Brooklyn Law School

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March 17, 2016

FHFA Duty to Serve Comment Letter

David J Reiss

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BROOKLYN LAW SCHOOL
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David J. Reiss
Professor of Law

March 17, 2016

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 Seventh Street SW., 8th floor
Washington DC, 20219

Re: Comments/RIN 2590-AA27:
Enterprise Duty to Serve Underserved Markets

Dear Mr. Pollard:

The FHFA has requested input on its proposed rule that would provide a Duty to Serve credit to Fannie Mae and Freddie Mac (The Enterprises) for eligible activities that facilitate a secondary mortgage market for mortgages related to preserving the affordability of housing for homebuyers, among other things. I write to comment on question **64** regarding the preservation of affordable homeownership through shared equity homeownership programs.

The Problem

The Proposed Rule requires that each Objective of an Underserved Markets Plan be measurable in order to determine whether it has been achieved by the Enterprise. The Proposed Rule requires that these programs "promote successful homeownership." § 1282.34(d)(4)(iii). While the Proposed Rule addresses ways that ensure that housing remains affordable for future owners after resale, it does not offer a way to measure successful or sustainable homeownership for participants while they are in a shared equity program.

The Proposed Solution

The FHFA should require that the Enterprises measure the tenure of homeowners participating in shared equity programs and disallow Duty to Serve credit if participants fail to maintain their housing for reasonable length of time. While this comment is being made in the context of shared equity programs, it applies with equal force to all homeownership programs that are counted for Duty to Serve purposes.

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Discussion[1]

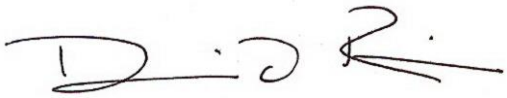
While the federal government has a range of affordable homeownership initiatives, it is surprising how few of them account for how frequently participants default. It appears that households and communities of color are most harmed by thoughtlessly loose underwriting criteria as they are disproportionately represented among homeowners impacted by the defaults and foreclosures. This has been the case with the FHA's Section 235 fiasco of the 1970s as well as its American Dream Downpayment Act debacle the 2000s.

History teaches us that the goal of sustainable homeownership should not be ignored. It should be closely hewed to for the sake of the Enterprises' legitimacy. It should also be closely hewed to for the sake of borrowers who should be able to rely on Enterprise underwriting as a signal that they will likely be able to afford their housing payments and keep their homes.

There will always be some percentage of mortgagors who will default on their loans. The key policy question is what the acceptable range of default is over the long term. If the rate is too low, it would imply that some were not given the opportunity to benefit from homeownership. If the rate is too high, it would likely imply that a mortgage was reducing household net worth and having too many negative social impacts on households as families deal with the effects of default, foreclosure and eviction.

There is no objective way to identify the most ideal default rate for Duty-to-Serve mortgages. One might, however, look at the alternatives available to households. Because eligible households have the option of renting, the benefits and drawbacks of a Duty-to-Serve-eligible mortgage to a household should be compared to renting as well as to other mortgage products that might be available to them. Shared equity homeownership programs should have housing tenures that exceed the reasonable alternatives if they are to generate Duty to Serve credits.

Sincerely,



David Reiss

[1]. This comment letter is drawn from David J. Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, Georgia L. Rev. (forthcoming 2016), *available at* http://ssrn.com/abstract=265287. Dominika Wilk assisted in its preparation.