July 6, 2021

Acting Director Shalanda Young
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: Request for Information: Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government

Dear Acting Director Young,

We the undersigned civil rights and consumer advocacy organizations are writing in response to the Office of Management and Budget's ("OMB") May 5, 2021, Request for Information on Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government (the "RFI").[1] We applaud the OMB for seeking input on the critically-important topic of advancing equity in government. Our organizations believe that the responses below will help inform the OMB's policies.

Section 1: Equity Assessments and Strategies: Approaches and methods for holistic and program- or policy-specific assessments of equity for public sector entities, including but not limited to the development of public policy strategies that advance equity and the use of data to inform equitable public policy strategies.

Attachments: A Place to Call Home: The Case for Increased Federal Investments in Affordable Housing

Federal Government Programs and Policies Must Account for Historic Systemic Racism and Exclusions

The nation's long history of private and public racism, sexism, xenophobia, and ableism has stifled or prohibited access to opportunities for marginalized people to build wealth, educational attainment, and live full and healthy lives. This history includes both the colonial period of our country as well as since the founding of the United States. Thousands of laws, ordinances, and policies were put in place that were either explicitly race-based or implemented with race-conscious provisions. These include the Headrights System, Slave Codes, the U.S. Constitution, Land Grant Act, Homestead Act, Fugitive Slave Act, Indian Removal Act, Freedman's Savings and Trust Company Act, Chinese Exclusion Act, Repatriation Laws, Jim Crow Laws, Home Owners' Loan Corporation Act, National Housing Act, Social Security Act, Presidential Executive Order 9066 (Japanese Internment), and the National Highway Acts, to name a few.

[1] OMB, Request for Information: Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24029 (May 5, 2021).

These policies worked to create a deeply inequitable society. They also created systems - like segregation, unbalanced tax codes, restrictive zoning, the dual credit market, and more - that are still in place perpetuating inequality and continuing to lock people out of critical opportunities and amenities people need to live successful lives.

For nearly the entirety of the nation's history, government-sponsored programs and practices among private sector product and services providers actively excluded marginalized people. For example, since the Civil Rights Era, the equity-focused provision of the Fair Housing Act – it's Affirmatively Furthering Fair Housing Provision[2] – has been ignored while the federal government has allowed trillions of dollars in housing and community development dollars to go unchecked for compliance with the Fair Housing Act. The result has been the continuation of neighborhood disinvestment, geographic and resource isolation, racially concentrated poverty, and inadequate access to neighborhood choice despite the passage of the Fair Housing Act.

Programs and policies must be designed and evaluated in a manner that appropriately accounts for the ways protected classes and other marginalized people have access to or are affected by them. Program design must begin with the foundational understanding that marginalized people, most of whom can be considered a protected class but not all, do not begin on the same footing when it comes to their ability to meet program requirements, be captured in their data collection process, receive publicly-disseminated information for the purposes of applying, or even actually benefit from a program due to their different needs. Most importantly, programs and policies must recognize that these conditions are the result of generations of government-sponsored programs and policies that were **intentionally** designed to exclude or harm Black, Indigenous, and People of Color (BIPOC), and that addressing this history requires similar intentionality. Every federal program and policy must be clearly framed as one of many efforts to rectify this history and begin taking bold and meaningful steps that are intended to confront and address racial and other inequities.

HUD's Affirmatively Furthering Fair Housing Assessment Tool Is a Strong Example of How to Assess and Develop Racial and Other Equity

One useful model for measuring program equity is the U.S. Department of Housing and Urban Development's (HUD) 2015 Affirmatively Furthering Fair Housing rule's accompanying Assessment of Fair Housing assessment tool, which assisted local governments in a process of identifying impediments to fair housing with the goal of developing strategies to address them.[3] In 2015, HUD released a new regulation intended to better implement and enforce the Affirmatively Furthering Fair Housing provision of the Fair Housing Act as well as an analytical framework known as an Assessment of Fair Housing (AFH), and a format for reporting to HUD. This framework was embodied in an Assessment Tool. This tool guided jurisdictions through a series of questions about the level of segregation and integration in their communities, the fair housing challenges faced by members of various protected classes, and the identification of the

[2] *See* 42 U.S.C. § 3608(e)(5); HUD Interim Final Rule, Restoring Affirmatively Further Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021).

[3] HUD, Website for Affirmatively Furthering Fair Housing (providing information and tools, including the Assessment Tool for Local Governments).

factors and forces driving those challenges. It included a particular focus on areas of hyper-segregation and high levels of poverty, known as Racially or Ethnically Concentrated Areas of Poverty, and it asked jurisdictions to consider the extent to which different communities within the jurisdiction had access to the full range of resources and opportunities available, including transportation, high-performing schools, jobs, and a healthy environment. The Assessment Tool also walked jurisdictions through the identification of top local fair housing priorities to be addressed over the subsequent three- to five-year period (that is, the time period covered by the jurisdiction's Consolidated Plan), and the establishment of metrics and timelines for assessing progress toward addressing those priorities. HUD completed an Assessment Tool for Local Governments, but was not able to complete the tools for public housing authorities or states before it suspended the AFFH rule under the Trump administration. The Assessment Tools were to be reviewed and updated, as necessary, every three years. By regularly requiring grantees to identify barriers to opportunity and housing choice, grantees were able to document existing disparities and other factors leading to inequities and build their remediation into future housing and community development planning. We encourage OMB to consider HUD's Affirmatively Furthering Fair Housing rule's assessment tool as a strong method of assessing and developing racial and other equity.

Socially Responsible Investing or Sustainability and Responsible Investment (SRI) and Environmental, Social and Governance (ESG) Frameworks Are Examples of How to Assess and Develop Racial and Other Equity

SRI and ESG investment frameworks are generally designed to target monetary and other investments to projects that generate both an improved society and a reasonable return on investment. They may promote equitable access to opportunities; favor the use of mechanisms for reducing or eliminating bias; raise awareness around social impacts; advance diversity, equity, and inclusion; increase transparency and disclosure; measure and track outcomes and impact; and support the integrity and health of communities, the environment, and financial markets. These frameworks also generally favor the use of methods for mitigating known and/or likely risks for negative impacts on vulnerable groups and communities.

