



PROPOSED ACTION
MEMORANDUM

HUD Fair Housing Review of Fannie Mae and Freddie Mac

Department of Housing and Urban Development
January 2021

I. Summary

Between 2005 and 2018, loans eligible for purchase by Fannie Mae or Freddie Mac (the GSEs) represented about 85% of the total mortgage market.¹ Despite their public mission, the GSEs underserve African Americans. Only 5% of GSE loans went to Black homebuyers, even though African Americans represent 14.6% of the population,² 13% of all households,³ and 8.9% of all owner households.⁴ Indeed, the GSEs' overly restrictive loan policies place them significantly behind the market in mortgages for Black households.

Remedying these racial disparities is crucial but difficult to accomplish, given the complex regulatory environment. The most straightforward approach would be for the Federal Housing Finance Agency (FHFA), an independent federal agency, to make the changes needed to eliminate these disparities. Following the 2008 financial crisis, Congress transferred most regulatory authority over the GSEs from the Department of Housing and Urban Development (HUD) to the newly created FHFA; the new agency also took the GSEs into conservatorship, although they remain private corporations. As a result of especially the latter development, FHFA could simply direct the GSEs to adopt more equitable policies. Unfortunately, the agency is currently headed by a Trump appointee, Mark Calabria, who is unlikely to support necessary reforms. His five-year term with for-cause removal protections is not set to expire until the end of President-Elect Biden's term, though the Supreme Court recently held arguments in a case that could potentially find the position's for-cause removal protections unconstitutional.⁵

Alternatively, HUD could use its own authorities to secure reforms by the GSEs. But in order to do so in a timely and effective manner, it should update outdated regulations and put more resources into reviewing GSE policies. When Congress transferred general regulatory authority over the GSEs to FHFA, it expressly kept HUD's fair housing oversight authority over the GSEs with HUD. But HUD's regulations implementing its fair housing oversight role over the GSEs have not been updated since the 2008 reforms: as a result, HUD's outdated regulations empower a now-defunct office—the Office of Federal Housing Enterprise Oversight (OFHEO), which in 2008 was folded into FHFA and abolished within HUD—to remedy fair housing violations. OFHEO had the statutory and regulatory authority to impose fines or issue cease and desist orders against the GSEs. While HUD has other fair housing enforcement tools available,⁶ these can be time-consuming, not necessarily as effective, and sometimes dependent on action by the Department of Justice.

Consequently, in order to effect reforms to GSE policies that would ameliorate racial disparities in their loan purchases, this memo proposes that the new administration's HUD take the following actions:

- One, update HUD's GSE fair housing regulations through notice-and-comment rulemaking to provide HUD with more effective tools to ensure compliance with HUD's fair housing mandate. Eventually, seek legislation that provides HUD with stronger remedies to enforce GSE fair housing compliance and that returns to HUD full authority to regulate the GSEs' mission (establishing and monitoring housing goals and duty-to-serve targets) in addition to ensuring fair housing compliance.

¹ Vanessa Gail Perry, Ph.D, 2020 State of Housing in Black America, National Association of Real Estate Brokers, section 2.4, table 2-2, available at: https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf.

² Vanessa Gail Perry, Ph.D, 2020 State of Housing in Black America, National Association of Real Estate Brokers, section 2.2, figure 2-3, available at: https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf.

³ Vanessa Gail Perry, Ph.D, 2020 State of Housing in Black America, National Association of Real Estate Brokers, section 1.2, figure 1-4, available at: https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf.

⁴ Vanessa Gail Perry, Ph.D, 2020 State of Housing in Black America, National Association of Real Estate Brokers, section 1.2, figure 1-4, available at: https://www.nareb.com/site-files/uploads/2020/11/2020-SHIBA_Report.pdf.

⁵ See *Collins, et al. v. Mnuchin, et al.* (No. 19-422), pet. for cert. granted July 9, 2020.

⁶ For example, HUD maintains investigative and rulemaking powers, as well as the authority to issue findings and initiate administrative and judicial enforcement proceedings under the Fair Housing Act.

Safety and soundness regulation would remain with FHFA.

- Two, conduct a thorough fair housing review of Fannie Mae's and Freddie Mac's loan purchase policies, focusing on pricing, underwriting, and appraisal practices.
- Three, address any fair housing concerns that arise from the review through negotiation, Fair Housing Act enforcement, or once other regulatory or statutory remedies have been established, other administrative measures.
- Four, work with FHFA to ensure the GSEs' federally defined housing goals, duty-to-serve targets, and other housing policies affirmatively further fair housing.

II. Justification

Fannie Mae (Federal National Mortgage Association)⁷ and Freddie Mac (Federal Home Loan Mortgage Corporation)⁸ are the popular names of two publicly traded corporations created by Congress. They have public shareholders and get substantial benefits not enjoyed by other corporations, such as exemption from certain taxes and SEC requirements.⁹ Fannie Mae was created in 1938 and Freddie Mac in 1970. Collectively, they are referred to as the Government Sponsored Enterprises, the Enterprises, or the GSEs.¹⁰

As required by their federal charters, the Enterprises serve a public mission.¹¹ Their public goals include promoting access to mortgage credit throughout the nation, including "central cities, rural areas, and underserved areas,"¹² and providing ongoing assistance to the secondary mortgage market "including for activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities."¹³ Part of how the Enterprises fulfill their public mission is through buying and guaranteeing mortgages issued by private lenders, pooling some into mortgage-backed securities which they sell to private investors.

Policies put in place by Fannie Mae and Freddie Mac over the past ten years are a driving force behind the significant and increasing racial disparities in both the rate and cost of homeownership for Black consumers.¹⁴ Pricing, underwriting, and appraisal policies have been identified as factors increasing these disparities.

HUD has the authority to require Fannie Mae and Freddie Mac to eliminate GSE policies that reduce access to and increase the cost of homeownership for consumers because of protected characteristics. This memo identifies the steps HUD needs to take to do so now. HUD can work informally with the GSEs,¹⁵ FHFA, and possibly the White House to remedy any fair housing concerns with GSE loan purchasing policies. Under the

⁷ See 12 U.S.C. § 1717.

⁸ See 12 U.S.C. § 1452.

⁹ <https://www.fanniemae.com/sites/g/files/koqyhd191/files/migrated-files/resources/file/aboutus/pdf/fm-amended-charter.pdf>.

¹⁰ The Federal Home Loan Banks (FHLBs), first established in 1932 to provide liquidity to the mortgage market, are also considered Government Sponsored Enterprises but are not addressed in this memo.

