August 31, 2009

Mr. Alfred Pollard
General Counsel
Federal Housing Finance Agency
1700 G Street, NW
Washington, DC 20552

Attention: Public Comment – RIN 2590 – AA17
(Prior Approval for Enterprise Products)

Dear Mr. Pollard:

We submit this letter on behalf of Fannie Mae and Freddie Mac (the "Enterprises") to offer the companies' views and suggestions on the interim final rule -- Prior Approval for Enterprise Products (the "Interim Rule") issued by the Federal Housing Finance Agency ("FHFA") on July 2, 2009.[1] The Interim Rule was issued to implement new section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 ("FHEFSSA"), as amended. This section ensures that FHFA has the opportunity to provide prior approval, after hearing public input, for new products to be offered by the Enterprises.

The Enterprises appreciate the need for FHFA to obtain the necessary information about new products to evaluate them under the statutory standards for approval. The Enterprises and FHFA also have a common interest in ensuring the efficient and effective operation of the review process so that the needs of the mortgage finance market will be addressed expeditiously. The Enterprises have reviewed the Interim Rule and the proposed Notice of New Activity form (the "NNA") and have identified certain areas where the scope of the regulation can be more appropriately tailored and the process could be streamlined to benefit the secondary market and better fulfill congressional intent. We appreciate the opportunity to provide the companies' views on this important regulation.

Statutory Background

Section 1123 of the Housing and Economic Recovery Act of 2008 ("HERA"), which amended section 1321 of FHEFSSA, requires an Enterprise to obtain the approval of the Director of FHFA for any product of the Enterprise before initially offering the product. HERA also imposes a new process and standards for approval of new products. Specifically, before a new product can be approved, the Enterprise must submit to the Director a written request for approval of the product that describes the product in such form as prescribed by order or regulation of the Director. Immediately upon receipt of a

[1] 74 Fed. Reg. 31602 (July 2, 2009).

request for approval of a product, the Director must publish notice of such request, with a description of the proposed product, and provide the opportunity for public comment for 30 days. No later than 30 days after the close of the public comment period, the Director must either approve or deny the product, specifying the grounds for such decision in writing. In considering a request for approval, the Director must determine that the new product is authorized under certain provisions of the Enterprise's charter, in the public interest, and consistent with the safety and soundness of the Enterprise and the mortgage finance system.

HERA also requires an Enterprise to provide written notice to the Director for any new activity that an Enterprise considers not to be a product. If an Enterprise determines that a new activity is not a new product, HERA provides an expedited notice process. The Enterprise must notify the Director of the new activity and must then wait for the Director to determine whether the activity is a product subject to public notice and comment and approval. The Director shall, immediately upon so determining, notify the Enterprise. If the Director does not provide such determination within 15 days of receipt of the new activity notice, the Enterprise may proceed with the activity.

While HERA authorizes the Director to determine the specific procedures and forms for the Enterprises to use in seeking approval for new products and providing notice of new activities, the statutory language, legislative history and public policy dictate that different procedures and forms apply to the two types of filings.

First, the expedited review process for new activities is one of the listed exclusions from the new product approval requirements. This section of the statute sets forth a totally separate purpose and process for the evaluation of new activities. New activities are to be evaluated, on an expedited basis, solely to determine if they are new products requiring public notice and comment and FHFA approval. New products, on the other hand, are to be evaluated under the specified statutory standards for approval, require public notice and comment, and are permitted a longer period for review by FHFA.

Second, a House committee report on H.R. 1427, a predecessor to HERA, commented on an early version of what ultimately became the new product approval section of the legislation:

> The Committee believes that the legislation provides [FHFA] with the flexibility to establish a workable system that will provide predictability as to what offerings or changes to existing offerings rise to the level of a new product that will be subject to notice and approval, addressing both the need to provide notice to market participants of new products and the need for the enterprises to respond in a timely manner to market demands. The Committee intends that the Agency will look to similar processes developed by the federal bank regulatory agencies in establishing

> procedures to minimize unnecessary burden on the enterprises and originating institutions while fulfilling the objectives of the provision.[2]

Following House passage of H.R.1427, Congress made a number of changes to the new product approval section aimed at reducing the administrative burden on the Enterprises. These changes included (i) simplifying the standard for approval of new products;[3] (ii) authorizing the temporary approval of new products without a public comment period in exigent circumstances; (iii) excluding certain "substantially similar" activities from the new product approval requirement; and (iv) narrowing the focus of the expedited review process for new activities.[4]

This legislative history, together with the statutory language adopted by Congress, expresses the intent of Congress that the process (A) be workable and predictable, (B) provide notice to the market of new products, (C) allow the Enterprises to meet market demands in a timely manner, (D) follow the example of the bank regulatory agencies, and (E) minimize unnecessary burden on the Enterprises.

