

**Center for Responsible Lending
Family Equality Council
Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
NAACP
National Coalition for Asian Pacific American Community Development
National Consumer Law Center (on behalf of its low-income clients)
National Council of La Raza
National Fair Housing Alliance
National Housing Law Project
National Urban League
The Opportunity Agenda
Poverty and Race Research Action Council (PRRAC)**

February 24, 2014

Dear Senate Banking Committee member:

The national civil rights, fair housing and consumer organizations listed above write to urge you to ensure that upcoming legislation to reform our nation's housing finance system will create a system that serves all qualified borrowers in a fair, non-discriminatory fashion. Our comments describe the laws and regulations that require the system to provide fair access and suggest ways the legislation can accomplish this goal.

Homeownership has long been a path into the middle class for families in America. To continue to grow America's middle class, reform of our housing finance system must provide affordable access to mortgage credit on fair terms for all qualified borrowers, regardless of their race, gender, national origin, familial status or other personal characteristics. This is true whether the reforms modify the existing secondary market entities (Fannie Mae and Freddie Mac) or whether they create entirely new institutions. Such non-discrimination is required under existing statute. It also makes good business sense, as the demographics of the nation are undergoing a dramatic shift: seven out of every 10 new households formed over the next decade will be households of color¹. In

¹ Joint Center for Housing Studies of Harvard University, "The State of the Nation's Housing 2013," the President and Fellows of Harvard College, 2013. p. 3.

other words, future housing demand will be driven by people of color. A robust housing market, both for new homebuyers seeking to purchase homes and for existing homeowners seeking to sell their homes, cannot exist in the absence of access to mortgage credit on fair and equal terms for all qualified borrowers.

Legislation to restructure the housing finance system must include provisions to ensure such access, which is mandated by law. It must incorporate a clear statement of the non-discrimination obligations of the entities in the system, a strong and effective system of regulatory oversight, a regulatory agency whose structure ensures that the policies and practices of secondary market entities do not create unnecessary or unfair barriers to access for borrowers of color and other underserved borrowers, and transparency that serves the needs of borrowers, lenders, investors and the public.

Below we review the existing legal framework that requires the housing finance system to be free from discrimination, the specific requirements that apply to the current secondary market entities and the impact of those requirements on access to mortgages, and offer recommendations for provisions that should be included in housing finance reform legislation to preserve and promote free and fair access to mortgage credit for all qualified borrowers.

Existing Statute Clearly Establishes Broad Federal Fair Housing Policy

A series of federal laws, regulations and executive orders form a strong regulatory framework aimed at ensuring non-discrimination in the housing and mortgage markets. These include the Fair Housing Act, the Equal Credit Opportunity Act, the federal charters of Fannie Mae and Freddie Mac, the Federal Housing Enterprises Financial Safety and Soundness Act and its implementing regulations, and several Executive Orders. This framework underscores the priority that Congress has placed upon fair access to housing, including mortgage lending.

The Fair Housing Act (“the Act”) states, “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” (42 U.S.C. 3601). The Act prohibits discrimination in housing-related transactions on the basis of race, color, religion, sex, disability, familial status or

national origin. Covered transactions include, among others, the origination or purchase of residential mortgages, as detailed in Sec. 805.²

The Act applies this prohibition to dwellings with financing guaranteed by the US government (42 U.S.C. 3603).³ These requirements are reiterated in Executive Order 11063.⁴

² Sec. 805. [42 U.S.C. 3605] Discrimination in Residential Real Estate-Related Transactions

(a) In General.--It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) Definition.--As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance--

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
(B) secured by residential real estate. (Emphasis added)

(2) The selling, brokering, or appraising of residential real property.

³ Sec. 803. [42 U.S.C. 3603] Effective dates of certain prohibitions

(a) Subject to the provisions of subsection (b) of this section and section 807 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 804 of this title shall apply:

(1) Upon enactment of this subchapter, to--

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to April 11, 1968;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to April 11, 1968: Provided, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; (Emphasis added.)

⁴ Executive Order 11063, adopted in 1962, prohibits discrimination in the sale, leasing, rental, or other disposition of properties and facilities owned or operated by the federal government or provided with federal funds. Available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EO11063.