¹¹ Fannie Mae Charter, available at:

<https://www.fanniemae.com/sites/g/files/koqyhd191/files/migrated-files/resources/file/aboutus/pdf/fm-amended-charter.pdf>; Freddie Mac Charter, available at: <http://www.freddie.mac.com/governance/pdf/charter.pdf>.

¹² 12 U.S.C. § 1716(4).

¹³ 12 U.S.C. § 1716(3).

¹⁴ Aronowitz, Golding, Hyun Choi, The Unequal Cost of Black Homeownership, MIT Golub Center for Finance and Policy, available at: [The Unequal Costs of Black Homeownership – MIT Golub Center for Finance and Policy](#).

¹⁵ 24 CFR § 81.41.

Obama administration, HUD was successful in using its fair housing mandate to identify evidence of discrimination and negotiate with FHFA to loosen Fannie Mae's underwriting standards to increase access to credit for Black homeowners.¹⁶ But if HUD cannot obtain fair housing compliance informally, it can issue findings and charge either GSE with Fair Housing Act violations.¹⁷ Once HUD's GSE regulations are updated, HUD may have other remedies it can impose directly to gain fair housing compliances.

Pricing

Over-pricing for perceived risk factors drives a large portion of the differential cost of homeownership for Black households. The decision to risk-base price rather than pool risk drives up interest rates for Black homeowners. It is one reason Black homeowners pay about \$250 per year more in interest charges for purchase loans. But risk-based pricing is not required for safe lending; it is a relatively recent policy choice on how to distribute risk. It can be safely reversed while continuing to support a safe and profitable mortgage industry.¹⁸

Risk-based pricing in the mortgage market is driven by the GSEs. Lenders pass along the guarantee fee charged by Fannie Mae and Freddie Mac to purchase the loan. It is telling that the GSEs choose to pool certain risks, such as prepayment risk, which benefits White homeowners, and risk-base price credit risk, to the detriment of Black homeowners.¹⁹

HUD has the authority to prohibit any discriminatory conduct by the GSEs in their purchase of mortgages,²⁰ including pricing. FHFA has its own mandate to eliminate pricing disparities by lenders with which the GSEs do business; FHFA cannot accomplish this directive if the GSEs are the main drivers of pricing disparities in the primary market.²¹

Underwriting

Fannie Mae and Freddie Mac, like the mortgage industry generally, use automated underwriting systems (or AUSs) to predict risk. The statistical models are calibrated using many years of mortgage application and performance data to predict delinquencies and defaults based on multiple risk-related factors, including loan-to-value (LTV) ratio, debt-to-income (DTI) ratio, and credit score.

Fannie Mae and Freddie Mac, as well as private lenders, cabin the AUS scorecard results by overlaying a credit threshold that further limits which loans the GSE will purchase or the lender will originate. In 2015, it is estimated that lenders failed to make about 1.1 million mortgages, due in large part to credit overlays.²²

Mortgage industry analysts have criticized credit overlays because they place excessive weight on a single risk factor, which amounts to post-hoc, arbitrary adjustments to these statistical models. This practice is problematic because it lessens the accuracy of the models and unnecessarily limits access to credit.²³

¹⁶ Fannie Mae, Selling Guide Announcement SEL-2017-06, (July 25, 2017), <https://singlefamily.fanniemae.com/media/4741/display>; Jude Landis, "Desktop Underwriter update helps lenders better serve creditworthy borrowers," Fannie Mae (July 11, 2017), available at: <https://www.fanniemae.com/portal/research-insights/perspectives/desktop-underwriter-dti-landis-071017.html>.

¹⁷ 24 CFR § 81.47(b).

¹⁸ Aronowitz, Golding, Hyun Choi, The Unequal Cost of Black Homeownership, MIT Golub Center for Finance and Policy, available at: [The Unequal Costs of Black Homeownership – MIT Golub Center for Finance and Policy](#).

¹⁹ Aronowitz, Golding, Hyun Choi, The Unequal Cost of Black Homeownership, MIT Golub Center for Finance and Policy, available at: [The Unequal Costs of Black Homeownership – MIT Golub Center for Finance and Policy](#).

²⁰ 12 U.S.C. § 4545(1); 24 CFR 81.41, 81.42.

²¹ 12 U.S.C. § 4561(d) ("Eliminating Interest Rate Disparities").

²² Laurie Goodman, Jun Zhu & Bing Bai, Overly tight credit killed 1.1 million mortgages in 2015, available at: <https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015>.

²³ Foote, Christopher L. and Gerardi, Kristopher S. and Goette, Lorenz F. and Willen, Paul S., Reducing Foreclosures: No Easy Answers (June 2009). NBER Working Paper No. w15063, available at:

DTI ratios are a common and especially pernicious overlay. Approximately one-third of Black and Latino borrowers have DTI ratios over 43%, which is approximately 50% higher than the proportion of white borrowers.²⁴ Evidence suggests that DTI thresholds disproportionately deny access to mortgage credit to Black and Latino borrowers.²⁵ Practically speaking, if a lender or purchaser imposes a DTI ratio of forty-five as its credit overlay, for example, a borrower with a DTI ratio over forty-five will not get a loan no matter what other indicia of creditworthiness the borrower presents.²⁶

Fannie Mae and Freddie Mac have documented their DTI limits in their underwriting guidelines.²⁷

There is no evidence that a DTI overlay on top of an AUS improves the ability of these models to predict loan performance. The AUS already weighs the DTI ratio as one of many variables used to measure the creditworthiness of the borrower. Adding a DTI overlay on top of the scorecard places unjustified weight on this variable in underwriting decisions.²⁸ While some empirical studies support the effectiveness of DTI ratios in predicting mortgage defaults as part of a scorecard,²⁹ others have found DTI ratios to have no effect, even as part of a scorecard, when one accounts for other risk-related factors.³⁰ This is partially due to DTI ratios often being inaccurately measured.³¹

Congress has directed HUD to periodically review and comment on the underwriting guidelines of the GSEs.³² HUD can proceed with this review immediately.

Appraisal Guidelines

It is well known that lower appraisals in Black neighborhoods lead to higher loan-to-value (LTV) ratios and thus lower acceptance rates and higher interest rates for Black borrowers. Research has shown, for example, that “[t]he devaluation of majority-black neighborhoods is penalizing homeowners in black neighborhoods by an average of \$48,000 per home, amounting to \$156 billion in cumulative losses.”³³ Other research has shown

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418921&rec=1&srcabs=1324023&pos=7; Lei Ding, Roberto G. Quercia, Wei Li, Risky Borrowers or Risky Mortgages: Disaggregating Effects of Using Propensity Scale Scores (2011), available at: <https://www.kansascityfed.org/publicat/events/community/2009csrc/Ratcliffe.pdf>.

