Fannie Mae®

January 8, 2021

By Electronic Delivery to FHFA Website

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

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

Dear Mr. Pollard:

Fannie Mae welcomes the opportunity to comment on the Federal Housing Finance Agency's ("FHFA") proposed rule, "Prior Approval for Enterprise Products," published on November 9, 2020 (the "Proposed Rule").[1] The Proposed Rule would implement section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. § 4541) (the "Safety and Soundness Act"), which requires Fannie Mae and Freddie Mac (the "Enterprises") to obtain prior approval from FHFA for new products and provide prior notice to FHFA of new activities. The Proposed Rule, if adopted, would replace an interim final rule issued by FHFA in 2009 (the "Interim Final Rule").[2]

I. Executive summary

Through the Safety and Soundness Act, Congress created a strong prudential regulator in FHFA, with robust supervisory powers to continuously monitor the Enterprises and obtain whatever information it needs to effectively review, examine and regulate any new or existing activity. FHFA's ongoing supervisory examination processes, together with a host of post-2008 rulemakings, including recently adopted or proposed regulations in the prudential pillars of capital, liquidity, stress-testing, and resolution planning, provide an oversight framework at least as strong as those that exist for the largest banks.

[1] 85 Fed. Reg. 71276 (Nov. 9, 2020).

[2] 74 Fed. Reg. 31602 (July 2, 2009), codified at 12 C.F.R. part 1253. FHFA as conservator subsequently instructed Fannie Mae not to submit new product requests under the rule. *See* Fannie Mae Form 10-K 2019, p. 19. As a result, the specific processes the Proposed Rule would mandate are largely untried in practice.

For one particular kind of activity, though, the Safety and Soundness Act goes a step further. For "new products," it grants FHFA prior approval authority to complement and supplement FHFA's other regulatory powers. To this end, it specifies two distinct processes:

(1) A screening process – in which the Enterprise provides a notice of a "new activity," which FHFA reviews to determine if the new activity is a new product;[3] and

(2) A substantive approval process – in which the Enterprise requests FHFA's approval of a new product, which entails public notice and comment.[4]

This second process – the substantive approval process for new products – represents an important and valuable tool that can enhance FHFA's ability to take timely action to supervise and regulate the Enterprises' safety and soundness, fulfillment of their statutory missions, compliance with their charters and service of the public interest, with appropriate public input. Fannie Mae offers some modest recommendations below, particularly with respect to the treatment of confidential information, but in general Fannie Mae believes that the Proposed Rule implements the statutory design well once this second process is under way.

Fannie Mae's main recommendations below concern the first process – for new activity screening. To be sure, Fannie Mae shares FHFA's goal of streamlining regulatory review. But Fannie Mae is concerned that, in some respects, the Proposed Rule conflates the new activity screening process with the new product approval process. Rather than streamline, this approach could ultimately add unnecessary burdens to both FHFA and Fannie Mae. Fannie Mae is concerned that applying extensive and highly-detailed information and process requirements to matters not involving a request for approval of a new product risks misdirecting both FHFA's and Fannie Mae's resources and attention and may impede routine incremental improvements in Fannie Mae's existing products, services and business practices.

Section II below addresses the proposed information requirements for new activity notices. The Proposed Rule would require that each notice provide 15 categories of information, many of which would entail substantial analytical work, plus a certification. However, particularly given the Proposed Rule's broad definition of "new activity," most notices would likely not entail new products subject to public notice and comment and FHFA approval. Accordingly, in most cases, much of the content of the notices would be unnecessary, including the detailed data, analysis and certification. Fannie Mae recommends that detailed data, analysis and certification be required, as appropriate, only after an activity has been determined to be a new product and an Enterprise has sought approval to engage in it.

Section III below addresses the initiation of the substantive approval process. The Proposed Rule appears to provide for FHFA to initiate new product approval processes, including public notice

[3] *See* 12 U.S.C. § 4541(e)(2).

[4] *See* 12 U.S.C. § 4541(c).

and comment, automatically upon determining a new activity to be a new product. Instead, in accordance with the statute, Fannie Mae recommends that the approval process commence only upon a request for approval by an Enterprise, which could be based on the Enterprise's own determination or FHFA's prior determination that the activity at issue is a new product.

Section IV below addresses the Proposed Rule's definition of "new activity." The proposed definition could generate a very high volume of new activity notices regarding incremental changes that raise no significant regulatory concerns. Fannie Mae recommends revisions to the proposed definition of new activity, including the proposed exemptions, that would avoid unnecessary burdens on both Fannie Mae and FHFA, while still ensuring that FHFA receives notice of all potential new products.

Section V below offers additional targeted recommendations to improve the Proposed Rule.

Fannie Mae offers these recommendations in the same spirit in which it was originally chartered in 1938. Throughout its long history, Fannie Mae has developed new products and services in response to the needs of the market and in pursuit of its chartered mission to increase the liquidity of mortgage investments in the secondary market and thereby promote mortgage affordability and access to credit. While a particular homeownership rate is not targeted by either policy makers or Fannie Mae, homeownership has risen substantially, albeit unevenly, across the nation since Fannie Mae's founding. The home financing market relies on Fannie Mae to innovate and provide new products and services to deliver the liquidity that makes this possible for diverse borrowers of all income levels throughout the United States. The home financing market remains one of the most complex and opaque of all forms of consumer credit, particularly for lower-income borrowers. With innovation this can and will change as it has for many other consumer experiences via application of new technologies. Fannie Mae is certain that all primary market stakeholders – mortgage bankers, home builders, realtors, consumer advocates and others – share Fannie Mae's commitment to ensuring that borrowers have sustainable access to mortgage products that are less complex and more efficient. Continuous innovation is essential to achieve this goal, and the public policies underlying the Fannie Mae charter and the Safety and Soundness Act will best be realized by a rule that avoids unnecessary burdens on that vital process.

II. The "Notice of New Activity" should be tailored to its statutory screening purpose.

The Proposed Rule would require every "Notice of New Activity" to contain three major elements:

- a description and characterization of the new activity (proposed § 1253.9(a)(1)-(5));
- further elaboration and detailed multi-disciplinary analysis of the new activity (proposed § 1253.9(a)(6)-(15)); and
- certification by an executive officer (proposed § 1253.9(c)).

