WYLIE LAW PLLC

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Clinton Jones
General Counsel
U.S. Federal Housing (FHFA)
400 Seventh Street, SW
Washington, DC 20219

Attention: Comments/RIN 2590-AB53

Dear Mr. Jones:

I am the former Deputy Director of Public Interest Examinations and former head of the Office of Fair Lending Oversight at the Federal Housing Finance Agency (FHFA), now styled U.S. Federal Housing (FHFA). I appreciate the opportunity to comment on FHFA's notice of proposed rulemaking to repeal the Fair Lending, Fair Housing, and Equitable Housing Finance Plans regulation ("Part 1293"). These comments represent my personal views and are based on my knowledge of the relevant laws and experience leading these functions at FHFA for seven years.

"In totality, FHFA's actions amount to a consciously and expressly adopted general policy that is so extreme as to amount to an abdication of statutory responsibilities"

One need look no further than the very section of its enabling statute that creates the agency to understand how deeply flawed FHFA's proposal is. FHFA was created by Congress to have "general regulatory authority" over its regulated entities, and the Director is given a mandatory duty to "exercise such general regulatory authority to ensure that the purposes of . . . any other applicable law are carried out." 12 U.S.C. § 4511(b)(2). I do not support the repeal of part 1293 and other recent actions by FHFA (including rescission of advisory bulletins, rescission of agency orders, and terminations of staff) that are directed toward nonenforcement of the Fair Housing Act, the Equal Credit Opportunity Act, 12 U.S.C. 4545, and the prohibition on unfair or deceptive acts in Section 5 of the Federal Trade Commission Act (applicable fair lending and consumer protection laws).[1] In totality, FHFA's actions amount to a "consciously and expressly . . . adopted general policy that is so extreme as to amount to an abdication of . . . statutory responsibilities" to enforce applicable fair lending and consumer protection laws

[1] These comments focus on the proposed repeal of 12 C.F.R. § 1293.11 and other similar recent actions by FHFA. However, I also agree with other commenters who do not support repeal of other sections of part 1293 for the well-stated and thoughtful reasons articulated. I have chosen to focus on this narrower topic because it is less likely to be covered in detail by other comments.

against Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), which FHFA is charged to do. *Heckler v. Chaney*, 470 U.S. 821, 833 n. 4 (1985). When combined with FHFA's conservator authority, FHFA's actions further serve to insulate Fannie Mae and Freddie Mac from any enforcement of applicable fair lending and consumer protection laws by individuals, other federal agencies, states, localities, and organizations who assert rights on behalf of the public. This raises constitutional concerns about agency abdication of responsibility combined with the use of agency authority to insulate regulated entities from accountability.

I. Administration and Enforcement of Applicable Fair Lending and Consumer Protection Laws Under FHFA's Statutory Authority

FHFA's statute shares many similarities with statutory frameworks for other federal financial regulators, which clearly served as a model for Congress in creating FHFA as an agency in 2008. Understanding how the statutes of these regulators function with respect to enforcement of applicable fair lending and consumer protection laws is therefore important.

"FHFA is now alone as a federal financial regulator in complete abandonment of cease-and-deist enforcement of applicable fair lending and consumer protection laws"

One of the key provisions is section 8 of the Federal Deposit Insurance Act. 12 U.S.C. § 1818. It provides authority for the regulator to pursue cease-and-desist orders for violations of "a law, rule, or regulation," 12 U.S.C. § 1818(b)(1), or civil money penalties for violations of "any law or regulation," 12 U.S.C. § 1818(i)(2), against entities under their jurisdiction. Federal financial regulators including the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of Comptroller of the Currency, and the National Credit Union Administration (under a similar statute) use this authority to supervise and enforce fair lending and consumer protection laws against their regulated institutions. Similarly, FHFA's authority enables it to pursue cease-and-desist orders for violations of "a law, rule, regulation," 12 U.S.C. § 4531(a)(1). FHFA is now alone as a federal financial regulator in complete abandonment of cease-and-desist enforcement of applicable fair lending and consumer protection laws under this statutory language.