Further, the Act makes it clear that all federal agencies that have programs or activities that relate to housing and community development have an affirmative obligation to promote fair housing.⁵ (42 U.S.C. 3608(d)) This affirmative obligation is reiterated in Executive Order 12892.⁶

The policy of non-discrimination in lending is also stated in the Equal Credit Opportunity Act (15 U.S.C. Sec. 1691 et seq.), which prohibits discrimination in any credit transaction based on, among other things, race, color, religion, national origin, sex or marital status, age (provided the applicant has the capacity to contract).⁷

Taken together, these provisions clearly articulate the policy of the United States to ensure that the housing market, including the system for financing housing, operates in a manner that treats people fairly, regardless of their race, gender, national origin or other protected status. Further, where federal funding is

⁵ Sec. 808 (d) Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

All executive departments and agencies shall 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 this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes. (Emphasis added)

⁶ Executive Order 12892, as amended, (adopted in 1994), requires federal agencies to affirmatively further fair housing in their programs and activities, and provides that the Secretary of HUD will be responsible for coordinating the effort. Available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EO12892.

⁷ 15 U.S.C §1691. Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter [the Consumer Credit Protection Act].

involved, whether in the form of loans, insurance or - as in the case at hand - guarantees, any federal agency administering such funds has an obligation to take affirmative steps to further fair housing.

The Secondary Market Currently Is Subject to Fair Housing Requirements

In addition to the Fair Housing Act and Equal Credit Opportunity Act, both of which have broad application, Congress has taken a number of specific steps to ensure that the secondary mortgage market system operates in a fair and non-discriminatory fashion. These include several provisions in the charters of Fannie Mae and Freddie Mac, the Government Sponsored Enterprises (GSEs), legislation governing the mission and operations of the GSEs, and regulations promulgated by HUD to implement specific provisions of that legislation.

The GSE charters make several references to their obligations under the Fair Housing Act.⁸ Language in the purposes sections of the GSEs' charters speaks broadly to their obligation to ensure the flow of mortgage credit to underserved borrowers and communities. Sec. 301 of each charter, for example, lists among the stated purposes of the enterprise, to "(3) provide ongoing assistance to the secondary market for residential mortgages (including 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) by increasing the liquidity of mortgage investments and improving the distribution of investment capital for residential mortgage investment; (4) promote access to mortgage credit throughout the Nation (including central cities, rural areas and underserved areas) by increasing the liquidity of mortgage investments and the distribution of investment capital available for residential mortgage financing;..."

To the extent that people of color, female-headed households, people with disabilities, families with children and other members of protected classes are over-represented among low- and moderate-income families, or in central cities, rural areas or other underserved areas, this language in their charters indicates a desire by Congress to ensure that they are served fairly by the GSEs.

Further reference to the GSEs' fair housing obligations is found in the charters' mortgage data collection and reporting requirements, (contained in Sec.

⁸ Fannie Mae's charter is in Title III of the National Housing Act, 12 U.S.C. Sec. 1716 et. seq. Freddie Mac's charter is in 12 U.S.C. Sec. 1451 et. seq.

309(m)(1)(a) of the Fannie Mae charter, and Sec. 307(e)(1)(A) of the Freddie Mac charter). These provisions require the GSEs to collect, maintain and provide to the Director of the Federal Housing Finance Agency data on the income, census tract location, race, and gender of mortgagors for their mortgages on 1-4 unit dwellings.

In addition, the GSEs are required to report to Congress on the number of families they serve by income, race and gender, as well as the characteristics of the census tracts and geographic distribution of housing financed. (See Sec. 301(n)(2)(B) of the Fannie Mae charter and Sec. 307(f)(2)(B) of the Freddie Mac charter.)

They are also required to “assess 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 based on the race of the borrower, including revisions thereto to promote affordable housing or fair lending;*”. (See Sec. 301(n)(2)(G) of the Fannie Mae charter and Sec. 307((f)(2)(G) of the Freddie Mac charter. Emphasis added.)

