrictions such as asset growth caps and increased capital requirements. Such severe financial restrictions would do nothing to reduce barriers to housing for underserved consumers and communities and, if imposed, could have the adverse result of reducing liquidity to these consumers and communities. Even the remote chance that such limitations could ultimately result from "deficiencies in equitable housing finance planning or implementation"[31] could undermine the innovation, flexibility, and collaboration that FHFA and Fannie Mae have developed.

Fannie Mae acknowledges FHFA's interest in addressing EHFP deficiencies with "corrective measures."[32] And we agree there should be an opportunity for an Enterprise to correct any FHFA-identified deficiencies before FHFA undertakes a formal enforcement action. But we believe that a remedial plan can be implemented without labeling a new mission regulation as a prudential standard. FHFA has itself recognized in the Proposed Rule's commentary its authority under existing law to take appropriate supervisory action based on the facts and circumstances of any violation.[33] Any such authority would include the inherent authority to provide an Enterprise with an opportunity to remediate an identified deficiency before taking other enforcement actions. By exercising that authority judiciously, we believe FHFA can maintain the collaborative relationship which has spurred creativity, innovation, experimentation, and ambitious efforts to reach high to support underserved communities in the EHFP context, all without resorting to the prudential standards framework which does not fit this subject matter.

Accordingly, while Fannie Mae supports the objective of the EHFP provisions in the Proposed Rule, Fannie Mae urges FHFA to withdraw the proposal to make Subpart C of the Proposed Rule a prudential standard under 12 U.S.C. § 4513b.

B. The Definition Of "Barrier" Should Be Revised To Conform With Current Policy

Proposed Section 1293.2 defines "barrier" as follows:

> Barrier means *an element of an Enterprise's actions, products, or policies*, or an aspect of the housing market that can reasonably be influenced by the Enterprise's actions, products, or policies, that contributes to an underserved community's limited share of sustainable housing opportunities, difficulties in accessing those sustainable housing opportunities, or the continuing adverse effects of discrimination affecting their participation in the housing market.[34]

We are concerned that the highlighted language presumes causation on the part of an Enterprise. That could expose an Enterprise to litigation and reputational risk. Accordingly, we recommend

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[30] *See, e.g.,* 12 U.S.C. § 4566(a)(4) (specifying enforcement mechanism for duty to serve).

[31] 88 Fed. Reg. at 25299.

[32] *Ibid*.

[33] *See ibid*.

[34] *Id*. at 25307 (emphasis added).

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that the definition of "barrier" be modified to adhere more closely to FHFA's current EHFP instructions, which require each Enterprise to include in its EHFP an "identification and summary of barriers to sustainable housing opportunity *related to* the Enterprise's actions, products, and policies and barriers to sustainable housing opportunity in the housing market that can be reasonably influenced by the Enterprise's actions" (emphasis added). The modified definition would read as follows:

> Barrier means *an aspect of the housing market that is related to, and can reasonably be influenced by, an Enterprise's actions, products, or policies*, that contributes to an underserved community's limited share of sustainable housing opportunities, difficulties in accessing those sustainable housing opportunities, or the continuing adverse effects of discrimination affecting their participation in the housing market.

C. The Requirements For "Meaningful Actions" Should Be Streamlined

Proposed Section 1293.25(c) provides that actions that are not compliant with applicable law (paragraph (4)), or that are required to remediate supervisory findings or as a result of enforcement action (paragraph (5)), do not qualify as "meaningful actions" for purposes of an EHFP. Fannie Mae suggests that both paragraphs be deleted as either unnecessary or redundant obstacles to plan design and implementation.

Regarding paragraph (4), while unlawful actions have no place in an EHFP, we believe this principle is self-evident, making a specific "compliance with laws" provision superfluous. Moreover, because there is no comparable provision in FHFA's other mission-related regulations applicable to the Enterprises,[35] its inclusion here could be taken to imply a heightened standard of review for EHFP actions relative to all other Enterprise activities, which may discourage or deter innovation in equitable housing finance planning.