However, there is a key difference between FHFA's civil money penalty authority and that of other federal financial regulators. FHFA's civil money penalty authority empowers it to enforce violations of "any provision of this chapter, the authorizing statutes, or any order, condition, rule, or regulation under this chapter or any authorizing statute." 12 U.S.C. §

4636(b)(1)(A).[2] Thus, to fulfill its Congressional general regulatory authority mandate over its regulated entities and ensure they comply with applicable law, FHFA must engage in an extra step compared to its peer financial regulators. For applicable laws not contained within the Safety and Soundness Act or the authorizing statutes, FHFA must establish a compliance requirement by "order, condition, or rule" in order to exercise its ability to enforce civil money penalties based on violations. Otherwise, it is limited to cease-and-desist to enforce applicable law. This is partly why the FHFA is given broad order and rulemaking under 12 U.S.C. § 4526 by Congress to not simply implement the specific provisions of the Safety and Soundness Act, but also to "carry out the duties of the Director" and "ensure that the purposes" of the laws are carried out, including Congress's charge to enforce "applicable law" with respect to the regulated entities it put under FHFA's charge. This step reflects a sensible requirement by Congress that ensures FHFA's enforcement of financial penalties for noncompliance with applicable law complies with longstanding "fair warning" requirements by giving regulated parties notice of which laws it intends to enforce. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), *United States v. Williams*, 553 U.S. 285, 304 (2008); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

A. Administration and Enforcement of the Fair Housing Act

> "[T]he administration of the Fair Housing Act by statute also falls to all housing and financial regulators"

FHFA stated in its notice of proposed rulemaking that "[w]ith respect to the Fair Housing Act, the Department of Housing and Urban Development ('HUD') is the administering agency" as part of arguing that requiring compliance with the Fair Housing Act by FHFA is unnecessary. However, FHFA's statement omits much, as the administration of the Fair Housing Act by statute also falls also to all housing and financial regulators pursuant to 42. U.S.C. § 3608(d).

The original Fair Housing Act specified in 1968 that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of" the Fair Housing Act, Pub. L. 90-284, section 808(d). Unfortunately, federal financial regulators initially failed to use their authority to enforce the law against their regulated institutions after its passage in 1968. This led to legal action in 1976 in *National Urban League v. the Office of the Comptroller of the Currency*. 78 F.R.D. 543 (1978). Most of the regulators settled and began

[2] "This chapter" refers to Chapter 46 of Title 12 of the United States Code, typically called the Safety and Soundness Act by FHFA. The authorizing statutes is a statutorily defined term under 12 U.S.C. § 4502(3) that includes the Fannie Mae and Freddie Mac charters and the Federal Home Loan Bank Act.

to enforce the Fair Housing Act, including one of FHFA's predecessor regulators, the Federal Home Loan Bank Board. However, enforcement by the federal financial regulators still lagged. There was some indication in Congressional hearings that regulators even took actions to shield their regulated entities from enforcement of the Fair Housing Act by the Department of Justice.

"When FHFA was created as a housing and financial regulator, it took on the authority and responsibility of enforcement of the Fair Housing Act"

Congress took decisive legislative action in 1988. It amended the Fair Housing Act to be crystal clear that "[a]ll 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" the Fair Housing Act. 42 U.S.C. § 3608(d). This represented a clear act by Congress to limit the default rule of prosecutorial discretion presumed in agency enforcement that was announced a mere three years earlier by the Supreme Court in *Heckler v Chaney*. 470 U.S. 821 (1985). Through the 1988 amendment, Congress overturned that default rule "by setting substantive priorities" for financial regulators and "circumscribing" their ability to elect not to enforce the Fair Housing Act. *Heckler*, 470 U.S. at 833. When FHFA was created as a housing and financial regulator, it took on the authority and responsibility of enforcement of the Fair Housing Act under 42 U.S.C. § 3608(d).

B. Administration and Enforcement of 12 U.S.C. 4545

FHFA's assessment of 12 U.S.C. § 4545 in the proposed rule in footnote 19 is also lacking by omission and inaccurate in certain respects. While it is true that Congress assigned rulemaking authority to HUD under 12 U.S.C. § 4545, enforcement authority is assigned to FHFA under 12 U.S.C. § 4531 and 12 U.S.C. § 4636. FHFA misreads HUD's acknowledgement of its need to refer violations to FHFA in 24 C.F.R. § 81.47(a) as a negative statement about FHFA's independent authority and duty under the Safety and Soundness Act to ensure compliance with all provisions of the Act. Not only can a HUD regulation not change a statutory command to FHFA, the regulation at issue does not purport to.

II. FHFA's Repeal of Key Parts of 12 C.F.R. part 1293 and Other Recent Actions

Through its proposed rule, FHFA is seeking to remove 12 C.F.R. § 1293.11(a) and (b) which required the regulated entities to comply with the applicable fair lending and consumer protection laws.

