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June 26, 2023

The Honorable Sandra L. Thompson  
Director  
Federal Housing Finance Agency  
400 Seventh Street SW  
Washington, DC 20024

RE: Fair Lending, Fair Housing, and Equitable Housing Finance Plans [RIN 2590-AB29]

Dear Director Thompson:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 135 million members. On behalf of our members, we are writing in response to the Federal Housing Finance Agency's (FHFA) request for comment on its notice of proposed rulemaking related to its fair lending oversight of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively the Enterprises) and the Federal Home Loan Banks (FHLBanks).<sup>1</sup>

## Background

In recent years, the FHFA has taken several actions to help the Enterprises and the FHLBanks (collectively the Regulated Entities) address fair lending issues and sustainable housing opportunities for underserved communities. The FHFA issued a policy statement on fair lending in 2021, describing the policies and considerations that would "guide its fair lending monitoring, supervision, and enforcement."<sup>2</sup> The policy statement clarified the FHFA's position on its monitoring, supervision, and enforcement powers over the Regulated Entities with respect to the Equal Credit Opportunity Act (ECOA), the Fair Housing Act, and the Federal Housing Enterprises Financial Safety and Soundness Act (Safety and Soundness Act).<sup>3</sup> Among other things, the FHFA also issued an advisory bulletin setting forth its supervisory expectations related to the Enterprises' compliance with fair lending and fair housing laws.<sup>4</sup> Furthermore, the FHFA required the

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<sup>1</sup> Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. 25293 (Apr. 26, 2023).

<sup>2</sup> Policy Statement on Fair Lending, 86 Fed. Reg. 36199, 36200 (July 9, 2021).

<sup>3</sup> *Ibid.*

<sup>4</sup> FHFA, Advisory Bulletin 2021-04: Enterprise Fair Lending and Fair Housing Compliance (2021), *available at* <https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/Enterprise-Fair-Lending-and-Fair-Housing-Compliance.aspx>.

Enterprises to implement Equitable Housing Finance Plans to address barriers to sustainable housing opportunities for underserved communities.<sup>5</sup> The plans were required to:

- Identify barriers to sustainable housing opportunities for underserved communities “directly related to the Enterprise’s actions or barriers in the housing market that can be reasonably be influenced by the Enterprise’s actions.”<sup>6</sup>
- Include objectives and measurable goals designed to address these barriers.<sup>7</sup>
- Develop a plan of meaningful actions to address the barriers in the plan.<sup>8</sup>

The FHFA has proposed to implement a new regulation codifying “FHFA’s existing fair lending oversight functions with respect to the [Regulated Entities], including conducting supervisory examinations, issuing examination findings, requiring regular and special reporting and data, and enforcement.”<sup>9</sup> The proposal intends to specifically codify FHFA’s requirements governing the Enterprise Equitable Housing Finance Plans, Enterprise data collection reporting requirements related to consumer language preference and homeowner education and housing counseling, and application of FHFA’s prudential standard framework—12 CFR Part 1236—to most of the Enterprise Equitable Housing Finance Plan requirements.<sup>10</sup> The proposed rule also seeks to include compliance by the Regulated Entities with the prohibition in section 5 of the Federal Trade Commission Act (FTC Act) against engaging in unfair or deceptive acts or practices (UDAPs) as part of FHFA’s fair housing and fair lending supervision.<sup>11</sup>

## General Comments

CUNA supports the FHFA’s mission of ensuring that the Enterprises fulfill their statutory missions to support affordable housing, community development, and diversity and inclusion, including the efforts to use the Enterprises to address barriers to sustainable housing opportunities for underserved communities. Decreasing the homeownership gap and the racial wealth gap for people of color and other underserved communities strengthens the United States’ long-term financial security.

CUNA also supports the proposed rule’s intent to make sure that the Regulated Entities comply with fair lending and fair housing laws. Strong oversight and supervision, which are included in

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<sup>5</sup> See generally Fannie Mae, Equitable Housing Finance Plan (June 2022), available at <https://www.fanniemae.com/media/43636/display>; Freddie Mac, Equitable Housing Finance Plan (June 2022), available at <https://www.freddie.com/about/pdf/2022-Freddie-Mac-Equitable-Housing-Finance-Plan.pdf>.