The United Nations and International Capital Market Association have done quite a bit of work establishing protocols and procedures around "socially responsible," "sustainable and responsible," and ESG investments and this work can serve as an important resource for assessing racial equity. These frameworks include a lot of work around establishing and clarifying definitions, goals, and metrics, as well as protocols for providing accountability and oversight for meeting goals.[4] A great benefit of this work has been the effort to procure agreement and clarity among a large number and variety of stakeholders regarding definitions, metrics, and oversight protocols.

[4] *See* Sustainable Finance, International Capital Market Association (providing materials and resources, including The Green Bond Principles, The Social Bond Principles, The Sustainability Bond Guidelines, The Sustainability-Linked Bond Principles, and Climate Transition Finance). *See also* Sustainable Development Goals, United Nations, Department of Economic and Social Affairs.

The evaluation of racial equity in the U.S. is an evolving field and the definition of what might be equitable for different groups has and will continue to change. Yet it is important for federal agencies to understand how to define racial equity and employ standard procedures for measuring whether different groups are able to access and benefit from tax-payer funded resources in an equitable manner.

One measure of fairness has been to determine whether or not various groups receive the same or equal amount of resources. However, equal distribution may not be fair or equitable. For example, if the federal government wants to distribute a $1 million fund to feed residents throughout the nation, it may equally apportion the money to all states (50), the District of Columbia (1), territories (5), and minor islands (8) meaning, each geographical area would receive $15,625. This method of distribution may be equal, but it might not be fair or equitable because some areas have very large populations and other areas have few residents. Equitable and fair distribution would mean distributing funds based on the population size of each geographical area.

The same philosophy applies to considerations regarding racial equity. The United Nations and International Capital Market Association have convened many stakeholders to determine what constitutes social responsibility or sustainability as well as many other terms and concepts, including equity. They have established protocols that place an emphasis on equitable access to resources, equitable participation in markets, and reduction of income and other forms of inequality.

They have also developed frameworks for assessing what type of activities will expand equity and social responsibility that include an evaluation system to determine whether investments truly promote equity and social responsibility. For example, the evaluation tool for Social Bonds[5] helps reviewers assess whether programs and products supported socioeconomic advancement and empowerment, promoted employment opportunities specifically for the alleviation of unemployment stemming from a socioeconomic crisis, supported the development of affordable housing, and other important goals that help build a fairer society. It allows for an assessment of what are the drivers of socioeconomic harms and inequities and then provides a framework for valuing projects that address those challenges.

The evaluation framework[6] also establishes specific target populations that must be served in order to qualify for the Social Bond designation. This specified social taxonomy helps provide a clear understanding of who are the groups that have been most harmed by policies and practices and need targeted support in order to expand better and fairer access to opportunities and resources. Those target populations include:

- Those living below the poverty line;
- Excluded and/or marginalized populations and/or communities;
- People with disabilities;
- Migrants and/or displaced persons;

[5] Social Bond Principles, International Capital Market Association (June 2021).
[6] Pre-issuance Checklist for Social Bonds/Social Bond Programmes, International Capital Market Associations (June 2021).

- The undereducated;
- The underserved, owing to a lack of quality access to essential goods and services;
- The unemployed;
- Women and/or sexual or gender minorities;
- Aging populations and vulnerable youth; and
- Other vulnerable groups, including as a result of natural disasters.

The efforts of the International Capital Market Association and United Nations to create a more sustainable and equitable global society, in a way that is uniform and scalable, can serve as an important example of how the U.S. federal government can develop and implement a framework for advancing racial equity.

Cost-Benefit Analysis Approaches May Be Incomplete For Racial Equity Assessments

While racial equity assessments may include a cost-benefit analysis, federal agencies should not solely rely on this approach for making determinations about which strategies to use to advance fair outcomes for underserved groups. Cost-benefit analyses may prove difficult in measuring the impact of benefits of affirmative, restorative, or other justice-oriented programs. This approach may be counterproductive when it comes to equity assessment frameworks.

Racial inequality impacts people's lives in ways that are often hard to measure. This is partly because we are still learning the myriad ways discrimination and racism impact people individually as well as the society as a whole. It is also because racial and systemic bias have hidden impacts. How do you place a numerical value on fear, anxiety, lack of productivity, isolation, depression, low self-esteem, stress, or socio-emotional wellbeing? How do you place a value on the missed opportunities that result from the exclusion of segments of the population from full participation in a program or service?

Using a cost-benefit analysis alone to inform decision-making about the efficacy of changing a system or policy to achieve greater racial equity may well exclude the evaluation of critical information that should inform the racial equity assessment process.

One of the most important results of a racial equity assessment is a better understanding of the benefits of changing policies, practices, systems, cultures, communications, or other items to eliminate discrimination and achieve fairer outcomes. A cost-benefit analysis would mean identifying and measuring the sum of the rewards of using a certain approach and subtracting the total costs of adopting that approach. The cost of changing a system that is manifesting a biased outcome might pose huge financial costs for a financial institution.

To weigh the advantages of either eliminating the system or changing to a system that is fairer, an entity would want to first determine how much bias the legacy system is exhibiting, then assess what a less discriminatory alternative might cost, and finally identify and measure all the known benefits of adopting the less discriminatory system. A more robust cost-benefit analysis might even include an opportunity costs assessment, that is, identifying and measuring a different alternative, like taking the money that would have been spent on a systems upgrade and investing that in a new business venture. The cost of adopting the new system would be compared to the value of the benefits derived from the new system. If the benefits from the new system outweigh the cost of the new system, then the new, less discriminatory system would be adopted. If the benefits from the new system do not outweigh the cost of the new system, then the old, more discriminatory system would stay in place.

