



January 8, 2021

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
Eighth Floor, 400 Seventh Street, SW
Washington, DC 20219

RE: Comments/RIN 2590-AA17 Prior Approval for Enterprise Products

Dear Mr. Pollard:

The Housing Policy Council¹ (HPC) appreciates the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") proposed rule on Prior Approval for Enterprise Products (the "Proposed Rule").² HPC members have substantial engagement with Fannie Mae and Freddie Mac (the "Enterprises") as originators and servicers of residential mortgage loans that are securitized by the Enterprises, as counterparties to the Enterprises in credit risk transfer structures, and as private mortgage insurers. As such, the members of HPC have a direct interest in the impact of the types of new activities and new products that the Enterprise engage in, as well as the manner in which the Enterprises support a competitive, equitable, and sound housing finance system.

HPC recognizes the need to update the existing procedures for reviewing and acting upon new activity and new product proposals by the Enterprises. The existing procedures were adopted over a decade ago with an abbreviated public comment period.³ Moreover, since the existing procedures were adopted we have seen them applied differently by different FHFA directors. Thus, there is a need for more clarity and certainty surrounding the procedures for reviewing and acting on new activity and new product proposals, especially if these procedures would apply to the Enterprises after the termination of the conservatorship.

¹ The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families. For more information, visit www.housingpolicycouncil.org

² 85 Fed. Reg. 217 (November 9, 2020).

³ FHFA existing rule was effective as an Interim Final Rule on the same date that it was published in the Federal Register. At the time FHFA stated that the normal notice and public comment period was inapplicable because it was in the public interest to implement the rule immediately. See 74 Fed. Reg. 31602 (July 2, 2009).

Summary of Comments

HPC is generally supportive of the Proposed Rule. We believe, however, that the Proposed Rule could be improved in several respects to make the process for reviewing and acting upon new activity and new product proposals even more clear and certain. Specifically, as described further below, we recommend that the final rule should:

Standard of Review for New Activities -- clarify the standard of review for new activities and explicitly mandate that the evaluation will include consideration of the public interest and nexus to the GSE's charters and housing mission;

Limitations on Pilots -- provide that pilot programs will be subject to definitive volume and time limits;

Standard for Determining Whether to Seek Public Comment on a New Product -- clarify the standard for when the Director seeks public comment on a new product to include consideration of the potential for the product to have a negative impact on participants in the mortgage finance system;

Level of Transparency about New Activity Notices and New Product Determinations -- provide more transparency to the public about both new activity notices and new product determinations;

Amount of Information for New Product Comment Period -- strike a balanced approach between disclosing information on new products and the need to protect confidential and proprietary information when an activity is at a nascent stage of development; and

Timing of Public Comment Period -- provide, within the statutory constraints, the public with more time to provide comments on new products.

II. Specific Comments and Recommendations

Standard of Review for New Activities

Proposed §1253.5, which is titled "Review of Notice of New Activity," lists three factors FHFA may apply when reviewing a Notice of New Activity. Specifically, proposed §1253.5(b) states that "Nothing in this regulation limits or restricts FHFA from reviewing a Notice of New Activity under any other applicable law, under the Director's authority to review for safety and soundness, or to determine whether the activity complies with the Enterprise's authorizing statute." Proposed §1253.5(b) further states that FHFA "may" conduct such a review as part of its determination that a Notice of New Activity submission is complete.

It is not clear which of the three factors listed in proposed §1253.5(b), if any, would be applied by the Director in reviewing a Notice of New Activity. Moreover, it is not clear if the

factors are to be considered only for purposes of determining that the Notice is complete or may be considered for determining that the activity is permissible and appropriate for an Enterprise. We recommend that this proposed section be revised to eliminate these ambiguities.⁴

First, we recommend that proposed §1253.5(b) be revised to affirmatively state that a Notice of New Activity “shall” be subject to review under four standards: (i) any applicable law; (ii) the Director’s safety and soundness authority; (iii) an Enterprise’s authorizing statute; and (iv) the public interest as identified in proposed §1253.4(b). An affirmative statement of the factors to be considered in reviewing a Notice of New Activity would help the Enterprises and other interested parties better understand the basis for determinations. The addition of a public interest factor is required by existing law and is consistent with other parts of the proposed regulation.