These objectives can be met by FHFA in a more effective manner than was possible when regulation of the Enterprises was divided between the Office of Federal Housing Enterprise Oversight ("OFHEO") and the Department of Housing and Urban Development ("HUD"). By combining the mission and safety and soundness oversight of the Enterprises into a single stronger regulator, Congress gave FHFA broader authority over the actions of the Enterprises than was available to either of its predecessor regulators. This broader authority allows FHFA to monitor the Enterprises on an ongoing basis and to be informed at all times of initiatives that are under consideration. In addition, the Enterprises' conservatorship minimizes the need for onerous notification processes because of the conservator's role in controlling the activities of the Enterprises. As a result, FHFA can be expected to both effectively regulate the Enterprises and meet the objectives of Congress.

The Enterprises set forth below an alternative approach to reviewing new products and activities that allows FHFA to implement the statutory requirements in a manner that meets congressional intent and recognizes the close association that the Enterprises have with FHFA, particularly during the conservatorship.

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[2] House Committee Report 110-142 on Federal Housing Finance Reform Act of 2007, 110th Congress, 1st Session.

[3] H.R. 1427 would have required the Director to determine that the proposed new product did not "materially impair the efficiency of the mortgage finance system."

[4] H.R. 1427 did not require FHFA to act on a new activity notice within 15 days. In addition, H.R. 1427 directed FHFA to treat a new activity as a product if it merely "consists of", "relates to" or "involves" a product, whereas under HERA, the Director must determine that a new activity is truly a new product.

A. The regulatory process adopted by FHFA should be workable and predictable.

The Enterprises submit that, in order to be workable and predictable, the final rule should provide clear definitions of "new product" and "new activity."[5] Moreover, the regulatory process should reflect the need for, and the value of, approaching products and activities in a different manner. Congress clearly intended that new products would be subject to a greater degree of pre-launch scrutiny than new activities, and that new activities would require a lower level of pre-launch review.[6]

1. Definitions of "New Activity" and "New Product"

The definitions of the terms "new activity" and "new product" are central to the statutory intent. Accordingly, these terms should be clearly defined and consistent with the statute.[7] The definitions proposed below recognize that different types of initiatives require a different level of attention from FHFA. New products require FHFA approval after public notice and comment, and new activities need only be reviewed to determine whether they constitute new products. Routine business (including activities that are substantially similar to existing activities), of course, requires no prior review or approval.

Through their proposed definitions of "new product" and "new activity", the Enterprises suggest that the appropriate focus for the Interim Rule is those activities that will have a novel and significant impact on the secondary mortgage market. Moreover, these definitions provide guidance to the public about the types of activities that will rise to the level of new products, and thus be subject to public scrutiny, consistent with Congress' intent.

a. New Product

The Enterprises propose the following definition of "new product":

> ***New product*** means any new activity relating to conventional mortgages that the Director determines merits public notice and comment on

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[5] Recognizing that the final rule will not be able to address every factual situation subject to the rule, the Enterprises recommend that FHFA issue guidance to address certain unclear terms such as "*de minimis*" and "substantially similar" and that the guidance should include examples of the types of activities and products that should and should not be subject to review or approval, respectively.

[6] At the same time, Congress expressly affirmed the agency's authority to conduct post-launch reviews of new and existing products and activities, whether for safety and soundness or for compliance with the Enterprises' respective authorizing statutes. See 12 USC § 4541(f).

[7] In addition, the Interim Rule contains definitional language regarding "new product" and "new activity" in the preamble, the regulatory text, and the Instructions for the NNA. The companies request that one definition of each term be contained in the regulatory text, and explanatory language be included in subsequent guidance to avoid interpretive confusion

matters of compliance with the applicable authorizing statute, safety and soundness, or the public interest, and that –

(i) poses significant new risks to the Enterprise or the mortgage finance system; or

(ii) involves a significant change in terms, conditions or limitations expressly contained in any prior approval granted under this part.

This definition limits "new products" to activities relating to conventional mortgages. While HERA did not provide a definition for "new product," the standard for approval states that the product must be "authorized under paragraph (2), (3), (4), or (5) of section 302(b) or section 304 of the Federal National Mortgage Association Charter Act" or "paragraph (1), (4), or (5) of section 305(a) of the Federal Home Loan Mortgage Corporation Act."[8] Because the Enterprises clearly are authorized to engage in other types of transactions, including transactions with respect to non-conventional mortgages[9] that are not addressed in the specified charter provisions, it seems clear that the statute is only intended to cover new products relating to conventional mortgages.

