NATIONAL FAIR HOUSING ALLIANCE

November 10, 2021

The Honorable Sherrod Brown
Chairman
United States Senate Committee on Banking, Housing, and Urban
Affairs 534 Dirksen Senate Office Building
Washington, DC 20510

Re: Nominees for the Board of Governors of the Federal Reserve and the Office of the Comptroller of the Currency and Their Commitment to Fair Lending

Dear Senator Brown:

We are writing to respectfully request that the Senate Committee on Banking, Housing, and Urban Affairs (the "Senate Banking Committee") thoroughly vet nominees for the Board of Governors of the Federal Reserve ("Board") and the Office of the Comptroller of the Currency ("OCC") with respect to their commitment to fair lending given the extremely concerning reports regarding the state of the fair lending supervision and enforcement program at each of these agencies.[1] We are particularly concerned about enforcement of the Fair Housing Act and other fair lending laws, given the persistent Black/White homeownership and wealth gaps. We applaud your lifelong commitment to protecting borrowers and communities of color and hope that you will use your role as Chair of the Senate Banking Committee to ensure that these powerful positions are filled by nominees with a strong and demonstrated commitment to fair lending.

Alarming Trends in Regulators' Fair Lending Referrals to the Department of Justice

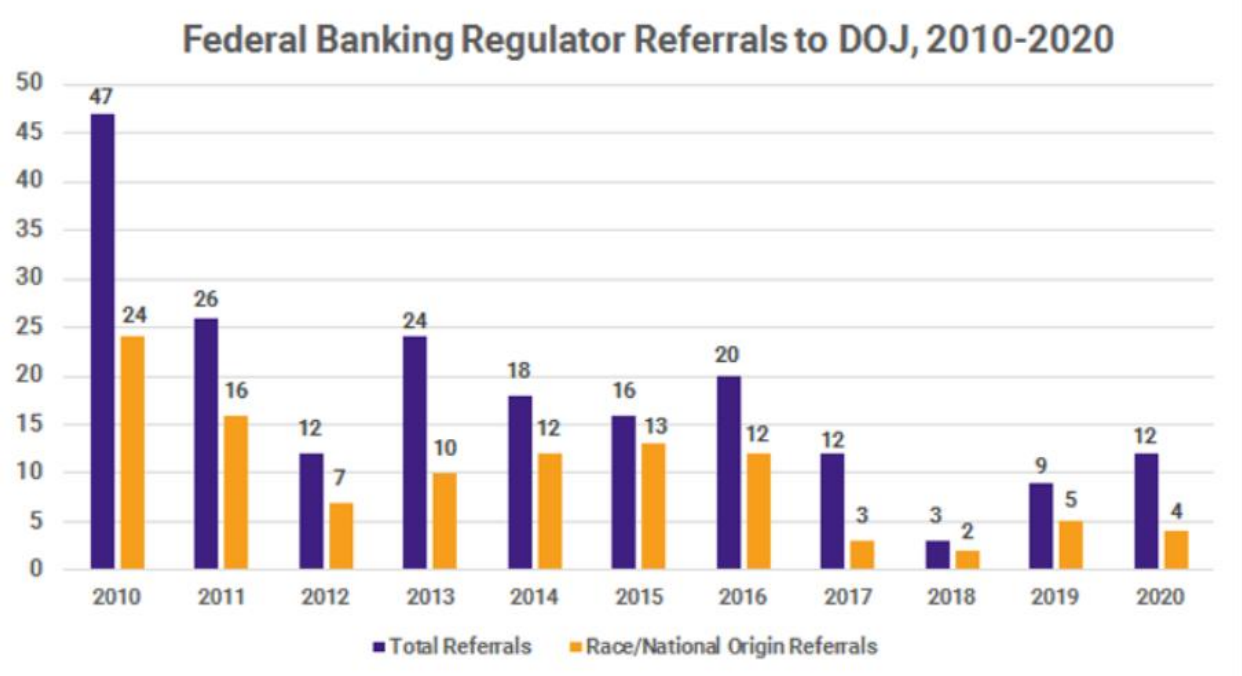
Each of the federal financial regulators, including the Board and OCC, has the responsibility to examine and supervise the regulated financial institutions within its jurisdiction for compliance with the fair lending laws: the Fair Housing Act and the Equal Credit Opportunity Act ("ECOA").[2] That is, as part of their supervisory authority, the federal financial regulators can routinely access the internal data, policies, and procedures of financial institutions to determine whether there is fair lending risk

[1] At the time of this writing, Professor Saule Omarova has been nominated as Comptroller of the Currency. There have been no nominations for positions at the Board, but it is expected that the following positions will be open in the coming months: Chair (Chair Powell's term expires February 5, 2022); Vice Chair of the Board (Vice Chair Clarida's term expires January 31, 2022); and Vice Chair for Supervision (Vice Chair Quarles' term expired October 13, 2021). In addition, the Board will have three open seats: one immediate opening, one opening after Governor Quarles leaves at the end of December, and one opening after Vice Chair Clarida leaves at the end of January (unless he is re-nominated).