²⁴ Neil Bhutta & Glenn Canner, Mortgage Market Conditions and Borrower Outcomes: Evidence from the 2012 HMDA Data and Matched HMDA – Credit Record Data, Fed. Res. Bulletin, 99, 4 (2013).

²⁵ Quercia, Roberto G. and Ding, Lei and Reid, Carolina Katz, Balancing Risk and Access: Underwriting Standards for Qualified Residential Mortgages (January 18, 2012), available at SSRN: <https://ssrn.com/abstract=1991262> or <http://dx.doi.org/10.2139/ssrn.1991262>.

²⁶ For details, see, e.g., Eligibility Matrix, Fannie Mae, available at: https://www.fanniemae.com/content/eligibility_information/eligibility-matrix.pdf.

²⁷ See Freddie Mac Seller/Services Guide, Section 5401.2; Monthly debt payment-to-income ratio (07/11/16) and Fannie Mae Single Family Selling Guide, Section B3-6-02: Debt-to-Income Ratios (08/30/2016), available at: <https://www.fanniemae.com/content/guide/selling/b3/6/02.html>.

²⁸ Golding, Edward, Laurie Goodman, and Jun Zhu. 2017, Fannie Mae Raises the DTI Limit, Washington, DC: Urban Institute, available at: https://www.urban.org/sites/default/files/publication/91936/fannie_mae_raises_dti_limit_0.pdf; Richard Green, The Trouble with DTI as an Underwriting Variable—and as an Overlay, Richard’s Real Estate and Urban Economics Blog, December 7, 2016, available at: <http://real-estate-and-urban.blogspot.com/2016/12/the-trouble-with-dti-as-underwriting.html>.

²⁹ See Sumit Agarwal et al., Collateral Pledge, Sunk-Cost Fallacy and Mortgage Default, 24 J. Fin. Intermediation 636-652 (2015); Sumit Agarwal, The Impact of Homeowners’ Housing Wealth Mismeasurement on Consumption and Saving Decisions, 35 Real Est. Res. 135-154(2007); Ryan Goodstein, Refinancing Trends Among Lower Income and Minority Homeowners During the Housing Boom and Bust, 42 Real Est. Res. 690-723 (2014).

³⁰ See Foote, Christopher L. and Gerardi, Kristopher S. and Goette, Lorenz F. and Willen, Paul S., Reducing Foreclosures: No Easy Answers (June 2009), NBER Working Paper No. w15063, available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418921&rec=1&srcabs=1324023&pos=7; Lei Ding, Roberto G. Quercia, Wei Li, Risky Borrowers or Risky Mortgages: Disaggregating Effects of Using Propensity Scale Scores (2011), available at:

<https://www.kansascityfed.org/publicat/events/community/2009csrc/Ratcliffe.pdf>; Quercia, Roberto G. and Ding, Lei and Reid, Carolina Katz, Balancing Risk and Access: Underwriting Standards for Qualified Residential Mortgages (January 18, 2012), available at SSRN: <https://ssrn.com/abstract=1991262> or <http://dx.doi.org/10.2139/ssrn.1991262>. The implications of these missed findings is that the effect of DTI on default depends on the characteristics of the dataset used in the model and/or the extent to which other factors, such as LTV or credit scores, mitigate these effects.

³¹ Foote, Christopher L. and Gerardi, Kristopher S. and Goette, Lorenz F. and Willen, Paul S., Reducing Foreclosures: No Easy Answers (June 2009). NBER Working Paper No. w15063, available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418921&rec=1&srcabs=1324023&pos=7.

³² 12 U.S.C. § 4545(6); 24 CFR §§ 81.41, 81.43(b).

³³ Perry, Andre, Jonathan Rothwell, and David Harshbarger. 2018. “The devaluation of assets in black neighborhoods: The case of residential property.” The Metropolitan Policy Program at Brookings,

that despite expectations from passage of the Fair Housing Act in 1968, “appraisal disparities have been increasing, not decreasing.”³⁴

In addition to this legacy from centuries of devaluing black communities, the GSEs currently require consideration of the predominant age range of properties in the neighborhood,³⁵ which tends to have a disparate impact based on race.

Congress has directed HUD to periodically review the appraisal guidelines of the GSEs.³⁶ Congress was especially attuned to discrimination related to neighborhood characteristics in property appraisals, as it specified that the GSEs cannot discriminate by considering “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.”³⁷ HUD must closely scrutinize how the GSEs and the primary lenders with which they do business consider these and other neighborhood characteristic in their appraisals and appraisal guidelines.

III. Current State

The Recovery Act

As a result of the 2008 housing crisis, Fannie Mae and Freddie Mac mortgage portfolios, which at the beginning of the crisis accounted for nearly half of the value of the entire national mortgage market, suffered overwhelming losses, far more than they had earned in the previous thirty-seven years combined.³⁸ Out of concern that the two companies would fail and cause a collapse of the housing market (and possibly the entire financial system), Congress passed the Housing and Economic Recovery Act of 2008 (HERA, or the Recovery Act),³⁹ which created FHFA as an independent federal agency to take over HUD’s role as the GSEs’ primary regulator.⁴⁰ FHFA is headed by a single Director, appointed by the President with the advice and consent of the Senate.⁴¹ The Director serves a five-year term, removable by the President “for cause.”⁴² On April 2019, Mark Calabria was sworn in as FHFA Director.⁴³ His term is therefore not set to end until the waning days of President-Elect Biden’s first term.

The Recovery Act vests FHFA with authorities similar to those of other prudential financial regulators.⁴⁴ The FHFA Director is charged with oversight over the prudential operations of each Enterprise to ensure it operates in a safe and sound manner, within its authority, in compliance with legal requirements, and pursuant to its public mission.⁴⁵

https://www.brookings.edu/wpcontent/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf; see also Debra Kamin, “Black Homeowners Face Discrimination in Appraisals,” New York Times, Aug. 25, 2020, <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html>.

³⁴ Howell, Junia, Elizabeth Korver-Glenn. 2020. “The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015.” Social Problems, <https://academic.oup.com/socpro/advance-articleabstract/doi/10.1093/socpro/spaa033/5900507?redirectedFrom=fulltext>.