This definition also limits "new products" to those products that are significantly different from existing products being offered by an Enterprise to the secondary market. HERA excludes from the new product approval process modifications to the Enterprises' automated loan underwriting systems, changes to mortgage terms or conditions and underwriting practices that do not change the nature of the underlying transaction, and activities that are substantially similar to products already offered by an Enterprise.[10] This points to the congressional expectation that the public would be notified of products when an Enterprise intends to offer a product to the secondary market that is a significant departure from products that the Enterprise has previously offered.

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[8] 12 USC § 4541(b)(1), (2).

[9] See, e.g. 12 USC § 1717(b)(1) (conferring authority on Fannie Mae "purchase, service, sell, or otherwise deal in" mortgages insured or guaranteed under cited federal government programs).

[10] EXCLUSIONS.—
(1) IN GENERAL.—The requirements of subsections (a) through (d) do not apply with respect to—

(A) the automated loan underwriting system of an enterprise in existence as of the date of enactment of the Federal Housing Finance Regulatory Reform Act of 2008, including any upgrade to the technology, operating system, or software to operate the underwriting system;

(B) any modification to the mortgage terms and conditions or mortgage underwriting criteria relating to the mortgages that are purchased or guaranteed by an enterprise, provided that such modifications do not alter the underlying transaction so as to include services or financing, other than residential mortgage financing; or

(C) any other activity that is substantially similar, as determined by rule of the Director to—

(i) the activities described in subparagraphs (A) and (B); and

(ii) other activities that have been approved by the Director in accordance with this section.

12 USC § 4541(e).

b. New Activity

The purpose of the new activity notice is to give FHFA the opportunity to determine whether an initiative identified by an Enterprise as a new activity is, in fact, a new product subject to public notice and FHFA approval. As proposed by the Enterprises:

> ***New activity*** means a new business line or service that is developed by an Enterprise and proposed to be offered to the secondary mortgage market generally and which –
>
> (a) was not offered to the secondary market prior to [effective date of final regulation]; or
> (b) was previously offered or engaged in by the Enterprise at a significantly lower volume, or in a significantly different manner.
>
> The term "new activity" does not include
>
> (1) Any Enterprise activity engaged in solely for the purpose of conducting the Enterprise's internal affairs;
> (2) Any product or service undertaken by an Enterprise that is *de minimis* in scope, volume, risk, or duration;
> (3) The automated loan underwriting system of an Enterprise in existence as of [the effective date of the final regulation], including any upgrade to the technology, operating system, or software to operate the underwriting system;
> (4) Any modification to the mortgage terms and conditions or mortgage underwriting criteria relating to the mortgages that are purchased or guaranteed by the Enterprise, provided that such modifications do not alter the underlying transaction so as to include services or financing other than residential mortgage financing;
> (5) Any activity that is substantially similar to the activities described in paragraph (3) or (4) of this section;
> (6) Any activity that is substantially similar to a product that has been approved in accordance with this part for either Enterprise;
> (7) Any activity that is substantially similar to an activity or product undertaken by either Enterprise since prior to [effective date of the final regulation]
> (8) Any activity undertaken at the request of FHFA or any activity undertaken at the request of the U.S. Department of the Treasury in connection with efforts to stabilize the financial system, or
> (9) Any activity undertaken for the purpose of mitigating losses or reducing risk on mortgages owned or guaranteed by the Enterprise.

The Enterprises' proposed definition both incorporates the statutory limitations on the new product approval process and meets the congressional purpose of excluding from

review any activities that do not have a significant impact on the Enterprise itself. This definition would also exclude from prior review combinations of activities for which an Enterprise has already received approval or provided notice.

This definition recognizes that activities undertaken at the request of FHFA have, in fact, already received approval and so there is no regulatory purpose to be served by requiring such activities to go through a formal notification process. This definition also takes into account the close supervision that FHFA has engaged in since the beginning of the conservatorship, and continues to engage in, and excludes from the definition of new activity those activities commenced by the Enterprises between passage of HERA and the implementation of the final rule (which largely consists of the period that the Enterprises have been in conservatorship) and activities undertaken at the request of the U.S. Department of the Treasury as part of efforts to stabilize the financial system.