[2] The federal financial regulators are: the Board of Governors of the Federal Reserve ("Board"), the Office of the Comptroller of the Currency ("OCC"), the Consumer Financial Protection Bureau ("CFPB"), the Federal Deposit Insurance Corporation ("FDIC"), and the National Credit Union Administration ("NCUA").

and/or a violation. Under the ECOA, the federal financial regulators are required to refer matters to the U.S. Department of Justice ("DOJ") when they have reason to believe a creditor has engaged in a pattern or practice of discrimination. The DOJ is staffed with attorneys who specialize in fair lending enforcement, but they do not have subpoena power or automatic access to the data and documents. Similarly, it is extremely challenging for the U.S. Department of Housing and Urban Development ("HUD"), state agencies, and civil rights and consumer advocates to gain access to the data and documents necessary to prove a fair lending case. Therefore, it is critically important that the federal financial regulators use the full scope of their authority to identify fair lending discrimination, provide timely and well-documented referrals to the DOJ, and ensure an efficient and effective process to mitigate and remedy harm to borrowers and communities of color, and other protected groups.

Despite the federal financial regulators' broad authority, recent data show a concerning decline in fair lending referrals to the DOJ.[3] In 2010, the federal financial regulators referred 47 matters to the DOJ based on a belief that the lender had engaged in a pattern or practice of discrimination. By 2020, that number had plummeted to just 12 matters. Similarly, the number of referrals based on race or national origin discrimination decreased from 24 matters in 2010 to just four matters in 2020.



Source: National Fair Housing Alliance, 2021 Fair Housing Trends Report

[3] *See* National Fair Housing Alliance, 2021 Fair Housing Trends Report, https://nationalfairhousing.org/reports-research/; DOJ, The Attorney General's 2019 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976 (July 2020), https://www.justice.gov/crt/page/file/1296731/download; CFPB, Fair Lending Report of the Bureau of Consumer Financial Protection (April 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-fair-lending_Report_2021-04.pdf.

The trend for race and national origin referrals is particularly disturbing because redlining, which represents the highest risk of systemic harm, is based on race or national origin discrimination. From 2010 to 2020, the DOJ engaged in only 10 public enforcement actions related to redlining.[4] Even more concerning, only two of those actions were based on referrals originally initiated by the federal financial regulators. For the remaining eight actions, the DOJ initiated the case itself or the matter was initially identified through a complaint by a local fair housing advocate. These trends raise the concern that the federal financial regulators are not using the full scope of their supervisory authority effectively to identify a potential pattern or practice of lending discrimination, which can result in a drain on the resources of the civil rights and consumer advocates, DOJ, HUD, and state agencies, as well as cause far-reaching harm for borrowers and communities of color.

DOJ Public Enforcement Actions - Redlining

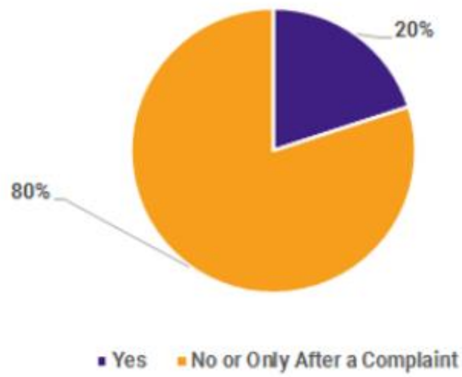
YEAR	BANK	REGULATOR	REFERRAL
2019	First Merchants Bank	OCC	NO
2018	KleinBank	FDIC	NO
2017	Union Savings Bank	FDIC	NO
2017	Guardian Savings Bank	OCC	NO
2016	BancorpSouth Bank	FDIC/CFPB	NO
2015	Eagle Bank & Trust	FDIC	NO*
2015	Hudson City Savings Bank	OCC/OTS	NO
2013	Community State Bank	FDIC	YES
2011	Citizens Bank	FED	YES
2011	Midwest BankCentre	FED	NO*

*Referral only after fair housing advocate complaint

Source: DOJ Fair Lending Cases, https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-prior-2018#lending

[4] *See* National Fair Housing Alliance, 2021 Fair Housing Trends Report, https://nationalfairhousing.org/reports-research.