But to assess the true value of the benefits derived from adopting the less discriminatory alternative, one would have to be able to not only identify all of the advantages of the new system but place a numerical value on each of them. Both of these are hard to do, in part because the universe of research on the myriad ways racism and discrimination impact people individually and effect the greater society is in its nascency. We have done little to delve into how racial inequality causes harm and we are just beginning to understand more fully the impacts of systemic racism on our society. For example, groundbreaking research from McKinsey reveals that closing the racial wealth gap would increase the U.S. GDP by 4% to 6% by 2028.[7] Recent research from Citigroup buttresses McKinsey's findings revealing that if racial inequality had been eliminated in housing, wages, education, and investment 16 years ago, up to $16 trillion would have been added to the U.S. economy. The same research concluded that eliminating these racial inequality gaps would increase the U.S. GDP by over $5 trillion over a 5-year period.[8]

What this research highlights is that achieving racial equity is not a zero-sum game; it rather results in exponential growth and societal improvements that benefit everyone and makes the U.S. more globally competitive. But this is just the tip of the iceberg in terms of what we currently know about how racial inequality stifles our growth and productivity or incapacitates us. We know that, because of systemic inequality, communities of color were disproportionately impacted by the COVID-19 pandemic, in both contracting the coronavirus and dying at disproportionately higher rates. We also know that communities of color experienced disproportionate effects in education, employment, and other areas. We will not understand the full scope of how these inequalities have really impacted us for decades to come.

Reducing judgements about the efficacy of adopting fairer systems to a purely numerical analysis holds certain drawbacks. It serves to devalue amenities and benefits that we do not fully understand but that may greatly contribute to our individual and collective well-being. In our data-driven society, we are often compelled to opt for a quantitative evaluation to determine what strategies we should value most, but when it comes to assessing solutions for deriving racial equity, quantitative analyses alone are insufficient or often incomplete.

Robust and Appropriate Data is Fundamental to Effective Racial Equity Assessments

Quality, complete, representative, and accurate data is paramount to assess the impacts of policies, practices, and programs on underserved groups, identify disparate or harmful outcomes, and devise options for crafting and implementing fairer strategies and solutions. Using inaccurate and incomplete data in the evaluation of whether systems have an undue racial impact will result in incorrect findings and misplaced policies, and can prove detrimental.

---

[7] Nick Noel, Duwain Pinder, Shelley Stewart, and Jason Wright, The Economic Impact of Closing the Racial Wealth Gap, McKinsey & Company (Aug. 13, 2019).
[8] Dana Peterson and Catherine Mann, Closing the Racial Inequality Gaps, Citigroup (Sept. 2020).

It is important to use a range of data and information to conduct assessments, including obtaining buy-in from affected communities on how their personal information might be used. Using both qualitative and quantitative data is critical for painting a more robust, complete picture about how systems are impacting people and communities of color, and other disadvantaged groups. Audits may provide information about how extensively an agency's program is reaching certain segments of the population. However, anecdotal and qualitative feedback can provide a deeper understanding about how useful programs are or whether certain groups are able to effectively access programs, and even how a program might be better designed to improve outcomes.

Agencies must be cognizant of how they are utilizing data while performing assessments. Drawing erroneous conclusions from the data will lead to the development of strategies and solutions that may not achieve intended results and can prove disastrous for people and communities. The Home Owners Loan Corporation's (HOLC) use of data to grade and assess neighborhoods is a prime example of how the inappropriate analysis of information can have lasting deleterious impacts.[9] The HOLC created one of the most harmful examples of structural racism and inequality by devising a mapping and ranking system that relied on the use of race in a negative and erroneous way.[10] The HOLC made discriminatory and inaccurate assumptions about key data points it had gathered and then used the inaccurate data to assess neighborhoods, determine where federally-backed mortgages would be made, and determine the price of mortgage loans. Using data inappropriately, the HOLC institutionalized the redlining of communities of color and neighborhoods are still gravely impacted by this system.

Data itself can have drawbacks. The underlying data used to perform a racial equity assessment might encode discrimination and if the data itself reflects bias, it will produce skewed results. Agencies must be careful, therefore, about placing too much emphasis on data points such as credit scores, crime rate statistics, school test scores, etc. that are often hardwired for bias and may tell a very incomplete story about how an agency's program is impacting a community or about the ability of certain communities to access opportunities. For example, a federal agency performing a racial equity assessment of its lending program, might conclude that because borrowers of color applying to the program had either no or lower credit scores, higher declination rates for those underserved consumers was warranted. However, that assessment would be incomplete. The agency should also look at whether program applicants had forms of non-traditional credit, like rental housing payments, residual income, or other timely payments that, because of structural inequality, are not captured in credit scoring systems. These types of non-traditional credit may better reflect the borrower's ability to repay their debt. The agency should understand that consumers of color are more likely to live in credit deserts and access credit from non-traditional sources that do not report timely payments to credit repositories.

---

[9] The Home Owners' Loan Act of 1933 established the HOLC as an emergency agency under the Federal Home Loan Bank Board. 12 U.S.C. § 1461 *et seq*. *See* University of Richmond, Virginia Tech, University of Maryland, and Johns Hopkins University, Mapping Inequality (documenting the discriminatory maps and area descriptions created by the HOLC between 1935 and 1940).

[10] *See* Lisa Rice, "The Fair Housing Act: A Tool for Expanding Access to Quality Credit," The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act (Gregory Squires, 1st ed. 2017) (providing a detailed explanation of how federal race-based housing and credit policies promoted inequality). *See also*, K. Steven Brown et al., Confronting Structural Racism in Research and Policy Analysis, The Urban Institute (Feb. 2019); Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017).

It is also important to ensure that as agencies develop their racial equity assessments, they make information available to the public about what data and methodologies were used to conduct the assessments. This is critical so that all key stakeholders can be apprised of and comment on the impact of the agencies' findings and provide feedback on steps that can be taken to mitigate harmful impacts. Transparency around how data is used to conduct assessments is important for helping researchers, the public, and other stakeholders understand and evaluate the process.