FHFA has also taken other recent actions of a similar nature:

- FHFA has rescinded Order No. 2025-OR-B-1 which required the Federal Home Loan Banks to comply with the applicable fair lending and consumer protection laws;[3]

- FHFA has rescinded Order No. 2025-OR-FHLMC-1 which required Freddie Mac to comply with the applicable fair lending and consumer protection laws;[4]

- FHFA has rescinded Order No. 2025-OR-FNMA-1 which required Fannie Mae to comply with the applicable fair lending and consumer protection laws;[5]

- FHFA has rescinded Order No. 2021-OR-FHLMC-2 which required Freddie Mac to comply with the applicable fair lending laws;[6]

- FHFA has rescinded Order No. 2021-OR-FNMA-2 which required Fannie Mae to comply with the applicable fair lending laws;[7]

- FHFA has rescinded Advisory Bulletin AB 2024-07 which provided practical guidance to the Federal Home Loan Banks on compliance with the applicable fair lending laws;[8]

- FHFA has rescinded Advisory Bulletin AB 2024-06 which provided practical guidance to the regulated entities on compliance with applicable consumer protection laws;[9]

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[3] https://web.archive.org/web/20250223210556/https://www.fhfa.gov/document/fair-lending-reporting-order-fhlb.pdf
[4] https://web.archive.org/web/20250223210600/https://www.fhfa.gov/document/fair-lending-reporting-order-freddie-mac.pdf
[5] https://web.archive.org/web/20250223210603/https://www.fhfa.gov/document/fair-lending-reporting-order-fannie-mae.pdf
[6] https://web.archive.org/web/20250223145729/https://www.fhfa.gov/sites/default/files/2023-04/FRE-Final-Order-re-Fair-Lending-Reporting.pdf
[7] https://web.archive.org/web/20250223145727/https://www.fhfa.gov/sites/default/files/2023-04/FNM-Final-Order-re-Fair-Lending-Reporting.pdf
[8] https://web.archive.org/web/20250310220420/https://www.fhfa.gov/advisory-bulletin/ab-2024-07
[9] https://web.archive.org/web/20250310220422/https://www.fhfa.gov/advisory-bulletin/ab-2024-06

- FHFA has rescinded Advisory Bulletin AB 2021-04 which provided practical guidance to the regulated entities on compliance with applicable fair lending laws;[10]

- Through purported reductions in force and other actions, FHFA has ended the employment of all FHFA staff who were responsible for supervisory oversight and enforcement of applicable fair lending and consumer protection laws.

While FHFA claims in the proposal that "[t]he repeal of unnecessary FHFA requirements for the regulated entities to comply with specified laws administered by other agencies is not intended to affect the applicability, effectiveness, or enforcement of those laws with respect to the regulated entities," this is simply untrue. By undertaking these actions, FHFA has removed its own ability to impose civil money penalties on its regulated entities for violations of these laws as discussed above, again placing it out of step with its peer federal financial regulators and in contradiction of its stated reservation of authority in the proposal.

III. FHFA's Actions Should be Understood Alongside Actions Occurring at Other Regulators

Because FHFA relies so heavily in the proposed rule on the potential acts of other federal agencies, its actions must be understood with reference to the current state of those agencies.

A. HUD

FHFA supports its proposed repeal by arguing that HUD has primary jurisdiction and is the appropriate administering agency for the Fair Housing Act and 12 U.S.C. § 4545 for FHFA's regulated entities. However, it has been recently reported that HUD's fair housing enforcement has been severely curtailed and the majority of staff transferred to other areas.[11]

B. CFPB

FHFA supports its proposed repeal by arguing that CFPB has primary jurisdiction and is the appropriate administering agency for the Equal Credit Opportunity Act for FHFA's regulated entities. However, the administration has attempted to fire nearly all CFPB staff and is in the process of draining the CFPB of funds in an apparent attempt to close or significantly curtail the agency.

[10] https://web.archive.org/web/20250310220426/https://www.fhfa.gov/advisory-bulletin/ab-2021-04
[11] https://www.nytimes.com/2025/09/22/realestate/trump-fair-housing-laws.html

C. FTC

FHFA supports its proposed repeal by arguing that HUD has primary jurisdiction and is the appropriate administering agency for unfair or deceptive acts or practices for FHFA's regulated entities. However, the administration has fired FTC commissioners.