Similarly, regarding paragraph (5), Fannie Mae believes the disqualification of "actions that are required to remediate supervisory findings or required as a result of enforcement actions" as meaningful activities is both unnecessary and potentially overbroad. This provision appears to be grounded in the principle that actions in the EHFP should reflect new or additional efforts, not those that the Enterprise is already committed to. However, this principle is already reflected in proposed Section 1293.24(c)(2), which requires an EHFP to "reflect significant additional action above and beyond actions that are also serving other Enterprise objectives and goals." Accordingly, we believe that paragraph (5) can be stricken without adversely affecting FHFA objectives.

Alternatively, if paragraph (5) is retained, FHFA should clarify that it does not apply to actions that are somehow connected or related to a required remedial action. Fannie Mae regularly engages in activities that relate to FHFA supervisory findings; that should not exclude such activities from being included in an EHFP if appropriate to meet the needs of an identified underserved community. Rather, so long as a given action goes "above and beyond" required remedial actions, it should be irrelevant that it may have its roots in a supervisory finding or enforcement proceeding.

[35] While both the housing goals and duty to serve rules identify certain Enterprise actions that do not qualify for credit under the rule, neither references compliance with laws. *See* 12 C.F.R. § 1282.16(b) (listing transactions and activities not counted for housing goals; *id.* § 1282.37(b) and (d) (listing activities not eligible for duty to serve credit).

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D. The Final Rule Should Expressly Permit Plan Updates To Be Incorporated In Annual Performance Reports

Under proposed Section 1293.22(e) and (i), any update to an EHFP must be submitted to FHFA by February 15 of the year covered by the update and must be published by April 15. Similarly, per proposed Section 1293.23(c) and (e), an Enterprise's annual report on its prior year's performance must be submitted to FHFA by February 15 and published by April 15. Fannie Mae appreciates that EHFP updates are now optional, but is also mindful of the resources of time and personnel that are required to produce performance reports (especially in view of the detailed content requirements in proposed Section 1293.23(b)), and suggests that FHFA clarify that an EHFP update may be incorporated in an Enterprise's annual performance report and need not be separately submitted and published. This will allow more efficient use of time, since the EHFP plan year being reporting on under Section 1293.23 will inform the need for any update to the EHFP under Section 1293.22.

E. Plan Contents Should Not Be Required to Extend Beyond The Three-Year Period Covered By The Plan

Proposed Section 1293.22(b)(3) provides that a plan must describe "the high-impact activities the Enterprise intends to undertake to further the identified objectives that span one or more years *(including extending beyond the period covered by the plan)*" (emphasis added). Fannie Mae respectfully submits that activities outside the time horizon of a plan should not be required to be committed to nor evaluated under the Proposed Rule. The three-year horizon is sufficiently challenging; activities that extend beyond that horizon should be addressed in a subsequent plan. Accordingly, Fannie Mae suggests Section 1293.22(b)(3) be revised to delete the italicized parenthetical quoted above. This would not prevent an Enterprise from identifying, at its discretion, objectives that might continue beyond the end of the current plan.

F. The Current Three-Year EHFP Should Not Be Subject to the Rule

The Proposed Rule does not specify effective dates. The second year of the current three-year EHFP is now halfway over, and Fannie Mae is in the process of evaluating options for its required update for the third and final year. To allow continuity in the current EHFP, and to avoid disruptions to its implementation, Fannie Mae requests that Subpart C not apply until the Enterprises' next EHFP cycle (2025-2027).

G. Responses to Questions

Below we offer responses to the specific questions posed by FHFA in Part VI of the commentary regarding EHFPs and updates.

- *Question 7. Is the three-year timeline for the plans adopted by the Enterprises appropriate?*

  Yes, the current approach to the EHFP includes a three-year timeline and Fannie Mae believes it has worked well.

- *Question 8. Should FHFA issue an evaluation of the Enterprises? Should the rule include required evaluation metrics for the progress reports?*

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Based on Fannie Mae's experience with the current EHFP, we believe a formal evaluation is unnecessary. The current EHFP review process has involved regular dialogue between Fannie Mae and FHFA and constructive feedback that is incorporated into the EHFP on an ongoing basis. This process has worked well and should obviate the need for an evaluation or evaluation metrics, which may not align with the inherent and intentional flexibility of the EHFP framework that FHFA has designed.

