

September 19, 2023

The Honorable Sandra Thompson
Federal Housing Finance Agency
Washington, DC

RE: (RIN) 2590–AB23 – Comment from Americans for Financial Reform Education Fund & National Housing Law Project on Suspended Counterparty Program Proposed Rulemaking

Dear Director Thompson,

The following comments are submitted on behalf of Americans for Financial Reform and the National Housing Law Project regarding the Federal Housing Finance Agency's proposed rulemaking on the Suspended Counterparty Program. We commend the Agency for taking steps to broaden the applicability of the Program to misconduct beyond the narrow scope of the current rule. This is especially important for tenants living in multi-family properties with federally-backed mortgages. Tenants on the private rental market have very few existing tools to hold landlords accountable for violations of their rights, even when those violations implicate the viability of the landlord's business or the property itself. As the agency tasked with ensuring that the GSEs and our housing finance system operate in a safe and sound manner, the FHFA must no longer ignore the risks posed by fraudulent activities in connection with property management.

Americans for Financial Reform Education Fund (AFR-ED) is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, we are working to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole.

The National Housing Law Project (NHLP) is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing the rights of low-income residents and homeowners; and increasing housing opportunities for underserved communities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,000 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and low-income residents' rights.

The more expansive definition of covered misconduct increases the accountability of counterparties whose actions infringe upon the rights of tenants, who often lack meaningful avenues for vindicating these rights.

The proposed rulemaking would expand the definition of covered misconduct under the FHFA's Suspended Counterparty Program, which allows the FHFA to issue orders suspending an individual or entity from doing business with Fannie Mae, Freddie Mac, and the Federal Home Loan Banks if they are found to have engaged in fraud or other financial misconduct related to mortgages, mortgage securities, or any lending product. In particular, the proposed rule would expand the definition of covered misconduct: currently, only actions resulting in criminal convictions or administrative sanctions are considered covered misconduct, but the proposed rule would allow the FHFA to take civil orders or judgments into account "in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party," and expands the categories of covered misconduct to include fraudulent actions taken "in connection with the management or ownership of real property."¹

As the public agency charged with ensuring that the GSEs fulfill their mission by operating in a safe and sound manner, the FHFA is correct to seek to expand the Suspended Counterparty Program to include civil violations and fraud related to the management or ownership of property. First, allowing beneficiaries of FHFA financing to commit consequence-free fraud related to the management or ownership of property poses a major risk to the safety and soundness of the GSEs as well as the entire housing financial system. Second, criminal convictions are very rare in the housing finance market, despite well-documented examples of fraudulent behavior. By including civil violations, the FHFA will be better able to take appropriate action against individuals and entities whose history of fraudulent behavior makes their continued involvement with the GSEs a risk to the safety and soundness of our housing finance system. By expanding the definition of misconduct to cover civil enforcement actions and activity in connection with the management or ownership of real property, the proposed rule puts forth a more reasonable standard for holding counterparties accountable for violations that would pose a risk to the safety and soundness of the market, the reputation of the GSEs, and the tenants.

Beyond safety and soundness concerns, as a general principle the GSEs should not continue to do business with counterparties who routinely engage in egregious conduct that violates tenant rights. While tenants are less likely to be aware of misconduct related to their landlord's mortgage, they are often the first to feel the impacts of mismanagement of the building where they live. This is especially true in the context of conditions violations. The National Housing Law Project's response to FHFA's RFI on multifamily tenant protections discusses some of the most common types of habitability issues facing tenants across the country.² As the proposed

¹ Notice of Proposed Rulemaking, FHFA Suspended Counterparty Program, (July 2023) www.fhfa.gov/SupervisionRegulation/Rules/Pages/Suspended-Counterparty-Program-Amendments.aspx

² NHLP, *Re: National Housing Law Project's Response to FHFA's Request for Input on Multifamily Tenant Protections*, 38-41 (July 31, 2023) (<https://www.fhfa.gov/AboutUs/Contact/Pages/input-submission-detail.aspx?RFID=6245>).

rule contemplates, ongoing, severe habitability issues not only harm tenants but also compromise the integrity of a building and, ultimately, the stability of the housing market.