<sup>6</sup> Fannie Mae, *supra* note 5, at 6.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25298.

<sup>10</sup> *Ibid.* Under FHFA’s prudential management and operations standards in 12 CFR Part 1236, failure to comply with a standard by regulation could require an Enterprise to submit a corrective action plan to FHFA describing how it will correct the failure to comply with the standard. 12 C.F.R. § 1236.4(a)-(c).

<sup>11</sup> *Id.* at 25301.

CUNA's key housing finance reform principles,<sup>12</sup> help to ensure that the Regulated Entities operate in a safe and sound manner. That said, CUNA offers the following comments on (1) the inclusion of the FTC Act's prohibition against UDAPs as part of the FHFA's fair lending and fair housing oversight of the Regulated Entities and (2) whether the FHLBanks should be subject to an Equitable Housing Finance Plan framework similar to the one in the proposal that covers the Enterprises.

### **Other Issues FHFA Should Consider in Adding UDAPs to its Compliance and Enforcement of the Regulated Entities**

Credit unions expressed concerns about the proposed UDAP enforcement over the Regulated Entities, at least to the extent it could be used to create more indirect oversight on credit unions. Credit unions are highly regulated institutions, and their compliance with UDAP and other consumer protection requirements are subject to the supervision of the National Credit Union Administration (NCUA) or the Consumer Financial Protection Bureau (CFPB). Supervision and enforcement over the Regulated Entities that could create additional burdens on credit unions and other lenders seeking access to the secondary market or the Regulated Entities' products and services would be redundant given NCUA or CFPB oversight and make it more difficult for credit unions to access the secondary market or take advantage of the Regulated Entities' product offerings.

Moreover, the activities of the Regulated Entities may not fall within the types of conduct that traditionally constitute UDAPs under guidance by the FTC and the prudential regulators. An act or practice is unfair under section 5 of FTC Act if it causes or is likely to cause substantial injury to consumers, consumers cannot reasonably avoid the injury, and there are no benefits to consumers or competition that outweigh the consumer injury.<sup>13</sup> A representation or an omission or practice is deceptive if it misleads or is likely to mislead a consumer; the consumer acts reasonably in interpreting the representation, omission, or act; and it is material in that it likely affects a consumer's decision.<sup>14</sup> UDAP examination procedures from the prudential banking regulators and the NCUA often look to advertising and disclosures made directly to consumers, handling of

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<sup>12</sup> See CUNA, *The Compendium of CUNA Policies on Legislative and Regulatory Issues 13* (Feb. 2022), available at [https://www.cuna.org/content/dam/cuna/advocacy/actions/documents/CUNA\\_Compendium%20of%20Policies\\_DG.pdf](https://www.cuna.org/content/dam/cuna/advocacy/actions/documents/CUNA_Compendium%20of%20Policies_DG.pdf) ("The entities providing secondary market services must be subject to appropriate regulatory and supervisory oversight to ensure safety and soundness, for example, by ensuring accountability, effective corporate governance, and preventing future fraud; they should also be subjected to strong capital requirements and have flexibility to operate well and develop new programs in response to marketplace demands.").

<sup>13</sup> See Fed. Trade Comm'n, *Policy Statement on Unfairness* (Dec. 17, 1980), available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> ("To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.")

<sup>14</sup> Fed. Trade Comm'n, *Policy Statement on Deception* (Oct. 14, 1983), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf).

consumer complaints, and related policies and procedures to identify UDAP risk.<sup>15</sup> To the extent that the activities of the Regulated Entities do not involve the types of consumer-facing interactions that are normally associated with UDAP findings by other regulators, the FHFA may be better served supervising the Regulated Entities solely through the lens of fair lending laws like the ECOA, Fair Housing Act, and Safety and Soundness Act.