- *Question 9. Should the Rule include required or optional priority goals? If so, who should determine which priority goals are applicable?*

  In the absence of proposed language, it is difficult to respond. In principle, priority goals should only be optional. The Enterprises should not be required to pick and choose among plan goals as they are all inherently important. The EHFP should remain as flexible as possible. If optional priority goals are to be included in the final rule, it should be the Enterprise that identifies them, subject to review feedback from FHFA.

- *Question 10. From year-to-year, what should be the scope of updates to the Equitable Housing Finance Plans?*

  Proposed Section 1293.22(d) appropriately permits an update to include all changes that the Enterprise wishes to make, without apparent limitation. Proposed Section 1293.22(d) also provides an illustrative, non-exclusive list of changes that should be described: "changes in identified barriers, objectives, meaningful actions, [and] specific, measurable, and time-bound goals." To this list, Fannie Mae recommends adding the term "underserved communities," which would dispel any misimpression that new underserved communities may not be added by way of an update.

- *Question 11. Should the focus of an EHFP be limited to one underserved community at a time?*

  Fannie Mae believes that the Enterprises should have the discretion to serve the needs of more than one underserved community in their respective plans (as is the case with our 2023 EHFP). In many cases, achieving plan goals can have the benefit of removing "barriers" for multiple underserved communities at the same time. Also, after the comprehensive public outreach contemplated by the Proposed Rule, it does not seem unreasonable to expect an Enterprise to propose addressing the needs of multiple underserved communities identified as part of that outreach.

- *Question 12. Does the rule provide for sufficient public engagement?*

  Proposed Section 1293.24 is broadly written to commit both the Enterprises and FHFA to meaningful public engagement, and appropriately so. Fannie Mae embraces public engagement with stakeholders and believes that the final rule should promote maximum flexibility for the Enterprises to engage in public outreach. The appropriate approach to public outreach can vary depending on a number of factors including the targeted audience, scheduling, technology, weather, and unanticipated issues like the COVID-19 emergency.

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Maximum flexibility is needed so that the Enterprises can adjust their approach in response to changing circumstances.

- *Question 13. Should FHFA adopt any special purpose credit programs under 12 CFR 1002.8(a)(1) and, if so, what type of program(s) should be adopted?*

  Fannie Mae included special purpose credit programs in its EHFP and is convinced that they remain a valuable tool for addressing historic discrimination. However, existing standards under 12 C.F.R. Part 1002, known as Regulation B, provide sufficient guidance to the Enterprises and their lenders on design and implementation of special purpose credit programs; they need not be addressed in the final rule. Moreover, including them in a regulation might have the unintended consequence of cementing current standards in place, making it harder to take advantage of newer developments in this field. However, Fannie Mae would not object to FHFA engaging with CFPB on a possible revision to Regulation B that would allow an Enterprise seller/servicer to extend or deny credit in accordance with the terms of a Regulation B-compliant special purpose credit program maintained by an Enterprise.

- *Question 14. Are the minimum requirement for the performance reports sufficient or should performance reports contain any additional information not included in the rule?*

  Fannie Mae recommends two changes to the minimum requirements for performance report at proposed Section 1293.23(b).

  First, we recommend clarifying paragraphs (3) and (5), which require performance reports to include a summary of outcomes and assessment of Enterprise accept rates and loan acquisitions categorized by, inter alia, "underserved community group (if available)." The Proposed Rule does not define the term "underserved community group," but it appears to refer to the one or more underserved communities that are the focus of the Enterprise's EHFP. To provide clarity and avoid confusion in the preparation of annual reports, Fannie Mae suggests that FHFA provide a definition of "underserved community group" or, alternatively, use its reserved power to provide public guidance on performance reports (see proposed Section 1293.23(f)) to clarify its expectations on data relating to underserved communities.

