

July 20, 2010

Mr. Alfred M. Pollard
General Counsel
Federal Housing Finance Agency

RE: RIN 2590 – AA27

Dear Mr. Pollard:

On behalf of the Consumer Federation of America, Center for American Progress Action Fund, Center for Responsible Lending, CDFI Coalition, National Association of Consumer Advocates, National Fair Housing Alliance, National Council of La Raza, and Opportunity Finance Network, we are pleased to offer comments on the proposed rule RIN 2590-AA27 to establish the Duty To Serve Underserved Markets for Fannie Mae and Freddie Mac.

We are pleased with the overall proposal, and appreciate the attention given to comments we submitted earlier in 2010 on the Advance Notice of Proposed Rulemaking. The importance of the Enterprises' role in meeting consumers' need for affordable and sustainable mortgage credit is greater today than in recent years. The mortgage crisis has highlighted the dangers of unregulated capital market participation in the mortgage system, and the risks to which consumers can be exposed when unsustainable mortgage products are allowed to proliferate. The Enterprises themselves engaged in support for some types of loans that have proven to be very damaging to their own capital, and to the homeowners and communities in which they were originated. Under Conservatorship, however, these practices have been ended and the Enterprises today are financing the vast majority of all mortgage credit.

Before addressing each of the specific questions raised in the proposed rule, we note FHFA's current policy of not approving any innovative or new credit products for either Enterprise during the Conservatorship.¹ While we can understand and support the importance of focusing the Enterprises on their core business lines, we also believe it is important in fulfilling both congressional intent in establishing the duty to serve in 2008, and in meeting the needs of low and moderate income consumers and communities that some innovation not only be permitted but encouraged. Continued high unemployment and underemployment; record-high delinquencies and foreclosures; and the inability of the Administration's *Making Home Affordable* program to provide relief to more than a small portion of homeowners facing financial stress in making their mortgage payments requires more, not less, innovation and flexibility in mortgage credit. This is even more important as non-Enterprise sources of mortgage capital remain on the sidelines, in both the homeownership and rental housing sectors. Without leadership from the Enterprises, we are concerned that entire segments of the low and moderate income population, as well as many borrowers of color, and the communities where they are concentrated will suffer from an unjustified shortage of credit on affordable and sustainable terms.

¹ "...FHFA's approach ...is to limit the proposed rule to existing core business activities of the Enterprises and not to require that they engage in new lines of business as a result of the duty to serve proposed rule." *Federal Register*, Vol. 75, No. 108, p 32100

The proposed rule also would prohibit counting any purchases of single-family private label securities (Sec. 1282.37(b)(6)). While we strongly support the exclusion of loans or securities backed by loans that fail to meet the specific tests relative to HOEPA or the Interagency Guidelines, this blanket prohibition potentially could prevent the Enterprises from providing support for underserved markets that otherwise should be encouraged. For instance, a group of CDFIs or nonprofit housing sponsors could package together loans they have originated using specialized expertise based either on location or the type of property. Such a security could be an important source of liquidity to continue or expand innovative lending programs. We do not see the value in prohibiting the Enterprises from purchasing such a security and receiving credit under the duty to serve. Similarly, the proposed rule would prohibit inclusion of any subordinate mortgages (Sec. 1282.37(b)(12)). Again, there are instances, including in rural areas, where local governments are issuing second liens with equity sharing provisions or other public purpose features to low and moderate income homeowners. The Enterprises should not be discouraged from exploring ways through which these loans could be packaged into securities and purchased by the Enterprises in order to expand liquidity and foster standardization among these second liens. We urge FHFA to reconsider this ban and substitute a more narrowly drawn prohibition in its place.

Sec. 1282.37(b)(14) also prohibits counting purchases of mortgages where the property has not received a certificate of occupancy. But in Sec. 1282.37(d), the proposed rule requires that loans only be counted in the year in which they are acquired. It is possible, especially for rental properties, that financing will be issued and loans purchased or guaranteed in advance of the receipt of a certificate of occupancy. This could be especially true where properties will be rehabilitated using proceeds from the loan. Should the time difference straddle a calendar year, it appears that the effect of the rule would be to prohibit the loan's counting. This seems counterproductive and unnecessary, and the proposed rule offers no further explanation for this requirement. We urge either clarifying language in the final rule, or modification of the proposed provision.

Manufactured Housing

We strongly support FHFA's decision to only consider loans for manufactured housing that are titled as real property toward the duty to serve requirement.

With respect to financing of manufactured home communities, we strongly support including financing for resident-owned and operated communities and therefore object to the prohibition in Sec. 1282.37(b)(5). Fannie Mae has worked with advocates and community development financial institutions (CDFIs) that are focused on helping residents convert their communities from third party ownership, and we believe this kind of effort should be supported and encouraged. Securing ownership of these communities is an important step in preserving their affordability and availability over time. Because these communities can be one of, or perhaps the only, form of affordable homes in some communities, securing their long-term availability is critical. We strongly support encouraging the Enterprises to use their resources to support acquisition by resident cooperatives and community land trusts that will preserve the property's affordability over time.