³⁵ Fannie Mae, Selling Guide (Dec. 16, 2020), https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B4-Underwriting-Property/Chapter-B4-1-Appraisal-Requirements/Section-B4-1-3-Appraisal-Report-Assessment/1032992631/B4-1-3-03-Neighborhood-Section-of-the-Appraisal-Report-06-03-2020.htm?SearchTy pe=coveo&_ga=2.6049459.1604620909.1610071045-177852433.1605682725.

³⁶ 12 U.S.C. § 4545(6).

³⁷ 12 U.S.C. § 4545(1); 24 CFR § 81.42.

³⁸ *Mnuchin, et al. v. Collins, et al.* (No. 19-563), *pet. for cert. granted* July 9, 2020, Brief for The Federal Parties at 3, filed August 17, 2020.

³⁹ 12 U.S.C. § 4501, et seq.

⁴⁰ 12 U.S.C. § 4511.

⁴¹ 12 U.S.C. § 4512(a), (b)(1).

⁴² 12 U.S.C. § 4512(b)(2).

⁴³ Press Release, “Dr. Mark Calabria Sworn In as Director of the Federal Housing Finance Agency,” Federal Housing Finance Agency (April 15, 2019), <https://www.fhfa.gov/Media/PublicAffairs/Pages/Dr-Mark-Calabria-Sworn-In-as-Director-of-the-Federal-Housing-Finance-Agency.aspx>.

⁴⁴ Strategic plan, page 3, available at: https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_StrategicPlan_2021-2024_Final.pdf.

⁴⁵ 12 U.S.C. § 4513.

Conservatorship

The Recovery Act further provides that the FHFA Director may, at his discretion, appoint FHFA as conservator or receiver for the Enterprises “for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs.”⁴⁶ On September 6, 2008, the FHFA director exercised this authority to appoint FHFA as conservator of Fannie Mae and Freddie Mac.⁴⁷

As conservator, FHFA obtains broad powers concerning the enterprises.⁴⁸ The “succession clause” immediately transfers to FHFA the assets, “rights, titles, powers, and privileges” of the Enterprises and of any of the Enterprises “stockholder, officer, or director.”⁴⁹ In other words, Fannie Mae and Freddie Mac continue to operate as private businesses, but with FHFA taking on the powers of their management, boards of directors, and shareholders.⁵⁰

FHFA describes its role as conservator thus:

FHFA has very broad authority, but the focus of the conservatorships is not to manage every aspect of Fannie Mae's and Freddie Mac's operations. Instead, FHFA is responsible for the overall management of Fannie Mae and Freddie Mac and has informed the Enterprises which decision-making functions should be performed by the Enterprises' boards of directors and/or management teams. The boards and management teams must consult with FHFA and obtain conservator approval as FHFA directs.⁵¹

Housing Goals

As part of their public mission, Fannie Mae and Freddie Mac must meet certain goals for their home loan purchases. The Recovery Act transferred the function of setting and overseeing these housing goals from HUD to FHFA.⁵² FHFA is required to set separate targets for GSE loans purchases for single-family⁵³ and multi-family housing.⁵⁴ Within single-family loans, separate percentage targets are set for purchase-money loans⁵⁵ and refinance loans.⁵⁶ Within purchase-money loans, separate percentage targets are set for loans for low-income families,⁵⁷ families that reside in low-income areas,⁵⁸ and very low-income families.⁵⁹ And for refinance loans, percentage targets are set for the purchase of refinance loans for low-income families.⁶⁰

The Director must set the targets by regulation for no more than three years at a time,⁶¹ although by regulation, he can adjust previously established targets for any year “to reflect subsequent available data and market developments.”⁶² As part of establishing the targets, the Director is required to collect annual

⁴⁶ 12 U.S.C. § 4617(a).

⁴⁷ Federal Housing Finance Agency, “History of Fannie Mae and Freddie Mac Conservatorships,” <https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx>.

⁴⁸ 12 U.S.C. § 4617(b).

⁴⁹ 12 U.S.C. § 4617(b)(2)(A).

⁵⁰ Federal Housing Finance Agency, “Conservatorship,” <https://www.fhfa.gov/Conservatorship>.

⁵¹ Federal Housing Finance Agency, “Conservatorship,” <https://www.fhfa.gov/Conservatorship>.

⁵² 12 U.S.C. subpart 2, Housing Goals (§ 4561, et seq.)

⁵³ 12 U.S.C. § 4562.

⁵⁴ 12 U.S.C. § 4563.

⁵⁵ 12 U.S.C. § 4562(a)(1).

⁵⁶ 12 U.S.C. § 4562(a)(2).

⁵⁷ 12 U.S.C. § 4562(a)(1)(A).

⁵⁸ 12 U.S.C. § 4562(a)(1)(B).

⁵⁹ 12 U.S.C. § 4562(a)(1)(C).

⁶⁰ 12 U.S.C. § 4562(a)(2).

⁶¹ 12 U.S.C. § 4562(e).

⁶² 12 U.S.C. § 4562(e)(3).

HMDA⁶³ data on loans originated and purchased for the previous year. The Director also determines compliance with the housing goals⁶⁴ and provides his findings to the Enterprises for thirty-day comment.⁶⁵

For example, FHFA housing goals for the Enterprises for 2018 through 2020 were established in a final rule published in the *Federal Register* on February 12, 2018,⁶⁶ and described in FHFA's 2019 Annual Housing Report⁶⁷:

Fannie Mae

	Benchmark Level	Market Level	FHFA Final Determination of Fannie Mae's 2019 Performance
Low-Income Home Purchase Goal	24%	26.6%	27.8%
Very Low-Income Home Purchase Goal	6%	6.6%	6.5%
Low-Income Areas Home Purchase Goal	19%	22.9%	24.5%
Low-Income Areas Home Purchase Subgoal	14%	18.1%	19.5%
Low-Income Refinance Goal	21%	24.0%	23.8%

FHFA set and approved compliance with these targets even though they were only marginally above the market level.

Duty to Serve Underserved Markets

In addition to the Housing Goals, as part of their public mission, the Enterprises are required to serve underserved housing markets. Specifically, Congress mandated that “each enterprise shall provide leadership to the market in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages for very low-, low-, and moderate-income families with respect to the following underserved markets”: manufactured housing, affordable housing preservation, and rural markets.⁶⁸

To fulfill their housing goals and duty-to-serve targets, the GSEs must, among other things, take affirmative steps to “assist primary lenders to make housing credit available in areas with concentrations of low-income and minority families”⁶⁹ and “develop the institutional capacity to help finance low- and moderate-income housing, including housing for first-time homebuyers.”⁷⁰

⁶³ 12 U.S.C. § 2801, et seq. The Home Mortgage Disclosure Act of 1975 (HMDA) requires lenders to collect and report data on the race, national origin, and other characteristics of the borrowers for whom they originate and refinance mortgages.

