



December 12, 2023

Via Email: FOIA@fhfa.gov
Sean Dent, Chief FOIA Officer
400 7th Street, SW
8th Floor
Washington, DC 20219

Freedom of Information Act Request: Legal Review of 88 Fed. Reg. 25,293

Dear Mr. Dent:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL has over 186,000 followers on X, and our Founder and President has over 550,000 followers on X.

I. Introduction

On April 26, 2023, the Federal Housing Finance Agency (FHFA) published the proposed rule “Fair Lending, Fair Housing, and Equitable Housing Finance Plans,” 88 Fed. Reg. 25,293 (Proposed Rule). The Proposed Rule directly conflicts with the Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023), in which the Court held that race-conscious programs violate the Equal Protection clause of the Constitution and are reviewed under the “strict scrutiny” standard. The Court also held that past racial discrimination is not a valid justification for racial discrimination in the present. *Id.* at 226. Yet, the Proposed Rule specifically redefines “underserved communities,” to which the federally chartered housing finance enterprises promote mortgage credit access, so that “past discrimination” is considered instead of economic factors. 88 Fed.

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Reg. at 25,300.¹ It truly “is a sordid business, this divvying us up” by race, color, national origin, or sex. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

Despite the Court clearly prohibiting racial discrimination, and the Biden Administration’s pattern of backing off of its own unlawful discriminatory policies,² FHFA’s Proposed Rule is yet another attempt by this Administration to offer benefits to some at the expense of others. The Proposed Rule falls short of the strict scrutiny standard, only justifying the government’s need for the Proposed Rule by claiming that statutory authorities of FHFA and the Enterprises “speak to the need to advance equity.” 88 Fed. Reg. at 25,294. Notably, the Proposed Rule does not define “equity.”

Through the Proposed Rule, the FHFA is allowing race to play a critical role in its conservatorship of Fannie Mae and Freddie Mac instead of basing eligibility for benefits on criteria permitted under existing law. For this reason, and all the other reasons articulated by members of the Senate Banking Committee,³ it appears that the agency issued the proposed notice without adequate legal review.

II. Record Requested

AFL requests the following records under 5 U.S.C. § 552:

- A. All records showing FHFA’s definition of the term “equity” as it is used in the Proposed Rule.
- B. All records of communications—including emails and memoranda—with the Office of General Counsel relating to the Proposed Rule.
- C. All records of meetings with the Office of General Counsel relating to the Proposed Rule.

III. Custodians

Office of the Director

- A. Sandra Thompson
- B. Karen Chang

¹ FHFA regulations currently define “underserved markets” to include manufactured housing, affordable housing, and rural. 12 C.F.R. § 1282.1.

² *E.g. Biden Administration Caves in Response to AFL Lawsuit, Will End Unconstitutional Racial Preferences in the Restaurant Revitalization Fund*, AMERICA FIRST LEGAL (June 4, 2021), <https://bit.ly/3tfjtEI>; *MAJOR VICTORY: President Biden and His Allies in Congress Rescind Racially Discriminatory Farm Loan Forgiveness Program; AFL Vows to Continue Fight for Equality for American Citizens*, AMERICA FIRST LEGAL (Aug. 31, 2022), <https://bit.ly/3RBKsDw>.

³ Letter from Members of the S. Comm. on Banking, Hous. and Urban Affairs, to the Hon. Sandra Thompson, Dir., Fed. Hous. Fin. Agency (Sept. 18, 2023), <https://bit.ly/47SMqVT>.

- C. Dan Fichtler
- D. Marcus S. Williams
- E. Christopher H. Dickerson
- F. Charles C. Yi
- G. Samuel Frumkin

Office of Fair Lending Oversight (OFLO)

- A. James Wylie
- B. Leda Bloomfield
- C. Annalyce Shufelt
- D. Sarah Friedman
- E. Lindsey Cope
- F. Leda DeRosa Bloomfield
- G. Sidney Carter
- H. Denise Lorenzen
- I. Renita Roberts

Division of Housing Mission and Goals (DHMG)

- A. Naa Awaa Tagoe

Office of the General Counsel (OGC)

All political appointees and all career employees with a grade equivalent of GS-15 and above in the OGC, including:

- A. Clinton Jones

IV. Fee Waiver

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees. The requested information specifically concerns identifiable operations and activities of the Federal Government.

AFL has a demonstrated ability and intention to effectively convey the information broadly to the public; AFL's status as a representative of the news media has been recognized by other agencies for granting fee waivers, including the Departments of Defense, Education, Energy, Health and Human Services, Justice, Interior, and Homeland Security. As a non-profit organization, AFL has no identifiable commercial

interest, and the request is made entirely to serve the public interest. We are, of course, available to provide additional information in writing or offline in support of this request. If AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

V. Processing and Production

Processing should occur in strict compliance with the processing guidance in the Attorney General's Memorandum on Freedom of Information Act Guidelines.⁴ To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Will Scolinos
America First Legal Foundation

⁴ U.S. DEP'T JUST. (Mar. 15, 2022), <https://bit.ly/3zvpzb6>.