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008, provides that one of the principal duties of the Director is to ensure that the “*activities of each regulated entity ... are consistent with the public interest.*”⁵ Thus, the Director must consider the public interest in connection with reviewing a Notice of New Activity. Additionally, §1253.3(a)(3)(iv) and §1259(a)(13) of the proposed regulation envision consideration of the public interest as part of reviewing a Notice of New Activity. Proposed 1253.3(a)(3)(iv) states that a New Activity includes an “activity that would substantially impact the mortgage finance system, safety and soundness of the Enterprises, compliance with the Enterprise’s authorizing statute, or the public interest as identified in §1253.4(b).” Similarly, proposed §1259(a)(13) states that a Notice of New Activity must “Describe the impact of the New Activity on the public interest and provide information to address the factors listed in §1253.4(b).”

Consideration of the public interest as identified in proposed §1253.4(b) also would ensure that the Director considers the competitive impact of a proposed new activity.⁶ HPC understands that piloting a new activity with only certain firms may be necessary as long as there are other important public interest factors that are advanced by conducting the pilot. Nonetheless, it is critical that an Enterprise not be permitted to use a new activity or pilot participation to provide an advantage to the same stakeholders over and over, giving such firms a “first mover” advantage at the expense of their competitors. Moreover, it is important that the Enterprises not use this authority to overtake the operations of private capital in the

⁴ FHFA has an obligation under Executive Order 12866 to write regulations that are “simple and easy to understand, with the goal of minimizing uncertainty and litigation” (Sec. 1, Par. (b)(12)). That order was issued by President Clinton in 1993 and has never been rescinded.

⁵ 12 U.S.C. 4513(a)(1)(B)(v), emphasis added.

⁶ As proposed, §1253.4(b) provides that the factors the Director must consider in determining whether a New Product is in the public interest include: (i) products offered by other market participants; (ii) the impact of the product on competition; and (iii) the impact of the product on market barriers and market inefficiencies. Adding an explicit consideration of the public interest to the standards of review would require a conforming change to §1253.4(b) to clarify that it applies to both new activities and new products.

marketplace. The statutory purpose of the Enterprises is to ensure the operations of the secondary market are financed by private capital to the extent feasible and to ensure the Enterprises' participation "respond[s] appropriately to the private capital market,"⁷ not to use their inherent governmental advantages to compete with or crowd out private capital and private market participants.

Second, we recommend that proposed §1253.5(b) be revised to clarify that the Director give equal weight to the safety and soundness standard and the public interest standard. As a practical matter, the failure to consider public interest while analyzing safety and soundness would be analogous to conducting a cost/benefit analysis that only assesses the costs of an activity and not the benefits.

Limitations on Pilots

Proposed §1253.9(a)(7) requires an Enterprise to include parameters on pilot programs, such as the "duration" and "volume" of the activity. We recommend that this section be revised to establish formal constraints on pilot activities, requiring that pilot activities be subject to specified time and volume limitations. Such limits would mitigate the significant first mover advantages that can accrue to participants in major industry pilots, particularly those that qualify as new products. Such limits also would mirror the process in the CFPB's "Compliance Assistance Sandbox Request" and grant approval of new activities (particularly those framed as a pilot) for a specified period of time. Furthermore, at the conclusion of the specified time or volume limit, an Enterprise should again be required to seek FHFA approval. This would then allow FHFA to determine whether the process was a success or failure, and also whether the pilot can or should be expanded to other market participants. An advantage of this approach is that it would prevent the type of pilot creep that was seen in recent years.⁸ If FHFA finds that a test of a pilot is successful, the Enterprise that conducted the pilot should in due course expand the change to other market participants. Adding this safeguard to the new activity/new product process would align and effectuate FHFA's stated goal of ensuring that there is no permanent special treatment provided to favored stakeholders in connection with participation in a pilot. Given concerns with how the pilot process has historically worked, the final rule should provide greater clarity on the way that existing pilots will be either converted to permanent product offerings or activities, or terminated.