In all cases we strongly support the consumer protection provisions included in the comments by the National Consumer Law Center in its comments on behalf of its low income clients on the ANPR earlier this year.

Multifamily Housing

We strongly support the proposed rule's inclusion of all the major HUD administered assistance programs that support affordable rental housing, and we support including the Section 221(d)(3) program, as well. We note that Fannie Mae has altered its underwriting guidelines for properties receiving Section 8 subsidies to more fully count the value of these subsidies and eliminate the requirement for sponsors to retain significant reserves as a hedge against appropriations risk for Section 8. This is a very positive step and one that should be encouraged through the proposed rule.

While these programs are of critical importance in preserving the stock of existing affordable rental housing, the vast majority of low income tenants live in unsubsidized, and usually smaller rental properties. The Enterprises have developed a significant and important market presence in projects with more than 50 units; their market share in the sector generally rose from 30 to 40 percent between 2008 and 2009, but their share of small multifamily loans remained flat.²

We recommend that FHFA include in the duty to serve the following activities with respect to investments in affordable rental housing:

1. Equity or debt investments in CDFIs that specialize in aggregating capital to invest in preserving and rehabilitating smaller rental properties. Examples of such entities include CIC in Chicago and CPC in New York.
2. Developing streamlined processes for underwriting debt on smaller properties that lower the transaction costs for these smaller loans. High transaction fees have been an impediment in the past.
3. Providing guarantees on low income housing tax credit (LIHTC) equity to broaden the market for equity investment.
4. Developing risk sharing partnerships that could extend the Enterprises' ability to underwrite debt on smaller properties with lower transaction and due diligence expenses.
5. Invest in multi-family housing that will expand affordable rental options in higher opportunity neighborhoods and contribute to the deconcentration of poverty.

We also strongly urge FHFA to include various forms of assistance that the Enterprises might make available to public housing agencies (PHAs) to assist them in preserving and/or upgrading housing they own and manage, and to local and state governments to assist in programs they operate for the same purposes. In particular, long-standing public finance products that Fannie Mae has marketed through which localities and PHAs can capitalize streams of entitled annual funds for modernization, reconstruction and rehabilitation are valuable tools that should be receive credit as part of the duty to serve obligation. Although they are in conservatorship, the Enterprises can continue to play an innovative

² *State of the Nation's Housing 2010*, Joint Center for Housing Studies, Harvard University, p. 24

and effective role in bridging public funds with private investments. The risks involved are low. The Enterprises should be able to offer such products at safe and competitive rates. Such efforts complement the more routine guaranteeing of debt issued by others for the same purposes.

We also endorse including support for state-funded or supported programs to preserve assisted affordable homes in assessing the duty to serve requirement. Affordable housing opportunities that contribute to the deconcentration of poverty, desegregation of neighborhoods, and expansion of housing choice for low and moderate income renters and homebuyers should also be included when assessing the duty to serve requirement.

Underserved Markets Plan

We support the broad outline of the proposed requirement for the Enterprises to file an “underserved markets plan.” These should be made available to the public promptly after they have been filed, so counterparties and other interested parties can fully understand what the Enterprises propose to do in carrying out their plan. But we strongly urge that these plans be subject to public review and comment before being adopted. This is especially important given that the proposed rule would require the plans to cover a two-year period.³ This will give those most likely to benefit from the Congress’ requirement to impose the duty to serve to provide feedback and recommendations before the Enterprises commence work under them. Merely allowing the Enterprises to propose benchmarks and targets, as proposed in the rule, without feedback or input from interested parties, risks adoption of plans that will not significantly increase the Enterprises’ work in these areas, or that will emphasize work that is of less value than other alternatives.

We also believe that the plans should be required to include an assessment of obstacles that have prevented greater market participation by the Enterprises in the enumerated areas, and how the benchmarks and activities they propose will address these. This will enable reviewers to understand what areas the Enterprises themselves have identified for remedy, and allow commenters to identify such areas that may not be included, but should be. An important part of increasing the Enterprises’ participation in these markets is gaining a common understanding of the reasons they have not participated more fully in the past, and how their proposed plans of action are likely to reduce or eliminate those obstacles. This could be added in Sec. 1282.35 (c) by adding the following language:

“The plan shall identify and enumerate for each of the underserved areas the obstacles that have been identified by the Enterprise that are or have prevented greater participation in the area, including but not limited to market conditions; risk factors; systems or other issues within the Enterprise’s control; and actual and potential loan volumes. The plan should specifically identify how the proposed benchmarks and activities will reduce or overcome these identified obstacles.”

This should be reinforced with additional language in Sec. 1282.35 (f) as follows:

“Benchmarks and objectives appropriate for a rating of satisfactory for a particular assessment factor should include an accounting for how the activities undertaken during the review period addressed the obstacles and difficulties identified in the plan; to what

³ Sec. 1282.35(b)

degree they were effective; and if they were not effective, why they were not. In addition, the rating for a particular assessment factor may include...”