⁶⁴ 12 U.S.C. § 4562(d).

⁶⁵ 12 U.S.C. § 4562(f).

⁶⁶ See 83 Fed. Reg. 5878 (Feb. 12, 2018), codified at 12 CFR part 1282.

⁶⁷ Annual Housing Report, Federal Housing Finance Agency (Oct. 30, 2020), <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual-Housing-Report-2020.pdf>.

⁶⁸ 12 U.S.C. § 4565.

⁶⁹ 12 U.S.C. § 4565(3)(A).

⁷⁰ 12 U.S.C. § 4565(4).

Fair Housing Compliance

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (FHEFSSA) made HUD the sole regulator of the GSEs. With the 2008 Recovery Act, all but HUD's fair housing oversight was transferred to FHFA.⁷¹

As part of HUD's fair housing oversight authority, Section 1325 of FHEFSSA (now part of the Recovery Act) directs HUD to issue regulations prohibiting the GSEs from discriminating in their purchase of mortgages.⁷² In addition, Section 1325 directs HUD to periodically review and comment on GSE underwriting and appraisal guidelines to ensure their consistency with the Fair Housing Act and Section 1325.⁷³ Section 1325 also requires HUD to take certain actions to ensure the lenders with which the GSEs do business are not discriminating. This involves requiring the GSEs to comply with HUD data requests and demands to sanction discriminating lenders.⁷⁴

HUD issued the required regulation in 1995, before the 2008 transfer of prudential regulatory authority to FHFA.⁷⁵ Consistent with Section 1325, HUD's 1995 regulations prohibit the GSEs from discriminating.⁷⁶ The reporting components of HUD's 1995 regulations require the GSEs, upon request, "to submit information to the Secretary to assist Fair Housing Act and ECOA investigations," and to provide annual public assessments of their underwriting standards, business practices, repurchase requirements, pricing, fees, and procedures that affect the purchase of mortgages for low- and moderate-income families, or that may yield disparate results on a prohibited basis (e.g., race, national origin), including revisions that may promote affordable housing or fair lending.

The 1995 regulations afford HUD two paths for remedying GSE violations: one for violations of Section 1325 and the 1995 regulations, and another for Fair Housing Act violations. For the former, HUD's regulations provide that the HUD Secretary shall refer potential GSE violations of Section 1325 and HUD's 1995 regulations to the Office of Federal Housing Enterprise Oversight (OFHEO) for enforcement.⁷⁷ OFHEO was the HUD component serving as the prudential regulator for the GSEs prior to 2008. OFHEO no longer exists; in function, it was replaced by FHFA.

For the latter, where HUD or a private complainant is proceeding against a GSE under the Fair Housing Act, HUD's Office of Fair Housing and Equal Opportunity (FHEO) conducts the investigation and makes cause/no cause findings.⁷⁸ Where reasonable cause is found, a charge must be issued, and the matter enforced pursuant to standard Fair Housing Act administrative or judicial enforcement routes.⁷⁹ If HUD or the GSE elects to proceed in federal court, the charge will be prosecuted by the Department of Justice, who will control the course of the litigation.

The only step that needs updating is the mechanism for enforcing violations of Section 1325 or the 1995 regulations that are not also violations of the Fair Housing Act—for example, where a GSE refuses to provide requested information to allow HUD to conduct fair housing investigations or refuses to sanction its lenders found to be discriminating. Also, HUD no longer has authority outside of the Fair Housing Act to enforce fair housing violations by the GSEs.

Nonetheless, HUD still has full authority to conduct fair housing investigations of GSE policies and practices, negotiate remedies, and proceed with enforcement under the Fair Housing Act.

⁷¹ Section 1325 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (FHEFSSA), 12 U.S.C. § 4545.

⁷² 12 U.S.C. § 4545(1).

⁷³ 12 U.S.C. § 4545(6).

⁷⁴ 12 U.S.C. § 4545(2), (3), (5).

⁷⁵ See 60 Fed. Reg. 61,888; 24 C.F.R. 81.41 to 81.47.

⁷⁶ 24 CFR §§ 81.41, 81.42.

⁷⁷ 24 C.F.R. § 81.47(a).

⁷⁸ 24 C.F.R. § 81.47(b).

⁷⁹ 24 C.F.R. § 81.47(b) (citing 42 U.S.C. §§ 3610(g) (reasonable cause determination), 3612(b) (AIJ hearing) and 3612(o) (judicial enforcement)).

Federal Housing Finance Oversight Board

The Federal Housing Finance Oversight Board (FHFOB) oversees FHFA and advises the FHFA Director on “overall strategies and policies in carrying out the duties of the Director” under the Recovery Act.⁸⁰ The FHFOB consists of the Secretary of HUD, the Secretary of the Treasury, the Chairman of the Securities and Exchange Commission, and the FHFA Director.⁸¹ Although the FHFOB cannot exercise any executive authority,⁸² the Recovery Act requires it meet at least quarterly⁸³ and to testify annually before Congress about the GSEs’ “safety and soundness,” “operations,” “status,” and efforts “in carrying out their respective missions,” as well as FHFA’s own “operations, resources, and performance,” and “fulfillment of its mission.”⁸⁴ The Secretary of HUD or any of the other FHFOB members, on written notice, can require a “special meeting” of the Board.⁸⁵

The FHEOB gives the HUD Secretary a seat at the table in discussions regarding the current state and future of the GSEs and FHFA, which includes any GSE reform initiatives.

Challenge to FHFA Director “For Cause” Tenure Provision

On December 9, the Supreme Court heard oral arguments in *Collins v. Mnuchin* to decide whether the “for cause” restriction on firing the FHFA director is constitutional. The question arose in a lawsuit brought by shareholders of Fannie Mae and Freddie Mac challenging an agreement between FHFA and the Treasury Department regarding the treatment of GSE profits.

The Supreme Court agreed to hear two issues: whether the FHFA’s structure violates the Constitution because the agency is headed by a single director who serves a five-year term and can be removed by the president only “for cause,” and, if so, what the remedy should be. Only the first question is addressed in this memo because it will decide how soon President-Elect Biden will be able to replace the current Trump-appointed FHFA Director with someone more likely to support fair housing compliance by the GSEs.