Programs and Policies Must Be Considered in Terms of their Cumulative and Cross-Sectional Impact

When considering equity, it is important not to look at each program in isolation, but instead look at the cumulative and cross-sectional impacts of policies and programs among marginalized communities. Program performance, for example, could be measured not solely by the activities that were conducted under the program but instead the various tangible results, such as greater awareness of rights and opportunities, better implementation of key elements of a program that increases access and reach, and changed industry behaviors and practices. How a program provides benefits in various other areas for the public is also essential to measure a program's true value and equity. Several examples illustrate areas where the federal government could better consider cumulative and cross-sectional impact.

<u>Measuring Environmental Impacts</u>

In environmental justice issues concerning the approval of polluting facilities, the government tends to evaluate whether any individual plant pollutes, but it may not consider the cumulative effect of all plants in the geographic area. The question worth considering instead may be how plant pollution affects a community and whether there is a disparate impact on protected classes because of the approval of a new facility.

<u>Communicating Positive Outcomes of Program Investments in Other Measurable Ways</u>

The federal government must do more to connect the impact that policies and programs have in other areas in order to continue to justify their expansion. For example, the benefits of investing in affordable housing development and preservation in the form of better health, educational, and health outcomes are well known, yet housing programs may not be evaluated for their greater social impacts or in other areas of increased opportunity. The federal government must directly connect the development and preservation of affordable housing and the well-documented evidence of expanded opportunities and the reduction of social and economic barriers that result to better demonstrate a state-interest in increasing production and preservation of housing.

<u>Administrative Enforcement Procedures</u>

In HUD's Fair Housing Initiatives Program, grant performance has recently been measured by the number of fair housing tests that are conducted within a grant period using awarded funds. This, however, only measures the number of tests that are conducted by a grantee and not how many units become open to protected classes through investigations, enforcement actions, client representation, housing provider trainings, or remediation of design and construction violations. Grantees should be able to tailor their investigative strategies according to the particularities of the housing market(s) in their respective service areas and have grant performance measured according to a metric tied to the nature and extent of discriminatory practices in said service areas. This will incentivize smarter and stronger enforcement program design and yield more systemic reversal of residential segregation and discrimination throughout the nation.

Grant Design and Awards Must Be Tied to Population Needs When Appropriate

There are various grant programs available to the public and government agencies that offer flat award amounts despite observed needs. In these instances, applicants in densely populated areas who serve a multitude of people when compared to applicants in rural, less densely populated areas may both receive the same award amounts. The result may be that the funds available for applicants serving more people will not be sufficient to address some applicants' specific needs or may be too much for others. The federal government should consider need and population served in grants applications, and measure success to include the number of people or communities served. The latter metric is important to ensure that less densely populated yet geographically sparse service areas also receive an equitable share of federal grant resources.

Importance of Using Diverse Teams in Racial Equity Assessments

Agencies conducting racial equity assessments should ensure staff reflect diversity, including diversity based on race and national origin. Increasing the diversity of the staff engaged in evaluating policies, practices, systems, and other areas for how they impact people and communities of color will lead to better outcomes. Research has shown that diverse teams are more innovative and productive[11] and that companies with more diversity are more profitable.[12] Moreover, people with diverse backgrounds and experiences bring unique and important perspectives to understanding how data impacts different segments of the market.[13] For example, in several instances, it has been people of color who were able to identify potentially discriminatory AI systems.[14]

[11] *See, e.g.*, John Rampton, Why You Need Diversity on Your Team, and 8 Ways to Build It, Entrepreneur (Sept. 6, 2019).

[12] *See, e.g.*, David Rock and Heidi Grant, Why Diverse Teams Are Smarter, Harvard Business Review (Nov. 4, 2016) (reporting that companies in the top quartile for ethnic and racial diversity in management were 35% more likely to have financial returns above their industry mean, and those in the top quartile for gender diversity were 15% more likely to have returns above the industry mean).

[13] *See, e.g.*, Inioluwa Deborah Raji et al., Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing, *in* Conference on Fairness, Accountability, and Transparency 33, 39 (2020) (stressing the importance of "standpoint diversity" as algorithm development implicitly encodes developer assumptions of which they may not be aware). *See also* Federal Reserve Board and OCC, Supervisory Guidance on Model Risk Management, SR 11-7 at 4 (Apr. 4, 2011) (stating that "[a] guiding principle for managing model risk is 'effective challenge' of models, that is, critical analysis by objective, informed parties who can identify model limitations and assumptions and produce appropriate changes").

[14] *See, e.g.*, Steve Lohr, Facial Recognition is Accurate, if You're a White Guy, New York Times (Feb. 9, 2018) (explaining how Joy Buolamwini, a Black computer scientist, discovered that facial recognition worked well for her White friends but not for her).

<u>Section 4: Financial Assistance</u>: Approaches and methods for assessing equity in the administration of agency grant programs and other forms of financial assistance.

Attachments: Using Special Purpose Credit Programs to Expand Equality; Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem; First Generation: Criteria for a Targeted Down Payment Assistance Program; Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color; NFHA Comments on the Validation and Approval of Credit Score Models Proposed Rule; NFHA/Unidos Response on the Federal Housing Finance Agency's Request for Information on Credit Scores; Discriminatory Effects of Credit Scoring on Communities of Color

The Federal Government Must Use an Equity Framework to Analyze Grant and Financial Assistance Programs

It is critical for the federal government to utilize an equity framework for grant and financial assistance programs. This includes ensuring fair housing and fair lending compliance is baked into all programs. Applying civil rights standards and tests, including disparate impact theory, is a crucial way to ensure financial assistance programs and services are fair and equitable.

