MORTGAGE BANKERS ASSOCIATION

June 26, 2023

Clinton Jones
General Counsel
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20219

RE: (RIN) 2590-AB29 FHFA Fair Lending, Fair Housing, and Equitable Housing Finance Plans Notice of Proposed Rulemaking

Dear Mr. Jones,

The Mortgage Bankers Association (MBA)[1] respectfully submits these comments in response to the Federal Housing Finance Agency's (FHFA) proposed rule regarding its fair lending oversight of the regulated entities, and the Equitable Housing Finance Plans (EHFP) of Fannie Mae and Freddie Mac (the Enterprises). MBA is generally supportive of certain aspects of the proposal and welcomes FHFA's proposal to codify the EHFPs and its associated practices into regulation. Two aspects of the proposal, however, raise serious concerns outlined further in this letter:

- the inclusion of *Section 5 of the Federal Trade Commission Act* regarding unfair or deceptive acts or practices (UDAP) as a standard for Fair Housing and Fair Lending Compliance, and
- the new requirement to collect the language preference of applicants and borrowers.

We recommend FHFA reconsider these portions of the proposed rule prior to finalization.

I. Support for EHFPs

MBA's priorities and initiatives are well aligned with the EHFPs and FHFA's commitment to addressing the ongoing racial and ethnic disparities in homeownership and wealth. MBA

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 1,700 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

has several initiatives designed to address our nation's long-standing challenges related to housing equity: Building Generational Wealth Through Homeownership[2]; Expanding Affordable Rental Housing Opportunities[3]; the Home for All Pledge[4]; and CONVERGENCE[5], MBA's placed-based initiative. MBA is committed to combating the barriers to sustainable housing for communities of color and understands that progress in this area will require ongoing effort for years to come. For this reason, MBA supports the codification and continued development of Enterprises' EHFPs.

In our response to FHFA's October 2021 request for information, MBA recommended that FHFA explore rulemaking or other options to make these efforts more durable, irrespective of how long the Enterprises remain in conservatorship. The ongoing and proactive work through the EHFPs is vitally important to identifying and overcoming barriers to sustainable housing opportunities through the thoughtful execution of meaningful actions towards measurable goals. The longstanding challenges will require long-term solutions, and it is critical that these efforts continue through changes in the market, shifting priorities, changes in leadership, and the Enterprises conservatorship status.

Most importantly, monitoring of Enterprise's efforts through the EHFP's are essential to closing the racial homeownership gap. We appreciate that FHFA has implemented some of the recommendations that MBA provided during the RFI for the Equitable Housing Plans in 2021, including:

- supporting Special Purpose Credit Programs;
- engaging with stakeholders that are focused on lowering or eliminating down payment barriers;
- partnering with organizations that raise awareness of the resources available to approve affordability and maintain sustainable homeownership; and
- allowing renters to leverage records of on-time payments to qualify for single-family loans.

The reporting and periodic reassessment of the plans appears to be an effective oversight process that will enable the Enterprises to continue to make progress.

Codifying the EHFPs is a welcome step that should enhance transparency and accountability and will ensure industry efforts on this issue continue. MBA supports codification of the EHFPs for consistency and durability.

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[2] https://www.mba.org/advocacy-and-policy/residential-policy-issues/building-generational-wealth-through-homeownership
[3] https://www.mba.org/docs/default-source/cmf-policy/24494-mba-affordable-rental-housing-strategy-brochure-pages.pdf?sfvrsn=395ca7d4_1
[4] https://www.mba.org/about-mba/the-home-for-all-pledge
[5] https://www.mba.org/advocacy-and-policy/affordable-housing-convergence

II. UDAP Oversight is Not Appropriate to Ensure Fair Housing and Fair Lending Compliance

MBA, of course, agrees that the Enterprises should comply with existing fair lending requirements as they support the public interest. However, we do not believe this should be expanded to apply *Section 5 of the Federal Trade Commission Act (FTC Act)* regarding UDAP as a standard for Fair Housing and Fair Lending Compliance.

Incorporating UDAP into the proposed rule is inconsistent with the Enterprises' Charters Acts precisely because it is a broad consumer protection statute. MBA believes UDAP principles as outlined in the FTC Act would not appropriately apply to the Enterprises as those are statutes that generally govern interactions between businesses and consumers, with very limited business to business application.[6] Traditionally, FTC UDAP violations relate to inappropriate behavior in consumer markets, such as misleading advertising or unfair trade practices. The Enterprises, on the other hand, are generally prohibited from engaging in direct consumer contact. Because the proposal does not provide any detail on the process or method that would be used to apply and enforce UDAP against the Enterprises, any finding by FHFA would create unwarranted negative inferences and possible liability for Enterprise lender partners.