In 1992, Congress enacted of the Federal Housing Enterprises Financial Safety and Soundness Act, or FHEFSSA (12 U.S.C. Sec. 4501 et. seq.). FHEFSSA spelled out in detail Congress’ expectations that the GSEs would adhere to the requirements of the fair housing laws and required the Secretary of HUD to oversee their compliance.⁹

⁹ 12 U.S.C. Sec. 4545

SEC. 1325. FAIR HOUSING.

The Secretary shall--

- (1) by regulation, prohibit each enterprise 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;
- (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;
- (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, and shall submit any such

HUD issued regulations to implement these provisions of FHEFSSA.¹⁰ The regulations mirror the statutory provisions, stating that, “Neither GSE shall discriminate in any manner in making any mortgage purchases 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.” (24 CFR Sec. 81.42)

Taken together, these statutory and regulatory provisions constitute a significant regulatory framework that demonstrates the importance Congress has placed on ensuring that the nation’s housing finance system, in all of its many parts, operates free from discrimination.

The Current Regulatory Framework Has Allowed Policies and Practices that Disadvantage Borrowers of Color and Other Underserved Market Segments

It must be noted that some of the steps taken by the GSEs have helped expand access to affordable, sustainable mortgages for borrowers of color and other historically underserved borrowers. Some of their actions, however, have raised barriers to such access. In many cases, these actions have been taken despite warnings from civil rights groups about their potential harm to borrowers of color and others. As a result, the GSEs have not always served these borrowers as well as they could or should in light of the clear fair housing and fair lending

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- information received to the appropriate Federal agencies, as provided in section 704 of the Equal Credit Opportunity Act, 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;
 - (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 Credit 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, United States Code; and
 - (6) periodically review and comment on the underwriting and appraisal guidelines of each enterprise to ensure that such guidelines are consistent with the Fair Housing Act and this section.

¹⁰ See 24 CFR 81, Subpart C (Sections 81.41 through 81.47).

policies of the United States, as articulated in the laws and regulations described above.

The imposition by the GSEs of fees that increase the cost of credit, and that hit borrowers of color and other underserved borrowers the hardest, is one example. At the direction of their regulator, the Federal Housing Finance Agency (FHFA), Fannie Mae and Freddie Mac have adopted pricing policies that divide loans into categories based on a variety of factors, including down payment (loan to value ratio), credit score, and product type.¹¹ Based on these factors, they impose additional fees for purchasing a mortgage from the originating lender. These are known as loan level price adjustments, or LLPAs. Fannie Mae currently charges a fee equal to 0.25% of the loan amount for a mortgage with a down payment between 5 and 10% to a borrower with a credit score of 740 or higher. As credit scores go down, the fee increases. For borrowers with credit scores between 720 and 730 who make a down payment between 5 and 10 percent, the LLPA is 0.5 percent. For those with credit scores credit scores between 700 and 719, the fee is 1 percent, and the fee goes up to 3.25 percent for borrowers with credit scores below 640.

As borrowers of color tend to have lower credit scores and less wealth to apply to a down payment, this type of pricing scheme tends to have a disproportionate impact on these borrowers, and in some cases may price them out of the mortgage market altogether. The factors upon which the LLPAs rely (down payment and credit score) do not correlate with the key risk features of the loans that experienced massive defaults in the foreclosure crisis. Those loans failed due to the combination of poor underwriting, little or no documentation, high fees, exploding interest rates and negative amortization. Down payment and credit score bear only a modest relationship to credit risk, and over-reliance on these factors is unwarranted. Any risk reduction benefits that these fees may offer to the GSEs must be balanced against the increased costs they represent for borrowers of color, for whom they may make conventional mortgages unaffordable. The LLPAs are also flawed as a mechanism for shrinking the government's footprint in the mortgage market. While they may reduce the number of loans sold to the GSEs, instead of encouraging the re-entry of private capital, they appear to be increasing the number of borrowers seeking loans insured by FHA. Those loans expose the government and the taxpayer to 100% of the credit risk.

¹¹ Fannie Mae's current LLPA fees are available at <https://www.fanniemae.com/content/pricing/llpa-matrix.pdf>.

