



June 26, 2023

Clinton Jones, General Counsel
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20024

RE: FHFA's Proposed Rule re: Fair Lending, Fair Housing, and Equitable Housing Finance Plans (Document Number:2023-08602; RIN 2590-AB29)

Dear Mr. Jones:

On behalf of the National Multifamily Housing Council (NMHC), please find our comments in response to the Federal Housing Finance Agency's ("FHFA") notice of proposed rulemaking (the "Proposed Rule") entitled, "*Fair Lending, Fair Housing, and Equitable Housing Finance Plans.*"¹ Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing \$3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

NMHC strongly supports the overarching goals of fair lending and fair and equitable housing. In fact, NMHC members work tirelessly to provide consumers with affordable housing and have championed efforts for inclusivity in the housing market.

FHFA's approach unfortunately misses the mark in efforts to make housing more affordable and instead raises due process concerns for entities that would be working to comply with this proposal. NMHC is particularly concerned that FHFA's attempts to add broad regulatory authority related to unfair or deceptive acts or practices ("UDAP") under Section 5 of the Federal Trade Commission Act ("FTC Act") go far beyond Congress's legislative intent for the work of the FHFA. It will also likely create unnecessary cost and regulatory burdens on impacted entities and therefore sow confusion in the broader

¹ 12 CFR Part 1293, RIN 2590-AB29 (the "Proposed Rule").

housing market. This will ultimately do more harm than good for all stakeholders, ranging from individuals, families and communities reliant on affordable housing programs to multifamily developers and other entities responsible for providing more housing units nationwide.

(I) Background:

Generally, the Proposed Rule seeks to codify the following requirements, which would apply to the regulated entities.

- FHFA’s fair lending oversight requirements for Fannie Mae and Freddie Mac (the “Enterprises”) and the Federal Home Loan Banks (the “FHLBanks”, and together with the Enterprises, collectively, the “regulated entities”);
- the requirements for the Enterprises to maintain Equitable Housing Finance Plans; and
- the requirements for the Enterprises to collect and report homeownership education, housing counseling, and language preference information from the Supplemental Consumer Information Form.
- The rule would also expand certain requirements for the Enterprises in fair lending compliance and provide greater oversight and transparency regarding the Equitable Housing Finance Plans. ²

While the Proposed Rule purports to codify certain requirements, as described above, it also invokes FHFA’s authority to impose additional requirements on the regulated entities.

(II) Analysis:

Codification of FHFA’s Fair Lending Oversight of the Regulated Entities, Subject to the Unwise Addition of FHFA’s Oversight Of Potential Unfair Or Deceptive Acts Or Practices

The proposed rule would codify in regulation 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. Notably, it also expands on previous authority in this area, stating, “*The proposed oversight would be substantially the same as FHFA’s current fair lending oversight functions, but would establish FHFA’s oversight of potential unfair or deceptive acts or practices by the regulated entities and would require the*

² *Id.* at 25293-25295.

regulated entities to file certifications of compliance with fair lending and fair housing laws with regular and special reports.”³

The Proposed Rule would require the regulated entities to comply with 15 U.S.C. 45 (Section 5 of the FTC Act), which prohibits UDAP. FHFA cites 12 U.S.C. 4511(b)(2) (the Safety and Soundness Act) as the basis for its authority to regulate the regulated entities’ compliance with Section 5 of the FTC Act. Under the Safety and Soundness Act, FHFA is empowered to oversee the regulated entities’ compliance with “other applicable law” and engage in enforcement for noncompliance thereof.⁴ The Proposed Rule also cites other federal financial regulators’ oversight of their respective regulated entities pursuant to such a framework.⁵

NMHC is deeply concerned with the FHFA’s use of a catch-all authority set forth under a seemingly innocuous catch-all provision in the FTC Act to materially expand its regulatory and enforcement authorities over the regulated entities. This is very likely in contravention of congressional intent. In effect, the FHFA is taking the position that it can use a broad authority to address undefined violations, using authority Congress bestowed to another regulator, that does not have a housing focus. Under the plain text of the FTC Act, there is no indication that Congress intended for a federal agency such as the FHFA to invoke a catch-all provision designed for germane purposes related to anti-trust and other matters under the FTC’s jurisdiction to be applied as the basis for another agency’s discretion to regulate other matters in a completely different industry and/or area of jurisdiction.

In fact, this expansion of enforcement authority appears to be in direct contravention of congressional intent by virtue of the fact that nowhere in any House or Senate committee report or hearing transcript is there indication that the purpose behind enactment of the FTC Act or the Safety and Soundness Act was to allow another federal agency to engage in UDAP-related enforcement authority. The Enterprises and FHLBanks have clear directives from Congress.⁶ FHFA argues that their actions are necessary because UDAP is an important protection under Federal law for consumers and other market actors against predatory and deceptive actions. Under this line of reasoning, the FHFA should be able to invoke any other laws that protect consumers and market actors, and adopt them and enforce them, as they see fit. This cuts against why Congress has identified

³ *Id.* at 25298.

⁴ *Id.* at 25301.

