June 23, 2022

Clinton Jones
General Counsel
Federal Housing Finance Agency
400 Seventh Street SW
Washington, DC 20219

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

Dear Mr. Jones:

The Housing Policy Council[1] ("HPC") appreciates the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") proposed rulemaking on fair lending, fair housing, and equitable housing finance plans (the "Proposed Rule").[2] HPC's members have an interest in the Proposed Rule; enforcement actions undertaken by FHFA pursuant to the Proposed Rule could explicitly or implicitly involve and affect mortgage market participants, including lenders and servicers, that are counterparties to the regulated entities.

I. Summary of Our Comments

HPC's members are committed to compliance with the letter and spirit of the nation's fair lending laws and support FHFA's goal of addressing barriers to sustainable housing opportunities for underserved communities. However, we believe that the Proposed Rule is not needed to advance that goal, and that it could be counterproductive. Accordingly, we respectfully recommend that FHFA withdraw the Proposed Rule or republish it in a substantially revised form. As discussed in more detail below:

- The Proposed Rule serves no obvious purpose; it simply references fair housing and fair lending laws that currently apply to the regulated entities and that FHFA has authority to enforce.

- The Proposed Rule does not address how FHFA would implement and enforce existing fair housing and fair lending laws in conjunction with the government agencies with primary authority for these laws, and this creates needless confusion and uncertainty for the regulated entities and their counterparties.

- Section 5 of the Federal Trade Commission Act, which prohibits unfair, deceptive acts or practices ("UDAP") is distinct from fair housing and fair lending and should not be incorporated in the Proposed Rule.

[1] The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers; mortgage, hazard, and title insurers; and technology and data companies. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit www.housingpolicycouncil.org.

[2] Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 88 Fed. Reg. 25293 (Apr. 26, 2023).

- Subpart C of the Proposed Rule, which classifies FHFA's equitable housing finance planning requirement as a prudential standard, blurs the distinction between business practices that affect the safety and soundness of regulated entities and their mission activities.

II. The Proposed Rule has no obvious purpose; it simply references fair housing and fair lending laws that already apply to the regulated entities that FHFA has authority to enforce.

In the preamble, FHFA states that the Proposed Rule would address barriers to sustainable housing opportunities for underserved communities by "codifying existing FHFA practices in regulation."[3] Indeed, within the past two years, FHFA has issued significant guidance to the regulated entities on compliance with fair housing and fair lending laws. This guidance includes individual orders to the Enterprises, a compliance bulletin on fair lending and fair housing, and a general policy statement on fair lending.[4]

Yet, the Proposed Rule contains no such detail and does not address FHFA's practices related to fair housing and fair lending enforcement. The Proposed Rule simply requires the regulated entities to "comply with fair housing and fair lending laws."[5] Moreover, the definition of "fair housing and fair lending laws" in the Proposed Rule does not reference or incorporate the guidance previously issued by FHFA. The Proposed Rule defines "fair housing and fair lending laws" to mean the Fair Housing Act, the Equal Credit Opportunity Act, and "implementing regulations."[6] This does not cover the order, policy statement, and advisory bulletin FHFA issued on fair housing and fair lending compliance.

It is unclear what purpose is served by adopting a regulation that simply directs the regulated entities to comply with fair housing and fair lending laws, to which they are currently are subject. As FHFA acknowledges in the preamble to the Proposed Rule, the agency has the existing statutory authority to require the regulated entities to comply with all applicable laws.[7] Moreover, long-standing government policy indicates that federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.[8] While FHFA may not be subject to this policy,[9] a rule that simply restates existing law, as does the Proposed Rule, does not satisfy this generally-accepted principle. Furthermore, the Proposed Rule and the preamble call into question both the applicability and certainty of existing provisions of law. Some parties could interpret promulgation of this new regulation to indicate that FHFA did not have the authority to enforce fair housing and fair lending laws prior to its issuance.

We also note that the federal banking agencies, which have comparable authorities over fair housing and fair lending laws, have not found it necessary to adopt any similar regulation.

II. The Proposed Rule does not address how FHFA would enforce the rule in a manner consistent with existing fair housing and fair lending laws, regulations, and guidance, and this creates needless confusion and uncertainty for the regulated entities and their counterparties.