An equity framework requires both qualitative and quantitative methods to identify and address the root causes of inequity in financial assistance policies, practices, and programs. Moreover, an equity framework requires a focus on dismantling unjust and discriminatory financial systems, including segregation (both the segregation of people and resources), the dual credit market, exclusionary zoning, and credit/insurance scoring mechanisms, that perpetuate discriminatory outcomes. These systems must be replaced with structures that are fair and do not manifest biased outcomes that can be predicted by race, ethnicity, national origin, or other protected classes. Agencies should collect robust data, including demographic data on race, ethnicity, and other protected classes, to understand who is being served by a program, who is being left out or inadequately served, and how to better target resources to communities that have been historically left behind. The Fair Housing Act's Affirmatively Furthering Fair Housing mandate and rule provides a robust equity framework that may guide the analysis of various other financial assistance programs.[15] In addition, the principles for socially responsible investments (described above) may provide a fitting framework.

An Equity Framework Requires the LIHTC Program to be Explicitly Subject to Title VI of the Civil Rights Act and the Affirmatively Further Fair Housing Mandate

While the Low Income Housing Tax Credit (LIHTC) is the largest program for the development of affordable rental housing in the country, the Treasury Department does not view it as financial assistance under Title VI of the Civil Rights Act. And while the Fair Housing Act provides that federal agencies that have regulatory authority over financial institutions must administer their

[15] *See* 42 U.S.C. § 3605(e)(8); HUD Interim Final Rule, Restoring Affirmatively Further Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021). *See also* HUD, Website for Affirmatively Furthering Fair Housing (providing information and tools, including the Assessment Tool for Local Governments).

programs in a manner that affirmatively furthers fair housing,[16] Treasury does not have any regulations or guidance that further fair housing by enforcing federal civil rights laws or their legal duty to overcome patterns of racial segregation in housing. As research demonstrates, often LIHTC projects are developed in areas that are already predominantly communities of color and contain concentrated poverty.[17] Treasury should explicitly acknowledge the authority of Title VI and the Fair Housing Act in their policies and regulations; establish a centralized, federal governing body to assure state housing finance agencies are in compliance with civil rights laws; and require state housing finance agencies to establish governing bodies that are inclusive of the communities they serve.[18]

Enforcement and Compliance Must be Strengthened

Despite civil rights laws on the books, housing and lending discrimination remains a major issue in the marketplace. Robust fair housing/fair lending enforcement and compliance is critical to help ensure all communities – including communities of color and low-income communities – have fair access to financial services. Across the government, agencies must ensure that programs receiving federal funds comply with a variety of civil rights statutes, including Title VI and Section 504. Federal agencies should increase their Title VI and Section 504 compliance reviews and pursue relief to address violations. Additionally, HUD, the Consumer Financial Protection Bureau (CFPB), the federal financial regulators, and the U.S. Department of Justice (DOJ) must revive their fair housing and fair lending enforcement efforts.[19]

Additionally, as we saw most recently with the Paycheck Protection Program (PPP), the Small Business Administration (SBA) must make fair lending enforcement and guidance a priority going forward. The PPP rollout was riddled with flaws that led to disparities in access, but SBA lending was already failing to fully serve Black and Latino businesses. The failure to issue guidance on serving underserved businesses during the PPP, and merely issuing a letter from the Administrator on June 15, 2020 -- over 3 months after PPP began -- is another example of how a lack of focus on this at the SBA has proven to be devastating for communities of color. An Office of Fair Lending should be created at SBA that would be charged with evaluating SBA programs and policies to ensure they are in compliance with all fair lending laws. This should be a high-level office with the Director reporting directly to the Administrator.

---

[16] *See* 42 U.S.C. § 3605(e)(8); HUD Interim Final Rule, Restoring Affirmatively Further Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021).

[17] *See* Carolina K. Reid, The Links Between Affordable Housing and Economic Mobility, The Terner Center, University of California at Berkeley, p. 3 (May 2018) (stating that "[t]he fact that developers receive a "boost" in tax credits for siting a project in QCTs or DDAs (both of which by definition have higher rates of poverty), coupled with higher land costs, NIMBY opposition to affordable housing projects and exclusionary zoning practices all increase the likelihood that LIHTC properties are concentrated in higher-poverty neighborhoods.").

[18] *See* Raquel Smith, A Seat at the Table: Changing the Governing Structure of Low Income Housing Tax Credit Program Administration to Reflect Civil Rights Values and Fair Housing, 6 Colum. J. Race & L. 193 (2016); The Low Income Housing Tax Credit, PRAAC (providing research and links).

[19] *See, e.g.*, Patrick Rucker, Trump Financial Regulator Quietly Shelved Discrimination Probes into Bank of America and Other Lenders, ProPublica (July 13, 2020) (discussing concerns that at least six redlining investigations were halted or stalled under the Trump administration's Office of the Comptroller of the Currency). While we acknowledge that the federal banking regulators are independent agencies, the White House can nominate leadership as well as hold discussions with the regulators to emphasize the importance of robust fair lending enforcement.

Further, disparities in access to SBA funds existed long before PPP. In SBA's fiscal years ending September 30, 2019 and 2018, for all SBA 7(a) loans made, only 5% were made to Black-owned businesses, and only 9% were made to Latino-owned businesses.[20] SBA should work with the Treasury, the CFPB and the prudential regulators to establish, monitor, and enforce an affirmative duty to fairly serve all small business borrowers; and establish affordable small business lending goals for all credit providers. The prudential regulators should require lenders covered by the Community Reinvestment Act to include a robust small business community reinvestment requirement that includes loans approved for small businesses and for business owners where the business credit runs through their personal credit profile. SBA and CFPB should work with all financial regulators to ensure that equitable small business lending is considered in CRA evaluations.

The Federal Government Must Take a Proactive and Targeted Approach to Undo Structural Barriers

In addition to a greater focus on enforcement and compliance, a more proactive approach is needed to expand access for underserved communities and to achieve equity-oriented results. The federal government should pursue and bolster programs that help reverse decades of redlining and structural barriers.