⁵ *Id.* at FN 73 Federal Deposit Insurance Corporation (FDIC) Guidance on Unfair or Deceptive Acts or Practices, FIL–57–2002 (May 30, 2002), available at <https://www.fdic.gov/news/inactive-financial-institution-letters/2002/fil0257.html>. See also HUD’s Mortgagee Letter 2014–10 (ML 2014–10), available at <https://www.hud.gov/sites/documents/14-10ML.PDF> (HUD letter ‘remind[ing] mortgagees of the Federal Housing Administration’s (FHA) requirements prohibiting misleading or deceptive advertising’).

⁶ 12 U.S.C. 1421, et seq.; See, The Evolving Role of the Federal Home Loan Banks in Mortgage Markets, Fed. Res. Bank of Cleveland, available at <https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2003-economic-commentaries/ec-20030601-the-evolving-role-of-the-federal-home-loan-banks-in-mortgage-markets.aspx> (June 2003).

certain agencies to focus their efforts on specific laws and missions, and why agencies develop expertise in accordance. If the FHFA can take this law Congress created focusing on the FTC and run with it in such a broad way, what is next in terms of encroachment?

The Proposed Rule specifically notes that the language related to considering compliance with fair housing and fair lending laws and the prohibition on unfair or deceptive acts or practices is intended to be flexible and tailored to the particular consideration at hand, while reinforcing the broad application of fair housing and fair lending laws and the prohibition on unfair or deceptive acts or practices on a regulated entity's operations and the board's ultimate responsibility for the regulated entity's oversight.⁷ This sentence further indicates that FHFA intends to invoke such authority related to oversight of unfair or deceptive acts in a flexible and broad manner, which means it could materially expand its authority to cover acts or practices for which it may not have appropriate statutory enforcement authority or expertise.

Further, FHFA also sets forth the following examples of how FHFA's compliance and enforcement authority could be used with respect to fair lending oversight (including the application of unfair or deceptive acts regulatory framework), equitable housing finance, or data collection or reporting as noted in the Proposed Rule:

- If FHFA found that a regulated entity had insufficient compliance management around fair lending laws or the proposed rule, FHFA could issue adverse examination findings and factor the insufficient compliance management into supervisory ratings;
- If FHFA found that a regulated entity had violated the Fair Housing Act, FHFA could issue adverse examination findings, factor the noncompliance into supervisory ratings, and enter into a consent order with the regulated entity requiring corrective action, additional remedies, and civil money penalties;
- If an Equitable Housing Finance Plan, annual update, performance report, or an Enterprise's actions taken under the program did not meet the requirements of this proposed rule, FHFA could issue an adverse examination finding, factor noncompliance into supervisory ratings, and issue a prudential management operating standard notice requiring the entity to submit a corrective plan; and
- If FHFA found that a regulated entity had not complied with required data collection or reporting, FHFA could issue an adverse examination finding, factor non-compliance into supervisory ratings, and enter into a written agreement with the regulated entity.⁸

According to research released by NMHC and the National Association of Home Builders ("NAHB"), regulatory, administrative, and political hurdles at all levels of government can account for an average of 40.6% of multifamily development costs further impacting

⁷ *Id.* at 25301.

⁸ *Id.* at 25300.

affordability.⁹ While some form of regulation is needed to ensure the health and well-being of all Americans, NMHC-NAHB research clearly demonstrates that the current levels of regulations at the local, state, and federal levels ultimately impose costly requirements on housing developers and other market participants, all of which ultimately force housing costs to rise. Some specific FHLBank-specific programs, like the Affordable Housing Program (“AHP”) also have certain regulatory and process burdens that disincentivize certain housing developers from participating. The opaque new burdens and risks associated with subjecting the regulated entities to UDAP violations under the FTC Act could and likely will materially impact housing providers, as well as lenders, seeking to work with these entities when the rules of the road are subjective or unclear.

While it is not entirely clear how the FHFA would wield its alleged authority under UDAP, it is instructive that other regulatory agencies such as the Consumer Financial Protection Bureau (“CFPB”) and the FTC have taken extremely broad views of actions that can be taken under UDAP or unfair, deceptive, or abusive acts and practices authority (UDAAP). Views on the use of these authorities are often politically subjective and swing with each election, creating even more complexity for industry. An example of this is that the CFPB recently rescinded the definition of the term and concept “abusive”, used in the previous Administration and replaced it with a new one,¹⁰ moving the goal posts for regulated entities. This type of subjectivity, which is likely to result if FHFA moves forward in its approach, creates considerable market uncertainty for the regulated entities and those who partner with them. While the FHFA’s goal is to enable more affordable and inclusive housing, its actions under the Proposed Rule will exacerbate the exact types of regulatory uncertainty that stand in the way of meeting its affordable housing goals.

NMHC urges FHFA and the FHLBanks’ system to focus on reducing regulatory burdens on all parties so that less time is spent on compliance thereof and more time is focused on developing, financing, and ultimately completing more housing units nationwide. As part of this, we would ask the FHFA to consider not moving forward with broad proposals related to UDAP.

