Housing Finance & Regulatory Affairs
David L. Ledford
Executive Vice President
dledford@nahb.org

December 23, 2020

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

Notice of Proposed Rulemaking: Request for Comments, Prior Approval for Enterprise Products

RIN 2590-AA17

Submitted electronically: RegComments@fhfa.gov

Dear Mr. Pollard:

On behalf of more than 140,000 members, the National Association of Home Builders (NAHB) welcomes this opportunity to respond to the Notice of Proposed Rulemaking: Request for Comments regarding Prior Approval for Enterprise Products. The housing market depends on Fannie Mae and Freddie Mac (collectively, the Enterprises) to provide accessible and affordable mortgage financing to creditworthy borrowers nationwide and throughout all economic conditions. This requires the Enterprises to be innovative while acting within their charters and maintaining safety and soundness standards. Understanding how the Federal Housing Finance Agency (FHFA) will distinguish between new activities and new products needing prior approval and establishing transparent processes should help the Enterprises and FHFA issue new and innovative mortgage-related products to the market in an efficient manner.

NAHB is a Washington DC-based trade association representing, among others, companies involved in the development and construction of for-sale single-family homes, including homes for first-time and low- and moderate-income home buyers as well as the production and management of affordable multifamily rental housing. The ability of the home building industry to meet the demand for housing, including addressing affordable housing needs, and contribute significantly to the nation's economic growth is dependent on a sound and efficiently operating housing finance system.

Background

The Notice of Proposed Rulemaking (Proposed Rule), if adopted, would replace a 2009 Interim Final Rule that established a process for the Enterprises to obtain prior approval from the director of the Federal Housing Finance Agency (FHFA) on any new products and provide prior notice to the director of any new activities before a new activity or a new product is offered in the market. This is a requirement of the Federal Housing Enterprises Financial Safety and Soundness Act (the Safety and Soundness Act) of 1992, as amended by section 1123 of the Housing and Economic Recovery Act (HERA) of 2008. The statute requires that the Enterprises submit to FHFA a written request for approval that describes a new product in terms established by FHFA in regulation. Upon receipt of the request, FHFA shall publish a notice for public comment. After allowing 30 days for receiving comments, FHFA has 30 days to determine whether the Enterprise may proceed to offer the new

product. A new product may only be approved if it is authorized by the Enterprise's charter, is in the public interest and is consistent with the safety and soundness of the Enterprise or the mortgage finance system.

The statute distinguishes between a new product and a new activity and specifies that for a new activity an Enterprise wants to offer and does not consider to be a new product, the Enterprise must provide written notice to FHFA of its intent. FHFA has 15 days from receipt of a complete notice of new activity to determine whether the activity is, in fact, a new product that requires prior approval. If FHFA determines the new activity is not a new product, or if after 15 days FHFA does not make a determination whether the new activity is a new product, the Enterprise may begin offering the new activity. If FHFA determines the new activity is a new product, the Enterprise must await approval or disapproval of the new product. As with a new product, the statute provides that FHFA shall establish, by regulation, the form and content of the notice of a new activity.

The Safety and Soundness Act excludes from the notice and 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. Activities that are substantially similar to activities already offered by an Enterprise or approved by FHFA also are excluded.

Either Enterprise may offer a new product or a new activity that is identical or substantially similar to a new product that FHFA has approved for the other Enterprise or that is otherwise available to the other Enterprise. While this does not require a notice of new activity or public notice and comment, an Enterprise must notify FHFA 15 calendar days prior to engaging in the substantially similar activity; provide a complete description of the substantially similar activity; and, for substantially similar products, describe how and why the activity is substantially similar.

FHFA may approve a new product without first seeking public comment if: (a) The Enterprise submits a specific request for temporary approval that describes exigent circumstances that make the delay associated with a 30-day public comment period contrary to the public interest and FHFA determines that exigent circumstances exist and that delay associated with first seeking public comment would be contrary to the public interest; or (b) notwithstanding the absence of a request by the Enterprise for temporary approval, FHFA determines on the director's own initiative there are exigent circumstances.