The GSEs have adopted this pricing scheme despite these limitations and despite concerns voiced by civil rights groups about their potentially discriminatory impact. In fact, in December, 2013, the GSEs announced further increases in their LLPAs, to take effect in the spring of 2014.¹²

In 2007, Fannie Mae adopted a new policy on the maximum loan-to-value ratio for loans made in so-called “declining markets,” in which evidence suggested that housing prices were decreasing. The policy increased by 5% the amount of down payment the homebuyer would have to make in order for such loans to be eligible to be sold to Fannie Mae. In other words, a loan that would previously have required a 5% down payment would now require 10% down.¹³ Freddie Mac adopted a similar policy. Given the racial disparities in household wealth in the U.S., this policy would have made it significantly harder for African American and Latino borrowers to meet this higher standard. In addition, given the housing market conditions of the time, it was likely that homes in communities of color would be more likely than others to be subject to the increased down payment requirement. Civil rights groups voiced strong concerns about this policy, with the result that in, 2008 Fannie Mae announced the elimination of the policy and instituted uniform national down payment standards instead.

The GSEs similarly disregarded the fair housing implications of their actions when they purchased private label securities (PLS) backed by unsustainable subprime mortgages during the run-up to the housing crisis. They purchased these securities for their investment portfolios in an effort to counter the impact of their loss of market share to subprime mortgages. The PLS market was created by Wall Street and propelled by demand from a range of investors, from pension funds to private equity firms. While the GSEs were relatively late to the table as purchasers of these securities, had they adhered to their obligation to affirmatively further fair housing, they never would have entered this market. The loans backing these securities were markedly different from those purchased and securitized by the GSEs directly, and had significantly higher default rates. Lenders and brokers marketed these subprime loans aggressively to borrowers of color, a great many of whom qualified for prime credit and

¹² Mel Watt, the new director of the agency overseeing the GSEs, has announced the postponement of the fee increases until he has had a chance to review the proposal.

¹³ See “Maximum Financing in Declining Markets,” Fannie Mae Announcement 07-22, December 5, 2007. Available at <https://www.fanniemae.com/content/announcement/0722.pdf>.

should have had access to cheaper, safer and more sustainable loans. Civil rights groups pointed out the damaging effects of this type of lending on borrowers and communities of color and strongly urged the GSEs to end their purchases of these PLS. These warnings went unheeded, to the detriment of the GSEs themselves, as well as the communities that were flooded with unsustainable mortgages. It is estimated that homeowners in communities of color have lost nearly \$2 Trillion in wealth as a result of concentrated foreclosures of subprime and other toxic loans on nearby homes.¹⁴

Another example of an action taken by the GSEs that ran counter to their fair lending obligations was their purchase of loans with single premium credit insurance. Single premium credit insurance, a product that was very expensive and brought little benefit to the consumer, was primarily associated with subprime mortgages.¹⁵ This meant it was targeted to borrowers and communities of color, where subprime mortgages were concentrated. By effectively increasing the cost of credit, it made homeownership more expensive for people in these communities.

Instead of “promoting access to mortgage credit throughout the Nation,” as their charters call for, policies and practices like the ones described here constrict access to conventional mortgages for borrowers and communities of color and other underserved markets.

The Existing Legal Framework Has Not Ensured Fair Access to Mortgages

The impact on the ground of policies and practices like those described above is evident from analysis of data on mortgage lending patterns and the mortgage purchases of the GSEs. Such analyses indicate that communities of color and

¹⁴ Bocian, Debbie Gruenstein, Peter Smith and Wei Li, “Collateral Damage: The Spillover Costs of Foreclosures,” Center for Responsible Lending, October 24, 2012

¹⁵ Extremely profitable for lenders, single premium credit insurance was promoted as a product that would pay off a mortgage if the borrower encountered various events (death, unemployment, divorce, etc.), although a great many policyholders found that when the covered events occurred, they were unable to collect the promised benefits. Typically, the policy was for a term shorter than the life of the mortgage, often seven years. The total amount of the policy premiums was charged upfront in a single lump sum. Since most borrowers could not afford that amount, the cost would be rolled into the mortgage. This meant that the borrower paid interest on the premium for the entire term of the mortgage, which could be long after the policy had lapsed.

other underserved areas have lacked consistent access to safe, sustainable mortgage credit on fair and equitable terms.