Differences In How the Proposed Rule Applies to the Enterprises vs. the FHLBanks

Under the Proposed Rule, the Enterprises and the Banks are subject to proposed subpart A (§§ 1293.1 through 1293.3) and subpart B (§§ 1293.11 through 1293.12), including general provisions related to fair housing and fair lending laws, compliance, examinations, oversight, and enforcement; however, the Banks are not subject to any reporting orders requiring regular or special fair housing and fair lending reports by

⁹ National Association of Home Builders and National Multifamily Housing Council, Regulation: 40.6 Percent of the Cost of Multifamily Development, <https://www.nmhc.org/globalassets/research--insight/research-reports/cost-of-regulations/2022-nahb-nmhc-cost-of-regulations-report.pdf>.

¹⁰ Consumer Financial Protection Bureau, “Policy Statement on Abusive Acts or Practices,” available at <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/> (April 3, 2023).

FHFA.¹¹ In addition, the Proposed Rule clarifies, “The Equitable Housing Finance Plan and broader equitable housing finance planning requirements described specifically in subpart C (§§ 1293.21 through 1293.26) would apply only to the Enterprises and would codify in regulation and expand on the existing equitable housing framework for the Enterprises that FHFA established.”¹²

FHFA is requesting comment as to whether the Banks should be subject to equitable housing considerations, including a similar framework to subpart C (§§ 1293.21 through 1293.26), and/or other ways to incorporate the concepts of equitable housing into the Banks’ mission and operations. Statutorily, Section 1313(f) of the Safety and Soundness Act, as amended, requires FHFA to “consider the differences between the Banks and the Enterprises with respect to the Banks’ cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure and joint and several liability.”¹³

The FHLBanks and the housing providers and other stakeholders they work with are already complying with a multitude of laws and regulations ensuring fair access to lending and housing. There are many programs in place that already have this very goal, and funding to participate in them is only provided to those acting in compliance with various requirements, including, but not limited to, the always-changing regulatory framework underlying affirmatively furthering fair housing (“AFFH”), among others.

In addition, each FHLBank is required to offer Community Investment Program (“CIP”) advances to its members.¹⁴ These advances are subject to stringent requirements, such as households with incomes of up to 115 percent of the area median income or commercial and economic development activities that benefit low- and moderate-income families (defined as 80 percent or less of area median income) or activities located in low- and moderate-income neighborhoods (where 51 percent or more of the households are low- or moderate-income) being eligible for funding thereof.¹⁵

Another example is the FHLBanks’ Community Investment Cash Advance (“CICA”) programs, for which eligibility is applicable only to specific entities, including, beneficiaries with incomes at or below 100 percent of the area median income, or in the case of rural areas, beneficiaries with incomes at or below 115 percent of the area median income.¹⁶ As described in the FHLBanks’ recent listening sessions conducted by FHFA, compliance with such programs requires significant time, effort, and financial and administrative costs. One consistent theme from various stakeholders across the housing industry during the FHLBanks’ listening sessions was the lack of flexibility with respect

¹¹ *Id.* at 25305.

¹² *Id.*

¹³ *Id.*

¹⁴ <https://www.fhfa.gov/PolicyProgramsResearch/Programs/AffordableHousing/Pages/Affordable-Housing-Home-Loan-Banks.aspx>

¹⁵ *Id.*

¹⁶ *Id.*

to compliance requirements for such programs. For example, many AHP grants have monitoring requirements that can last 5-10 years, if not longer, and do not align with similar or corresponding state and local grant programs.

The addition of further regulatory requirements and compliance burdens on the FHLBanks, particularly in contravention of Congress' express decision to enact different regulatory frameworks for the Enterprises as compared to that of the FHLBanks, would result in significant burdens that would have the effect of taking away the time, effort and funding that stakeholders would be able to devote to the promotion of more affordable housing units nationwide. Adding another complex layer by subjecting the FHLBanks to the same requirements as the Enterprises seems unnecessary and overly complicated. It is also far from clear that this is in line with Congress's goals for the FHLBank system, which is focused on providing reliable liquidity to its member institutions to support housing finance and community investment.

Congress has outlined key differences between the Enterprises and FHLBanks and expects different regulatory frameworks for both sets of regulated entities. It would be a mistake for the FHFA to enact regulatory changes in contravention of congressional intent. The Proposed Rule will further market uncertainty in an era of high inflation, high interest rates and other factors that have already exacerbated recent levels of market uncertainty. Housing providers, individuals and families in underserved communities, and all other stakeholders simply request that the FHFA reduce market uncertainty and create an environment that enables developers, lenders, housing providers, and other stakeholders to build and supply more affordable housing units.

In summary, the Proposed Rule would constitute a step backwards from advancing the goal of affordable housing. On this basis, the NMHC strongly urges the FHFA to consider limiting the expansion of authorities and jurisdiction set forth under the Proposed Rule.

Thank you for your attention to these concerns.

Sincerely,

Cindy Chetti
Senior Vice President, Government Affairs
National Multifamily Housing Council
1775 Eye Street, N.W., Suite 1100
Washington, D.C. 20006