DOJ Redlining Cases Based on Referrals, 2010-2020



Source: National Fair Housing Alliance, 2021 Fair Housing Trends Report

<u>The Board's Appalling Abdication of Its Responsibility to Protect Communities of Color</u>

Redlining Reviews Are Critical to Remedying the Homeownership and Wealth Gap

"Redlining" is one type of discrimination prohibited under the Fair Housing Act and the ECOA. Redlining occurs when lenders deny or discourage applications or avoid providing loans and other credit services in neighborhoods based on the race, color, or national origin of the residents of those neighborhoods.[5]

The identification of redlining risk and/or violations is critically important at this time. In America, homeownership is the key to financial stability as well as other opportunities, such as home equity for college education, home repairs, medical bills, or small business loan collateral. Unfortunately, the Black/White homeownership gap is currently as big as it was before passage of the Fair Housing Act in 1968 and the Black/White wealth gap remains alarming, even when controlling for education.[6] Researchers from the Federal Reserve Bank of San Francisco have identified redlining as one of the key structural barriers that caused a staggering $22.9 trillion in losses to U.S. economic output over the past 30 years.[7]

[5] *See* Federal Financial Institutions Examinations Council ("FFIEC") Interagency Fair Lending Examination Procedures (Aug. 2009), https://www.ffiec.gov/PDF/fairlend.pdf; *United States v. Cadence Bank, N.A.*, Case No. 1:21-mi-99999-UNA (N.D. Ga. Complaint Filed Aug. 30, 2021), https://www.justice.gov/opa/press-release/file/1428611/download.

[6] Laurie Goodman and Jun Zhu, *The Future of Headship and Homeownership*, Urban Institute (Jan. 2021), https://www.urban.org/sites/default/files/publication/103501/the-future-of-headship-and-homeownership.pdf; Neil Bhutta, Jesse Bricker, Andrew Chang, et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106(5) Federal Reserve Bulletin (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3716339; Jung Hyun Choi, *Breaking Down the Black-White Homeownership Gap*, Urban institute (Feb. 21, 2020), https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap.

[7] Shelby R. Buckman, Laura Y. Choi, Mary C. Daly, Lily M. Seitelman, *The Economic Gains from Equity*, Brookings Papers on Economic Activity (Sept. 9, 2021), https://www.brookings.edu/bpea-articles/the-economic-gains-from-equity/.

Acknowledging the importance of addressing redlining violations, the DOJ recently announced an ambitious new "Combatting Redlining Initiative." Attorney General Merrick Garland stated: "When people are denied credit simply because of their race or national origin, their ability to share in our nation's prosperity is all but eliminated….We will spare no resource to ensure that federal fair lending laws are vigorously enforced and that financial institutions provide equal opportunity for every American to obtain credit."[8] The CFPB and OCC joined the DOJ at the announcement, but the Board was notably absent and did not issue a statement in support of the initiative.[9] If federal financial regulators, such as the Board, do not use their resources and authority to identify redlining risk and/or violations, then communities of color will be unfairly starved for credit, financial stability, and life opportunities.

The Board's Success Metric for Redlining Reviews Is The Exam Turn-Around Time Rather Than Identification of Discrimination and Protection of Communities of Color

Given the importance of redlining reviews, it is alarming to learn of the Board's appalling abdication of its responsibility to protect borrowers and communities of color, and its singular focus on exam turn-around times. A recent report from the Board's Office of Inspector General ("OIG") took an incredibly myopic view of fair lending supervision by focusing solely on exam turn-around times (that is, the time to close the exam), rather than on any analysis of whether the Board's fair lending program actually identified discrimination risks and/or violations and was able to appropriately protect borrowers of color and other protected groups.[10] In fact, the OIG was almost exclusively focused on the burden of delays for banks. The report stated: "[D]elays in closing examinations in a timely manner may adversely affect examiner efficiency as well as **supervised institutions** and may pose a reputational risk for the [Federal Reserve] System….[I]nstitutions with an open review are unable to engage in **strategic corporate activities like mergers or acquisitions**." (p. 24) The OIG's report seems to suggest that the Board's priority is, and should be, getting through the exam process quickly in order to enable institutions to get on with business, rather than fulfilling its responsibility to ensure that that business is conducted in a manner that complies with our nation's fair lending laws and with those institution's charter obligations to the communities they serve. The OIG did not interview any civil rights or consumer advocates for their perspective.