Recent data shows that the GSEs are not currently serving communities of color effectively, forcing many borrowers of color – even those with high credit scores - to seek Federal Housing Administration (FHA) financing for their home purchases. In 2009 and 2010, for example, 60% of the home purchase loans made to African American and Hispanic homebuyers were FHA loans, compared to 33% for white borrowers.¹⁶ In 2013, FHA accounted for 54% of purchase mortgage financing for African American and Hispanic borrowers.¹⁷ This is not simply a function of the credit records of those borrowers. Between January, 2009 and December, 2010 the percentage of FHA borrowers with credit scores greater than 720 ranged from a low of 24.29% to a high of 37.07%. That figure did not dip below 25% until the 3rd quarter of 2013.¹⁸

This is not a new phenomenon. At a hearing in the House Banking Committee in 2000, William Apgar, then the HUD Assistant Secretary for Housing, testified that, “Today, minorities are under represented in the mortgage market. They are less likely to obtain mortgage financing and less likely to receive loans on as favorable terms as whites. *HUD has determined that the GSEs have purchased proportionately fewer loans for African-American and Hispanic borrowers than are originated in the overall private mortgage market.*” (Emphasis added.)¹⁹

Other research on the extent to which the GSEs have purchased loans on homes in communities of color also demonstrates that the enterprises have not always served these communities in a manner consistent with their fair lending obligations. According to the Federal Housing Finance Agency, in 2011 and 2012, the percentage of home purchase loans bought by Freddie Mac was lower than that of the primary market in many market segments that are critical from a fair lending perspective. These include census tracts with minority population above

¹⁶ See “A Second Look at FHA’s Evolving Market Shares by Race and Ethnicity,” available at http://www.huduser.org/portal/pdredge/pdr_edge_featd_article_080312.html.

¹⁷ U.S. Department of Housing and Urban Development, “Financial Status of the FHA Mutual Mortgage Insurance Fund FY 2013,” December 13, 2013.

¹⁸ Ibid.

¹⁹ Statement of William C. Apgar, Assistant Secretary for Housing, Federal Housing Commissioner Before the House Subcommittee on Capital Markets, Securities and Government Sponsored Enterprises Committee on Housing, Banking and Financial Services, March 22, 2000.

30%, loans made to Hispanics, American Indians and Native Alaskans, Asians, African-Americans, and Native Hawaiians and Pacific Islanders, loans made to women, census tracts with incomes below 100% of area median income, and loans made to borrowers with incomes below area median income. Fannie Mae also lagged behind the primary market in loans made to borrowers with incomes below area median. The picture for refinance loans was somewhat better, although still mixed, with Freddie Mac largely continuing to lag behind Fannie Mae.²⁰

This is consistent with analysis going back to the 1990s, when research found that the GSEs' market shares of loans made to people of color, particularly African Americans, and in communities of color was lower than their market shares of loans made to white borrowers and in white communities. One study of GSE purchases between 1993 and 1996 found that, "Fannie Mae and Freddie Mac provided a lower proportion of funding for mortgage lending to lower income and minority borrowers than to higher income or White borrowers. The GSEs also had lower market shares in lower income neighborhoods than in higher income neighborhoods, in central-city areas compared to suburban areas, and in neighborhoods that are geographically targeted according to HUD's mandates for GSE loan purchase activity compared to non-targeted neighborhoods."²¹

Another study from that period, examining GSE loan purchases between 1995 and 1999, found that they lagged behind the primary market in their purchase of loans made to African-American borrowers and in African-American neighborhoods. That study found that, "The GSEs' market shares for loans to upper-income African-American borrowers are similar to their market shares for loans to very low-income White borrowers."²²

²⁰ See FHFA Annual Housing Report October 2013, Appendix B. Available at <http://www.fhfa.gov/webfiles/25743/ANNUALHOUSINGREPORT2013FINAL103013.pdf>.