[3] 88 Fed. Reg. 25294 (April 26, 2023), emphasis added.
[4] FHFA Orders In Re: Enterprise Compliance and Information Submission with Respect to Fair Lending, Nos. 201-OR-FNMA-2 and 2021-OR-FHLMC-2; Advisory Bulletin AB-2021-04, Enterprise Fair Lending and Fair Housing Compliance; and Policy Statement on Fair Lending, 85 Fed. Reg. 36199 (July 9, 2021).
[5] Proposed 12 C.F.R. § 1293.11(a).
[6] Proposed 12 C.F.R. § 1293.2.
[7] Id.
[8] Executive Order 12866, Sept. 30, 1993.
[9] Independent agencies are not subject to Executive Order 12866, and FHFA has been classified as an independent agency for purposes of that Order (see 44 U.S.C. § 3502(5)).

The Proposed Rule addresses FHFA's enforcement authority by stating that the agency may enforce compliance with the rule through its existing enforcement authorities.[10] The Proposed Rule does not provide any further details on how FHFA would exercise this authority, especially as to procedures and particularly in relationship to other agencies that have primary responsibility or share enforcement over fair housing and fair lending laws.

The absence of any details creates needless confusion and uncertainty for the regulated entities and their counterparties. For example, the Fair Housing Act gives the Secretary of the Department of Housing and Urban Development ("HUD") the authority to enforce the Act against entities, including the regulated entities, following receipt of a private complaint or after opening an investigation.[11] While FHFA and HUD have entered into a Memorandum of Understanding ("MOU") related to fair housing and fair lending coordination, the Proposed Rule does not address whether FHFA will adhere to that MOU or adopt different practices.[12]

Additionally, Section 1325 of the Federal Housing Enterprise Financial Safety and Soundness Act (the "Safety and Soundness Act") directs the Secretary of HUD to issue regulations that prohibit the Enterprises from "discriminating in any manner in the purchase of any mortgage because of race, color, religion, sex, handicap, familial status, age, or national origin, including any consideration of the age or location of the dwelling or the age of the neighborhood or census tract where the dwelling is located in a manner that has a discriminatory effect."[13] Currently, the regulation HUD has issued under that authority provides that the Secretary will refer violations and potential violations of section 1325 of the Safety and Soundness Act to the Director.[14] Where a private complainant or the HUD Secretary is also proceeding against an Enterprise under the Fair Housing Act, it is HUD's Assistant Secretary for Fair Housing and Equal Opportunity that conducts the investigation and proceeds with enforcement pursuant to sections 812(b) and (o) of the Fair Housing Act.[15] Yet, proposed section 1293.11 does not address the interaction between the Proposed Rule and HUD's existing regulation.

Furthermore, while the focus appears to center on its regulated entities and their actions to support fair lending, the effect on third parties is not enunciated or delimited in the Proposed Rule. Actions directed at the regulated entities will in many instances have a direct or indirect effect on third parties and this downstream impact merits greater explanation to clarify whether additional enforcement will be undertaken and how, in consultation with or by "transfer" to an institution's primary regulator, the Department of Justice, or HUD for enforcement. The absence of this detail in the Proposed Rule creates uncertainty for third-party providers of mortgages and/or services, which otherwise are subject to regulation and enforcement by HUD, the Consumer Financial Protection Bureau, the prudential banking agencies, or state regulators.

By contrast, FHFA has a rule implementing the suspension of parties from doing business with the regulated entities.[16] That regulation details how and on what bases FHFA will act to suspend a third party, including the duration of a suspension, the applicable procedures and timelines, re-consideration of and exceptions from orders, how a third party may appeal a proposed suspension, and internal deliberations on decision making. While that rule falls in the category of a critical safety and soundness

[10] Proposed 12 C.F.R. § 1293.3.
[11] 42 U.S.C. § 3610.
[12] Memorandum of Understanding by and Between the U.S. Department of Housing and Urban Development and the Federal Housing Finance Agency Regarding Fair Housing and Fair Lending Coordination (Aug. 12, 2021).
[13] 12 U.S.C. § 4545(1).
[14] 24 CFR § 81.47(a).
[15] 24 CFR § 81.47(b).
[16] 12 CFR § 1227.

function, a proposed fair lending enforcement regime should have a similar level of detail to permit robust and informed public input.

In sum, FHFA has failed to clarify how it would use its enforcement authority under the Proposed Rule in a fashion that aligns but does not conflict with the authority of other government agencies under existing fair lending laws. FHFA should provide greater clarity on the procedures and actions that FHFA would undertake regarding alleged fair lending violations and directed alteration of regulated entity behavior.