In addition, FHFA would reserve the right to require additional information (proposed § 1253.9(b)).

Fannie Mae recommends a simple change: each Notice of New Activity should be required to include only the information in the first category above (information specified in proposed § 1253.9(a)(1)-(5)). The information in the second and third categories (information specified in proposed § 1253.9(a)(6)-(15) and the certification specified in proposed § 1253.9(c)) should be required only if and when an Enterprise is submitting a request for approval of a new product.

Fannie Mae's recommendation is grounded in the statutory distinction between new activity notices and new product approval requests. The Safety and Soundness Act provides that "[f]or any new activity that an enterprise considers not to be a product," the Enterprise must provide "written notice … of such activity," whereupon FHFA is to conduct an "expedited review" to determine if it is a new product.[5] That process is clearly distinct from the statutory "procedure for approval," which requires submission of a "written request for approval" for the subset of new activities that FHFA determines to be new products.[6] The information specified in proposed § 1253.9(a)(1)-(5) should generally be ample for FHFA to conduct the required "expedited review" of whether the new activity is a new product. If FHFA needs additional information relating to a notice of new activity, it may require it pursuant to proposed § 1253.9(b).

The more detailed information specified in proposed § 1253.9(a)(6)-(15) and the certification specified in proposed § 1253.9(c) may be of value at the substantive approval stage. However, the majority of new activities are unlikely to reach that stage. Moreover, producing and certifying this additional information for each new activity would be unduly burdensome. Proposed § 1253.9(a)(6)-(15) would require pro forma financials, risk analysis, market research, economic analysis, oversight details, fair lending self-evaluation, legal opinions, intellectual property information, public interest analysis, safety and soundness analysis, and accounting information. Proposed § 1253.9(c) would require an executive officer certification that all this information and analysis contained no material misrepresentations or omissions. To provide this certification – which the Safety and Soundness Act does not require – Fannie Mae would need to develop detailed due diligence sub-certification processes involving multiple employees for every Notice of New Activity. In many cases, those processes would relate to information that FHFA does not need to make a determination under proposed § 1253.5(c).

In this way, the Proposed Rule would impose substantial compliance burdens that would divert resources from other necessary business activities, delay the implementation of new activities (including urgent actions needed in response to natural disasters and other emergencies[7]) and impede innovation. Fannie Mae believes that robust internal controls are sufficient to ensure

[5] 12 U.S.C. § 4541(e)(2).

[6] 12 U.S.C. § 4541(c).

[7] While proposed § 1253.7 provides an "exigent circumstances" exception to the public comment requirement for new products, that exception does not appear to relieve an Enterprise of its obligation to complete a Notice of New Activity.

quality submissions without the need for an accuracy and completeness certification to FHFA.[8] Accordingly, the additional information specified in proposed § 1253.9(a)(6)-(15) and the certification under proposed § 1253.9(c) should be required only if and when an Enterprise submits a request for approval of a new product.

The commentary to the Proposed Rule recognizes that the Safety and Soundness Act "makes a distinction between an activity and a product" and "has separate provisions for a request for prior approval of a new product and for a notice of a new activity that the Enterprise does not believe to be a new product."[9] However, it states:

> FHFA does not believe that it is practical to require an Enterprise 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 the Agency. For that reason, the proposed rule provides for a unified notice process which requires an Enterprise to make a single form of submission—a Notice of New Activity. A single submission will also streamline the review conducted by FHFA.[10]

Fannie Mae respectfully disagrees. As discussed in section III below, the majority of Enterprise submissions would not involve new products. Therefore, by front-loading information requirements, the Proposed Rule would impose substantial burdens in order to provide information that FHFA would not ultimately need. Fannie Mae recognizes that whether an Enterprise new activity constitutes a new product is ultimately FHFA's decision. However, the Safety and Soundness Act provides for the Enterprise to determine in the first instance whether a new activity is a new product: if the Enterprise believes the new activity is a new product, it can apply for approval, and if the Enterprise believes the new activity is not a new product, it can submit a notice.[11] Under the statute, the Enterprises are incented to make accurate submissions because submitting a new activity notice for a new product would only result in delays.

Fannie Mae's proposal is consistent with the operation of the Enterprises over the last decade. In conservatorship, FHFA and Fannie Mae have communicated continuously and transparently to ensure that Fannie Mae submits appropriate matters for conservator notice and decision. FHFA has not mandated uniform information requirements for every submission. Instead, Fannie Mae has provided documentation sufficient to evidence its analysis and recommendation, which usually consists of materials that were generated to satisfy required internal approvals and governance. Moreover, while the conservator has specified that certain matters require prior Board of Directors approval and expects all submissions to be accurate and complete, it has not mandated an executive officer certification process such as the one described in the Proposed Rule.

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[8] FHFA can always review and verify information submitted by an Enterprise and, regardless of certification, the Enterprises always have a duty to provide complete, candid and accurate information to FHFA.

[9] 85 Fed. Reg. at 71277, 71278.

[10] 85 Fed. Reg. at 71278.

[11] *Compare* 12 U.S.C. § 4541(c)(1) *with* 12 U.S.C. § 4541(e)(2)(A).