FHFA should strengthen the proposed rule by adding examples of the types of misconduct and sanctions that would give rise to suspension.

FHFA is clear that the misconduct it is interested in acting upon does not need to be strictly financial.³ However, to put borrowers on notice about the types of non-financial misconduct that would fall within the scope of the proposed rule, providing additional examples of types of misconduct would be useful.

FHFA should consider gaps in the current Suspended Counterparty Program that are not fully addressed by the proposed rule, especially misconduct related to conditions violations.

The lack of habitable conditions is a significant problem that the proposed additions to the Suspended Counterparty Program can help address. For example, Freddie Mac recently filed a foreclosure suit against Apex Investments' Chicago arm for substandard conditions at Ellis-Lakeview Apartments, located on the South Side of Chicago. Ellis-Lakeview has both a federally-backed mortgage through Freddie Mac as well as HUD subsidies. Freddie Mac's suit followed numerous habitability complaints from tenants (e.g., mold, poor ventilation, rodents and holes in the walls), 15 failed code inspections in 2020 alone, and HUD's decision to withhold subsidy payments in 2021.^{4,5} To the extent that a counterparty like Apex Investments engages in similarly egregious conduct that both harms tenants and poses a reputational risk to the GSEs, the proposed rule adds another tool for FHFA to address such widespread problems.

Standing alone, the egregious actions at Apex Chicago likely would not give rise to a suspension order under the current or proposed rule. Although the habitability violations might constitute a "knowing and material breach" of Apex's contract with HUD to keep up the building's conditions, HUD's withholding of the subsidy does not appear to fit under FHFA's

³ The proposed rule notes that "Misconduct in connection with real property management or ownership—e.g., submission of fraudulent reports in connection with real property management service contracts, failure to maintain safe housing in accordance with assisted housing contracts, etc.—demonstrates a potential risk to the regulated entities, even in the absence of a close nexus between the misconduct and financing (e.g., mortgage origination fraud)."

⁴ "Residents say the living conditions at Ellis Lakeview worsened after Apex bought the building in July 2019. The following year, building code violations increased to at least 45 — up from an annual average of 15, according to city records. Inspectors found broken elevators, torn and stained carpets, peeling paint, mice and roach infestations, water leaks, and malfunctioning exit signs." Alejandra Cancino, "In rare move, Freddie Mac files suit against South Side landlord," InjusticeWatch (August 8, 2023), <https://www.injusticewatch.org/news/housing/2023/ellis-lakeview-freddie-mac-lawsuit/>.

⁵ Elvia Malagón, "HUD withholds rental subsidies from South Side building following building code violations," Chicago Sun Times (March 8, 2021), <https://chicago.suntimes.com/2021/3/8/22314045/chicago-public-housing-apex-chicago-llc-ellis-lakeview-apartments>.

proposed definition of a conviction nor an administrative sanction.⁶ The FHFA should contemplate their role in holding bad actors like Apex accountable for the kind of repeated, willful neglect of their properties that can lead tenants to suffer as they did in Ellis-Lakeview, and assess whether additional measures or programs are needed if the Suspended Counterparty Program does not apply.

Additionally, in the final rule, FHFA should address enforcement actions by local municipalities and whether such actions would fall under the definition of covered misconduct. As was the case in Ellis-Lakeview, where the property received dozens of violations from local code enforcement in Chicago over years before HUD or Freddie Mac stepped in, municipalities are often on the front lines of addressing habitability problems. These municipalities rely on code violations and other local administrative sanctions to get landlords into compliance. Sometimes, these tools are limited, especially in the case of egregious actors who operate across multiple jurisdictions. Including municipal actions will allow FHFA to take action against serious habitability-related misconduct that poses a risk to the safety and soundness of the market and the reputation of the GSEs.

Thank you for your consideration of our comments and recommendations. We look forward to working with FHFA. Should you have any questions, please contact Caroline Nagy (caroline@ourfinancialsecurity.org) or Marie-Claire Tran Leung (mctranleung@nhlp.org).

⁶ FHFA's proposed definition of "conviction" includes "an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party," while an "administrative sanction" is defined as "a debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question."