Standard for Determining Whether to Seek Public Comment on a New Product

Proposed §1253.4 defines a New Product as any New Activity that the Director determines merits public notice and comment about whether it is: (i) authorized by certain provisions of an Enterprise's statutory charter; (ii) in the public interest; and (iii) consistent with

⁷ 12 U.S.C. 1716 and Public Law No. 91-351, 84 Stat. 450

⁸ American Banker, October 31, 2019, "GSEs Need to Shape Up if They Want to Leave Conservatorship: Calabria" "Calabria was surprised to learn...that despite a previously issued directive that banned the two GSEs from offering volume discounts to lenders, Fannie and Freddie were still engaging in that practice. "There were a number of exceptions granted to lenders... [b]ut the fact they existed was contrary to the spirit of the previous directive."

the safety and soundness of the Enterprise or the mortgage finance system. Proposed §1253.6 further provides that if the Director determines that the New Activity is a New Product, FHFA shall publish a public notice soliciting comment on the New Product, and that, after considering public comments, the Director must provide the Enterprise with a written determination on whether the Enterprise may proceed with the New Product. That determination must specify the grounds for the Director's decision.

We believe that these provisions would be enhanced by the addition of certain factors the Director should consider when determining whether to seek public comment on a new product. Specifically, HPC recommends that, in deciding whether to seek public comment, the Director should be required to consider the potential for the product to have a negative impact on participants in the mortgage finance system. Consideration of these factors in advance of public comment should reduce the potential for new products to have a disruptive or inequitable impact on the mortgage finance system. Moreover, the addition of these factors would provide more transparency into a Director's determination and would enhance consistency in the determination process.

HPC also requests that FHFA include in the preamble to the final rule examples of the type of proposals that would be treated as new products versus new activities. The preamble to the proposed rule includes illustrative examples of activities that would be treated as new activities under the rule, and, as FHFA notes, the inclusion of these examples is "useful" to stakeholders in understanding the scope of the proposed rule.⁹ The inclusion of examples of new products in the preamble to the final rule would serve a similar purpose. HPC also requests that FHFA clarify the length of time that can elapse between when a Director determines that an activity is a new product and the time it is sent out for public comment. Currently, the process is ambiguous as to whether this timing is simultaneous, as soon as practical, or some other standard. To ensure that this new product process is as efficient as possible, FHFA should clarify the timeline for each step of the process, wherever possible.

Level of Transparency about New Activity Notices and Determinations

Greater transparency surrounding a Notice of New Activity also would help clarify the distinction between New Activities and New Products. While §1253.6 of the proposed rule provides for some disclosure of New Product requests through public notice and comment, the proposed rule does not provide for any transparency regarding a Notice of New Activity. FHFA's current practice of disclosing the number of conservatorship decisions is the closest known corollary to a new activity request. Yet, that disclosure includes no information about the name or even the type of a proposed activity. This lack of information on the types of new activities that the Enterprises are engaged in makes it difficult to track whether the Enterprises

are pursuing or engaged in new business ventures that are of interest to various market participants.

To provide more transparency into the new activity process, HPC recommends that FHFA, either monthly or quarterly, publicly release a list of the Notices of New Activities received during the applicable period, which identifies the Enterprise that submitted the Notice and places the proposed activity within a certain category. The categories of proposed activities should be sufficiently specific to give the public adequate general information to understand the basic parameters of the activity, but not be so specific as to disclose operational details that might reveal confidential aspects of the work under development, that are not ready for public consumption.

This minimal level of information would enable the public to better appreciate what activities the Enterprises are focused on, and over time this could provide some insight into Enterprise reaction to market trends. This level of transparency also would alleviate the current practice under which the Enterprises are able to privately claim that they would like to work on certain issues but were prevented from doing so by FHFA.

Additionally, we recommend that FHFA disclose final determinations on New Activities. This disclosure would give stakeholders an even more informed view of the dedication of Enterprise time and resources to innovation and a clearer picture of the types of activities that FHFA will and will not deem to be permissible for an Enterprises to pursue. Such a disclosure would be consistent with the policies announced by the Consumer Financial Protection Bureau regarding Compliance Assistance Sandbox Requests and Trial Disclosure requests.