III. The Enterprises should control whether and when to initiate a new product approval process.

The statutory distinction between new activity screening and new product approval is also the premise of Fannie Mae's second recommendation. The Proposed Rule would require notice of all new activities, including a statement of the Enterprise's position as to whether the new activity constitutes a new product, whereas Congress provided for notice to FHFA only of a new activity that the Enterprise does ***not*** consider to be a new product.[12] The Proposed Rule would trigger public notice and comment automatically upon FHFA's determination that a new activity is a new product, whereas the statute provides that notice and comment is only triggered upon the Enterprise's written request for approval of a product.[13] Further, as noted above, the Proposed Rule prescribes a single submission, at the notice of new activity stage, whereas the statute calls upon FHFA to prescribe the form of two distinct submissions – a "written notice" for a new activity that the Enterprise does not consider a new product and a "written request for approval" of a new product.[14]

Fannie Mae appreciates FHFA's effort to streamline and simplify the statutory submission process. However, an essential component of the statutory scheme is that a public notice and comment process is triggered by the ***Enterprise*** formally seeking approval of a new product. In some cases, that will involve skipping an unnecessary step: if the Enterprise considers a new activity to be a new product, there is no reason to delay with a notice of new activity; the Enterprise should proceed directly to submitting a request for approval of a new product. If the Enterprise submits notice of a new activity believing that the new activity is not a new product, but FHFA determines that it is a new product, then consistent with 12 U.S.C. § 4541(c), the Enterprise should have the choice whether and when to submit a request for approval. Informed by FHFA's determination that the new activity is a new product, the Enterprise may decide to amend or not proceed with its proposal; it may decide to prepare supplemental analyses that will inform public comment; or it may work with FHFA to ensure that the necessary information to inform public comment can be disclosed without compromising the Enterprise's confidential business information.

Consistent with the statute, the Enterprises should have the opportunity to make such judgments on an informed basis for the subset of new activities deemed new products. This approach is consistent with the statute, which provides that an Enterprise should be allowed to control the timing of initiation of a public comment period.[15]

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[12] *Compare* proposed § 1253.9(a)(4) *with* 12 U.S.C. § 4541(e)(2)(A).

[13] *Compare* proposed § 1253.6(a) *with* 12 U.S.C. § 4541(c)(2).

[14] *Compare* proposed § 1253.5(a) *with* 12 U.S.C. § 4541(e)(2)(A) (notice) and § 4541(c)(1) (request for approval).

[15] *See* 12 U.S.C. § 4541(c)(2) ("***Immediately upon receipt of a request for approval of a product*** … the Director shall publish notice of such request and of the period for public comment"; emphasis added).

Regardless of whether FHFA ultimately adopts a one- or two-step submission process, the final rule should make clear that an Enterprise may withdraw a submission at any time. An Enterprise may choose to withdraw a submission for many reasons, *e.g.,* a change in market appetite, customer demand, or the Enterprise's own budget priorities or strategy. While FHFA may intend for the Enterprises to have this discretion, an express statement to this effect would prevent potential challenges from the public for the release of information relating to a withdrawn notice.

IV. The definition of "new activity" should be adjusted to focus on potential new products.

By defining "new activity," the Proposed Rule determines the scope of the notice requirement. Fannie Mae believes the general structure of the definition in proposed § 1253.3 is appropriate and helpful. Subsection (a)(1) defines an "activity" as a "business line, business practice, offering or service" that "the Enterprise provides to the market." Fannie Mae appreciates FHFA's drafting of subsection (a)(1) so that it makes clearer than the equivalent language in the Interim Final Rule that only market-facing activities, not internal operations and systems, are potentially subject to notice requirements. Subsection (a)(2) requires that the activity be "new" as of the effective date of the regulation. Subsection (a)(3) requires some kind of change or impact associated with the new activity. And subsection (b) sets forth appropriate exclusions consistent with the text and purpose of the statute.

However, as elaborated below, Fannie Mae recommends that subsections (a)(2), (a)(3), and (b) each be amended to clarify that the singular focus of the notice requirement for new activities is to identify potential new products, and that new activities that do not rise to the level of potential new products – while reviewable by FHFA under its robust, core regulatory authorities – should not require notice under this additional regulatory framework. Fannie Mae therefore recommends that FHFA (1) clarify that activities undertaken by the Enterprises between the start of conservatorship on September 6, 2008 and the effective date of the final rule are not "new"; (2) adjust the "activity" criteria to screen out minor variations in operations; and (3) expand the exclusions list, as specified below.

A. The delineation of "new" activities in proposed § 1253.3(a)(2) should be clarified and narrowed.

The Safety and Soundness Act distinguishes between ***existing*** products and activities, and ***new*** products and activities, requiring notice before an activity is "commence[d]" or approval before a product is "initially offer[ed]."[16] The Proposed Rule appropriately uses the effective date of the final rule as the "trigger date" to determine what is "new" in order to "look[] forward, rather than retroactively."[17] However, its test for identifying "new" activities is ambiguous and could be construed as encompassing activities that have already "commence[d]"and products that have been "initially offer[ed]" and that, therefore, should not be subject to prior notice or approval.

[16] 12 U.S.C. § 4541(a), (e)(2)(A) & (f).

[17] 85 Fed. Reg. at 71278.

Under proposed § 1253.3(a)(2), an activity is considered new if (i) it is not engaged in by the Enterprise "as of" the effective date of the final rule, or (ii) it enhances, alters or modifies an existing activity that the Enterprise is engaged in "as of" that date. "As of" is ambiguous in both contexts. It could mean activities engaged in precisely "on" the effective date, "around" the effective date, or "prior to" the effective date. The elaboration in the commentary to the effect that a product Fannie Mae offered during conservatorship but discontinued in 2010 would be deemed "new" if restarted[18] suggests that FHFA may construe "as of" narrowly, and thus define "new activity" broadly.

Fannie Mae recommends a clearer and narrower definition of new activity that would exclude certain non-continuous activities that were commenced before the effective date of the new rule. An essential aspect of the Enterprises' mission is to respond to cyclical changes in the market, which may involve offering or engaging in activities on a non-continuous basis. Examples of such Enterprise activities include: non-performing loan sales; credit risk transfers; seasoned loan pool purchases; senior-subordinate mortgage-backed securities; long-term standby commitments; acquisitions of government-insured and government-guaranteed loans; multifamily full recourse loans; and support for bonds that build or rehabilitate multifamily subsidized housing. Such activities should not be deemed "new" merely because they are not occurring in the market conditions prevailing at the time the new rule takes effect. Instead, a practical understanding of "new" should be applied.