The Supreme Court’s ruling in June 2020 regarding the removal restriction for the Consumer Financial Protection Bureau (CFPB) director set the stage for the current challenge to FHFA’s “for cause” removal clause. In *Seila Law LLC v. Consumer Financial Protection Bureau*,⁸⁶ the Court struck down a provision of the Dodd-Frank Act that permitted the President to fire the head of the CFPB only for “inefficiency, neglect of duty, or malfeasance in office.” The GSE shareholders in *Collins* argue for the same result with respect to the “for cause” removal restriction for the FHFA Director.

Because the Department of Justice refused to defend FHFA’s “for cause” removal provision, the Court appointed a former law clerk of Justice Alito as amicus to defend the agency.⁸⁷ The amicus brief supporting FHFA makes three points: (1) the Court does not have to reach the constitutional question because the underlying agency decision was made by an acting Director whom the President can remove at will, (2) even if the removal restriction is properly before the Court, *Collins* is distinguishable from *Seila* because FHFA has more limited authority than the CFPB, as FHFA regulates only a handful of federally chartered entities, and (3) the language of the FHFA removal restriction (“for cause”) is more expansive than that of the CFPB’s

⁸⁰ 12 U.S.C. § 4513a(a).

⁸¹ 12 U.S.C. § 4513a(c).

⁸² 12 U.S.C. § 4513a(b).

⁸³ 12 U.S.C. § 4513a(d)(1).

⁸⁴ 12 U.S.C. § 4513a(e).

⁸⁵ 12 U.S.C. § 4513a(d)(2).

⁸⁶ 140 S. Ct. 2183 (2020).

⁸⁷ *Collins, et al. v. Mnuchin, et al.*, Nos. 19-422 & 19-563, Brief of Court-Appointed Amicus Curiae, filed Oct. 16, 2020.

restriction (removal for “inefficiency, neglect of duty, or malfeasance in office”), with FHFA’s “for cause” removal provision allowing the President to remove the FHFA Director for any cause, including a policy disagreement.

Given the textual differences between the CFPB and FHFA removal provisions, the two cases are not identical, and the Court has room to distinguish them. Once the Court issues a decision, the new administration should take the opportunity to further analyze Calabria’s position. Firing the FHFA director for political reasons, as FHFA’s amicus in Collins suggests, probably goes too far. But firing the FHFA director for refusing to cooperate with HUD in its AFFH coordinating role, or worse, for thwarting HUD’s efforts to bring the GSEs into fair housing compliance, would not be for a political reason. It is a legal reason, and thus “for cause.” It would constitute firing him because he refuses to follow his Fair Housing Act obligations and is undermining another agency’s attempts to discharge its own Fair Housing Act mandate.

IV. Proposed Actions

This memo proposes that HUD take four steps to ensure fair housing compliance by Fannie Mae and Freddie Mac. The first two steps—update HUD’s GSE regulations and conduct a thorough fair housing review of the Enterprises’ loan purchase policies and practices—should be initiated immediately and simultaneously. After that, HUD can proceed to take steps to remedy any fair housing concerns it identifies. In addition, HUD should immediately begin working with FHFA to update the GSEs’ housing goals and duty-to-serve targets to ensure they affirmatively further fair housing.

1. Update HUD’s GSE Regulations

HUD should undertake notice-and-comment rulemaking to update its 1995 GSE regulations at 24 CFR part 81. HUD can continue to exercise its fair housing oversight authority with its existing regulations, but it lacks independent authority to impose remedies for noncompliance with its 1995 regulations or the underlying statute (Section 1325) short of petitioning FHFA to bring Fannie Mae and Freddie Mac into compliance. As their regulator, FHFA has the power to issue cease-and-desist orders or impose fines, and as their conservator, FHFA can direct the GSE to take the demanded action. But referring the matter to the GSEs’ primary regulator and conservator does not ensure HUD’s fair housing concerns are resolved, or resolved fully and adequately in a timely manner, especially given FHFA’s current leadership.

HUD’s independent Fair Housing Act enforcement authority is quite strong. It includes subpoena power subject to fines and criminal penalties for noncompliance⁸⁸ and an administrative process that can, if HUD or a GSE so elect, result in the Department of Justice prosecuting the action against the GSE in federal court.⁸⁹ As a point of comparison, HUD issued a Fair Housing Act charge against Facebook in March 2019, the matter was referred to the Department of Justice for enforcement, and a year later, it is still pending.⁹⁰

In addition to HUD’s general authority to administer and enforce the Fair Housing Act, Congress has given HUD the specific authority to issue regulations that prohibit the GSEs from discriminating in their loan purchases⁹¹ and that require the GSEs to provide information to assist HUD in investigating whether the

⁸⁸ 42 U.S.C. § 3611.

⁸⁹ 42 U.S.C. § 3612(o).

⁹⁰ Tracy Jan and Elizabeth Dwoskin, “HUD is reviewing Twitter’s and Google’s ad practices as part of housing discrimination probe,” Wash. Post (Mar. 28, 2019), <https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/>.

⁹¹ 12 USC § 4545(l).

GSEs' lenders are violating the Fair Housing Act or the Equal Credit Opportunity Act.⁹² Moreover, without the need to issue regulations, Congress has authorized HUD to direct the GSEs to sanction their lenders for violating the Fair Housing Act or ECOA, "pursuant to a final adjudication on the record, and after opportunity for an administrative hearing, in accordance with subchapter II of chapter 5 of title 5."⁹³

At a minimum, HUD's revisions to its 1995 regulations must remove 24 CFR § 81.47(a), which requires HUD to refer violations and potential violations of Section 1325 to the Director of OFHEO. OFHEO is a HUD office that no longer exists. Instead, HUD's revised regulation could mandate a referral to FHFA for purposes of notice and action by FHFA, as the GSEs' primary regulator. But FHFA, which is also the conservator, cannot be the sole arbiter of HUD's fair housing concerns. Rather, the revised regulations should establish a regulatory enforcement regime separate from FHFA that HUD can control to enforce its Section 1325 enforcement authorities. To the extent HUD lacks the statutory authority needed to promulgate a meaningful Section 1325 regulatory enforcement regime, it should consider seeking additional remedial authority from Congress.

For example, the authority transferred from HUD (OFHEO) to FHFA to enforce the housing goals and duty-to-serve targets⁹⁴ provides that after giving the relevant Enterprise notice of the agency's concerns, the GSE must within forty-five days submit a remedial plan,⁹⁵ with the opportunity to submit a revised plan within fifteen days if the agency disapproves the first plan.⁹⁶ If the GSE refuses to submit the initial plan, or the resubmitted plan remains unsatisfactory, or the GSE fails to implement the plan, the agency has the power to issue cease-and-desist orders and impose civil money penalties.⁹⁷

After HUD's 2016 engagement with FHFA over GSE fair housing compliance, FHFA created its own fair housing office. HUD, in its role as the agency directed by Congress to oversee fair housing compliance by the Enterprises, should establish a working relationship with FHFA's internal fair housing office. The data suggests FHFA's new office has not made much progress in eliminating racial disparities in GSE loan purchases or pricing.