In addition, the underserved markets plan should address ways in which the Enterprises will address their obligation to affirmatively further fair housing. Although Section 3608 of the Fair Housing Act requires agencies with supervision authority over financial institutions affirmatively further fair housing, FHFA has thus far not adequately considered how its housing goals expand housing choice. Underserved markets plans must address ways in which the Enterprises will not only increase the supply of housing but must also address how the Enterprises will increase housing choice, including ways in which it will increase the supply of affordable housing in high-income census tracts.

Loan Product Assessment

We support including research and development activities in the area of loan underwriting and loan performance as part of the plan and fulfilling the duty to serve. Underwriting guidelines that have the effect of restricting credit to low and moderate income families and communities, and particularly communities of color, should receive a high priority in the development of such work. In particular, we urge the Enterprises to carefully review the performance of responsible community lending products that were developed during the 1990’s and early 2000’s, and review the potentially disparate impacts of current loan level pricing adjustments that have contributed to Enterprise low down payment loans’ lack of commercial competitiveness with FHA.

We appreciate the proposal’s reiteration of the congressional charge in the Enterprises’ charter that activities that benefit low and moderate income families may have lower, albeit still profitable, returns than other products.⁴ We support the development and use of products that are economically sustainable. But there are varying levels of profitability throughout the Enterprises’ book of activities. Those that serve low and moderate income families and communities, and that meet the duty to serve established by Congress, should be a high priority under this interpretation.

Outreach Assessment Factor

We support the inclusion of activities that help foster wider use of Enterprise initiatives and products in this assessment factor. But we strongly urge FHFA to require Enterprise plans to identify specific *outcomes* that will result from these activities. It is important for the Enterprises to meet with stakeholders and customers, and to provide training in the use of their products and services. But these are basic commercial functions that the Enterprises and, should and do carry out in the normal course of their business. With respect to the duty to serve, there should be an obligation to connect the outreach and education activities with concrete anticipated results. In this way, FHFA and stakeholders can evaluate whether these activities are effective, and either reinforce similar activities or direct the Enterprises to adjust their strategies accordingly.

⁴ *Federal Register*, op cit, p. 32111

Loan Purchase Assessment Factor

This is the most critical element of the proposed duty to serve plans. Concrete results reflected in greater lending in current products, or initiatives with altered products to meet specific needs are the most important result anticipated by the duty to serve requirement. The proposal to judge performance “relative to the market opportunities available to the Enterprise”⁵ should be augmented by a review of the degree to which the Enterprises have increased their level of investment in the underserved markets over a period of time. Year to year fluctuations in market conditions will affect the opportunities available to the Enterprises. But unless there is a trend toward improved performance, the plans will not have their desired effect. FHFA should consider seeking public review and comment on the plans and the Enterprises’ reported results in order to gain effective third party insights into their performance. For instance, it would be helpful to know whether announced programs to acquire loans under the requirements actually work, or have been frustrated by repeated obstacles. This has been the case too often in the past with Enterprise initiatives that seemed promising on paper, but that led to little or no actual investment.

Again, since the plan would require the Enterprises to themselves propose the benchmarks by which they will be judged in this area, we repeat our recommendation that proposed plans be open to public review and comment before they are adopted.

Investments and Grants Assignment Factor

We strongly support including this factor in the evaluation of Enterprise performance. We are troubled by FHFA’s assertion in the proposed rule that “Because the Enterprises are in conservatorship and are obligated to pay dividends to the Treasury for preferred shares of Enterprise stock...the investments and grants assessment would receive little to no weight.”⁶ This offers no incentive for the Enterprises to do what is sometimes most critical in seeding new markets or new products, and that is to assist in their use through either investments, grants or both. We urge FHFA to reconsider this position in the final rule.

Assigned Ratings

We believe that the intention of the duty to serve requirement will be best served if the ratings that are assigned to performance under the final rule include more than simply “satisfactory” and “unsatisfactory.” Experience under the Community Reinvestment Act has illustrated that simple binary tests make genuinely useful evaluations of performance very difficult. More gradations will enable FHFA to bring an important level of nuance and sophistication to its evaluation of Enterprise performance under the plans.

We also believe that a satisfactory performance overall should be predicated on the Enterprise receiving at least a satisfactory rating on its loan purchase assessment factor. This would be consistent with the requirement under CRA that lenders must receive at least a satisfactory rating in the lending test in order to receive an overall satisfactory rating. As noted earlier, the acquisition of loans is the most important test under the duty to serve. Making this test a bar the Enterprises must clear in order to receive a generally satisfactory report would emphasize this.

⁵ Sec. 1282.36(a)(4)

⁶ *Federal Register*, op cit, p. 32112

Requirements for Transactions or Activities.

We support the provisions of these sections in the proposed rule.

FHFA seeks comment on the use of census tract median incomes in cases where actual tenant income is not available. Although this is an imperfect means by which to determine income, and the Enterprises should be required to make every possible effort to acquire actual tenant incomes, we support this method over the alternative proposed in the rule.

Enterprise Reporting

We support the proposed requirement for three quarterly and one final report. This is consistent with the reporting regime for the housing goals. We support the proposed contents proposed in the rule.

Respectfully submitted,

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National Fair Housing Alliance
Opportunity Finance Network