In an analogous context, involving risk management standards for national banks and savings associations, the OCC has defined "new" activities as "those offered for the first time, as well as offerings that the bank previously discontinued but will offer again after a ***substantial period of time*** has passed."[19] In the present context, the inception of conservatorship is the appropriate starting point for defining existing activities. As the commentary explains, Enterprise activities since September 2008 have been subjected to "special conservator review … in addition to FHFA's standard supervisory and regulatory oversight."[20] Enterprise activities engaged in under the supervision and without the objection of the conservator should not be deemed new and should not require notice to FHFA under this rule. Accordingly, Fannie Mae recommends revising proposed § 1253(a)(2)(i) to read "An activity which: (i) ***Was*** not engaged in by the Enterprise ***between September 6, 2008, and*** the effective date of this section, ***provided that such activity was not discontinued at the direction of FHFA***."[21]

[18] 85 Fed. Reg. at 71279.

[19] OCC Bulletin 2017-43, issued on Oct. 20, 2017 (emphasis added).

[20] 85 Fed. Reg. at 71278.

[21] Fannie Mae also suggests shortening proposed § 1253(a)(2)(ii) to "(ii) Is an enhancement, alteration, or modification to an existing activity," in order to eliminate the ambiguous "as of" language.

B. FHFA should adjust the criteria in proposed § 1253.3(a)(3) to focus on potential new products.

Activities that meet the requirements of proposed § 1253.3(a)(1) and (2) are subject to notice requirements under the Proposed Rule if they fall within any of six categories set forth in proposed § 1253.3(a)(3). Fannie Mae understands proposed § 1253.3(a)(3) to be intended to distinguish new activities from minor variations in existing operations, and to avoid needlessly deploying Enterprise and FHFA resources on notice procedures where there is no prospect of a "new product" subject to prior approval. To achieve this screening purpose, the Interim Final Rule excludes *de minimis* activities and includes changes to existing activities only if "significant."[22] Fannie Mae appreciates that FHFA has sought to minimize reliance on such indefinite standards and therefore did not include such limitations in the Proposed Rule. However, the omission of such limitations makes revisions to the Proposed Rule essential for Notices of New Activities to serve their intended purpose – to identify those activities that may be new products – without unduly burdening both the Enterprises and FHFA.

Fannie Mae's suggested revisions to proposed § 1253.3(a)(3) would retain its basic structure but bolster its screening function. As proposed, subparagraphs (i) and (ii) appear potentially limitless: potentially, practically any variation in an Enterprise's market-facing operations could be construed as entailing a new or modified policy or process or new data or resources, and practically any transaction can affect risk, albeit to a *de minimis* extent. Fannie Mae recommends that subparagraph (i) be reformulated as a condition of, rather than an alternative basis for, "new activity" status,[23] and that what is currently subparagraph (ii) be revised to apply only to activities that ***significantly*** expand the scope or increase the level of specified risks. Fannie Mae also recommends eliminating subparagraph (v), which would subject any pilot to new activity notice requirements. Notice would instead be required if, but only if, a pilot meets one of the other thresholds for notice or if it proceeds beyond the pilot stage as per proposed subparagraph (vi).

With these revisions, proposed § 1253.3(a)(3) would effectively screen out from the notice requirement conduct that is *de minimis* in scope, volume, risk, and/or duration, or that amounts to a relatively minor modification to the Enterprise's existing operations, while providing clear guidance and ensuring that FHFA would receive prior notice of any new activity that has the potential to merit new product review. Without these revisions, proposed § 1253.3(a)(3) has the potential to result in the filing and review of hundreds of notices of new activities that would not rise to the level of new products – each burdening FHFA to act within 15 days. For FHFA, the costs

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[22] 12 C.F.R. § 1253.2 ("new activity" excludes business practices and services "*de minimis* in scope, volume, risk, or duration" and includes existing activities engaged in "at a significantly different level, or in a significantly different manner"); 12 C.F.R. part 1253, Appendix, Instructions for NNA Submission, section A.1 ("new activity" excludes "a minor, non-substantive transaction or activity that does not involve significant credit, interest rate, operation … or reputation risk" and includes "a significant expansion or alteration of an existing activity or product").

[23] Specifically, paragraph (3) would begin, "An activity that requires a new type of resource, a new type of data, a new policy or modification to an existing policy, or a new process or infrastructure, and is described by one or more of the following paragraphs:" and subparagraphs (ii) through (vi) would be renumbered accordingly.

and burdens of such notices may be compounded by potential Freedom of Information Act requests for notices submitted under the rule. To be clear, narrowing the scope of the definition would not prevent FHFA from reviewing Enterprise activities through the use of its robust, core formal and informal regulatory and supervisory tools.

1. Subparagraph (i): Resource, Data, Policy, Process, or Infrastructure

Subparagraph (i) of proposed § 1253.3(a)(3) would trigger a notice requirement for any activity that requires "a new type of resource, a new type of data, a new policy or modification to an existing policy, [or] a new process or infrastructure." Fannie Mae continuously updates its resources, data, policies, processes and infrastructure to improve its services and maximize efficiency. For example, simply to run its existing business, Fannie Mae constantly works to automate existing manual processes and replace legacy systems. When updates serve a new activity that may have the potential to constitute a new product, notice requirements should apply, but updates per se should not require notice. Fannie Mae's proposed restructuring of § 1253.3(a)(3) would achieve that result and prevent current subparagraph (i) from becoming a bureaucratic roadblock or a disincentive to routine business updates and improvements.

New type of resource. According to the commentary, a "new type of resource" could be "newly contracted vendors for a different type of service" or "a new organizational division."[24] Fannie Mae regularly employs new vendors[25] or revises its internal organization[26] in order to enhance efficiency of its existing operations. In such cases, a notice requirement would only impair efficiency. Notice is properly required when Fannie Mae employs a new resource in connection with an activity that has the potential to be a new product, but in that circumstance, notice will be triggered by the other subparagraphs of § 1253.3(a)(3).

New type of data. The second element, a "new type of data" – which the commentary indicates could be a singular data item[27] – also unnecessarily envelops routine updates and improvements to existing activities.[28] As with resources, notice should be required only when Fannie Mae uses the data in connection with an activity that could be a new product.

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[24] 85 Fed. Reg. at 71278.