Down Payment Assistance

Given our national crisis and inequitable housing finance system, a new, substantial public investment in homeownership is needed to bring in first-generation homebuyers, including homebuyers of color. The Center for Responsible Lending (CRL)/National Fair Housing Alliance (NFHA) Down Payment Assistance Program would help achieve this goal.[21] Although there undoubtedly are millions of young families for whom down payment assistance could accelerate their path to homeownership, given limited resources, it is essential that this program be targeted in a way that delivers on President Biden's promise to address the long-term discrimination and racial inequities that continue to plague our society, especially those rooted in exclusionary housing policies. It is also critical that the program reaches potential homebuyers who bear the burdens of past discrimination and who may never be able to achieve the dream of homeownership without this assistance. Targeting first generation homebuyers is an effective method.

It is also imperative to ensure equitable delivery channels for grant making and financial assistance programs. For example, in the CRL/NFHA down payment proposal, half of the funds are to be set aside for state Housing Finance Agencies that have adopted Affirmatively Furthering Fair Housing plans that comport with the letter and spirit of the Fair Housing Act. These funds would be awarded based on the size of the renter population in each state. The proposal recommends that the other 50% should be awarded through a competitive bidding

---

[20] *See* Small Business Administration, SBA Business Loan Approval Activity Comparisons for Fiscal Years 2012 to 2019, for the Period Ending 08-30-2019 (Aug. 2019)
[21] CRL and NFHA, First Generation: Criteria for a Target Down Payment Assistance Program (May 21, 2021).

process run by the Community Development Financial Institutions Fund at the U.S. Department of the Treasury to select administrators committed to and capable of delivering funds to socially and economically disadvantaged individuals.

Special Purpose Credit Programs

Furthermore, the Equal Credit Opportunity Act (ECOA) includes a unique mechanism for advancing racial and other forms of equity via Special Purpose Credit Programs (SPCPs).[22] The programs permit creditors and other entities to create special products and services to facilitate lending to underserved consumers while ensuring lenders would not be deemed to be in violation of the nation's fair lending laws.[23] Federal agencies that provide credit programs should include an evaluation of how they promote and support the use of SPCPs in any racial equity assessment as these programs are critical to advancing justice in the credit and financial system.[24]

The federal financial regulators, CFPB, HUD, SBA, and DOJ should more broadly inform lenders of the potential to use SPCPs in order to facilitate extension of responsible credit favorably designed for underserved communities. These agencies should also issue guidance to ensure lenders have confidence that SPCPs, designed and implemented properly, advance the goals of other civil rights laws, including the Fair Housing Act. To describe further how SPCPs advance fair housing and lending statutes, we point to the recently published work of NFHA and Relman Colfax PLLC, Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem.[25] This work explains how ECOA coexists within the regulatory framework with the Fair Housing Act and sections 1981 and 1982 of the Civil Rights Act of 1866.

Without an Equity Framework, Underserved Communities are Left Behind

When the federal government does not use an equity framework and ignores principles for socially responsible investments, underserved communities are inevitably left behind. Unfortunately, there are countless examples of this occurring. The following examples serve as a cautionary tale.

Paycheck Protection Program

The Paycheck Protection Program (PPP) was not crafted with an equity lens. The design of the program, which relied on banks to originate the loans, unfairly put Black, Latino, and Native American business owners at a distinct disadvantage in attempting to access PPP funds when so many were already on precarious financial footing. Banks prioritized customers with whom they had an existing banking relationship. Yet, Black businesses are less likely to access credit

[22] *See* Lisa Rice, Using Special Purpose Credit Programs to Expand Equality, National Fair Housing Alliance (November 4, 2020).
[23] 15 U.S.C. § 1691(c); Final Rule, 42 Fed. Reg. 1242 (Jan. 6, 1977).
[24] *See* Patrice Alexander Ficklin and Charles Nier, III, The Use of Special Purpose Credit Programs to Promote Racial and Economic Equity, Poverty & Race Research Action Council (May 2021).
[25] Stephen Hayes, Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem, National Fair Housing Alliance and Relman, Colfax (Nov. 2020).

through a bank. Research from the Federal Reserve found that in the previous five years, 46% of White-owned businesses with employees accessed credit from a bank, and 6% accessed credit from a credit union.[26] During that same time, just 23% of Black-owned employer firms accessed credit from a bank, and 8% from a credit union and 32% of Latino-owned employer firms accessed credit from a bank and 4% from a credit union.[27] Banks also tended to prioritize larger PPP loans to maximize fees, leaving out the smallest of small businesses from accessing relief.[28]

Additionally, the Small Business Administration (SBA) did not collect adequate data. An analysis of the SBA's PPP data shows that over three-fourths of the 5.2 million loans made in 2020 contained no demographic information. Just 9.5% reported proprietor race or ethnicity information, 16.2% reported proprietor gender, and 14.5% reported whether the proprietors were veterans. Collecting such little information, the SBA made it nearly impossible to judge their own success in extending relief to vulnerable communities.[29]

Student Debt

Moreover, student lending programs are inequitable. The growth of outstanding student loan debt over the last decade has been staggering. Today, more than 44 million people carry over $1.7 trillion of outstanding student loan debt, an amount that exceeds all other types of non-mortgage loan debt.[30] Two out of three graduates in the class of 2017 borrowed federal student loan debt to finance their education.[31] This phenomenon is especially concerning for communities of color, as existing wealth disparities make the burden of student loan debt particularly heavy for Black and Latino communities.