MBA acknowledges FHFA's attempts to emphasize the importance of safety and soundness, avoiding unfair or deceptive acts or practices, and formally stating that predatory products or activities would violate the proposed rule. However, the application of UDAP as a supervisory framework and annual certification of compliance is inappropriate and could have unintended consequences for multiple market participants. As the Agency notes, the FTC's UDAP standard "encompasses a broad scope of activities harmful to individuals that goes beyond illegal discrimination." In other words, FTC UDAP is not related to Fair Lending and Fair Housing compliance.[7] For these reasons we recommend this portion of the proposed rule be removed from any final rule.

III. Remove Codification of Data Collection Standards

MBA remains committed to improving the delivery of financial services to borrowers with Limited English Proficiency (LEP) to address the challenge of accessing sustainable housing opportunities. As the Agency knows, mortgage lenders and servicers recently adjusted their systems and processes to implement FHFA's May and August 2022 respective announcements requiring lenders to present the Supplemental Consumer

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[6] If FHFA is interested in using the UDAP lens to evaluate how the GSEs treat their seller/servicers, it would be more appropriate to do that outside the context of a fair lending rule that necessarily has a consumer focus.

[7] A similar effort by the Consumer Financial Protection Bureau to expand their UDAAP authority—similar to the FTC Act prohibitions with the addition of abusiveness—is currently in active litigation that raises valid concerns about an agency attempting to blend Congress's fair lending laws with their consumer protection laws. It would be inappropriate for FHFA to take similar action to convert UDAP into a fair lending statute until the conclusion of that litigation.

Information Form (SCIF) and for servicers to obtain and maintain the data collected. While we appreciate the Agency's continued focused on LEP borrowers through codification of the Enterprises current data collection standards, such codification is not necessary or appropriate.

As a practical matter, it appears that codification would s expand the scope of FHFA's original announcement. In the proposed rule, FHFA's seeks to clarify that requiring Enterprises duty to collect data does not change the obligations of lenders and servicers. That is, lenders remain permitted to only present the SCIF with the decision to "generate" the data for collection being the borrower's decision. The proposed rule, however, changes the original presentment requirement of the SCIF to a formal collection requirement to document and provide the language preference data of applicants and borrowers by removing express mention of the SCIF itself in the proposed rule. If notice and comment is necessary to pursue efforts to track language preference data, those efforts should have been pursued separately at the time of FHFA's announcement. Expanding the scope of lenders and servicers obligations is inappropriate now.

Moreover, codification will unnecessarily limit flexibility for changes that might be required. The experience of using the SCIF is new, and we should allow time to see its benefits before making its use a regulatory requirement. The assertions made in the rule about the usefulness of the data are unfounded given how little time has passed since the SCIF has been in widespread use. It remains to be seen the conclusions that may be drawn on how to improve the delivery of mortgage services to LEP borrowers through this data.

Additionally, codifying the current data requirement for the Enterprises could lead to stricter compliance standards for lenders and servicers if data results show the SCIF is not sufficiently tracking language preference. This change would confuse the newly required regulatory collection obligations with the appropriately voluntary nature of providing answers on the SCIF and may result in pressure on lenders to increase collection efforts despite the fact that the borrower controls the election on the SCIF. This risk is heightened by the conversion of the requirement from policy to a regulation subject to supervision. Thus, a requirement to collect the data could trickle down into inappropriate pressure on borrowers to complete the selection or create adverse consequences for lenders if borrowers decline to provide the data on the SCIF.

As mentioned, MBA supports FHFA's Equitable Housing Finance Plans to help underserved borrowers. We recommend that FHFA remove the data collection standards from the proposed rule. Doing so eliminates additional uncertainty and possible risk for the industry while still protecting FHFA's goal to identifying barriers to access.

IV. Conclusion

MBA supports FHFA's efforts to create a fairer and more equitable housing industry. We agree that increasing transparency and accountability will ensure a long-term commitment towards addressing barriers to sustainable housing for underserved communities. We urge FHFA to further explore codification of the EHFPs to ensure they are formalized as a function of the Enterprises' mission obligations rather than as a safety and soundness requirement. We also encourage FHFA to reconsider the inclusion of the FTC's UDAP standards and its data collection standards regarding language preference.

We look forward to continuing the partnership with FHFA and supporting ongoing work on these issues. Should you have any questions or wish to discuss these concerns further, please contact Sasha Hewlett at 202-557-2805 or via email at shewlett@mba.org.

Sincerely,

Pete Mills
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Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association