Some credit unions indicated they had concerns about litigation risk for the Regulated Entities if the FHFA made a finding that one of the Regulated Entities engaged in a prohibited UDAP as part of the FHFA’s fair lending and fair housing supervision.<sup>16</sup> If the costs of accessing the secondary market or one of the products and services of the Regulated Entities increase to account for heightened litigation risk, then credit unions may find it more difficult to access the secondary market or obtain necessary liquidity in the housing finance market.

### **Procedural Guardrails in the Form of Guidance to the Regulated Entities Could Help to Ensure That Credit Unions Are Not Overburdened by UDAP or Other Non-Fair Lending Supervision**

CUNA encourages the FHFA to finalize the fair lending and fair housing oversight regulation without codifying the UDAP compliance requirements in proposed section 1293.11(b).<sup>17</sup> If the FHFA, however, determines to move forward with codifying those UDAP compliance requirements, then it should provide guidance to the Regulated Entities specifying the types of conduct that might be implicated by the prohibition against UDAPs described in section 1293.11(b). This guidance could resemble the FHFA’s advisory bulletin to the Enterprises on fair

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<sup>15</sup> See generally CFPB, Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) Examination Procedures (Mar. 16, 2022), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf); Bd. of Governors of the Fed. Reserve Sys., Consumer Compliance Handbook, FTC Act—Section 5 (Dec. 2016), available at <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>; Fed. Deposit Ins. Co., Consumer Compliance Examination Manual, Unfair, Deceptive, and Abusive Practices—FTC Act/Dodd-Frank Act (June 2022), available at <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf>; Office of the Comptroller of the Currency, Comptroller’s Handbook, Unfair or Deceptive Acts or Practices and Unfair, Deceptive, or Abusive Acts or Practices (June 2020), available at <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/unfair-deceptive-act/pub-ch-udap-udaap.pdf>; NCUA, Fed. Consumer Fin. Protection Guide, Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) (Oct. 2019), available at <https://ncua.gov/regulation-supervision/manuals-guides/federal-consumer-financial-protection-guide/compliance-management/unfair-deceptive-or-abusive-acts-or-practices-udaap>.

<sup>16</sup> While consumers have no private right of action for violations of section 5 of the FTC Act, state consumer protection laws may provide an avenue for relief where none exists under the FTC Act. See generally Marshall A. Leaffer & Michael H. Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence (1980), Articles by Mauer Faculty, 945, available at [https://www.repository.law.indiana.edu/facpub/945?utm\\_source=www.repository.law.indiana.edu%2Ffacpub%2F945&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://www.repository.law.indiana.edu/facpub/945?utm_source=www.repository.law.indiana.edu%2Ffacpub%2F945&utm_medium=PDF&utm_campaign=PDFCoverPages).

<sup>17</sup> See Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25307-08 (“Regulated entities must comply with the prohibition on unfair or deceptive acts or practices under 15 U.S.C. 45.”).

lending and Fair Housing compliance,<sup>18</sup> providing examples of Regulated Entity-specific conduct that might be prohibited by section 5 of the FTC Act. Guidance in this form could mitigate against the risk of credit unions being indirectly overburdened by FHFA supervision over the Regulated Entities.

### **Differences Between the Enterprises and the FHLBanks Make It Difficult to Apply the Enterprise Equitable Housing Finance Plan framework to the FHLBanks**

CUNA supports the FHFA and the Enterprises' "focus on housing equity that is aligned with other critical objectives including safety and soundness and other mission activities."<sup>19</sup> The framework for the Enterprise Equitable Housing Finance Plans included in the proposed rule requires, among other things, identification of barriers to sustainable housing opportunities that affect an underserved community, objectives and outcomes designed to address those barriers, and meaningful actions tailored to further the plan objectives.<sup>20</sup> Barrier is defined in the proposed rule in a way that "includes Enterprise actions, products, or policies as well as aspects of the housing market that can be reasonably be influenced by an Enterprise's actions, products, or policies because these are what an Enterprise can most easily change."<sup>21</sup>