Proposed Rule

The proposed rule to implement the requirements for prior approval by FHFA of new products of the Enterprises adheres closely to those of the 2009 Interim Final Rule currently in place. It includes some minor, positive modifications.

The proposed rule, like the Interim Final Rule, designates FHFA, not the Enterprises, to determine whether a new activity is a new product that needs public review and comment.

HERA's amendment to the Safety and Soundness Act was written such that it allows the Enterprises to determine whether to submit to FHFA a notice of new activity or a request for product approval. However, in the Interim Final Rule, FHFA concludes that the law allows FHFA to determine whether a new activity is a new product or a new activity and cites the reason as because the statute does not specifically define a new product or new activity, but requires a complex consideration of an activity's charter compliance, its safety and soundness for the requesting Enterprise, and whether it is in the public interest. In the proposed rule, FHFA preserves its authority to determine whether a new activity is a new product that merits public notice and comment based on the agency's review of the notice of new activity and assessment of the activity's compliance

with the charters of Fannie Mae or Freddie Mac, impact to safety and soundness of the Enterprise or the mortgage finance system, and service to the public interest.

As also itemized in the Interim Final Rule, the proposed rule states FHFA may consider the following to determine whether a new product is in the public interest:

- The degree to which the new product might advance any of the purposes of the Enterprise under its authorizing statute;
- The degree to which the new product serves underserved markets and housing goals as set forth in the Safety and Soundness Act;
- The degree to which the new product is being or could be supplied by other market participants;
- The degree to which the new product promotes competition in the marketplace or, to the contrary, would result in less competition;
- The degree to which the new product overcomes natural market barriers or inefficiencies;
- The degree to which the new product might raise or mitigate systemic risks to the mortgage finance or financial system;
- The degree to which the new product furthers fair housing and fair lending; and,
- Such other factors as determined appropriate by the Director.

New activities and new products are defined by inclusion. In the Interim Final Rule, new activities and new products were defined by exclusion.

The proposed rule differs from the Interim Final Rule in that it defines a new activity and a new product by inclusion rather than exclusion. The proposed rule defines a new activity as:

- A business line, business practice, offering or service that the Enterprise provides to the market either on a standalone basis or as part of a business line, business practice, offering or service; and,
- Is not engaged in by the Enterprise as of the effective date of this section, or, is an enhancement, alteration, or modification to an existing activity that the Enterprise currently engages in as of the effective date of this section.

Additionally, under the proposed rule, a new activity must also be described by *one or more* of the following:

- Requires a new type of resource, data, process, infrastructure, policy, or modification;
- Expands the scope or increases the level of credit risk, market risk, or operational risk to the Enterprise;
- Involves new categories of borrowers, investors, counterparties, or collateral;
- Substantially impacts the mortgage finance system, the Enterprises ’safety and soundness, or compliance with the Enterprises ’charters;
- Is a Pilot; and/or,
- Results from a Pilot.

The proposed rule would clarify that if an activity has one of the criteria of a new activity then that activity is not considered substantially similar and an Enterprise must submit a Notice of New Activity.

Exclusions from new product approval, temporary approval requirements and proposed requirements for substantially similar and identical new products are unchanged from the statute and the Interim Final Rule.

The Notice of New Activity Submission Form has been eliminated.

FHFA has eliminated the detailed Notice of New Activity Form and incorporated the required content of the form into the text of the regulation rather than in a specific form. This modification is intended to streamline and simplify the required content and the submission process.

The proposed rule eliminates the possibility of criminal penalties for any person responsible for any material misrepresentation or omission in connection with submissions under the rule.

Under the Interim Final Rule, enforcement actions for material misrepresentation or omission included criminal penalties that could include up to five years in prison. This language has been eliminated in the proposed rule. The proposed rule would allow for enforcement actions against the Enterprises or affiliated entities that includes orders to cease-and-desist, temporary orders to cease-and-desist, and civil money penalties for failure to comply with the proposed rule's requirements.