2. Conduct GSE Fair housing Review

HUD is charged with ensuring fair housing compliance by the GSEs in their loan purchases. The process has several steps. It requires:

- negotiating a non-disclosure agreement with the Enterprises and FHFA
- contracting with an experienced econometric consulting firm to analyze years of GSE mortgage data. This step includes finding money in HUD's budget to fund the contract.
- directing the fair housing reviews of Fannie Mae's and Freddie Mac's pricing, underwriting, and appraisal policies

Any of these steps could already be in progress. In assessing the status, the new team should review any existing NDA to ensure it does not unduly favor the GSEs' interests over HUD's enforcement needs. If so, the NDA should be renegotiated.

⁹² 12 USC § 4545(2) and (3).

⁹³ 12 USC § 4545(5).

⁹⁴ See 12 U.S.C. § 4565(c).

⁹⁵ Cf. 12 U.S.C. § 4565(e)(3).

⁹⁶ Cf. 12 U.S.C. § 4565(e)(6).

⁹⁷ Cf. 12 U.S.C. § 4565(e)(7); see also 12 U.S.C. § 4581 and 12 U.S.C. § 4585

HUD has the skill and statutory mandate to conduct a detailed review of Fannie Mae's and Freddie Mac's loan purchase policies for fair housing compliance. The reviews should consider both single-family and multi-family loan purchases, and at a minimum, it should address the known problem areas for single-family loans: pricing, underwriting, and appraisals. HUD has conducted such reviews in the past—most recently, at the end of the Obama administration, when HUD was able to convince Fannie Mae to raise its DTI threshold from forty-five to fifty.⁹⁸

3. Remedy GSE Fair Housing Concerns

Once a fair housing review is completed, remedial paths for any fair housing concerns HUD identifies include:

- informal resolution. HUD would notify FHFA and the respective GSE of its concerns and negotiate a resolution.
- if need be, elevating the informal process to the White House level.
- notifying the House and possibly Senate Banking Committees of HUD's fair housing concerns. HUD could create a report to send to the Committees, taking care not to include any data restricted by the NDA. Public hearings would put pressure on the GSEs and FHFA to address HUD's fair housing concerns. GSE reform is not off the table, so either party may be interested in knowing more about any GSE fair housing violations HUD may find.
- issue reasonable cause findings and discrimination charges under the Fair Housing. This would initiate formal prosecution of the alleged Fair Housing Act violations before a HUD ALJ or in federal district court.

None of these steps require any changes to HUD's 1995 GSE regulations. Once those regulations are updated, HUD could directly secure compliance through whatever means are provided in the regulations. Ideally, for meaningful enforcement, HUD would have the authority to impose substantial civil money penalties.

At bottom, HUD would need the authority to direct the Enterprise to modify noncompliant underwriting, pricing, or appraisal policies. HUD also should have the authority to require that Fannie Mae and Freddie Mac board members (who must be approved by the conservator) fully understand the GSEs' fair housing obligations. This can be accomplished by requiring the board members to participate in fair housing training conducted by HUD fair housing staff, and by encouraging FHFA to use its authority to expand the GSE boards to include members with a demonstrated commitment to fair housing.

4. Assist FHFA in Developing GSE Housing Goals, Duty-to-Serve Targets, and other Policies that Affirmatively Further Fair Housing

As a regulator, FHFA is required to establish annual housing goals and duty-to-serve targets for the GSEs. The Fair Housing Act requires FHFA to exercise its regulatory authority over the GSEs “in a manner affirmatively to further” fair housing and to cooperate with HUD in doing so. Given FHFA's history to date,

⁹⁸ Fannie Mae, Selling Guide Announcement SEL-2017-06, (July 25, 2017), <https://singlefamily.fanniemae.com/media/4741/display>; Jude Landis, “Desktop Underwriter update helps lenders better serve creditworthy borrowers,” Fannie Mae (July 11, 2017), <https://www.fanniemae.com/portal/research-insights/perspectives/desktop-underwriter-dti-landis-071017.html>.

it is not likely to be motivated to take meaningful steps (or any steps) toward satisfying this obligation. HUD thus should take the lead, as the agency charged with coordinating AFFH compliance by all the federal agencies, to push this process forward and ensure the housing goals, duty-to-serve targets, and other housing- and urban development-related policies affirmatively further fair housing.

The 1968 Fair Housing Act prohibits housing discrimination in the private housing market as well as by HUD and other federal agencies. It also requires federal agencies and executive departments to “administer their programs and activities relating to housing and urban development (*including any Federal agency having regulatory or supervisory authority over financial institutions*) in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with [HUD] to further such purposes.”⁹⁹ Congress added this affirmative requirement so the Fair Housing Act would not only end redlining and segregation by the federal government but also undo their effects.

In 1994, President Clinton signed a five-page executive order implementing the Fair Housing Act’s affirmative fair housing requirement.¹⁰⁰ As if anticipating resistance by the financial regulators, both the Fair Housing Act and the executive order highlight their inclusion in the AFFH mandate:

As used in this order, the phrase “programs and activities” shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and *Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions)*.¹⁰¹

Identifying “guarantees” as a covered “program” or “activity” points directly to FHFA in its role as regulator of the GSE loan guarantee program.

The 1994 executive order spells out in more detail HUD’s AFFH coordinating role for all the federal agencies:

The primary authority and responsibility for administering the programs and activities relating to housing and urban development affirmatively to further fair housing is vested in the Secretary of Housing and Urban Development.¹⁰²

And:

In support of cooperative efforts among all executive agencies, the Secretary of Housing and Urban Development shall: (a) cooperate with, and render assistance to, the heads of all executive agencies in the formulation of policies and procedures to implement this order and to provide information and guidance on the affirmative administration of programs and activities relating to housing and urban development and the protection of the rights accorded by the Act.¹⁰³

Not only is HUD required to aid the other federal agencies in developing their AFFH policies and procedures, but the other agencies are required to cooperate with HUD in that effort. HUD is authorized to request information from the other agencies and the agencies are required to provide the requested information to HUD:

⁹⁹ 42 U.S.C. § 3608(d) (emphasis added).