The definition also provides that loss mitigation activities should not be treated as new products, and therefore need no review as new activities. The Enterprises engage in loss mitigation as an inherent part of managing the risk of their core businesses, and authority to mitigate losses on mortgages they own or guarantee is principally derived from their property disposal authority – section 309(a) of Fannie Mae's charter, and section 303(c) of Freddie Mac's charter[11] – and not in any of the charter provisions referenced in HERA's new product approval section. Further, while the primary purpose of the new product approval process is to improve oversight of products that create new risks to the Enterprises, the purpose of loss mitigation activities is to reduce and manage existing risks. These activities, therefore, need not be subjected to the same level of review as other new activities, and the delay that could arise from prior review of loss mitigation activities is likely to be particularly damaging to the Enterprises.

2. Notice of New Activity

Because of the number and variety of new initiatives that may be under consideration by the Enterprises at a given time, it is crucial that the review process capture only those activities that Congress intended to capture. It is also very important that the notice process be closely tailored to congressional intent to meet the objective of being workable and predictable. For the reasons explained below, the Enterprises believe that the NNA as set forth in the Interim Rule would require the Enterprises to make formal submissions in more circumstances, and containing more information, than is necessary to comply with the statute.

In the Interim Rule, FHFA recognized that HERA contemplated a two-part process by which FHFA was to perform two distinct functions: (1) determining whether a new activity is a new product and (2) reviewing a new product to determine whether it meets the statutory standards for approval. However, the Interim Rule collapses these distinct

[11] 12 USC § 1723a; 12 USC § 1452(c).

processes into one, requiring the same amount of information in a new activity notice as in a new product approval request. This process collects more information than is necessary for a new activity review and effectively eliminates the expedited review of new activities.

The Enterprises suggest that the NNA should better reflect the distinction between new activity notices and requests for new product approval, as expressly contemplated by HERA. Attached to this comment letter is a proposed revised form of notice that the Enterprises believe provides the necessary information without unduly burdening or delaying the review or approval process. For new activities, the revised form requires a description of the activity, including an explanation for the basis of the Enterprise's determination that the new activity does not constitute a new product. For new product approvals, a more detailed submission is required. However, the Enterprises propose that only the description of the product is necessary to begin the public comment period.[12]

Consistent with the statutory language, an Enterprise must make the initial determination whether a new activity is a new product.[13] Thereafter, FHFA may conclude that the activity is in fact a new product and require additional information, or determine that the activity is not a new product and allow the Enterprise to proceed. This approach has the benefit of providing a true expedited process for new activities while inherently discouraging the Enterprises from intentionally mischaracterizing an activity.

The Enterprises note, moreover, that HERA expressly preserves the authority of FHFA to review activities of the Enterprises for safety and soundness and for mission compliance.[14] There is no reason for concern that by utilizing a more streamlined notice of new activity FHFA will be unable to review the full spectrum of activities undertaken by the Enterprises. The nature of the supervisory relationship allows FHFA to review activities for safety and soundness and evaluate performance data on an ongoing basis. By collapsing safety and soundness review with and into the new product review, the Interim Rule creates unnecessary delay and inefficiency at the initiation of a new product and is duplicative of the ongoing safety and soundness review. A more streamlined notice would, however, meet the expectation of Congress that the regulatory process be workable and predictable.

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[12] To initiate the approval procedure, HERA specifies that an Enterprise "shall submit to the Director a written request for approval of a product that describes the product" consistent with the requirements of the Director. 12 USC § 4541(c)(1) (emphasis added). The Enterprises submit that a description of the product that outlines the purpose and function of the product is sufficient to meet this statutory requirement.

[13] The statute expressly confers on the Enterprises the responsibility of making the initial judgment whether a new activity constitutes a new product. It states that the new activity notice procedure applies "for any new activity that an enterprise considers not to be a new product." 12 USC § 4541(e)(2) (emphasis added).

[14] 12 USC § 4541(f).

B. The regulatory process should provide notice to the market of products that are truly new.

As discussed above, the statutory exclusions suggest that only products that are significantly different from products already offered by the Enterprises need to be noticed to the public. Business terms and underwriting changes are excluded from the definition of new product if they do not change the underlying nature of the transaction as residential mortgage finance, and activities that are substantially similar to approved products do not require notice to the public or approval from FHFA. It is clear, therefore, that Congress contemplated that a limited population of products would rise to the level of a truly new product.

Notwithstanding that Congress intended to impose a public notice and prior approval requirement on few products, HERA noted that FHFA retains the authority to examine all new and existing products to determine whether they are consistent with safety and soundness and the mission of the Enterprises. This language preserves FHFA's authority and responsibilities, but does not suggest that the safety and soundness review should be a part of the new product approval process. Rather, safety and soundness and mission issues should continue to be addressed through the supervisory process and not the Interim Rule.

