

Congress of the United States
Washington, DC 20515

October 11, 2022

The Honorable Sandra Thompson
Director
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC, 20024

Dear Director Thompson:

We write to express our concerns with some elements of the closing cost initiatives announced in the Equitable Housing Finance Plans released on June 8, 2022, by Fannie Mae and Freddie Mac (the Enterprises) at the direction of the Federal Housing Finance Agency (FHFA).¹ Both plans contemplate new efforts to incentivize consumers to purchase attorney title opinion letters in lieu of title insurance. The plans aim to lower closing costs and make homeownership more accessible for low- to moderate- income and minority homebuyers. However, these initiatives appear to risk exposing these consumers to harm by not providing the same consumer protections as title insurance. They also raise concerns about the safety and soundness of the Enterprises, increase taxpayer risk which FHFA must consider as the GSEs' regulator and conservator.

First, both plans place low- and moderate-income, and minority borrowers at risk of going uninsured against some of the most common title defects for the average homebuyer. As a result, the attorney opinions imperil the ability of these consumers to be compensated for title issues. Attorney opinions increase the likelihood these precarious homeowners lose their house and lose the ability to build wealth.

The differences between attorney title opinions and title insurance can be confusing to policymakers, mortgage lenders, and legal practitioners. It is not hard to imagine how much more challenging these distinctions are for the typical consumer.

An attorney title opinion does not insure against items that cannot be discovered by searching public records such as the forgery of a seller's deed or an invalid or deficient will being used to transfer title after an owner's death.²

A key feature of title insurance includes a "duty to defend" against covered title defects, which means the insurance company will hire lawyers and pay a homeowner's defense costs. Attorney title opinions lack this crucial consumer protection. If a homeowner suffers a title problem in

¹ Fannie Mae, Equitable Housing Finance Plan, at 25–27 (June 2022), *available at* <https://www.fanniemae.com/media/43636/display>; Freddie Mac, Equitable Housing Finance Plan, at 23 (June 2022), *available at* <https://www.freddie.com/about/pdf/Freddie-Mac-Equitable-Housing-Finance-Plan.pdf>.

reliance on an attorney's opinion, the attorney (and by extension any malpractice carrier) will have no obligation or incentive to compensate the homeowner absent a showing of fault beyond any inherent flaws in the public records. Most homeowners do not want to simply receive an insurance payment but prefer the opportunity to have the title defect fixed and to stay in their home.

Unlike title insurance (which, in essence, is no-fault insurance), the homeowner must prove malpractice to make a claim under an attorney opinion letter. Proving malpractice may require homeowners to pay legal fees or navigate the legal system entirely on their own. In other words, instead of being defended in court by a title insurer, the injured homeowner will have to hire a *new lawyer* to sue their original title attorney while *simultaneously* defending against the title defect itself. This is especially concerning given that the Federal Reserve has found that 35% of Americans cannot cover a \$400 emergency expense, much less afford to self-fund litigation expenses in potentially two separate lawsuits over the same title problem.³

Given these issues, it is critical for Congress and other policymakers to understand how attorney opinion letters will be promoted to consumers and what representations will be made to encourage their use of this product. For example, Freddie Mac indicates its pilots will involve "targeted marketing and outreach" through "lenders and community organizations."⁴ Many legal practitioners and respected legal scholars have argued that *not* requiring homeowners to purchase title insurance (absent an extensive written disclaimer explaining the risks to the consumer) should itself be considered legal malpractice.⁵ This raises concerns that the "targeted marketing" of the closing cost pilots may fail to adequately convey these risks to consumers, misleadingly suggest to homebuyers that attorney title opinions have been endorsed by the Enterprises or the federal government, and even potentially cross the line into the unauthorized practice of law.

Both of the Enterprises' closing cost initiatives appear to rest on questionable data that has not been released for vetting by independent analysis, and thus cannot be considered definitive. Freddie Mac states the title insurance "policy premium is usually the largest closing cost... averaging over one percent of the loan amount."⁶ It is unclear how this figure was derived as it seems to simultaneously overstates a recent scholarly analysis of the costs to consumers by several multiples⁷ while also ignoring typically far larger closing costs in the transaction. While Fannie Mae has released some limited data in a recent report on closing costs,⁸ the methodology used in

³ <https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-dealing-with-unexpected-expenses.htm>

⁴ Freddie Mac, *supra* note 1, at 19.

⁵ Robin Paul Malloy & Mark Kaplow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407 (2000), available at <https://scholarship.law.stjohns.edu/lawreview/vol74/iss2/4/>; Robin Paul Malloy, *Using Title Insurance to Avoid Malpractice and Protect Clients in a Changing Marketplace*, 11 THE DIGEST 51 (2003), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=585779.

⁶ Freddie Mac, *supra* note 1, at 23 (emphasis added).

⁷ See Stewart E. Sterk, *Title Insurance: Protecting Property at What Price?*, 99 WASH. U. L. REV. 519, 545–546 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796556 (showing range of costs studied from California rate of 0.32% for \$500,000 owner's title insurance to Texas rate of 0.59% for similar coverage).

⁸ Fannie Mae, *Barriers to Entry: Closing Costs for First-Time and Low-Income Homebuyers* (Dec. 2021), available at <https://www.fanniemae.com/research-and-insights/publications/barriers-entry-closing-costs-first-time-and-low-income-homebuyers>.

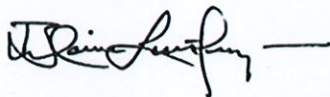
this report does not enable any direct comparisons between the costs of attorney title options and title insurance. These flaws undercut its conclusions on the impact of these costs on different categories of borrowers.

In light of the concerns identified above, we request that you provide us with the following information prior to approving any further Enterprise pilot expanding the use of attorney title opinion letters:

1. The data and methodology used by both Enterprises to formulate the closing cost analyses reflected in their respective plans.
2. A detailed economic analysis of the potential costs to consumers of purchasing attorney title opinions compared to title insurance, broken down by property valuation, transaction type, and geographic market.
3. An analysis of the risks of attorney title opinions compared to title insurance to the property and financial interests of (a) consumers, (b) mortgage lenders, and (c) the Enterprises.
4. Details of how attorney title opinions will be marketed to consumers, including what communications and disclaimers will be made and the steps that will be taken to avoid violations of consumer protection laws.

We expect FHFA to address these concerns in a timely manner, prior to approving the expansion of any Enterprise closing cost pilot, in order to give Congress the opportunity to engage further on this important matter. We appreciate your attention to these significant issues and look forward to your response.

Sincerely,



Blaine Luetkemeyer
Member of Congress



Brad Sherman
Member of Congress