  Second, we recommend striking paragraph (4), which requires an Enterprise's annual performance report to contain a summary of the value of resources dedicated to the EHFP, both internally and by third parties. With respect to internal costs, this requirement would present numerous unanswerable questions and is not a valuable exercise. Fannie Mae could not create an accurate picture of the resources we dedicate to an EHFP because of the organic and overlapping nature of our equity-based work. To develop and implement our plan effectively, Fannie Mae embeds these tasks across our businesses, meaning that work is not concentrated in a single team but rather involves contributions from a wide range of employees who address aspects of the plan as a portion of their ongoing job responsibilities. Most of these employees are salary-based and do not keep track of their time on a project-

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by-project basis. With respect to third-party expenditures,[36] reporting would appear to be easier to provide but remains problematic. Because our vendors often work under a master contract that covers multiple matters in addition to EHFP, all work would have to be reviewed and allocated in some manner consistent between the Enterprises.

In short, compliance with proposed paragraph (4) would require Fannie Mae to expend significant resources obtaining, analyzing, allocating, and reporting employee time and expenses, and third-party expenditures, distracting from the actual work of advancing the needs of underserved communities. We therefore strongly encourage FHFA to rely on its examinations and other channels to review and understand the resources that Fannie Mae is dedicating to its EHFP outcomes, and not include any financial value standards in the public-facing performance report.

III. The Data Collection and Reporting Provisions in Proposed Section 1293.31 Should Be Modified To Align With Current Policy and Practice

Proposed Section 1293.31 requires each Enterprise to collect and report data on language preference, homeownership education, and housing counseling relating to single-family mortgages. As discussed in the commentary to the Proposed Rule, FHFA announced in May 2022 that the Enterprises would require lenders to collect this data using a standard form created by FHFA and the Enterprises -- the Supplemental Consumer Information Form ("SCIF").[37] The May 2022 announcement was followed by a multi-year implementation period requiring substantial technology resources by the Enterprises to achieve the implementation deadline of March 1, 2023.

Fannie Mae supports FHFA's decision to codify into regulation the May 2022 policy.[38] We suggest four clarifications to proposed Section 1293.31 to better achieve alignment with current policy and practice and to avoid ambiguity and differences in industry interpretation.

The SCIF. First, while the commentary to the Proposed Rule identifies the SCIF,[39] proposed Section 1293.31 does not. The proposed rule language should mention the SCIF, as the contents of that document determine what lenders are required to request, collect, and report.

Optionality. Second, consistent with current practice, the Enterprises will require lenders to request and report on the data collected from the SCIF. FHFA notes in the commentary that certain applicants may choose not to respond to a question on language preference and

[36] Fannie Mae interprets the pertinent language of paragraph (4) -- "additional value of resources contributed from third parties" -- to refer to amounts paid by an Enterprise to a third party in connection with its EHFP. Alternatively, it may be calling on the Enterprise to estimate the value of contributions of all third parties toward its EHFP objectives. If so, this would result in an almost fanciful figure with little assurance of accuracy. This ambiguity is further evidence FHFA should remove paragraph (4) from the final rule.

[37] 88 Fed. Reg. at 25304-25305; *see also* https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Mandatory-Use-of-the-Supplemental-Consumer-Information-Form.aspx.

[38] 88 Fed. Reg. at 25304 ("The proposed rule would be substantially the same as the policy announced by FHFA in May 2022").

[39] *See id*. at 25305.

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that the Proposed Rule would not require such a response;[40] we believe this should be addressed in regulatory guidance or commentary in the final rule. Similarly, the final rule should reflect the fact that lenders and borrowers complete the homeownership education and housing counseling sections of the SCIF only when such education or counseling is required by the loan program or product for which the borrower has applied; if not applicable to the loan product or program, this section is left blank.[41]

Automated underwriting systems. Third, again consistent with current practice, proposed Section 1293.31 should be limited to loans underwritten through an Enterprise's automated underwriting system ("AUS"). Each Enterprise has established its AUS as its SCIF data collection point, such that SCIF data for mortgage loans that are manually underwritten are not captured.[42] Having an exception-based workaround to capture this information from the small number of manually-underwritten loans[43] would be time-consuming and labor-intensive.