[25] For example, in 2017 Fannie Mae hired a vendor to build a new system for multifamily lenders to register and submit loans to Fannie Mae for consideration, receive pricing, track loan status, submit waiver requests, and receive responses to requests. While Fannie Mae performed these functions previously, the new system, called DUS Gateway®, consolidated these existing functions in a more user-friendly and responsive interface.

[26] For example, Fannie Mae has reorganized its customer delivery teams to provide existing services more quickly and efficiently to its customers and has created new teams to address emerging risks (e.g., reorganization to better support affordable housing loan acquisitions).

[27] 85 Fed. Reg. at 71278 ("[A] new activity that uses a new type of data would include collecting a data item from an external party that had not been collected or used before by an Enterprise.").

[28] For example, in 2020 alone, Fannie Mae's Multifamily business has released more than 200 technology updates, many of which add new or modified data elements, in order to improve service and enhance efficiency.

New policy or modification to an existing policy. Designating a "new policy or modification to an existing policy" – the third element – as a trigger for a new activity would also capture a large volume of routine activities, including revisions and updates to internal risk management policies. Even more broadly, this could be construed to require notice every time the Enterprises update their selling and servicing guides. In 2020 alone, Fannie Mae has issued hundreds of single-family and multifamily guide updates, supplements or other notices. Fannie Mae issues updates for many reasons, including to address risk, modify mortgage terms and conditions, clarify or simplify a policy, or change the requirements for seller/servicer activities and eligibility in response to changes in the market, applicable laws, regulatory actions, or economic conditions.[29] Such updates merit notice only when captured by other subparagraphs of paragraph (3).

New process or infrastructure. The final element of subparagraph (i) is a "new process or infrastructure." This broad and potentially limitless term could apply to any change in Fannie Mae's business and operating environment or physical facilities or systems.[30] The vast majority of those changes are in service of Fannie Mae's existing offerings and do not merit FHFA review as potential new products.

In sum, subparagraph (i) of proposed § 1253.3(3) would sweep too broadly to perform a meaningful screening function on its own. If FHFA still wishes to include a "new type of resource," "new type of data," "new policy or modification to an existing policy," and/or "new process or infrastructure" as triggers for a new activity, Fannie Mae recommends that FHFA partner them with the other criteria currently described in subparagraphs (ii), (iii), (iv) and (vi), as recommended above.

2. Subparagraph (ii): Credit, Operational or Market Risk

Subparagraph (ii) of proposed § 1253.3(a)(3) would also sweep broadly, capturing any activity that "expands the scope or increases the level of" an Enterprise's credit, market or operational risk, without any qualifier that might filter out activities where the incremental risk is insignificant, immaterial or otherwise *de minimis*. The broad scope of this provision is reinforced by the definitions of "credit risk," "market risk," and "operational risk" in proposed § 1253.2, which also lack any threshold for significance or materiality.[31] As a result, any activity that increases risk, however minor or remote, and regardless of applicable risk mitigants, could trigger a notice requirement. This could be the case, for example, if an Enterprise implements controls or processes to mitigate one risk, such as credit or counterparty risk, and thereby introduces

[29] For example, Fannie Mae updated its selling and servicing guides multiple times in 2020 in response to the CARES Act and various FHFA directives

[30] For example, Fannie Mae recently automated and modernized the process by which single-family servicers report loan status and performance, eliminating the need for servicers to call Fannie Mae with the information.

[31] The definition of "credit risk" is particularly expansive as it would appear to include an increase in risk associated with a single consumer. *See* Proposed § 1253.2 ("*Credit risk* is the potential that a borrower … will fail to meet its obligations in accordance with agreed terms."). Even the most qualified borrower poses some risk of not meeting its obligations, albeit a smaller risk than for a less qualified borrower.

additional, though minor, operational risk. Further, absent a *de minimis* qualifier, almost any transaction may be said to expand or increase risk, since few transactions are entirely risk-free.

FHFA explains in the commentary that it avoided qualifiers such as "significant" and "*de minimis*" "because they lack "a clear, common understanding."[32] However, the Enterprises have been operating for over a decade in conservatorship under FHFA guidance that uses such qualifiers. For example, the Enterprises are instructed to submit certain "significant" or "material" changes for conservator review.[33] These instructions have been implemented successfully over time and demonstrate the workability and practicality of qualifiers that, while potentially subjective, are imbued with meaning through regular communications in which FHFA conveys its expectations to the Enterprises.

Similarly, FHFA has limited the scope of its New Business Activities ("NBA") regulation[34] by incorporating a materiality concept into its definition of NBA. As amended, a Federal Home Loan Bank ("Bank") is required to submit notice only for those activities that entail "***material*** risks not previously managed by the Bank."[35] In proposing this amendment, FHFA acknowledged that "[a]ssessing the materiality of the risks associated with a new activity necessarily will entail some subjective judgments by the Banks."[36] However, FHFA explained:

> For those instances in which it is unclear whether the risks associated with a proposed activity would be material, FHFA expects that a Bank would discuss the contemplated activity with FHFA staff early in the process to determine whether the risks warrant the submission of an NBA notice. For those instances in which a Bank undertakes a new activity based on its own determination that the associated risks are not material, FHFA expects to assess those decisions as part of the regular examination process.[37]

Like the Banks, the Enterprises are capable of assessing the significance of the risks associated with their new activities. If an Enterprise is unsure whether the risks associated with a particular proposed activity are significant, then the Enterprise, like the Banks, should be able to consult with FHFA regarding the need to file a notice. Indeed, the Interim Final Rule expressly contemplates such consultation.[38] If an Enterprise proceeds with a new activity after determining that it does not

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[32] 85 Fed. Reg. at 71278.

[33] Fannie Mae, 2019 Form 10-K, p.145.

[34] 12 C.F.R. part 1272.

[35] 12 C.F.R. § 1272.1 (definition of NBA).

[36] 81 Fed. Reg. 57499, 57501 (Aug. 23, 2016).

[37] 81 Fed. Reg. at 57501; *see also* Final Rule, 81 Fed. Reg. 91690, 91692-91693 (Dec. 19, 2016).