III. Section 5 of the Federal Trade Commission Act, which prohibits unfair, deceptive acts or practices ("UDAP"), is distinct from fair housing and fair lending and should not be incorporated in the Proposed Rule.

FHFA is proposing to incorporate its oversight of UDAP in the Proposed Rule. For the reasons given below, HPC believes it is neither necessary nor appropriate to do so.

First, the inclusion of UDAP in the Proposed Rule has little, if any, legal significance. The reference to UDAP is simply a restatement of existing law.[17] The Proposed Rule does not otherwise elaborate on the meaning or implementation of that law. By comparison, the federal banking agencies, which have authority to enforce the prohibition on UDAP, have found no need for a similar rulemaking. Rather, the federal banking agencies have issued guidance and examination procedures which set forth the standards used to assess whether an act or practice is unfair or deceptive, the interplay between the Federal Trade Commission Act ("FTC Act") and other consumer protection statutes, examination procedures, best practices, and corrective actions that should be considered for violations of Section 5 of the FTC Act.[18]

Second, even if a UDAP rulemaking is necessary, the Proposed Rule is not the appropriate vehicle for doing so. UDAP encompasses a broad range of activities distinct from fair housing and fair lending. In the preamble to the Proposed Rule, FHFA acknowledges this,[19] and even characterizes UDAP as a "non-fair lending consumer protection authorit[y]."[20] Moreover, similar efforts to equate UDAP with discrimination are subject to legal challenge. Last year, the CFPB updated its examination manual on unfair, deceptive or abusive acts or practices ("UDAAP") to incorporate discrimination as an unfair act or practice. Several industry trade associations requested that CFPB rescind these changes, noting that Congress never used "unfairness" and "discrimination" interchangeably. Those trade associations subsequently sued CFPB for exceeding its statutory authority and that lawsuit is ongoing. The U.S. Supreme Court also has recognized disparate impact as a theory of liability only when Congress uses certain "results-oriented" language in antidiscrimination laws, such as the Fair Housing Act. Section 5 of the FTC Act, however, neither contains the requisite language, nor is it an antidiscrimination law.

Third, the inclusion of UDAP in the Proposed Rule raises more questions than it answers. For example, the Federal Trade Commission ("FTC") has issued policy statements regarding unfair and deceptive acts or practices, and these statements provide helpful insights and guides for the regulated industry on how the FTC interprets these terms. The federal banking agencies explicitly state that they apply the same standards as the FTC in determining whether an act or practice is unfair or deceptive.[21]

[17] Proposed 12 CFR § 1293.11(b).
[18] See, e.g., Interagency Guidance Regarding Unfair or Deceptive Credit Practices (Aug. 22, 2014); FDIC, Consumer Compliance Examination Manual, Section VII. Unfair and Deceptive Practices – Federal Trade Commission Act.
[19] 88 Fed. Reg. 25293, 25301 ("FHFA understands unfair or deceptive acts or practices to encompass a broad scope of activities harmful to individuals that go beyond illegal discrimination.")
[20] 88 Fed. Reg. 25293, 25306, Question 5.
[21] See, e.g., FDIC, Consumer Compliance Examination Manual, Section VII. Unfair and Deceptive Practices – Federal Trade Commission Act

These agencies detail the FTC's test for unfairness and deception and explain each factor. FHFA has not followed suit. The absence of any similar detail in the Proposed Rule causes confusion and concern that the FHFA interpretation of UDAP may differ from that of other enforcing agencies.

IV. The classification of FHFA's equitable housing finance planning requirement as a prudential standard blurs the distinction between business practices that affect the safety and soundness of regulated entities and their mission activities.

FHFA is proposing that Subpart C of the Proposed Rule, which requires the Enterprises to engage in equitable housing finance planning, be a prudential standard pursuant to Section 1313B of the Safety and Soundness Act.[22] In the preamble to the Proposed Rule, FHFA states that this classification is legally appropriate, sound policy, and would enable the agency to use the corrective measures in the agency's existing Prudential Management and Operations Standards ("PMOS") regulation to address deficiencies in equitable housing finance planning or implementation by an Enterprise.[23]

Section 1313B of the Safety and Soundness Act lists ten prudential management and operations standards that the Director must implement, by regulation or guideline. Section 1313B also provides that the Director may establish "such other operational and management standards as the Director determines to be appropriate."[24] As explained below, HPC does not believe that it is appropriate for the Director to classify equitable housing finance planning as a prudential standard.