In fact, recent research shows that, rather than helping communities of color build wealth, a college education actually deepens the wealth gap due to the high costs and structural issues in our system.[32] For example, after 20 years in repayment, the typical Black borrower still owes 95% of the original balance while their White peers owe only 6% of their original balance after that amount of time.[33] As a result of their need to borrow more, alongside targeting and financial

26 Federal Reserve Board, Small Business Credit Survey: Report on Employer Firms (2020).
27 *Id.*
28 *See* Testimony of Ashley Harrington, Federal Advocacy Director, Center for Responsible Lending, before the U.S. House Committee on Small Business Regarding "Paycheck Protection Program: Loan Forgiveness and Other Challenges" (June 17, 2020) (discussing the structural inequities in the PPP program).
29 There have been similar equity challenges with the U.S. Department of Agriculture (USDA). *See, e.g.* Ximena Bustillo, "Rampant Issues": Black Farmers Are Still Left Out at USDA, Politico (July 5, 2021) (noting, among other things, denial disparities in loan applications for Black farmers).
30 National Student Loan Data System, Federal Student Aid Portfolio Summary.
31 Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (Feb. 2021).
32 Jason N. Houle and Fenaba R. Addo, Racial Disparities in Student Debt and Reproduction of the Fragile Black Middle Class, Sociology of Race and Ethnicity 1-16 (Aug. 2, 2018).
33 Laura Sullivan, Tatjana Meschede, Thomas Shapiro, and Fernanda Escobar, Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap, Institute on Assets and Social Policy at Brandeis University (Sept. 2019).

deception by for-profit institutions and often abusive servicers, a disproportionate percentage of students of color and the majority of black students are unable to pay student debt and will default.[34]

Despite these facts, for most students, especially students of color, the pursuit of higher education is not a choice. Indeed, postsecondary education is a necessity, not a luxury, for today's workforce.[35] Unless bold, new actions such as across-the-board cancellation are taken to deal with the student debt crisis, a generation will be trapped in debt undertaken to try to advance their lives.[36]

Beyond the need for cancellation, the Department of Education must evaluate all of their repayment programs and servicer outcomes with a racial equity lens. The department has just initiated a rulemaking process that will include repayment reform and is also in the midst of renegotiating servicer contracts. Currently, federal student loan repayment and servicing requirements include unnecessary barriers that disproportionately harm students of color. Concerns have been raised that servicers are providing access to affordable income-driven repayment in an unequal way, with a disproportionate impact by race and sex.[37] For example, borrowers of color are more likely than their white peers to experience servicer misrepresentation.

Borrowers of color are also more likely to participate in income-based repayment (IBR), which is supposed to make debt manageable and provide a pathway to forgiveness. However, the current system is far too complex and burdensome and very few borrowers have actually achieved loan forgiveness through this program. The plans should be streamlined and the payments should be actually affordable. Too often, borrowers in IBR, often borrowers of color, watch their balances grow even as they remain in repayment for decades. First, historical practices preventing inter-generational wealth building mean that borrowers of color graduate with more student loan debt. Second, the overrepresentation of students of color in the student bodies of predatory, for-profit schools and ongoing workplace discrimination mean that borrowers of color are more likely to struggle with repayment of those loans. Servicer misrepresentations increase the costs of those loans and erect yet another barrier to wealth building, perpetuating the cycle.

GSE Mortgage Refinancing

The Federal Housing Finance Agency (FHFA) recently announced that the Government-Sponsored Enterprises (GSEs) would implement a new Low-Income Borrower Refinance Option that, as designed, would exclude the borrowers hardest hit by the economic crisis -- particularly

---

[34] Judith Scott-Clayton, The Looming Student Loan Default Crisis is Worse Than We Thought, Brookings Institution (2018).
[35] Over 95% of jobs created since the Great Recession have gone to those with at least a bachelor's degree. *See* Anthony Carnevale, *et al*., America's Divided Recovery: College Haves and Have-Nots (2016).
[36] Center for Responsible Lending and the National Consumer Law Center, Road to Relief: Supporting Federal Student Loan Borrowers During the COVID-19 Crisis and Beyond (2020).
[37] *See* Protect Student Loan Borrowers from Discrimination, Center for Responsible Lending Joint Comment Letter to the CFPB (June 3, 2019).

borrowers of color -- from accessing it.[38] The program requires lenders to conduct a full underwriting, includes credit score minimums, and is limited to those with an existing GSE-backed loan. Especially now, during the COVID-19 crisis and at a time of historic low interest rates, more borrowers should be able to benefit from the current refinance boom to save money on their mortgage payment. Unfortunately, the refinance surge is not reaching lower-income, lower-wealth, or Black and Latino families adequately, particularly borrowers with smaller loan balances.[39] Recently, Federal Reserve economists found significant disparities in refinancings during the pandemic across racial and ethnic groups. The economists estimate that through October 2020, only 6% of Black borrowers and 9% of Latino borrowers refinanced as compared to 12% of White borrowers.[40] Moreover, of the estimated total refinancing savings of $5.3 billion for all households, Black households received only approximately $198 million, or 3.7%. Given these inequitable circumstances, FHFA and the GSEs should implement a streamlined refinance program to make rate term refinancing more available to lower wealth borrowers and borrowers of color, particularly considering the Federal Reserve's continued support in purchasing billions per month in agency mortgage-backed securities.

Additional examples of programs and policies that do not utilize an equity framework include:

- Federal agencies have failed to articulate clear standards regarding the use of algorithmic systems and technologies in the housing and financial services space, which could result in disparate impacts on communities and consumers of color and other protected groups;[41]
- FHFA and the GSEs require the use of the Classic FICO score which is an outdated system. There are less discriminatory alternatives to Classic FICO, including scoring systems which responsibly utilize alternative data, such as rental payment history;[42] and
- FHFA and GSE pricing policies increase the cost of credit for lower wealth families and families of color. These policies include the capital rule requirements, loan level pricing adjustments, the Private Mortgage Insurer Eligibility Requirements, and the setting of guarantee fees.[43]

---

[38] *See* Federal Housing Finance Agency, Fact Sheet: Low-Income Borrower Refinance Option (Apr. 28, 2021).

[39] *See* Sumit Agarwal, Souphala Chomsisengphet, Hua Kiefer, Leonard C. Kiefer, and Paolina C. Medina, Inequality During the COVID-19 Pandemic: The Case of Savings from Mortgage Refinancing, Working Paper (May 19, 2021); Kristopher Gerardi, Paul Willen, and David Hao Zhang, Mortgage Prepayment, Race, and Monetary Policy, Federal Reserve Bank of Boston, Working Paper 20-7 (2020).

[40] Kristopher Gerardi, Lauren Lambie-Hanson, and Paul Willen, Racial Differences in Mortgage Financing, Distress, and Housing Wealth Accumulation during COVID-19, Federal Reserve Banks of Atlanta, Philadelphia, and Boston (June 22, 2021).