Conventional loans. Finally, as a practical matter, the requirements under proposed Section 1293.31 should apply only to conventional mortgage loans, not other types of loans, such as Federal Housing Administration-insured loans, that are eligible for sale to an Enterprise. The Enterprises are not in a position to compel lenders to request this data from loan applicants applying for a non-conventional loan.

To make these clarifications and ensure consistency with current policy and practice, the final rule could adopt language modelled on FHFA's current instructions to the Enterprises, as follows:

Subpart D—Data Collection

§ 1293.31 Required Enterprise data collection and reporting.

(a) In general.--Each Enterprise shall collect, maintain, and provide to FHFA the following data relating to single-family **conventional** mortgages:

(1) The language preference of applicants and borrowers; and

(2) Whether applicants and borrowers have completed homeownership education or housing counseling and information about the homeownership education or housing counseling.

(b) Collection of data.--To collect the data described in subsection (a), each Enterprise shall require lenders to—

[40] *Ibid*.

[41] *See* Supplemental Consumer Information Form — Instructions, Fannie Mae/Freddie Mac Form 1103 (5/2022), available at https://singlefamily.fanniemae.com/media/29361/display.

[42] See Supplemental Consumer Information Form Update, May 3, 2022, available at https://singlefamily.fanniemae.com/media/31291/display.

[43] Manually-underwritten loans represented approximately 0.04 percent of the single-family loans acquired by Fannie Mae in 2022.

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> (1) request the information on the Supplemental Consumer Information Form (Fannie Mae/Freddie Mac Form 1103), as such form may be revised from time to time by the Enterprises; and
>
> (2) report to the Enterprise any data collected by means of the Supplemental Consumer Information Form, in a manner prescribed by the Enterprise.
>
> (c) Automated underwriting systems.—Each Enterprise shall support Supplemental Consumer Information Form requirements in their respective automated underwriting system datasets.

* * * * *

The Proposed Rule marks an important milestone in the ongoing journey to fulfill the purpose in the Fannie Mae Charter "to promote access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas)."[44] Together, the Enterprises and FHFA will continue to strive for our aligned goals to remove barriers to sustainable housing opportunities and to assure compliance with fair lending and fair housing laws in America. We appreciate the opportunity to share our observations and suggestions for the content of the final rule in this regard.

In closing, we offer two final observations.

First, to ensure effective implementation of fair housing, fair lending, and UDAP laws, we encourage FHFA to engage closely with HUD and the Federal Trade Commission ("FTC"), which share responsibility for these matters. Regulatory clarity and consistency is critically important to Fannie Mae's safe and sound operation and compliance management. That clarity could be disrupted if HUD and the FTC were to issue separate and potentially inconsistent fair housing, fair lending, and UDAP regulations or take other potentially inconsistent supervisory actions. Fannie Mae encourages FHFA to use this rulemaking opportunity to cement inter-agency coordination and collaboration on these matters.[45]

Second, we believe there should be consideration given to how Subpart B may impact the Enterprises' contractual terms with mortgage lenders and servicers. In particular, it is important to be clear that FHFA's fair lending and UDAP supervision of the Enterprises does not extend to the business practices and operations of Enterprise counterparties. Fannie Mae can build the necessary internal systems and infrastructure to ensure our compliance with the new requirements proposed by Subpart B, but we cannot, and should not, be expected to oversee the methods and means of compliance with laws by our lenders and servicers. We appreciate that nothing in the Proposed Rule or commentary signals a desire by FHFA to have the Enterprises change the scope of

[44] 12 U.S.C. § 1716(4).

[45] While for the past three years, HUD and FHFA have had in place a temporary Memorandum of Understanding regarding fair housing and fair lending coordination, it expires in 2025 and there is no assurance it will be extended.

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their engagement with their respective lenders and servicers; we ask FHFA to make this point explicit in the commentary accompanying the final rule or subsequent guidance.

If you have questions regarding the matters addressed in this letter, please contact the undersigned at terry_theologides@fanniemae.com.

Sincerely,

DocuSigned by:
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Stergios "Terry" Theologides
Executive Vice President, General Counsel, and Corporate Secretary
Fannie Mae