Center for Responsible Lending

Comment to the Federal Housing Finance Agency on Prior Approval for Enterprise Products

12 CFR Part 1253, Document No. 2020-23452, RIN-2590-AA17

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Submitted via FHFA website

I. Introduction and Overview

Thank you for the opportunity to comment on the Federal Housing Finance Agency's (FHFA's) proposed rule on prior approval for Enterprise products. The proposed rule would replace a 2009 interim final rule that established a process for Fannie Mae and Freddie Mac (GSEs) to obtain prior approval from the FHFA Director for a new product and provide prior notice to the Director of a new activity.

The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 40 years, Self-Help has provided over $9 billion in financing to 172,000 homebuyers, small businesses, and nonprofit organizations. It serves more than 154,000 mostly low-income members through 62 retail credit union locations in North Carolina, California, Florida, Illinois, South Carolina, Virginia, and Wisconsin.

CRL urges FHFA to provide for a streamlined approval process for the GSEs to submit new activities that do not rise to the level of a new product. Otherwise, given the proposed rule's extraordinarily broad definition of a new activity, the GSEs will be stymied from pursuing new endeavors by excessive red tape and overly burdensome documentation requirements. A streamlined process is particularly important to encourage innovation in creating additional affordable housing activities and pilots, as well as offer new loss mitigation options for borrowers in a time of crisis such as the COVID-19 pandemic that is disproportionately impacting Black and brown families and other lower-wealth Americans.

II. FHFA Should Create a Streamlined and Less Burdensome Process for the GSEs to Submit New Activities for Approval

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008, authorized the FHFA Director to review products prior to the products being offered to the market. Specifically, the Safety and Soundness Act required "each [E]nterprise to obtain the approval of the Director for any product of the [E]nterprise before initially offering the product."[1] It also provided that a new product be subject to public notice and comment. The Safety and Soundness Act distinguished between a new activity and a new product, requiring approval only for the latter, and provides for a GSE to submit information to FHFA so that the Director may make certain determinations related to that distinction.

In the proposed rule FHFA states that it does not believe that it is practical to require a GSE to identify a new product in advance – as distinct from a new activity that is not a new product – for purposes of determining which type of submission to make to FHFA. Thus, the proposed rule provides for a single notice process that requires a GSE to make one form of submission – a Notice of New Activity. Under the proposed rule, once FHFA obtains all of the information, the agency has 15 days to decide whether the new activity is also a new product, which would then be subject to a 30-day public comment period.

CRL urges FHFA to provide a separate process for a GSE to seek approval for a new activity. Contrary to FHFA's reasoning in the proposed rule, it is impractical to require a GSE to submit arduous documentation for a new activity that may only be a minor deviation from an existing activity or product. Indeed, conflating products and activities at the initial submission stage would simply

[1] *See* 12 U.S.C. 4541(a).

hamstring new activities that should not require the same extensive submission requirements as a new product.

FHFA should also provide distinct definitions for "new product" versus "new activity" so a GSE knows what type of submission to provide. The definition of a new activity should not encompass every possible action a GSE may take. The rule's purpose is to ensure appropriate oversight over new products and require notice of new activities, not to micromanage the GSEs. FHFA's definition of new activity should not be so broad that it includes every minor deviation of an existing program or small process/policy changes. Additionally, pilots should be presumed to be a new activity as they are designed as short-term experiments, rather than a new product. As discussed below, it is critical for the GSEs to retain the ability to engage in "test and learn" pilots to serve affordable markets. For either a submitted notice of a new activity or new product, FHFA would retain the authority to request additional information and determine that a purported new activity is in fact a new product.