[41] *See* Advocate Comment Letter to the Federal Financial Regulators regarding the Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, including Machine Learning (July 1, 2021).

[42] Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color; NFHA Comments on the Validation and Approval of Credit Score Models Proposed Rule; NFHA/Unidos Response on the Federal Housing Finance Agency's Request for Information on Credit Scores; Discriminatory Effects of Credit Scoring on Communities of Color.

[43] *See, e.g.*, CRL, Comment to the Federal Housing Finance Agency on Enterprise Regulatory Capital Framework (Aug. 31, 2020)

<u>Section 5: Stakeholder and Community Engagement</u>: Approaches and methods for accessible and meaningful agency engagement with underserved communities.

HUD's Affirmatively Furthering Fair Housing Regulation Is A Useful Model for Stakeholder Engagement

Policy decisions that are informed by the priorities and lived experiences of the people whom they will affect the most are more likely to promote fairness and equity than those that are not informed by this type of input. The Affirmatively Furthering Fair Housing (AFFH) regulation promulgated by the Department of Housing and Urban Development (HUD) offers one useful model for engaging low- and moderate-income people, people of color, people with disabilities and others who too often are not at the table in discussions about policies that affect them and their communities.[44] That regulation requires HUD grantees to engage in a fair housing planning process to identify key fair housing issues in their communities, understand the forces responsible for creating and perpetuating those problems, set priorities for tackling those problems and determine how their housing and community development resources would be deployed to mitigate those problems, both through expanding housing opportunities throughout the community and investing in disinvested and under-resourced neighborhoods.[45]

The AFFH rule's community engagement has several key components. It contains the common requirement for posting draft fair housing plans for public review and comment and holding a public hearing to receive feedback on those drafts. But it goes beyond this basic requirement in several important ways. First, it requires grantees to consult with community members during the process of developing their draft fair housing plans. As a result, the experiences and priorities of those community members help to inform and shape the plans in the earliest stages. Second, the regulation identifies the types of organizations with whom grantees must consult. These include "public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDs and their families, homeless persons), community-based and regionally-based organizations that represent protected class members and organizations that enforce fair housing laws."[46] Including this level of specificity and range of organizations in the regulation is a major advance over HUD's previous fair housing planning process and enables grantees to incorporate a wider range of perspectives and experiences into the formulation of their plans and priorities.[47] Third, the regulation requires grantees to include in their plans a description of the

---

[44] *See* HUD Interim Final Rule, Restoring Affirmatively Further Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (June 10, 2021).

[45] *See* Testimony of Ellen Lee, Director of Community and Economic Development for the City of New Orleans, before the U.S. House of Representatives Committee on Oversight and Reform Subcommittee on Civil Rights and Civil Liberties (Feb. 5, 2020) (providing a good snapshot of the types of issues addressed in the AFFH regulation and the impact of the fair housing planning process).

[46] *See, e.g.*, 24 C.F.R. § 91.100 (a)(1), which is a HUD regulation that applies to units of local government. Similar requirements apply to state governments and other types of HUD grantees (referred to as program participants).

[47] *See* Vicki Been and Katherine O'Regan, NYU Furman Center, Comment Letter to HUD about AFFH: Assessment of Fair Housing for Consolidated Plan Participants (March 6, 2018) (providing a detailed analysis of the impact of these provisions of the 2015 AFFH rule on the nature and extent of community participation in the fair housing planning process).

comments received from the community, to note whether or not those comments were accepted and if not, the reasons why not.[48] This provides a measure of transparency and accountability, helping community members understand how their input was received.

In addition to the provisions of the regulation itself, in the past, additional technical assistance resources were provided in a few communities by HUD and/or philanthropic sources, which gave a significant boost to the community engagement process. These were made available because, on the one hand, this was a new rule in 2015, requiring – as does any new rule - a certain amount of technical assistance to ensure a smooth roll out, and on the other hand, because the rule was of significant interest as a tool to promote racial equity.

The technical assistance resources previously provided made it possible for local fair housing or other community- based organizations to play a unique role as partners with HUD grantees, helping grassroots groups and community leaders understand the concepts underlying the AFFH rule, how the fair housing planning process could affect their communities and advance their priorities, and how they could engage in the process most effectively. Although the concepts behind the AFFH rule – expanding access to opportunity, overcoming the barriers posed by segregation, increasing resources in disinvested communities, ending discrimination and creating real housing choice for all – are relatable for many people, the regulatory language, jargon, and acronyms used in the rule itself can be confusing and intimidating for those who are not steeped in the field. The ability to provide community-based "interpreters" who could cut through the jargon and explain the importance of the rule and its fair housing planning process in plain English and in the context of other community concerns, proved to be invaluable as a means to engage a much wider range of community stakeholders than previous fair housing planning efforts.

In addition, in some places, these fair housing partners were able to pass through resources to smaller, more grassroots organizations to make their participation and that of their members in the fair housing planning process. Small grants to organizations with limited budgets to underwrite the staff time and expenses associated participating in this process, and to provide childcare and food at meetings were critical for making it possible for community members to engage and provide input that would otherwise be missing from these plans. This gave grantees a much richer and better-grounded understanding of the community's needs and priorities. In these cases, the pass-through funds were provided by philanthropic sources. Given how important they were for enabling meaningful participation by community stakeholders, they should be built into both the expectations and budget for other community engagement efforts.

[48] *See* 24 C.F.R. § 5.154(d)(6).

Thank you for considering our views. If you have any questions, please contact Jorge Andres Soto at Jsoto@nationalfairhousing.org or 202-898-1661.

Sincerely,

Americans for Financial Reform Education Fund

Autistic Self Advocacy Network

Center for Community Progress

Center for Responsible Lending

Illinois People's Action

Long Island Housing Services, Inc.

National CAPACD- National Coalition for Asian Pacific American Community Development

National Community Stabilization Trust

National Fair Housing Alliance

National Low Income Housing Coalition

Woodstock Institute