

March 17, 2016

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 7th Street SW
Washington, DC 20219

Re: Enterprise Duty to Serve Underserved Markets, Notice of Proposed Rulemaking, 80 Fed. Reg. 79182 (December 18, 2015)

Dear Mr. Pollard,

This letter is submitted on behalf of the undersigned civil rights and fair housing organizations to provide input on the FHFA's proposed "Duty to Serve" rule. We applaud the agency's effort to provide "Extra Credit for Residential Economic Diversity Activities," consistent with its duty to promote fair housing, and we are also proposing several improvements and corrections in response to the questions set out in the notice. Throughout these comments, we are responding to the general question of "how the residential economic diversity activities for extra credit should be defined and assessed" (p. 79185), and our comments also address specific questions in the proposed rule, which are referenced in the section headings below.

As a federal agency administering activities relating to housing, the Federal Housing Finance Agency is bound by the duty to affirmatively further fair housing, as set out in the 1968 Fair Housing Act:

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.

42 U.S.C. §3608(d). This requirement extends as well to the federally chartered GSEs.¹ Judicial decisions have defined the "affirmatively furthering fair housing" duty as follows: (1) federal agencies may not engage in discrimination, including practices that establish, perpetuate or exacerbate segregation; (2) federal agencies must not permit and may not acquiesce in the discrimination of the non-federal actors they supervise; (3) federal agencies must assess the civil rights impact of their supervisory and financial decisions; and (4) federal agencies and those they supervise must take affirmative steps to dismantle conditions of discrimination and create truly open housing markets. See "Affirmatively Furthering Fair Housing" (final rule), 80 Fed. Reg. 42272 (July 16, 2015) and cases cited therein. The FHFA's proposed Duty to Serve rule is an

¹ It is important to note, in the context of the proposed FHFH Duty to Serve rule, that a significant reason for the adoption of Section 3608 of the Fair Housing Act was the explicit redlining and exclusion of African Americans from the federal housing finance system in the emerging American suburbs of the mid-20th Century. This practice of racial apartheid, which America is still struggling to undo, was perpetrated by the predecessors of the GSEs currently overseen by the FHFA. See, e.g., David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in *The New Suburban History* 11, 16 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

important step toward FHFA compliance with Section 3608 of the Fair Housing Act, but it also needs to be strengthened and more carefully tailored to achieve the agency's goals.

1. The emphasis on economic diversity should be a mandatory element of the Duty to Serve rule, and should take race into account (questions 4,6,7,43,82,86)

The duty to affirmatively further fair housing is not optional for federal agencies engaged in oversight of programs and activities affecting housing and urban development. The proposed rule should set out clear expectations for geographic balance in duty to serve investments, so as to avoid an over-concentration of units in higher poverty or racially segregated neighborhoods, and to ensure that developments in low poverty areas are accessible to low income families of color through strong affirmative marketing efforts.

2. FHFA's proposed use of HUD-defined "Difficult to Develop Areas" (DDAs) as a proxy for high opportunity areas is a good step, but is too limited for nationwide application (82,83)

The use of a DDA-type measure of housing cost by zip code makes sense as an easy-to-implement and rough proxy for opportunity. However, HUD's particular method for calculating DDAs (counting the 20% of zip codes with highest cost nationwide, vs the 20% of highest cost zip codes in each MSA) is not required by the LIHTC statute and unnecessarily limits the number of DDAs in each metro area. It also creates a significant imbalance with the number of eligible QCTs in each metro area, which will create unintended incentives for imbalanced application of the incentive in many regions.

If FHFA is committed to using a Difficult to Develop Areas index as a proxy for opportunity, we recommend that FHFA request from HUD an **alternative metro-based version of DDAs** that lists the 20% of highest cost zip codes in each metro area, and augment that list by including all low poverty census tracts in the metropolitan area that are not already including in the DDA formulation.

3. FHFA's proposed definition of "mixed income housing" should be adjusted to reflect the realities of housing development in high poverty areas (85)

We support the incentive to support preservation of "mixed income" housing in poor neighborhoods. But we urge FHFA to require that the **mixed income incentive reflect the actual occupants** of the developments, not just the "rent structure" of the development. The reality of some "mixed income" rental housing in high poverty neighborhoods is that the "higher rents" in these properties are often supported by Section 8 Housing Choice Voucher families, who can afford the higher rent because of their voucher, but who are often the poorest residents of the neighborhood.

4. Supporting community revitalization efforts in Qualified Census Tracts (84,87)

FHFA's proposal to track the Low Income Housing Tax Credit statute's preference for developments in QCTs that "contribute to a concerted community revitalization plan" is appropriate, but unless this provision is made a general condition of investment (rather than an optional incentive), it will have little effect, as most developments will be located in QCTs where there are no meaningful community revitalization efforts going on.

The question of how areas with “concerted community revitalization plans” should be identified is difficult. Choice Neighborhood and Promise Zone designations are a reasonable approach, since they generally require significant organizing, documentation, and non-housing investment to qualify. Our review of state LIHTC Qualified Allocation Plans (QAPs) has found a wide range in the definition of the “community revitalization” preference, and we would urge FHFA not to use these state QAP definitions. It is possible that HUD or the Treasury Department may define the “concerted community revitalization plan” requirement in the future, and the rule should remain flexible enough to include such a subsequent definition.

5. What additional Enterprise activities should be included in the Economic Diversity incentive?
(38,82,83,86)

For developments in higher opportunity areas (DDAs and low poverty census tracts), FHFA should encourage and require strong affirmative marketing plans, including recruitment of Section 8 Housing Choice Voucher families with children from higher-poverty areas.

For all developments, discrimination against voucher holders should be prohibited as part of the underwriting process and mortgage, as it is in LIHTC, HOME, and other programs.

6. Other comments (27,43)

In regard to the FHFA’s request for comments on whether the term “preservation” should include new construction, we would object to this definition, particularly where existing housing in a high poverty neighborhood is being demolished and replaced. Unless the neighborhood in question is in the direct path of gentrification, rebuilding such a development will perpetuate and extend segregation in the neighborhood, unless a significant portion of the replacement units are located off-site, in a high opportunity area.

Thank you for the opportunity to present these comments. Please let us know if you would like any additional information.

Sincerely,

Philip Tegeler
Megan Haberle
Poverty & Race Research Action Council
Washington, DC

Joseph Rich
Lawyers Committee for Civil Rights Under Law
Washington, DC

Hilary O. Shelton
NAACP
Washington, DC

Lindsay Daniels
National Council of La Raza
Washington, DC

Kate Walz
Sargent Shriver National Center on Poverty Law
Chicago, IL

Myron Orfield
Institute on Metropolitan Opportunity
Minneapolis, MN

David Harris
Charles Hamilton Houston Institute
Harvard Law School
Cambridge, MA

Adam Gordon
Fair Share Housing Center
Cherry Hill, NJ

Maddie Sloan
Texas Appleseed
Austin, TX

Rob Breymaier
Oak Park Regional Housing Center
Oak Park, IL

Patrick Maier
Innovative Housing Institute
Baltimore, MD

Erin Boggs
Open Communities Alliance
Hartford, CT

William R. Tisdale
Metropolitan Milwaukee Fair Housing Council
Milwaukee, WI