

June 26, 2023

Clinton Jones  
General Counsel  
Federal Housing Finance Agency  
400 7<sup>th</sup> St SW  
Washington, DC 20219  
RE: Comments/RIN 2590-AB29



Dear Mr. Jones,

The American Land Title Association (ALTA)<sup>1</sup> welcomes the opportunity to provide comments on the Federal Housing Finance Agency's (FHFA) notice of proposed rulemaking on Fair Lending, Fair Housing, and Equitable Housing Finance Plans (Proposed Rule). Our members are fully committed to compliance with all fair housing and fair lending laws, and supportive of important efforts to ensure equitable and sustainable housing opportunities for all communities nationwide.

ALTA believes it is critical for FHFA to continue to increase public engagement and opportunities for comment during the development and updates to each Enterprise's Equitable Housing Finance Plan. Transparency and the opportunity to collaborate and comment are critical to ensure the success of these important efforts.

To that end, we commend the FHFA for finalizing the Prior Approval for Enterprise Products Final Rule last year and ensuring its enactment this past April. Given the importance of the topics in the Equitable Housing Finance Plans, we believe FHFA should err on the side of transparency and subject any new and merited activity, program, or product in these plans to public comment under this rule. Further, we believe public input should not only occur at the end of the process, when a formal proposal is being advanced to the FHFA by the Enterprises, but throughout the development process to allow for true collaboration with industry partners that operate in the marketplace alongside the Enterprises each day.

Given this push for transparency and collaboration, it was disheartening to see Fannie Mae use the Equitable Housing Finance Plans to explore going beyond its charter and into the primary market via a reported title waiver proposal it is developing without full transparency. This reported pilot would allow Fannie to waive their title insurance representation and warranty and serve as a de facto title insurer, a role for which they were not established, nor for which are they regulated or have expertise. Further, it is also concerning to see the Enterprises promote more risk for homebuyers through the promotion of unregulated title insurance alternatives like certain emerging attorney opinion letters, through their Equitable Housing Finance Plans.

In fact, the opaqueness of Fannie Mae's work on its reported pilot has drawn concerns from across the industry as well as from numerous policymakers and regulators. Requiring the Enterprises to make public more details about pilots they are designing under the Equitable Housing Finance Plans from the outset will ensure they are aligning those projects with clearly outlined goals. After all, no one understands

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<sup>1</sup>ALTA is the national trade association and voice of more than 6,000 title insurance agents, abstracters, and underwriters, ranging from small, one-county operations to large national title insurers in the United States. ALTA is represented by an Active ALTA Member in every county in the United States. ALTA members search, review and insure land titles to protect homebuyers and mortgage lenders who invest in real estate.

these issues better than the actual businesses working hand in hand with lenders, consumers, homeowners, and affected communities.

However, while ALTA supports FHFA increasing public engagement and opportunities for comment during the development and updates to each Enterprise's Equitable Housing Finance Plan, we strongly believe it is inappropriate to make the development of these plans a prudential management standard under Section 1313B of the Safety and Soundness Act, as outlined in Subpart C of the Proposed Rule.

The Equitable Housing Finance Plans are not of the same category of issue as those prudential management standards outlined in Section 1313B of the Safety and Soundness Act. This section lists ten prudential management and operations standards focusing on topics like internal financial and audit controls, liquidity and reserving, management of market, and credit and counterparty risk.<sup>2</sup>

While the section does contain a catch all that the Director may establish "such other operational and management standards as the Director determines to be appropriate,"<sup>3</sup> these topics are wholly different from the concepts and business practices covered by the Equitable Housing Finance Plans. Further, the failure to meet a prudential standard is meant to constitute an unsafe and unsound practice subject to the enforcement provisions of 12 U.S.C. chapter 46, subchapter III.

Under those provisions, failure to meet the standard subjects the Enterprises to a corrective action plan that is meant to restrict their activities and reduce Enterprise risk. Some corrective actions include reducing total assets, requiring an increase in retained earnings, and requiring an increase in capital. We do not see how the actions taken under the Equitable Housing Finance Plans fall into the same category of oversight. We recommend ensuring a clear distinction between prudential business practices and oversight, and other mission activities.

In addition, we do not believe the inclusion of compliance with Section 5 of the Federal Trade Commission Act in the proposal is needed or relevant to aid FHFA's ability to oversee the Enterprises. Nevertheless, we believe the promotion of unregulated title insurance alternatives does implicate the Enterprises' UDAP compliance. Under existing FTC policy statements, an act or practice is unfair when it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. Similarly, the FTC outlined a three-part test for deceptiveness which includes (1) the representation, omission, or practice must mislead or be likely to mislead the consumer, (2) the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances, (3) the misleading representation, omission, or practice must be material.

The marketing of unregulated title insurance alternatives implicates both definitions, and since the Enterprises created the market for those emerging alternatives it implicates their actions. Those marketing these alternatives represent that they are exactly like a comprehensively regulated title insurance product, however the coverage is significantly different. Unlike a full title insurance policy, these unregulated alternatives do not provide coverage for matters not discoverable in the public land records or for fraud, which are significant causes of title claims.

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<sup>2</sup> 12 U.S.C. § 4513b(a)

<sup>3</sup> 12 U.S.C. § 4513b(a)(11).

These misleading representations are highly material to the consumer considering how to best protect their property rights. Further, it is likely that these alternatives violate existing state insurance law and regulations subjecting consumers to the potential of substantial injury of getting a less protective product from a provider that is violating the law. If you elect to finalize this aspect of the proposal, you should consider reviewing the Enterprises' acceptance of these unregulated title insurance alternatives under the UDAP standard.

Finally, we would also like to express our overall support for the comments provided by the Housing Policy Council on this notice of proposed rulemaking.

Thank you for the opportunity to comment. We look forward to continuing to work collaboratively with the FHFA and the Enterprises to achieve our shared goals of making housing more accessible and affordable to everyone throughout the country.

Working to expand homeownership as a way of promoting wealth building and financial stability is critical. We share the desire to improve economic opportunity for all Americans through these efforts. In the spirit of that shared goal, we believe more transparency between all actors will grant us a united front when dealing with these challenging issues.

We are happy to further discuss these matters and answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Gottheim". The signature is fluid and cursive, with a large initial "S" and "G".

Steve Gottheim  
General Counsel  
sgottheim@alta.org