C. The Enterprises should be able to meet market demand in a timely manner.

In certain respects, the Interim Rule may build unnecessary delay into the product approval process. In this regard, the Interim Rule includes standards and requirements that were not contemplated by the statute and may require the Enterprises to produce forecasts, analysis, and conclusions that will slow the process of introducing new initiatives. Moreover, the Interim Rule may delay publication of a notice of a new product or consideration of a notice of new activity until the Enterprise has produced substantial amounts of information, and it treats inconsistently the time limitations imposed for new product approval and new activity notice.

1. Criteria for Approval of New Products Should Not Include Safety and Soundness of the "Financial System"

The Interim Rule states that the Director will approve a new product if, among other criteria, it is "consistent with the safety and soundness of the . . . financial system."[15] This standard for approval goes beyond the statute, which requires consideration of the safety and soundness of the Enterprise and the "mortgage finance system," but not the "financial system" as a whole. While the mortgage finance system undoubtedly is an important component of the "financial system," the latter term is clearly much broader and would require the Enterprises to produce substantially more information than is

[15] 12 CFR § 1253.4(b)(2).

contemplated by the statute. The production and evaluation of this information would result in substantial unnecessary delays without advancing congressional intent.

2. "Public Interest" Consideration Should Not Include the Possibility of Other Providers

HERA requires FHFA to determine whether a new product is in the public interest. The Interim Rule has interpreted this standard to include an analysis of "the degree to which the new product is being supplied or could be supplied by non-government-sponsored enterprise firms." The Enterprises believe that this consideration should not be part of the "public interest" determination for both policy and statutory reasons.

First, recent history has demonstrated that the presence of non-government sponsored enterprises in the market does not provide sufficient market support in an economic downturn. While the Enterprises' mission is to provide a constant and reliable source of liquidity, other types of entities are more likely to exit the mortgage market and reduce liquidity at a time when liquidity is needed. For example, Fannie Mae's Early Funding products provide an important alternative to mortgage lenders' warehouse lines of credit and/or balance sheets. As warehouse lines became more difficult to obtain or retain, and as capital has become increasingly scarce, mortgage lenders have been able to use the Early Funding products to expedite Fannie Mae's purchase of their mortgage loans in order to maintain or increase their warehouse capacity and/or improve their own liquidity position. Similarly, lenders that needed protection from interest rate fluctuations were able to obtain long-term commitments from the Enterprises when they were unavailable from other sources. The ability of the Enterprises to offer products such as these when the market was strong provided important protections to the mortgage finance system as the economy declined. If the Enterprises had been required to demonstrate the value of these products to the public when the Enterprises were among various competitors in the market, the products may not have been available when the Enterprises were the sole source of liquidity.

In addition, to the extent that a new product is legally authorized for an Enterprise under its charter, this reflects a congressional determination that it is appropriate for an Enterprise to offer the product, assuming other statutory criteria are satisfied. The Enterprises believe that it would be inconsistent with the charter authorities of the Enterprises for FHFA to restrict congressionally permitted products because of the presence, or potential presence, of other market participants.

3. Delay Prior To Product Or Activity Consideration

The Enterprises believe that a description of the activity is all that should be necessary for FHFA to begin the process of determining whether an activity is a new product, or to publish sufficient information about the product for public comment. However, the Interim Rule states that an Enterprise must submit all of the information required by the

Notice of New Activity form, for both a new activity and a new product, before FHFA will deem the submission complete and either determine that the activity is not a new product or, if it is determined to be a new product, publish a notice soliciting comments. As a result, the Enterprises will be required to completely analyze any new activity, including completing financial projections, assigning personnel, submitting related regulatory applications, and partnering with any necessary counterparties before FHFA will begin to consider whether the activity is a new product and thus public notice and comment and FHFA approval are required.

For a new product, this process would prevent the Enterprise from offering the product to the market for at least 60 days after the completion of the analysis. Much of the information requested, such as staffing matters and financial projections, is not likely to be available until late in the development process and would be confidential information that should not be released as part of the public comment process. As a result, requiring this information prior to initiating the public comment period unduly burdens the new product approval process.