[38] 12 C.F.R. part 1253, Appendix, Instructions for NNA Submission, section A.1 ("The Enterprises will work with examiners to assure clarity regarding whether an activity is new and fits within the Notice of New Activity … submission requirement") and section A.4 (consultation with FHFA).

present significant risks, FHFA may conduct its own risk assessment as part of its regular supervisory processes. This approach would enhance the Enterprises' ability to assess the final rule's applicability to particular activities while also meeting FHFA's supervisory and regulatory objectives.

Accordingly, Fannie Mae recommends that FHFA amend subparagraph (ii) to cover activities that "significantly" expand the scope or increase the level of an Enterprise's credit, market or operational risk. If FHFA remains concerned that a "significance" qualifier lacks "a clear, common understanding," illustrations in the commentary to the final rule or subsequently issued guidance could provide additional clarity. For example, FHFA could clarify through illustrations that it considers any credit-related activity to be significant for purposes of triggering a Notice of New Activity if it requires approval by the Enterprise's senior management risk committee.

3. Subparagraph (v): Pilots

Subparagraph (v) of proposed § 1253.3(a)(3) would require an Enterprise to provide a Notice of New Activity to FHFA for any "activity that is a pilot." A pilot is a limited-scope test designed to determine whether the Enterprise should expend time and resources to pursue an idea. Including pilots in the definition of a new activity would result in premature and potentially duplicative submissions and oversight for activities that may never move beyond the pilot stage or otherwise meet the threshold for notice to FHFA. Fannie Mae recommends that FHFA delete pilots from the list of activities while retaining proposed § 1253.3(a)(3)(vi), "activity resulting from a pilot."

Fannie Mae is not recommending an exemption for pilots or any other early-stage initiative. Pilots that meet the other criteria for a new activity, such as entailing a significant increase in the level of credit risk due, for example, to the amount of dollars committed to the activity, would still require notice under Fannie Mae's recommended approach. Further, FHFA would, of course, retain the ability to stay informed of pilot developments through regular supervisory processes. But if a pilot does not meet other new activity criteria, notice should not be required purely because it is a pilot. Rather, consistent with proposed § 1253.3(a)(3)(vi), FHFA would receive a notice if and when an Enterprise proposed to expand a pilot into a new activity. Notice at that point will be more valuable, given that the purpose of a pilot is to develop information that will inform consideration of the new activity.

The reference to "marketing" activities in proposed § 1253.3(a)(1) is illustrative. Marketing pilots commonly involve A/B testing to identify the best messaging for targeted audiences. The results of this testing inform the eventual marketing campaign. An A/B testing pilot does not expand the scope or increase the level of credit risk, market risk or operation risk for an Enterprise, involve a new category of borrower, investor, counterparty or collateral, or substantially impact the mortgage finance system, an Enterprise's safety and soundness or compliance, or the public interest. As such, A/B testing should not be considered a new activity, much less merit public comment as a new product, if released directly without first using a pilot. Requiring notice merely because a pilot is used would potentially deter the efficient use of pilots, and not assist FHFA in screening new activities for possible new products.

C. The exclusions in proposed § 1253.3(b) should be clarified and expanded.

1. Independent and Future Technology Systems

Proposed § 1253.3(b)(1)-(3) largely track the statutory text in providing exclusions for (1) an Enterprise's automated loan underwriting system ("AUS"), including upgrades; (2) modifications to mortgage terms and conditions or mortgage underwriting criteria; and (3) any activity that is "substantially similar" to (1) or (2). The commentary elaborates that "the technology systems that evaluate the appraised value of a property, such as Fannie Mae's Collateral Underwriter (CU) … would not fall within [the AUS] exclusion,"[39] and requests comment on how the rule should be applied to related but independent and future technology systems. Fannie Mae believes that proposed § 1253.3(b) should apply to CU® and other existing and future systems with similar functions that are integral to an Enterprise's mortgage terms, conditions, and underwriting. Further, Fannie Mae recommends that FHFA also exclude the Enterprises' existing and future automated systems for mortgage loan sale and delivery.

Fannie Mae's AUS is critical to its success in fulfilling the core secondary mortgage market role assigned to it by its charter. It is the technological embodiment of Fannie Mae's Selling Guide and the underwriting criteria and other terms and conditions upon which Fannie Mae purchases and guarantees mortgage loans. Fannie Mae's economic model and its public policy mission depend on an AUS that is sophisticated, continuously evolving to better meet market needs, and powered by reliable data inputs.

The core of Fannie Mae's AUS is Desktop Underwriter® (DU®), but several integral technologies feed information into DU to help it render sound eligibility decisions. CU uses appraisal data and advanced analytics to help identify and research appraisals with overvaluation, appraisal quality, or property eligibility/policy compliance risks. Properly underwriting the collateral is an integral part of the AUS, and the DU appraisal waiver feature relies on the CU engine. Other underwriting technologies that are critical integral components of the AUS include: DU validation service, which allows a lender to confirm key items needed to meet Fannie Mae's underwriting requirements by using data provided by third parties to validate income, asset and employment information entered by the lender in DU; Desktop Originator® (DO®), which permits a sponsored mortgage broker to access DU; Condo Project Manager™ (CPM™), which facilitates the underwriting of condominium projects; Servicing Management Default Underwriter™ (SMDU™), which helps underwrite a borrower for a workout; and the proprietary internal credit scoring system that underlies the DU engine.

Each of these systems represents a technological implementation of Fannie Mae's policies relating to mortgage terms, conditions, and underwriting that are published in its Guides. No regulatory significance should attach to their form as separate technologies, given that they are used together

[39] 85 Fed. Reg. at 71280.

to serve a common automated underwriting purpose. They could have been constructed as a single system but are separate to facilitate technology roll-out and maintenance. Substance should control, not form.