The PMOS regulation and accompanying guidance promulgated by FHFA in response to Section 1313B of the Safety and Soundness Act are focused on fundamental business practices that may impact the safe and sound operation of the Enterprises. The standards in the PMOS regulation and guidance address matters such as internal controls, internal audits, market risk exposures, liquidity, asset growth, and credit risk.[25] The PMOS regulation specifically recognizes that a failure to meet any standard may constitute an unsafe and unsound practice for purpose of the enforcement provisions of 12 U.S.C. chapter 46, subchapter III.[26]

The preparation and implementation of equitable housing finance plans, while established by FHFA to guide the regulated entities mission activities in conservatorship, are unrelated to FHFA's safety and soundness standards for the Enterprises. As FHFA has stated, there are several statutory and regulatory authorities that apply to the Enterprises that speak to the need to advance equity for homebuyers, homeowners, and tenants in the housing market, and the equitable housing finance plans are another "tool" for the Enterprises to pursue this goal,[27] but they are not a prudential standard.

Treating equitable housing finance planning as a prudential standard also is likely to be counterproductive. The corrective actions authorized in the PMOS regulation for a deficiency in an Equitable Housing Finance Plan are designed primarily to restrict the operations of the Enterprises, not expand them.[28] Those corrective actions include prohibiting an increase in average total assets, requiring an increase in retained earnings, and requiring an increase capital. Imposing such restrictions on an Enterprise for a deficiency in an Equitable Housing Finance Plan would be inconsistent with the purpose of such plans.

[22] 12 U.S.C. § 4513b(a).
[23] 88 Fed. Reg. 25293, 25298.
[24] 12 U.S.C. § 4513b(a)(11).
[25] 12 CFR pt. 1236 and App. A to pt. 1236.
[26] 12 CFR § 1236.3(d).
[27] Fed. Hous. Fin. Agency, Enterprise Equitable Housing Finance Plans: Request for Input, 2-3 (Sept. 2021).
[28] 12 CFR § 1236.5.

Furthermore, classifying equitable housing finance planning as a prudential standard is not necessary for safety and soundness purposes. In the preamble to the Proposed Rule, FHFA acknowledges that compliance with the Proposed Rule, if finalized, would be subject to the applicable standards in the PMOS regulation.[29] Thus, for example, if a program or activity implemented pursuant to an equitable housing finance plan violates either the existing market risk or credit risk standards in the PMOS regulation and guidance, FHFA may address those risks under the current PMOS regulation.

Finally, as a matter of comparison, Section 1313B of the Safety and Soundness Act is based upon Section 39 of the Federal Deposit Insurance Act.[30] The prudential standards established by the federal banking agencies under that authority are limited to business practices that may impact the safety and soundness insured depository institutions,[31] and they do not address the obligation of an insured depository institution to meet the credit needs of the local communities in which the institution is chartered.[32] In other words, in implementing Section 39 of the Federal Deposit Insurance Act, the federal banking agencies have maintained a clear distinction between business practices that may impact the safety and soundness of an insured depository institution and mission activities of the institution. We urge FHFA to follow this example. To do otherwise risks a blurring of prudential supervision with mission objectives, which may cause supervisory personnel to pay insufficient attention to matters that may jeopardize the safety and soundness of an Enterprise.

In sum, the PMOS regulation and guidance are designed to address operational, business, and management risks of the Enterprises, not their mission, and it is ill-suited for enforcing the equitable housing finance plans. Accordingly, we recommend that FHFA not classify the equitable housing financing planning as a prudential standard in the final rule.

V. Conclusion

In conclusion, HPC believes that the Proposed Rule is not necessary and may be counterproductive. Accordingly, we respectfully recommend that FHFA withdraw the Proposed Rule or republish it in a substantially revised form.

We appreciate the opportunity to comment on the Proposed Rule. If you would like to discuss our letter, please contact Matt Douglas at matt.douglas@housingpolicycouncil.org

Yours truly,

Edward J. DeMarco
President
Housing Policy Council

[29] 88 Fed. Reg. 25293, 25299.
[30] 12 U.S.C. § 1831p-1.
[31] 12 CFR pt. 30 (national banks); 12 CFR pt. 364 (state non-member banks); and 12 CFR § 208.3(d) (state member banks).
[32] The Community Reinvestment Act requires insured depository institutions to meet the credit needs of the local communities in which the institution is chartered. See 12 U.S.C. § 2901 et seq.