¹⁰⁰ Executive Order 12892 of January 17, 1994, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰¹ Executive Order 12892 of January 17, 1994, Section 1-102, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰² Executive Order 12892 of January 17, 1994, Section 2-102, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰³ Executive Order 12892 of January 17, 1994, Section 3-303, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

In connection with carrying out functions under this order, the Secretary of Housing and Urban Development is authorized to request from any executive agency such information and assistance as the Secretary deems necessary. Each agency shall furnish such information to the extent permitted by law and, to the extent practicable, provide assistance to the Secretary.¹⁰⁴

But HUD's coordinating role does not remove the AFFH obligation from the agency itself:

The head of each executive agency [here, FHFA], is responsible for ensuring that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing as required by section 808 of the Act [42 U.S.C. 3608] and for cooperating with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act.¹⁰⁵

Indeed,

In carrying out the responsibilities in this order, the head of each executive agency shall take appropriate steps to require that all persons or other entities who are applicants for, or participants in, or who are supervised or regulated under, agency programs and activities relating to housing and urban development shall comply with this order.¹⁰⁶

For several reasons, HUD is particularly well placed to play a central role in ensuring the GSE housing goals and duty to serve targets affirmatively further fair housing. First, HUD is the fair housing regulator for the GSEs, authorized to routinely examine their loan-purchase policies and practices. Second, from 1992 to 2008, HUD established those goals and targets itself. And third, HUD runs the FHA-insured mortgage program, which serves a significant segment of the mortgage market and is similar in many respects to the GSEs' loan guarantee program.

Some minimum options FHFA should accept as steps to affirmatively further fair housing in establishing GSE housing goals and duty-to-serve targets (consistent with their statutory parameters):

Housing Goals:

- For multi-family loan purchases, include subgoals for:
 - housing in high-income areas affordable to low-income families¹⁰⁷
 - housing in high-income areas affordable to very low-income families¹⁰⁸

Duty to Serve:

- Affordable Housing Preservation
 - Develop underwriting standards that exclude loan purchases for buildings that do not accept tenants who pay all or part of their rent with government housing assistance (housing vouchers).
 - Establish a monitoring program to enforce this standard.
 - This will facilitate the preservation of housing serving Section 8 and other subsidized tenants¹⁰⁹ by limiting loan purchases to housing that accepts those tenants. HUD's housing development funds and Treasury's housing tax credit program prohibit source of income

¹⁰⁴ Executive Order 12892 of January 17, 1994, Section 3-304, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰⁵ Executive Order 12892 of January 17, 1994, Section 2-202, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰⁶ Executive Order 12892 of January 17, 1994, Section 2-203, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing, 59 Fed. Reg. 13 (Jan. 20, 1994).

¹⁰⁷ 12 U.S.C. § 4563(a)(1).

¹⁰⁸ 12 U.S.C. § 4563(a)(2).

¹⁰⁹ 12 U.S.C. § 4565(a)(B)(i).

discrimination by program recipients. The GSEs cannot be serving a public mission if they purchase loans for properties that exclude tenants who accept government housing subsidies.

- Additional Categories.¹¹⁰ HUD should identify additional underserved markets that the GSEs have a duty to serve and that will affirmatively fair housing. Examples might include:
 - moderate- and low-income first-time homebuyers
 - borrowers who suffered foreclosure due to the 2008 financial crisis

Other Policies:

FHFA's AFFH requirement is not limited to establishing housing goals and duty-to-serve targets. It applies to FHFA's overall supervision of the GSEs. Accordingly, HUD should insist that FHFA, as part of its AFFH obligation, require the GSEs to:

- eliminate risk-based pricing
- eliminate credit overlays
- require fair housing training for GSE board members and the addition of GSE board members with substantive, consumer-focused fair housing experience and expertise

HUD may be making the same or similar demands as part of ensuring the GSEs do not discriminate. If HUD finds any of these practices to be discriminatory, it is impossible for FHFA to allow them to continue and remain true to its AFFH obligation.

V. Next Steps

In addition to the steps outlined above to ensure the GSE's loan purchases comply with the fair housing laws, a significant part of HUD's fair housing oversight over the GSEs focuses on ensuring the lenders with which the GSEs do business do not discriminate. HUD has never fully implemented this authority, which invites a comprehensive enforcement strategy. It should do that now.

Section 1325 gives HUD the following authority with respect to lenders doing business with the GSEs:

- (2) by regulation, require each enterprise to submit data to the Secretary to assist the Secretary in investigating whether a mortgage lender with which the enterprise does business has failed to comply with the Fair Housing Act [42 U.S.C. 3601 et seq.];
- (3) by regulation, require each enterprise to submit data to the Secretary to assist in investigating whether a mortgage lender with which the enterprise does business has failed to comply with the Equal Credit Opportunity Act [15 U.S.C. 1691 et seq.], and shall submit any such information received to the appropriate Federal agencies, as provided in section 704 of the Equal Credit Opportunity Act [15 U.S.C. 1691c], for appropriate action;
- (4) obtain information from other regulatory and enforcement agencies of the Federal Government and State and local governments regarding violations by lenders of the Fair Housing Act and the Equal Credit Opportunity Act and make such information available to the enterprises;

¹¹⁰ 12 U.S.C. § 4565(c).

(5) direct the enterprises to undertake various remedial actions, including suspension, probation, reprimand, or settlement, against lenders that have been found to have engaged in discriminatory lending practices in violation of the Fair Housing Act or the Equal Opportunity Act, pursuant to a final adjudication on the record, and after opportunity for an administrative hearing, in accordance with subchapter II of chapter 5 of title 5;¹¹¹

Consistent with this statutory authority, HUD's 1995 regulations authorize HUD to require the GSEs to submit information and data to assist in investigating potential fair lending violations by GSE lenders,¹¹² and authorize HUD to direct the GSEs to issue sanctions against GSE lenders for fair housing violations.¹¹³

Once HUD updates its 1995 GSE regulations, as discussed above, HUD will have the authority to enforce GSE compliance with any of these demands without petitioning FHFA for assistance.

But even without that regulatory update, the statutory mandates are clear, and HUD has Fair Housing Act enforcement authority to address housing discrimination by any GSE lender. HUD should therefore put in place a comprehensive enforcement strategy that calls on the GSEs to supply data to aid HUD in identifying and proving fair housing violations by GSE lenders, and that regularizes sanctions by the GSEs to remedy and deter fair housing violations.

¹¹¹ 12 U.S.C. § 4545(2) – (5).

¹¹² 24 CFR § 81.44.

¹¹³ 24 CFR § 81.46.