NAHB Recommendations

NAHB supports a product approval process that ensures Fannie Mae and Freddie Mac are operating within their charters and undertaking activities in a safe and sound manner and appreciates FHFA's effort to set forth a regulation through notice and comment in place of an Interim Final Rule. Robust regulation of Enterprise activities balanced with a process for allowing and encouraging innovative new activities and prompt responses to market needs is important to the mortgage finance system.

NAHB makes the following recommendations.

The Enterprises, not FHFA, should make the initial determination whether a new activity is a new product and the notice of new activity should reflect their determination.

NAHB believes the Safety and Soundness Act allows for the Enterprises to determine whether a new activity requires notice or prior approval and accordingly provides for different submission processes to FHFA. However, FHFA's current and proposed submission process does not allow the Enterprises to make the determination of whether an activity requires notice or prior approval and, therefore, allows for only one, unified submission process. An Enterprise is required to submit the same detailed information for all new activities whether prior approval would prove necessary or not. The notice of new activity calls for so much information that should FHFA determine the activity to be a new product, FHFA can use the Enterprise's notice of new activity as the basis for the notice of public comment.

Allowing no distinction between new activity notices and requests for new product approval, as expressly contemplated by the statute, means valuable time and resources will be used to submit detailed notices of new activities for new activities that only require notice and not prior approval.

NAHB recommends the Enterprises, not FHFA, make an initial determination whether a new activity is a new product and two submission processes be established. If the Enterprises are allowed to determine whether an activity is a new activity or a new product, the notice of new activity could include significantly less information. The complex details currently necessary for a notice of public comment and prior approval would be submitted initially only if an Enterprise believes the activity is a new product. NAHB believes the enhanced definitions of a new activity and a new product in the proposed rule are sufficient for an Enterprise to make that determination.

Within 15 days of receipt of a notice new activity, if FHFA disagrees with an Enterprise's assessment that a new activity required only notice, FHFA could require the Enterprises to submit the additional information necessary to issue a notice of public comment.

Alternatively, FHFA could establish a process that allows for the Enterprises to consult with FHFA prior to the Enterprises submitting a notice of new activity to determine whether a new activity requires notice or prior approval and request the appropriate submission process.

NAHB believes the fact that the statute outlines an expedited timeframe for review of new activities, which do not need to be issued for public comment and prior approval, makes clear that new activities are to be treated differently. Requiring the same submission documentation appears contrary to this intent and unnecessarily burdensome in the case of new activities.

Since nothing precludes FHFA from deciding at any point that an activity or product offered by an Enterprise is not safe and sound, is not consistent with the statutory mission of the Enterprises or requires additional information, we caution FHFA not to make the process too onerous or complex so as to discourage the Enterprises from seeking new and innovative ways to meet housing finance needs.

The Proposed Rule should set a timeframe for how many days FHFA should have to review a notice of new activity and determine the submission is complete and "received."

The proposed rule, like the Interim Rule, provides that the 15 day timeframe for FHFA to notify an Enterprise whether it has determined a new activity needs prior approval before being offered begins after notifying the Enterprises it has received a complete submission package. However, there is no set timeframe for how many days FHFA may take to determine a notice of new activity is complete and then notify the Enterprise the submission has been received.

Allowing FHFA unlimited time to notify the Enterprises that a submission is complete and received practically renders moot the expedited 15 day review of a complete package to make a determination about the need for prior approval. Reviewing a submission to determine if it is complete, also requires a certain degree of review of the activity itself. Unlimited time prior to starting the 15 day clock should be reconsidered.

Conclusion

NAHB supports FHFA establishing specific and transparent guidelines for the Enterprises to submit a notice of new activity and request for prior approval of new products as required by the Safety and Soundness Act. NAHB requests that FHFA ensure there is enough flexibility in the process for the Enterprises to respond readily and effectively to market needs and opportunities.

Thank you for considering our recommendations. Please contact Becky Froass, Director, Financial Institutions and Capital Markets, at rfroass@nahb.org or 202-266-8259 with any questions.

Sincerely,

David L. Ledford

David L. Ledford

Executive Vice President
Housing Finance and Regulatory Affairs