Accordingly, contrary to the statement in the commentary regarding CU, these systems and modifications thereto are most appropriately considered as part of Fannie Mae's AUS and thus excluded under 12 U.S.C. § 4541(e)(1)(A) and proposed § 1253.3(b)(1). Alternatively, they may appropriately be considered means of implementing modifications to mortgage terms and conditions or mortgage underwriting criteria, and thus excluded under 12 U.S.C. § 4541(e)(1)(B) and proposed § 1253.3(b)(2).[40] Or, they may be considered "substantially similar" to the AUS system or to modifications to mortgage terms, conditions and underwriting criteria, and thus excluded under 12 U.S.C. § 4541(e)(1)(C) and proposed § 1253.3(b)(3). Which exclusion applies is ultimately less important than that CU and other underwriting-related systems are excluded. The statutory exclusions evince a Congressional recognition that mortgage underwriting and related technologies are a mission-critical aspect of the Enterprises' core mission, not a potential new product for which notice might serve a valid purpose. Requiring a regulatory notice and potentially a public comment process whenever the Enterprises upgrade the tools they use for underwriting risks unnecessarily impeding execution of their core mission.

Fannie Mae has a related concern regarding the limiting language in the second sentence of the "substantially similar" exclusion, proposed § 1253.3(b)(3). That sentence refers back to the "new activity" criteria in proposed § 1253.3(a)(3). Under the current version of proposed § 1253.3(a)(3), it would mean that a revision of a technological system or underwriting criterion that involved a new type of data or a policy modification – *i.e.,* essentially any non-trivial upgrade – could not qualify as "substantially similar." By defining the "substantially similar" exclusion by reference to the threshold criteria for new activity, proposed § 1253.3(b)(3) would effectively write the exclusion out of the statute; its function is to exclude certain activities that would otherwise qualify as new activities, not to restate the new activity definition. Instead, to implement 12 U.S.C. § 4541(e)(1)(C), the final rule should recognize any activity or technology that primarily serves a function related to underwriting as "substantially similar" to an AUS, mortgage terms, conditions and underwriting criteria.

Fannie Mae also recommends that FHFA clarify the treatment of the Enterprises' automated systems for mortgage loan sale and delivery, which the Proposed Rule does not specifically address. Fannie Mae's sale and delivery systems include Loan Delivery and C&D™ (systems for submitting single family and multifamily loans for sale to Fannie Mae), Early Check™ (a quality control system for checking the required data elements for loans sold to Fannie Mae), Uniform Collateral Data Portal (a joint Enterprise system for collecting appraisal data), Pricing & Execution–Whole Loan and Pricing & Execution–MBS (single-family pricing systems), and DUS Gateway® (a

[40] Fannie Mae understands the term "mortgage terms and conditions" to include the documents used in the mortgage loan origination process (including the loan documents in which the term and conditions are contained), and the terms and conditions under which loans are sold to the Enterprises, including eligibility requirements for sellers and servicers, sale and delivery requirements and, mortgage insurance requirements.

loan registration and pricing platform for multifamily loans). Collectively, these systems and their components amount to the ministerial processes Fannie Mae uses to facilitate the sale, delivery, pricing, review and packaging of loans. As such, their function is to implement Fannie Mae's mortgage terms and conditions. Accordingly, an upgrade to these systems either amounts to a modification of Fannie Mae's mortgage terms and conditions (excluded under proposed § 1253.3(b)(2)) or is substantially similar to such a modification (excluded under proposed § 1253.3(b)(3)).

Like the AUS systems, Fannie Mae's sale and delivery systems are automated means of performing its core secondary mortgage market mission. It is essential for Fannie Mae to update the supporting technologies continuously and efficiently, and to create new technologies for this same purpose when appropriate, without unnecessary regulatory impediments. And like the AUS systems, they are not the kind of activity Congress called upon FHFA to screen for potential new products. The administration of core mortgage sale and delivery processes does not involve new offerings to the market with any potential to raise competition or other public interest concerns of the sort described in proposed § 1253.4(b).

For the foregoing reasons, Fannie Mae recommends that FHFA clarify that both AUS systems (broadly defined, as above) and automated sale and delivery systems are excluded from the notice requirement. In addition, Fannie Mae recommends that FHFA delete the second, limiting sentence of proposed § 1253.3(b)(3).

2. Other Enterprise Activities

Proposed § 1253.3(b)(4), together with proposed § 1253.8, would provide an exclusion for activities undertaken by an Enterprise that are the same as, or substantially similar to, a new product approved for or otherwise available to the other Enterprise under the rule.[41] FHFA requests comment on whether the scope of this exclusion is too broad or too narrow. Fannie Mae believes the scope of this exclusion is too narrow in four respects.

First, proposed § 1253.8(b)(4) suggests that an activity may not qualify as "substantially similar" if it falls within proposed § 1253.3(a)(3)(i)-(iv). This raises the same concern as noted above in reference to proposed § 1253.3(b)(3): by incorporating most of the definition of new activity, the "substantially similar" exclusion would be rendered practically nugatory. Accordingly, as recommended with respect to proposed § 1253.3(b)(3), FHFA should judge whether an activity is "substantially similar" by comparing it to the activities at issue, without referring back to the new activity definition.

[41] A new product is available to an Enterprise under proposed § 1253.6(g) if FHFA does not act on the Enterprise's request for approval of the product within 30 days after the end of the public comment period.

Second, while the Safety and Soundness Act provides a broad exclusion for activities that are substantially similar to approved new products,[42] the Proposed Rule limits the exclusion to activities that are substantially similar to new products approved for "the ***other*** Enterprise" or that are otherwise available to "the ***other*** Enterprise." Based on the plain language of the statute, the final rule should, like the Interim Final Rule,[43] exclude any activity undertaken by an Enterprise that is substantially similar to a new product approved for, or otherwise available to, ***either*** Enterprise. There is no sound reason to put the Enterprise that obtains new product approval at a disadvantage by allowing only "the ***other*** Enterprise" to undertake substantially similar activities without submitting a Notice of New Activity. Moreover, there is arguably less risk in allowing an Enterprise to undertake activities substantially similar to its own new products, versus the new products of the other Enterprise, because an Enterprise would presumably be more familiar with the risk and details of its own new product.