4. Deadlines for FHFA Action

The Interim Rule imposes inconsistent deadlines for the new activity notice and the new product approval without any apparent justification for doing so. The statute requires FHFA to act on a new product approval request within 30 days of the close of the public comment period. It requires FHFA to act within 15 days of a new activity notice. The Interim Rule, however, allows FHFA 15 *business* days to act on a new activity notice and 30 *calendar* days to act on a new product approval request.[16] Unlike in situations where short time periods are counted in business days, there is no apparent justification for treating new activity deadlines differently than the new product deadlines. Court rules, for example, frequently distinguish between time periods that include business days and those that include calendar days. Short time periods of approximately a week generally are counted in business days unless the rule specifies that the time period refers to calendar days. Longer time periods are counted in calendar days.[17] Referring specifically to business days for new activity review may unnecessarily lengthen the time that an Enterprise must wait before beginning a new activity, when the statute clearly meant for new activities to be reviewed quickly.

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[16] 12 CFR § 1253.3(c).

[17] See, e.g., Fed. R. App. Proc. 26(a). Note also the Supreme Court's adoption of a change to the Federal Rules of Civil Procedure: currently Rule 6(a) counts time periods of less than 11 days in business days. As of December 1, 2009, if a statute does not specify the method of computing, a time period designated in days will be counted as calendar days for purposes of the rule.

D. FHFA should follow the example of the bank regulatory agencies.

While the statutory schemes that apply to banks and bank holding companies are different from HERA with respect to notice or approval of new activities, the FHFA process can appropriately be informed by the processes developed over many years by the federal banking agencies. The banking agencies have developed various streamlined procedures to minimize the burden associated with notice and approval requirements, and have developed different processes for different levels of review. Moreover, significant new business activities frequently are brought to the attention of the regulator through the regular informal contacts that occur between banking institutions and their federal regulators, rather than by formal applications or notices.

In this regard, the Enterprises urge FHFA to follow the example of the federal bank regulators and develop streamlined forms and procedures, such as those used by the Office of the Comptroller of the Currency and the Federal Reserve Board for operating subsidiary and new activity applications, which are far simpler than the NNA proposed by FHFA.[18] The Enterprises submit that the bifurcated form of notice included with this letter would appropriately capture information necessary first to make a determination whether a new activity is a new product, and if so, then to approve the new product, and is also consistent with a more streamlined approval process advocated by the Enterprises and followed by the banking agencies.

The banking agencies also approach certification in a less onerous way than does the Interim Rule. While banking agencies require certifications in connection with types of filings that are similar to the NNA, such filings are less frequently required in the banking context. Therefore, to follow the model used by the banking agencies, the Enterprises request that the certification be limited to requests for new product approval.

E. The Interim Rule should minimize unnecessary burden on the Enterprises.

As written, the Interim Rule would require the Enterprises to retroactively submit an NNA for all products and activities initiated since July 30, 2008. The Interim Rule also: allows the Director to approve and condition or limit new activities; creates a presumption of non-confidentiality for information submitted in connection with the NNA; creates the potential of legal liability for inadvertent errors; and requires the Enterprises to develop and implement an arduous certification process. These provisions impose an undue burden on the Enterprises, and will discourage the Enterprises from innovating and taking steps to meet new market needs. The Enterprises suggest alternative treatment for these issues.

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[18] *See* http://www.occ.treas.gov/corpbook/forms/OpSubApplication.pdf and http://www.federalreserve.gov/ reportforms/forms/FR_Y-420080430_f.pdf.

1. Effective Date

The Enterprises request that the Interim Rule be made effective as of the date that the final rule is published. The Enterprises have been in conservatorship since September 2008, and FHFA is well aware of their current activities and products. Little would be gained by requiring them to provide notice or seek approval now for activities or products, respectively, commenced since July 30, 2008. Moreover, in view of the conservatorship status of the Enterprises, in which their activities are under the direction of FHFA, the activities of the Enterprises have been closely scrutinized and any activities undertaken since the conservatorship have been *de facto* approved by FHFA.

2. The Interim Rule May Only Impose Restrictions or Conditions on New Products

HERA provides that "[i]f the Director approves the offering of any product by an enterprise, the Director may establish terms, conditions, or limitations with respect to such product with which the enterprise must comply in order to offer such product." While there is no comparable provision in HERA with respect to new activities, the Interim Rule states that the Director may "approve" a new activity "subject to such terms, conditions or limitations" as the Director deems appropriate.[19] This goes beyond the statutory mandate and places an undue burden on the Enterprises to obtain approval and meet conditions that were not envisioned by Congress. The Enterprises request that the language of the Interim Rule be made consistent with the statutory language, and exclude references to approving, conditioning or limiting a new activity.