The Safety and Soundness Act contemplates separate processes, recognizing that the level of required documentation, review, and public input is distinct for products and activities. Moreover, the proposed rule's definition of a new activity is exceedingly broad. Proposed section 1253.3 states that a new activity would include "a business line, business practice, offering or service, including guarantee, financial instrument, consulting or marketing, that the Enterprise provides to the market either on a standalone basis or as part of a business line, business practice, offering or service."[2] Additionally, the activity is one that the GSE is not engaged in already, or "is an enhancement, alteration, or modification to an existing activity."[3] A new activity also requires one or more of the following:

> (i) a new type of resource, a new type of data, a new policy or modification to an existing policy, a new process or infrastructure.
> (ii) Activity that expands the scope or increases the level of credit risk, market risk or operational risk to the Enterprise.
> (iii) Activity that involves a new category of borrower, investor, counterparty, or collateral.
> (iv) Activity that would substantially impact the mortgage finance system, safety and soundness of the Enterprise, compliance with the Enterprise's authorizing statute, or the public interest as identified in § 1253.4(b).
> (v) Activity that is a pilot.
> (vi) Activity resulting from a pilot that is described by one or more of paragraphs (a)(3)(i) through (iv) of this section.[4]

Essentially, anything minimally new or which makes a slight change to an existing activity would be considered a new activity and require the full suite of information, as delineated in proposed section 1253.9.

Imposing such a burdensome process is likely to inhibit the GSEs' ability to pursue affordable housing initiatives at a time when our nation needs them the most.[5] It is critical for the GSEs to be able to react

[2] 85 Fed. Reg. 71276, 71283-84 (November 9, 2020).
[3] *Id.*
[4] *Id.*
[5] Our country is facing a widespread affordable housing crisis among homeowners and renters. *See* Joint Center for Housing Studies at Harvard University, *State of the Nation's Housing 2020*, available at

to market changes and innovate in their existing products, processes, and policies to better serve low- to moderate-income borrowers and borrowers of color without excessive bureaucracy and delay. For example, the GSEs' Duty to Serve plans are mostly comprised of new activities. Requiring that all of these activities be subject to excessive documentation is impractical and contrary to the spirit of the Duty to Serve statute and rule. Pilots are frequently the best approach to try out new affordable housing initiatives. The GSEs should constantly engage in "test and learn" initiatives to better serve affordable markets, both in terms of credit access and loss mitigation.

However, the proposed rule does not exclude loss mitigation from the definition of a new activity, thus miring a new loss mitigation tool in the overly burdensome approval process. During the COVID-19 crisis, millions of homeowners have relied on forbearance under the CARES Act to get through this difficult time. The GSEs have designed a helpful set of loss mitigation options for borrowers, but in the context of a crisis, it is especially critical for the GSEs to be able to pivot quickly to create and offer new foreclosure prevention solutions. For example, the GSEs' streamlined flex modification as well as the deferral option have provided innovative and practical solutions for borrowers exiting forbearance. It is likely that additional solutions will be needed in the future and it is important for the GSEs to be able to adapt to changing environments without excessive delay. Given the widening racial homeownership gap and racial wealth gap as well as the disparities exacerbated by the COVID-19 crisis, time is of the essence for the GSEs to try new programs and bring promising pilots to scale.[6]

Because of these concerns, CRL urges FHFA to develop a streamlined process to permit the GSEs to submit new activities to FHFA without the extensive detail as if they were new products. Rather than submit the immense amount of information required for a new product, the submission process should include summary information and information the GSE created for internal approval.

Such a process would not prevent FHFA from obtaining needed information from the GSEs or from seeking public comment. First, the GSEs would still submit the full new product information for an initiative that in their judgement would have a major impact. Furthermore, for submitted activities that in fact may rise to the level of a new product, FHFA should maintain an explicit right to within 15 days request additional information or to require the GSE to provide all of the new products information. FHFA should also reserve the right to designate the purported new activity a new product and require public comment.

Lastly, for new products that justifiably require more extensive information, we appreciate FHFA's emphasis on the importance of fair housing considerations by requiring that "the degree to which the New Product furthers fair housing and fair lending" be considered in the initial submission as well as in the public notice and comment process.

Thank you for considering our comments and we would be happy to discuss them further.

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https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report.pdf.

[6] *See* Center on Budget and Policy Priorities, *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, Updated December 18, 2020, available at https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and; Alanna McCargo and Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, Urban Institute (November 2020), available at https://www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_0.pdf.