The differences between the Enterprises and the FHLBanks, however, may not make the Equitable Housing Finance Plan framework a great fit for the FHLBanks because it may be difficult to determine how aspects of the housing market could be reasonably influenced by an advance, which is primarily how the FHLBanks inject liquidity into the housing finance market.<sup>22</sup> FHLBank members fully collateralize these advances<sup>23</sup> and decide how to use them, including as a source of liquidity in times of economic uncertainty.<sup>24</sup>

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<sup>18</sup> FHFA, Advisory Bulletin 2021-04: Enterprise Fair Lending and Fair Housing Compliance (2021), *available at* <https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/Enterprise-Fair-Lending-and-Fair-Housing-Compliance.aspx>.

<sup>19</sup> FHFA, Enterprise Equitable Housing Finance Plans Request for Input (Sept. 2021), at 3-4, *available at* <https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Equitable-Housing-Finance-Plans-RFI.pdf>.

<sup>20</sup> See Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. at 25302 (describing the proposed content requirements for Equitable Housing Finance Plans in section 1293.22(b)).

<sup>21</sup> *Id.* at 25300.

<sup>22</sup> See Jim Parrott & Mark Zandi, In Defense of the Federal Home Loan Banks 2 (Apr. 2023), *available at* [https://www.urban.org/sites/default/files/2023-04/In%20Defense%20of%20the%20Federal%20Home%20Loan%20Banks\\_0.pdf](https://www.urban.org/sites/default/files/2023-04/In%20Defense%20of%20the%20Federal%20Home%20Loan%20Banks_0.pdf) ("In typical times, advances make up around two-thirds of the liquidity that FHLBs provide (see Chart 1)."); FHLBanks Office of Finance, Combined Financial Report for the Year Ended December 31, 2022 7 (Mar. 24, 2023), *available at* [https://fhfb.com/ofweb\\_userWeb/resources/2022Q4CFR.pdf](https://fhfb.com/ofweb_userWeb/resources/2022Q4CFR.pdf) ("Advances, the FHLBanks' largest asset category on a combined basis, were \$819.1 billion and \$351.3 billion, and represented 66% and 49% of combined total assets at December 31, 2022 and 2021.").

<sup>23</sup> Parrott & Zandi, *supra* note 22, at n. 2 (explaining the collateralization process and the discounting of the collateral).

<sup>24</sup> *Id.* at 2 (noting how FHLBank members turned to advances to address liquidity concerns in the wake of 2007, in 2020 during the COVID-19 pandemic, and more recently after bank failures in March 2023).

The Enterprises, on the other hand, provide the housing finance market with liquidity, stability, and affordability by purchasing mortgage loans from lenders.<sup>25</sup> When the Enterprises package the purchased loans into mortgage-backed securities and guarantee the payment of principal and interest to investors, they increase the amount of money available for additional real estate lending.<sup>26</sup> Mortgage lenders can then use the funds to make more mortgage loans, and the entire process helps lower interest rates for homeowners by facilitating the liquidity of the secondary mortgage market.<sup>27</sup>

A review of the 2022 Equitable Housing Finance Plans for Fannie Mae and Freddie Mac reveals that the plans are based around their business models of purchasing single-family and multifamily loans. For example, both Fannie Mae and Freddie Mac’s plans include meaningful actions related to their automated underwriting systems,<sup>28</sup> multifamily products,<sup>29</sup> and loan servicing.<sup>30</sup> The Enterprises can use these levers to reasonably influence certain aspects of the housing market, but the advances provided by the FHLBanks simply do not offer that same ability because of the role that advances play (i.e., serving as a source of liquidity rather than as an access point into the secondary market).