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[8] DOJ Press Release, *Justice Department Announces New Initiative to Combat Redlining* (Oct. 22, 2021), https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining.

[9] Compare the Board's recent statement of support related to a climate initiative: Board Press Release, *Federal Reserve Board Issues Statement in Support of the Glasgow Declaration by the Network of Central Banks and Supervisors for Greening the Financial System* (Nov. 3, 2021), https://www.federalreserve.gov/newsevents/pressreleases/other20211103a.htm.

[10] Board OIG, *The Board Can Improve the Efficiency and Effectiveness of Certain Aspects of Its Consumer Compliance Examination and Enforcement Action Issuance Processes*, Evaluation Report 2021-SR-B-012 (Oct. 6, 2021), https://oig.federalreserve.gov/reports/board-consumer-compliance-oct2021.pdf ("Board OIG Report").

The Board Delegated High Risk Redlining Reviews to Reserve Banks Even After Evidence Showed That They Routinely Made Material Errors, Which Could Result in Harm to Communities of Color

In a stunning admission, the Board's OIG Report disclosed that although the Board's Fair Lending Enforcement Section routinely found that Reserve Bank examiners in the field cannot appropriately identify risk and/or violations, the Board decided to delegate certain high-risk redlining reviews to the Reserve Banks anyway. More specifically, the report stated that for the past several years, Board staff provided the Reserve Banks with extensive fair lending training in a multitude of formats, including a fair lending risk assessment tool, in-person training, monthly calls, guidance documents, and a redlining analysis memo template and sample. Despite this training, the Board's Fair Lending Enforcement Section found that the Reserve Banks' analysis for exams conducted in 2019 and 2020 "**often required material changes or lacked support for the Reserve Banks' recommendations and that [the Board's] review resulted in changes to the Reserve Banks' recommended risk rating or supervisory outcome**." (pp. 25-26) This means that without intervention by the Board Fair Lending Section's team of specialized attorneys, economists, and analysts, the Reserve Banks likely would have missed key risk factors that could result in harm to borrowers and communities of color.

Despite the Reserve Banks' material errors, in January 2021, the Board decided to delegate certain high-risk redlining matters to the Reserve Bank examiners, rather than have those matters reviewed by the Board's Fair Lending Section. Even more disturbing, the Board's OIG agreed with the delegation of high-risk redlining matters despite the fact that it was clear that the Reserve Bank examiners were not able to appropriately review redlining risk. Moreover, the Board's OIG did not impose any conditions or controls that would ensure the effective identification of redlining risk and/or violations. In fact, the Board's OIG only required additional training for the Reserve Bank examiners by some time in 2022, even though years of training has not been shown to improve the results. The result is the elimination of review by the Board's specialized Fair Lending Section, which is the only safeguard to ensure that the Board is fulfilling its fair lending obligations. This means that:

- The Board knows that the Reserve Banks cannot appropriately evaluate redlining risk but has delegated high-risk redlining reviews to the Reserve Banks anyway, which will likely result in harm to borrowers and communities of color;
- The Board will not even commit to providing additional training to the Reserve Banks until some time in 2022;
- The Board will not take any additional steps to protect borrowers and communities of color, such as additional oversight; and
- The Board's OIG has agreed with this approach, which is based solely on closing exams quicker rather than on any analysis of whether this approach would actually protect the legal rights of borrowers and communities of color.

The Board's actions display an appalling abdication of authority at a time when redlining reviews are critically important to protecting borrowers and communities of color and addressing the racial homeownership and wealth gaps. At the time of these decisions, the following Board members had oversight responsibility and continue to have oversight responsibility at this moment:

- Chair Jerome Powell
- Governor Michelle Bowman, Chair of the Division of Consumer and Community Affairs ("DCCA") Oversight Committee
- Governor Lael Brainard, Member of the DCCA Oversight Committee[11]

The OCC's History of Lax Fair Lending Enforcement

Although there has been some improvement under Acting Comptroller Michael Hsu, the OCC's history suggests a lax approach to fair lending supervision and enforcement that would need careful reform and attention by the new Comptroller. As depicted in the chart above, the OCC did not identify the redlining issue and refer the matter to the DOJ in at least three matters in the past few years. Moreover, according to a *ProPublica* report from 2020, over the last few years, OCC staff discovered at least six banks were allegedly engaging in discriminatory lending practices, but none were penalized or even publicly reprimanded.[12] The agency's historic failure to engage with the full extent of its fair lending authority has put millions of consumers at unnecessary and increased risk. The next Comptroller should ensure that the personnel, policies, and procedures are in places to protect borrowers and communities of color and other protected groups.