Level of Transparency About New Product Determinations

While the proposed regulation provides for public comment on New Products, it is silent on whether the public, and even those interested stakeholders who take the time to provide written comments to FHFA, will be informed of the agency decision. For items that go through the new product public comment process, FHFA should conclude the process by transparently informing the public about the decision and rationale for approving or denying the new product. Further, there is an inference in the proposed regulation that the non-requesting Enterprise will be informed about the agency decision, so that it can pursue a “substantially similar” product as a new activity, without having to go through the public comment process.¹⁰ Yet, again, it is unclear how the non-requesting Enterprise would know that a New Product had been approved for the other Enterprise. That lack of transparency surrounding final action on New Products stands in contrast to almost every other similar process conducted by a federal financial regulator, all of which require a public disclosure of final agency determinations.¹¹ In the spirit of transparency, fairness, and consistency with other federal financial regulators, the

¹⁰ § 1253.3(b)(4)

¹¹ For example, the Federal Reserve publishes agency approvals of new activities by bank holding companies, the OCC publishes agency approvals of new activities by national banks. Additionally, the CFPB through its Compliance Assistance Sandbox and Trial Disclosure Process publishes agency approvals and denials.

public along with the non-requesting Enterprise should be made aware of the agency new product determination and the rationale for a decision in a timely manner.¹²

Additionally, we recommend that, on an annual basis FHFA include a section in the Agency's Performance and Accountability Report about how the new product process is working. This annual update should include statistics on how many new product reviews were conducted, how many public comments were received, how FHFA complied with the regulatory timelines, and an overall transparency into how the process is working, any lessons learned, and any proposed changes to make the process more effective or efficient.

Amount of Information for New Product Comment Period

It is important for FHFA to provide enough information for the public to provide informed feedback about a new product while simultaneously withholding confidential and proprietary information that, if disclosed when an activity is at a nascent stage of development, could inhibit innovation. HPC recognizes that this is one of the trickiest elements of the entire Proposed Rule, as it is challenging to provide sufficient details to elicit meaningful public commentary without requiring an Enterprise to disclose key business details about a promising activity that might discourage future innovations. This challenge is clearly understood by HPC members that want the GSEs to stay focused on their secondary market function. HPC members have concerns about participating in an Enterprise pilot that would require premature public disclosure of business and market information that could interfere with the effort, possibly raising stakeholder and public interest/concerns before there are actual results.

To balance these competing interests, HPC recommends that FHFA establish a general standard for what information will be published as part of a standard new product process, and a different standard that includes significantly less information for a new product that involves a limited participation pilot. The key distinction between these two processes is how widely available the Enterprise intends to make the new product. HPC recommends that new products involving a limited participation pilot go through a streamlined public disclosure process where only essential information is made public, and subsequently if an Enterprise wants to expand the new product into a general offering, more details should be disclosed.

In summary, for new product offerings that will be made widely available to seller/servicers, HPC recommends that all non-proprietary information on the Notice of New Activity be made public for comment, and for a new product offering that involves a limited participation pilot, HPC recommends only disclosing the name of the activity, a brief description of the activity, the date of commencement and duration of the pilot, and the volume limitation established. Although this is a limited amount of information, it is still sufficient for the public to comment about the central issue of whether the pilot represents an appropriate secondary

¹² HPC is comfortable with a public notice on a monthly or quarterly basis, if FHFA decides that a simultaneous announcement to the requesting Enterprise and the public is problematic.

market activity for the Enterprises to be testing. It also provides enough information for the public to know when the pilot is expected to conclude, thus allowing stakeholders to follow up with FHFA at the appropriate time about when and if the product will be allowed to grow into a broader offering.

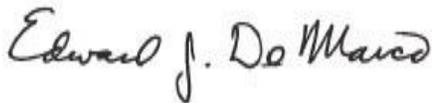
Timing of Public Comment Period

HPC recognizes that the timelines for public comment provided in the statute are explicit and challenging for all parties. However, FHFA does appear to have some flexibility to help provide stakeholders a bit more time to provide thorough public comments. One narrow option would be for the 30-day public comment period to exclude all weekends and holidays (as is the current practice under interim final rule). This simple change would provide the public 8-9 more days to digest the information and coordinate a response. Although this alone wouldn't alleviate the burden on public stakeholders, it would be a clear improvement over the proposal.

III. Conclusion

Thank you for your consideration of these recommendations. If you have any questions or would like to discuss these comments, please contact Meg Burns, EVP for the Housing Policy Council, at 202-589-1926.

Yours truly,

A handwritten signature in black ink that reads "Edward J. DeMarco". The signature is written in a cursive style with a large initial 'E' and 'D'.

Edward J. DeMarco
President
Housing Policy Council