It is unlikely given the combination of these actions that these regulators could fulfill the role of primary regulator of FHFA's regulated entities under the applicable fair lending and consumer protection laws.

IV. FHFA's Conservator Power Should Not Shield Fannie Mae and Freddie Mac from Outside Enforcement of Applicable Fair Lending and Consumer Protection Laws

FHFA's statute also contains conservator authority modeled by Congress on similar authority for the FDIC. FHFA has served as conservator for Fannie Mae and Freddie since September 6, 2008. As conservator the agency may "operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity." 12 U.S.C. § 4517(b)(2)(B). When it does so, the Agency "shall not be subject to the direction or supervision of any other agency of the United States or any State." *Id.* at 4517(a)(7). Further, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as conservator." *Id.* at 4617(f).

FHFA, Fannie Mae, and Freddie Mac have often argued that these provisions immunize Fannie Mae and Freddie Mac from enforcement by outside federal agencies, states, and others of applicable fair lending and consumer protection laws.

> "Congress surely did not intend to authorize a statutory scheme that immunizes Fannie Mae and Freddie Mac from compliance with applicable fair lending and consumer protection laws for more than 17 years"

FHFA cannot have its cake and eat it too. FHFA cannot abdicate its own responsibility to enforce applicable fair lending and consumer protection laws with one hand while arguing directly or through Fannie Mae and Freddie Mac with the other that they cannot be held accountable under these laws by outside parties. Congress surely did not intend to authorize a statutory scheme that immunizes Fannie Mae and Freddie Mac from compliance with applicable fair lending and consumer protection laws for more than 17 years. Congress does not, "one might say, hide

elephants in mouseholes." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

If FHFA moves forward with the proposed rulemaking, it should resolve this contradiction and the "confusion" that FHFA asserts exists by adopting a regulation that specifies that all regulators specified in the proposed rule preamble as "having primary jurisdiction" as well as other outside actors are not barred by FHFA's conservator authority from enforcing compliance against Fannie Mae and Freddie Mac. A regulatory provision could be adopted as 12 C.F.R. 1237.14:

§ 1237.14 Effect of Conservator or Receiver Authority on Fair Lending and Consumer Protection Enforcement

(a) Courts are not restricted from taking action to enforce compliance with the Fair Housing Act, the Equal Credit Opportunity Act, 12 U.S.C. § 4545, the prohibition on unfair or deceptive acts or practices under 15 U.S.C. § 45 or any similar federal or state statute that applies to a regulated entity that is being operated under conservatorship or receivership by the Agency.

(b) A regulated entity under conservatorship or receivership by the Agency is still subject to the direction or supervision of agencies of the United States and any State with respect to the supervision and enforcement of the Fair Housing Act, the Equal Credit Opportunity Act, 12 U.S.C. § 4545, the prohibition on unfair or deceptive acts or practices under 15 U.S.C. § 45, or any similar federal or state statute that applies to the regulated entity.

FHFA also appears to acknowledge that directors and managers of a regulated entity have a duty to comply with the applicable fair lending and consumer protection laws under their fiduciary duties. 90 FR 35475, 35478 (Jul. 28, 2025). It therefore follows that FHFA cannot insulate actions taken by itself or by the regulated entities while under its conservator or receiver authority that are in noncompliance with the applicable fair lending and consumer protection laws. Such attempts by FHFA would be in excess of its conservator or receiver powers and therefore subject to outside enforcement under the clear precedent established by the Supreme Court in *Collins v Yellen* that "[w]here FHFA does not exercise but instead exceeds [conservator or receiver] powers or functions, the anti-injunction clause imposes no restrictions." 141 S. Ct. 1761 (2021).

V. FHFA Should Instead Fulfill its Statutory Responsibilities

Instead of the course of action undertaken by FHFA in the proposed rule and other recent actions, FHFA should keep 12 C.F.R. § 1293.11 in its current form, employ sufficient staff

knowledgeable and competent in the applicable fair lending and consumer protection laws, and permit them to operate with sufficient autonomy in a separate organizational unit so that they are not subjected to obstruction from other FHFA staff or regulated entity officers and directors when conducting their work. This will both fulfill FHFA's statutory responsibilities and ensure that Fannie Mae and Freddie Mac receive consistent enforcement and supervision on these issues rather than be subject to the enforcement and supervision of multiple outside actors.

Sincerely,

James Wylie
Principal
Wylie Law PLLC