Overall Recommendation

In sum, the significant deficiencies in the Board and OCC's fair lending supervision programs cannot be ignored and strong leadership with a commitment to acting on evidence of lending discrimination must be accompanied by programmatic commitments at each agency. We recommend the following four initial solutions to begin to redress demonstrated deficiencies and fortify the Board and OCC's fair lending supervision programs:

- Clear commitment from agency leadership;
- Appropriate internal structure, such as senior leadership with fair lending expertise reporting directly to the Chair/Comptroller, and well-trained staff with robust oversight and adequate resources;
- Accountability mechanisms, including transparency and regular reporting to Congress and the public on the functions and outcomes of the agency's fair lending supervision program; and
- Regular engagement by agency supervision staff with civil rights and consumer advocates.

[11] *See* https://www.federalreserve.gov/aboutthefed/bios/board/default.htm.

[12] Patrick Rucker, *Trump Financial Regulator Quietly Shelved Discrimination Probes into Bank of America and Other Lenders*, ProPublica (July 13, 2020), https://www.propublica.org/article/trump-financial-regulator-quietly-shelved-discrimination-probes-into-bank-of-america-and-other-lenders.

<u>Suggested Questions for the Nominees</u>

Respectfully, we suggest that the committee consider the following lines of questioning for the Board and OCC nominees.

- In what ways do you think your agency can demonstrate a commitment to racial equity?

- Will you create a position for a Senior Advisor of Racial Equity that reports directly to the Federal Reserve Chair/Comptroller of the Currency, and require this person to provide regular reports to the Federal Reserve Chair/Comptroller of the Currency, Senate Banking Committee, and House Financial Services Committee?

- Will you commit to hiring an individual with extensive fair lending expertise in a senior position within the division of consumer compliance supervision to represent the voices of vulnerable consumers and communities at your agency? Will you commit to making that person available to committee staff on a quarterly basis to report on your agency's progress on promoting racial equity and fair lending?

- Will you commit to providing a public report of the number of exams per quarter; how many exams had a fair lending risk assessment; how many exams had a redlining, pricing, or underwriting focal point; how many exams resulted in a Matter Requiring Attention related to fair lending; and how many exams resulted in a referral to the DOJ?

- A recent report from the Board's OIG measured the fair lending program's effectiveness based solely on exam turn-around times. Do you think that is the best measure of a successful fair lending program? If not, what do you think are the measures of a successful fair lending program?

- How does the agency ensure that examiners in the field are effectively identifying fair lending risk and/or violations? When was the last time the agency conducted an audit of this effectiveness? Will you commit to conducting such an audit within the first year of your tenure?

- In recent years, the federal financial regulators have failed to identify and refer several matters where DOJ or HUD brought an enforcement action. In those situations, would you commit to conducting an audit of why the agency failed to identify discrimination, including any gaps in the examiners' ability to appropriately identify risks and/or violations and any decisions by the agency not to refer a matter?

- What quantitative metrics does your agency use to determine whether there is fair lending risk related to the pricing and underwriting of mortgage loans, and redlining of communities of color? What are the qualitative metrics? Do you think they should be changed? If so, how and why?

- To what extent does your agency conduct an analysis of disparate impact, including conducting the analysis of less discriminatory alternatives? Will you commit to publicly releasing fair lending examination procedures related to the analysis of less discriminatory alternatives within the first year of your tenure?

- To what extent is your agency conducting fair lending examinations of lenders' use of artificial intelligence, including machine learning? Will you commit to publicly releasing fair lending examination procedures related to artificial intelligence within the first year of your tenure?

- What are the thresholds or triggers for escalating a matter to the fair lending specialists at the agency? Do you think they should be changed? If so, how, and why?

- What are the thresholds for referring a matter to the DOJ? Do you think they should be changed? If so, how, and why?