### **Applying a Modified Housing Finance Plan Framework to the FHLBanks May Also Be Difficult**

Notwithstanding this misalignment between the Equitable Housing Finance Plan framework and the main benefits that the FHLBanks provide to their members (i.e., advances), the FHLBanks purchase loans from their members, although, in volumes that are far below those of the Enterprises. In 2021, the FHLBanks acquired approximately \$21 billion in mortgage assets from their members,<sup>31</sup> while the Enterprises acquired approximately \$2.5 trillion in single-family loans.<sup>32</sup> Even if the application of the framework was limited to the purchase activities of the FHLBanks (e.g., Mortgage Partnership Finance Program, Mortgage Purchase Program, Mortgage

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<sup>25</sup> FHFA, Fannie Mae and Freddie Mac, <https://www.fhfa.gov/about-fannie-mae-freddie-mac> (last visited June 23, 2023).

<sup>26</sup> FHFA, *supra* note 25.

<sup>27</sup> FHFA, *supra* note 25.

<sup>28</sup> See Fannie Mae, *supra* note 5, at 22-23 (“Expand Eligibility and Access for credit-invisible borrowers through automated underwriting enhancement and positive rental data implementation to support the expansion of eligibility for Black consumers.”); Freddie Mac, *supra* note 5, at 53 (noting that Freddie Mac intended to integrate cash flow data into its automated underwriting system in 2024).

<sup>29</sup> See Fannie Mae, *supra* note 5, at 14 (“Pilot rental payment reporting across the multifamily industry to help Black renters with no credit score establish a credit history and help those with low credit scores to increase them.”); Freddie Mac, *supra* note 5, at 77-79 (describing efforts to incentivize multifamily borrowers to furnish rent payments to the credit reporting agencies).

<sup>30</sup> See Fannie Mae, *supra* note 5, at 38 (“Provide ongoing oversight of Servicer Forbearance/Loss Mitigation efforts.”); Freddie Mac, *supra* note 5, at 26-28 (“Freddie Mac is reevaluating its servicing policies to better improve borrower outcomes, particularly for Black and Latino homeowners, with a goal of implementing improvements through an SPCP.”).

<sup>31</sup> Letter from Ryan Donovan to Director Sandra Thompson, FHFA (Oct. 2022) at 3, *available at* [https://fhlbanks.com/wp-content/uploads/2022/10/FHLB-System-at-100\\_Comment.10.26.22.pdf](https://fhlbanks.com/wp-content/uploads/2022/10/FHLB-System-at-100_Comment.10.26.22.pdf).

<sup>32</sup> FHFA, Fannie Mae and Freddie Mac Single-Family Guarantee Fees in 2021 (Nov. 2022), at 13, *available at* <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/GFee-Report-2021.pdf>.

Asset Program), the disparity in acquisition volume and market share between the FHLBanks and the Enterprises calls into question whether the FHLBanks' purchase activities could reasonably influence certain aspects of the housing market, which could affect whether a barrier could be identified for purposes of the framework. Because of this uncertainty and the poor fit of the framework to FHLB advances, CUNA urges the FHFA to refrain from applying the Equitable Housing Finance Plan framework to the FHLBanks and to consider alternative ways to incorporate principles of equitable housing for the FHLBanks.

### **Alternative Ways to Incorporate Principles of Equitable Housing for the FHLBanks**

One alternative is to simply encourage each individual FHLBank to continue finding local solutions to provide affordable housing-related programs beyond the statutory ten percent Affordable Housing Program (AHP) contribution.<sup>33</sup> Many FHLBanks already go beyond the AHP statutory requirements based on local need and the presence or lack thereof of affordable housing assistance at the state and/or local level. Where state programs are insufficient or do not exist, FHLBanks fill the gap to address local needs and concerns. Supporting these initiatives relies on the flexibility of the FHLBank System and allows each FHLBank to effectively respond to the needs of its applicable community.

### **Conclusion**

Thank you for this opportunity to provide input on the Fair Lending, Fair Housing, and Equitable Housing Finance Plans Notice of Proposed Rulemaking. If you have questions or if we can be of any assistance, please do not hesitate to contact me at (202) 603-1985 or [dpark@cuna.coop](mailto:dpark@cuna.coop).

Sincerely,



David Park  
Senior Director of Advocacy & Counsel

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<sup>33</sup> 12 U.S.C. § 1430(j)(5).