3. The Rule Does Not Adequately Protect Confidential Information

The Interim Rule imposes a presumption of non-confidentiality for information submitted with respect to both new activity notices and new product approvals.[20] However, information submitted by the Enterprises to FHFA is already subject to the Freedom of Information Act ("FOIA"), which generally presumes that information submitted to the government will be publicly available unless one of the enumerated exceptions applies.

Importantly, FOIA, unlike the Interim Rule, completely protects from disclosure "matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions" as well as for competitively sensitive proprietary information.[21] Among bank regulators, such information exchanges enjoy robust protection from disclosure to protect the free and open communication between the regulated entity and

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[19] 12 CFR § 1253.3(c).
[20] *Id.* § 1253.5(a).
[21] 5 USC § 552(b)(8), (4).

its regulator.[22] This important exception from FOIA is no less important to facilitate open communication between the Enterprises and FHFA.

The Interim Rule, as currently drafted, has the unfortunate effect of upsetting the careful balance that FOIA has struck between disclosure of information and protection of confidential supervisory and competitively sensitive information. The effect of presuming non-confidentiality may well result in chilling the free and open communication between the Enterprises and FHFA.

The Interim Rule's presumption in favor of non-confidentiality is also particularly inappropriate with respect to new activity notices, which are not required to be the subject of public comment. Moreover, the Interim Rule would have the effect of allowing public disclosure of much more information than would be necessary for interested parties to appropriately comment on a potential new product.

The Enterprises work with counterparties who invest in and develop proposals, and then seek to partner with an Enterprise. To complete the NNA, it may be necessary to include the counterparty's proprietary information. If FHFA were to make public the proprietary information developed by such a third party, that party would be placed at a competitive disadvantage because of its relationship with the Enterprise, and the Enterprises would have a much more difficult time finding partners with whom to innovate.

Accordingly, the Enterprises recommend that the presumption of non-confidentiality be stricken from the Interim Rule. In addition, the Interim Rule should ensure that an Enterprise may withdraw an NNA from consideration if the Director determines that the new activity should be treated as a new product or the Director determines that information will otherwise be treated as non-confidential.

4. Proposed Enforcement Is Excessive

The Enterprises propose that enforcement be consistent with other areas of HERA where sanctions are imposed on the Enterprise rather than individual employees. Section 1130 of HERA, for example, allows civil money penalties and cease and desist orders to be imposed against an Enterprise that fails to meet certain statutory requirements. There are no enforcement provisions specified in HERA for failure to submit accurate new product or new activity information. Rather, section 1123 anticipates that FHFA will continue to exercise its plenary authority to review the safety and soundness of any product or activity undertaken by the Enterprises.

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[22] A House committee report on H.R. 1427 states that "[a]s with the banking agencies, the Committee expects that the Agency will establish procedures that provide for appropriate treatment of proprietary business information." A presumption that all information is public appears to be inconsistent with Congressional intent. Supra note 2 at 132.

The Enterprises recognize that FHFA must have the authority to nullify or modify any decision rendered on the basis of materially inaccurate or incomplete information. However, the Interim Rule's emphasis on the possibility of civil or criminal sanctions for any persons "responsible" for any material misrepresentation or omission, without any apparent requirement that the person acted with either knowledge or reckless disregard, has the effect of threatening Enterprise employees with legal jeopardy despite their good faith. The Enterprises request that the Interim Rule limit civil or criminal sanctions to intentional wrongdoing.

It is also important to note that the Interim Rule intends that the enforcement provisions will apply with respect to the voluminous materials to be submitted in connection with the NNA, including financial projections and other forward looking statements. Given the large volume of materials to be produced and the need to make estimates and predictions about future performance, inadvertent errors are more likely to occur. It is particularly important, therefore, that the enforcement provisions be narrowly tailored to capture intentional misstatements, and that enforcement be limited to the Enterprises.

5. The Certification Requirement Will Create Substantial Delay

The Interim Rule contemplates that the certification requirement will apply to every NNA submitted by an Enterprise. The Interim Rule also requires the NNA to be submitted for a broad array of potential new products and new activities. The certification must be made by an executive officer.

Because of the breadth of information that must be submitted with an NNA, to make the certification required by the Interim Rule, the executive officer would need to rely on a due diligence process that will include employees from throughout the company. The companies have in place similar types of due diligence processes for financial reports, capital reports, and mortgage report data. These processes are difficult and time-consuming but necessary for the ultimate certifier to exercise his fiduciary duties to the company. The reports that are certified, however, are annual or quarterly reports. The additional process that would be necessary to address the breadth of the Interim Rule would require company employees to go through the due diligence process multiple times during the year, would divert company resources from other necessary business activities, and would substantially delay the review process for both new products and new activities. The Enterprises request that FHFA eliminate the certification requirement at least for new activities.