- In the recent redlining matter of *United States v. Cadence Bank, N.A.*, Acting Comptroller Hsu imposed a civil fine on the bank along with the DOJ's settlement agreement. Will you commit to doing the same to promote solidarity with fair lending principles even if the agency failed to refer the matter to DOJ?

- If the DOJ has returned a matter for administrative enforcement, what steps do you think the agency should take to ensure that borrowers are fully protected?

- What steps does the agency take to ensure that examiners are provided comprehensive training on how to identify fair lending risk and violations, including redlining? How often are the examiners required to take fair lending training?

- The Board has already created a Supervision Climate Committee,[13] but has not mobilized similar resources to address racial equity. Will you commit to creating a Supervision Racial Equity Committee comprised of staff from the safety and soundness as well as the consumer compliance supervision sections?

- Unfortunately, the agencies' abysmal approach to protecting the rights of borrowers and communities of color makes the case even stronger that Special Purpose Credit Programs are necessary and appropriate. Will you commit to working with the other agencies to develop a practical template for lenders to complete the written plan necessary to offer a Special Purpose Credit Program in compliance with ECOA and the Fair Housing Act? Further, will you commit to mobilizing agency resources to compiling and publicly releasing the data that would be useful to a lender that wants to create a Special Purpose Credit Program?

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[13] *See* Federal Reserve Bank of New York Press Release, *Kevin Stiroh to Step Down as Head of New York Supervision to Assume New System Leadership Role at Board of Governors on Climate* (Jan. 25, 2021), https://www.newyorkfed.org/newsevents/news/aboutthefed/2021/20210125.

- The data to establish redlining risk is public, but it is challenging for civil rights and consumer advocates to find the funds to work with consultants and vendors to analyze the data, and, unfortunately, the agencies have done an abysmal job in bringing appropriate enforcement actions. The agencies could help the efforts of advocates who are committed to appropriate enforcement of the law by releasing the analysis to the public. Will you commit to working with the other agencies to releasing a public analysis of the data that is useful in identifying redlining risk at a financial institution, including a map of the CRA assessment areas, a map of the branches and loan production offices, and a quantitative analysis of the regulated financial institution's applications and originations versus their peers?

- The agencies use a risk-focused approach to supervision, which includes factoring in any complaints by consumers or advocates. However, it is very hard for the average consumer to be able to interpret the byzantine structure of banking regulation, find the correct regulator, and then find the correct portal to lodge a complaint against a bank. Will you commit to working with the other agencies to develop a single portal where a consumer can easily file a complaint that will be routed to the correct regulator and where the correct regulator will be identified for any future communications? Will you commit to ensuring that the portal is regularly updated with accurate information about the bank's current regulator?

- The agency's supervision staff (including examiners) have frequent contact with banks and industry trade associations, but limited contact with civil rights and consumer advocates. Will you commit to ensuring that your supervision staff (including examiners) have regular meetings with civil rights and consumer advocates to understand their perspective? Will you make the same commitment for yourself?

- The agency has incredible resources at its disposal to conduct extensive research into the causes of the persistent homeownership and wealth gaps. Will you commit to dedicating the agency's resources to researching these issues as well as engaging with civil rights and consumer advocate researchers?

Board Nominees Only

- A recent Board OIG Report made the stunning disclosure that the Board has intentionally delegated high-risk redlining reviews to the Reserve Banks (instead of the Board Fair Lending Team's specialized attorneys, economists, and analysts) even though the Board knows that the Reserve Banks often commit material errors, which could result in harm to borrowers and communities of color. What changes would you make to the Board's redlining exam procedures to ensure that borrowers and communities of color are fully protected?

Thank you for considering our views. If you have any questions, please contact Nikitra Bailey, Senior Vice President of Public Policy (nbailey@nationalfairhousing.org), at the National Fair Housing Alliance.

Sincerely,

Lisa Rice
President and Chief Executive Officer
National Fair Housing Alliance

CC: The Honorable Patrick Toomey
The Honorable Charles Schumer
The Honorable Nancy Pelosi
The Honorable Raphael Warnock
The Honorable Tom Tillis
The Honorable Maxine Waters
The Honorable Patrick McHenry
The Honorable Ronald Klain
The Honorable Brian Deese
The Honorable Susan Rice
The Honorable Cedric Richmond
Federal Reserve Chair Jerome Powell
Federal Reserve Governor Lael Brainard
Federal Reserve Governor Michelle Bowman
Acting Comptroller Michael Hsu
Professor Saule Omarova