²¹ Case, Bradford, Kevin Gillen and Susan M. Wachter, "Spatial Variation in GSE Mortgage Purchase Activity," *Cityscape: A Journal of Policy Development and Research*, Vol. 6, No. 1, 2002. Available at www.huduser.org/periodicals/cityscape/vol6num1/chp1.pdf.

²² Bunce, Harold, "An Analysis of GSE Purchases of Mortgages for African-American Borrowers and Their Neighborhoods," US Department of Housing & Urban Development, Housing Finance Working Paper Series HF-011, December, 2000. Available at www.huduser.org/Publications/pdf/workpapr11.pdf.

Recommendations for Legislative Provisions to Ensure Fairness and Non-Discrimination in the Secondary Mortgage Market

As Congress considers a restructuring of the nation's housing finance system, it has the opportunity – and faces the necessity – to create a system that serves all qualified borrowers on a fair and non-discriminatory basis. To do this, it must draw from the best of past policies aimed at ensuring that the system is fair, and improve on those policies that have proven less effective.

The legislation should incorporate the following provisions:

1. A clear statement that each entity in the system must serve all borrowers in a fair and non-discriminatory fashion.

The legislation must impose, upon all entities that administer a federal guarantee as well as those that take advantage of it, an *affirmative obligation to serve all qualified borrowers*, and to do so in a manner consistent with existing civil rights statutes, including the Fair Housing Act and the Equal Credit Opportunity Act, among others.

2. A structure that provides the necessary oversight and enforcement and establishes effective accountability measures.

a. Oversight and enforcement. The agency that oversees the operations of the secondary mortgage market must include an Office of Fair Lending, whose director reports directly to the head of the regulatory agency. Too often, financial regulatory agencies have failed to place sufficient priority on ensuring that the institutions they regulate do not discriminate. This problem requires a structural solution, one that sends a strong signal about the importance of ensuring that the market operates in a non-discriminatory way, creates the mechanism for accountability, and places that mechanism in a prominent place within the agency to make sure that it receives the resources and attention it requires. A model for this structure can be found in the Consumer Financial Protection Bureau.

The regulator must have explicit responsibility and authority to supervise the fair lending aspects of the system, including the authority and obligation to collect necessary data and conduct on-site examinations of the institutions that administer the federal guarantee. It must also have the authority to take prompt action to correct any violations it may find,

or to refer those violations to another federal agency with enforcement powers.

b. Accountability. Any entity utilizing the federal guarantee should be required to certify to the regulator, on an annual basis, its compliance with all applicable fair housing and fair lending laws and to provide such supporting documentation as the regulator deems appropriate. The Community Development Block Grant (CDBG) statute provides a model for this approach. It requires recipients of funds under the CDBG program and other formula programs administered by HUD to certify each year that they are in compliance with all applicable civil rights statutes and obligations.²³

A weakness of the CDBG approach is its failure to require HUD to verify the certifications. To address this problem, the statute should require the regulator to verify the accuracy of the certifications based on data about the policies and performance of the entities and other sources of information – including public comment – as appropriate.

3. Transparency.

To ensure that the verification process described above is robust and to instill public confidence in the fairness of the housing finance system, the statute should also require the regulator to make public the data on which it relies to verify the civil rights certifications. The public should have a reasonable opportunity to comment on the certifications and to provide any supplemental information it may have that would inform the regulator’s determination about the extent to which the entity has met its civil rights obligations.

Each of these elements is necessary to create a housing finance system that will serve all borrowers fairly and support a strong housing market for the future. We urge you to ensure that they are incorporated into any housing finance reform legislation that Congress enacts.

²³ 42 U.S.C. §5304(b)(2): “Any grant under [the CDBG program] shall be made only if the grantee certifies to the satisfaction of the Secretary that ... the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.”

Thank you for your consideration of these issues. If you have questions about our recommendations, please contact Debby Goldberg (dgoldberg@nationalfairhousing.org), Lisa Rice (lrice@nationalfairhousing.org) or Deidre Swesnik (dswesnik@nationalfairhousing.org) at the National Fair Housing Alliance. All are available by phone at 202-898-1661.

Sincerely,

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