***

The Enterprises support the objective of Congress to allow FHFA broad approval authority over significant new products, and to allow public participation in the approval process for products that could have a significant impact on the mortgage finance system. The Enterprises encourage FHFA to implement the statutory requirements in a manner that reflects the intention of Congress that this approach to new products should allow the

Enterprises to continue to respond appropriately and in a timely manner to market needs and not unduly burden the Enterprises at a time when innovation and flexibility are very important to borrowers and the secondary mortgage market.

Thank you for allowing us to present these views. If you have questions regarding the matters addressed herein, please feel free to contact us.

Sincerely,

Timothy J. Mayopoulos
Executive Vice President, General Counsel
and Corporate Secretary
Fannie Mae

Robert E. Bostrom
Executive Vice President, General Counsel
and Corporate Secretary
Freddie Mac

Attachment: Proposed Form of NNA

	FEDERAL HOUSING FINANCE AGENCY	**NNA NUMBER ASSIGNED** **NNA-F**

12 CFR Part 1253 – Appendix
NOTICE OF NEW ACTIVITY/NEW PRODUCT FORM

SEE INSTRUCTIONS FOR INFORMATION REQUIRED TO BE SUPPLIED ON THIS FORM

Enterprise: _____

Name of the Proposed New Activity/New Product:

Scope

Purpose of the Proposed New Activity/New Product Submission

The purpose of the Notice of New Activity/New Product Form (NNA) is to provide information to the Director on activities that may constitute new products, and on new products that require the approval of the Director under the Housing and Economic Recovery Act of 2008 (12 USC 4541). An activity that is a new product is subject to the prior approval of the Director after public notice and comment.

For a new activity that an Enterprise does not consider to be a new product, the Enterprise will complete and submit Part A below. Unless the Director requests additional information, the Director will determine whether the activity is a new product within 15 days of receipt of the notice. If a new activity is determined not to be a new product, or if the Director takes no action within 15 days, the Enterprise may move forward with the activity.

If an activity is determined to be a new product, the Enterprise must provide the information set forth in Part B below and any additional information requested by the Director. Upon completion of the information in Part B below, the Director will publish notice of the proposed new product for public comment for up to 30 days. Within 30 days of the close of the public comment period, the Director will determine, based on the provisions of the statute and regulation, whether to approve the new product. If the Director takes no action within such 30 day period, the Enterprise may offer the product.

This process does not limit the authority of the Director to determine the safety and soundness of new and existing products or activities or to review new and existing products or activities to determine that such products or activities are consistent with the statutory mission of an enterprise.

Enterprise Contact Information:

Name:
Title:
Telephone Number:
Email Address:

FHFA Contact Information:

Name:
Title:
Telephone Number:
Email Address:

Part A - For any New Activity:

Description of Activity. Provide a complete and specific description of the proposed new activity.

Explain why the Enterprise believes that the new activity is not a new product.

Submitted by:

Signed: _____

Print Name: _____

Title: _____

Date: _____

Part B - For any New Product:

1. *Description of Product.* Provide a complete and specific description of the proposed new product.

2. *Projected Size and Start Date of the New Product.* State the anticipated commencement date for the proposed new product. State the anticipated volume of the new product during the first year of operation.

3. *Impact on Public Interest.* Describe the impact of the new product on the public interest, including whether the proposed product is expected to advance any of the four charter purposes of the Enterprise, meet the affordable housing goals, or serve underserved markets.

4. *Legal Analysis.* If there are significant legal issues involved in the proposed new product, provide copies of any legal opinions prepared in connection with the new product.

5. *Other Regulatory Applications.* Describe any notice, filings and/or applications – including any application for patents – the Enterprise has submitted or will submit to other regulators (federal, state or local) or to foreign governments relating to the proposed new product.

6. *Acquisition.* If an acquisition is involved, describe the financial features of the transaction and provide pro forma financials of the acquiree.

7. *Accounting Treatment.* Describe the accounting treatment proposed for the new product.

8. *Tax Implications.* Describe any significant anticipated tax impact of the proposed new product.

9. *Risk Implications.* Describe any significant impact of the proposed new product on the risk profile of the Enterprise.

CERTIFICATION:

To the best of my knowledge and belief, the information contained in this filing, including any supporting materials, contains no material misrepresentations or omissions, and is true, correct and complete.

Signed: _____

Print Name: _____

Title: _____

Date: _____