Third, the exclusion for approved new products should not be limited to those approved under proposed § 1253.6(a) through (e) or otherwise available under proposed § 1253.6(g), but rather should also apply to products granted temporary approval under proposed § 1253.7. The Safety and Soundness Act states that the requirements of 12 U.S.C. § 4541 do not apply to an activity that is substantially similar to activities that have been approved in accordance with 12 U.S.C. § 4541. Subsection (c)(4)(C) of 12 U.S.C. § 4541 allows for temporary approval of new products in exigent circumstances without a public comment period. Accordingly, consistent with the statute, both Enterprises should receive the benefit of a temporary approval under proposed § 1253.7, insofar as the exigent circumstances that justify the temporary approval for one Enterprise will likely be the same for the other.

Fourth, a Notice of New Activity should not be required for an Enterprise to commence an activity that is the same as, or substantially similar to, an activity in which either Enterprise is currently engaged in accordance with the final rule. As the commentary to the Proposed Rule explains, activities initiated since September 2008 have been subject to special conservator review in addition to FHFA's standard supervisory and regulatory oversight.[44] Given this heightened scrutiny, an existing activity of one Enterprise should be available to the other without the need to submit a Notice of New Activity.[45] This is consistent with the provision in the Interim Final Rule that excludes any activity of an Enterprise that is substantially similar to an activity or product continuously undertaken by the other Enterprise since prior to the applicable trigger date.[46]

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[42] 12 U.S.C. § 4541(e)(1)(C)(ii) (excluding any activity that is substantially similar to "activities that have been approved by the Director in accordance with this section").

[43] 12 C.F.R. § 1253.2 (definition of "New Product," paragraph (d)). The commentary to the Interim Final Rule explained, "To avoid duplication of review, a product undertaken by an Enterprise which is substantially similar to a product previously approved under this part ***for either Enterprise*** is not a new product." 74 Fed. Reg. at 31603 (emphasis added).

[44] 85 Fed. Reg. at 71278.

[45] FHFA may require an abbreviated notice as described in proposed § 1253.8(a)(2) & (b)(2).

[46] *See* 12 C.F.R. § 1253.2 (definition of "New Product," paragraph (e)).

3. Risk Mitigation of Owned and Guaranteed Assets

Proposed § 1253.3(b)(5) would exclude from the definition of new activity "any Enterprise business practice, transactions, or conduct performed solely to facilitate the administration of an Enterprise's internal affairs to conduct its business." FHFA states that this would exclude human resources activities, but it would "not exclude activity which ultimately impacts an offering to the public."[47] Fannie Mae recommends that FHFA further clarify that, subject to the same caveat, § 1253.3(b)(5) also excludes activities undertaken for the purpose of mitigating risks associated with mortgages that an Enterprise already owns or guarantees. With this clarification, § 1253.3(b)(5) would serve as an appropriate corollary to proposed 1253.3(a)(1), which defines a new activity as one "provide[d] to the market."

Fannie Mae must engage in a range of activities to manage assets that it owns or guarantees. These include activities undertaken to monitor and mitigate its risk exposure on performing loans, reduce losses and assist borrowers on non-performing loans, and realize recoveries when Fannie Mae takes ownership of the property securing loans. While many of the activities taken to mitigate risk are inward-facing, even risk mitigation efforts that impact third parties do not directly impact primary market lending, nor do they directly affect market competition for a mortgage product. They are neither the subject of an "offering" to the market within the meaning of 12 U.S.C. § 4541(a), nor are they "provide[d] to the market" within the meaning of proposed § 1253.3(a)(1). Accordingly, these activities, along with the systems, processes and controls in support of these activities, should be outside the scope of the Proposed Rule.

Risk mitigation activities are designed to manage Fannie Mae's existing risk exposures on loans and, in many cases, also help to keep homeowners and renters in their homes.[48] These activities are commonly implemented through direction provided to Fannie Mae's contractually-bound servicers and vendors. Beyond not fitting in the market-facing statutory and regulatory criteria for notice and review, there is no policy or supervisory reason to subject risk mitigation activities to the

[47] 85 Fed. Reg. at 71280. In addition to human resources, Fannie Mae understands the internal affairs exclusion to encompass Internal Audit and other second-line functions that are inward-facing and do not directly impact the market.

[48] Today, for example, Fannie Mae requires a single-family servicer to offer a 90-day delinquent borrower a Flex Modification, and Fannie Mae has established a program for COVID-19 Payment Deferrals with certain eligibility requirements, such as that the borrower be less than 30 days delinquent. The requirements for servicers to offer Flex Modifications and the COVID-19 Payment Deferrals, including the eligibility requirements Fannie Mae has established, are not offers to the mortgage finance market or even offers to lenders. Nor is there a market "offering" when Fannie Mae's Multifamily business takes actions to manage the performance and condition of collateral properties securing its loans, such as updating its processes for delivery of operating statements, rent rolls or inspection reports, or authorizing its servicers to offer up to 180 days of forbearance to borrowers impacted by the COVID-19 emergency. Moreover, when Fannie Mae engages in REO management (that is, when it acquires, manages and ultimately disposes of properties acquired by Fannie Mae through foreclosure), it is not facing the mortgage market, offering a product to that market or engaging in activities relating to the mortgage finance system. It is, instead, taking action to mitigate its risks.

new notice process. They do not raise the kind of policy concerns that FHFA seeks to address under proposed § 1253.4(b)(3)-(5) because they do not affect competition in mortgage finance markets. Further, allowing Fannie Mae the flexibility to initiate and conduct risk mitigation efforts it considers necessary and appropriate, without subjecting those efforts to the Proposed Rule, promotes its safety and soundness. FHFA can use its other formidable powers to oversee Fannie Mae's efforts to manage its risks and keep homeowners and renters in their homes. Added delays and burdens on those efforts arising from the notice, review and other processes under the Proposed Rule would be counterproductive and, in some instances, could harm homeowners and renters insofar as revised loss mitigation policies cannot be implemented quickly in response to economic and market conditions.

In sum, Fannie Mae believes that proposed § 1253.3(a)(1) should be understood to exclude risk mitigation activities because they are not "provide[d] to the market." However, in the interest of clarity, Fannie Mae recommends that proposed § 1253.3(b)(5) be revised to expressly exclude risk mitigation from prior notice and approval requirements so it reads as follows: "Any Enterprise business practice, transactions, or conduct performed solely to facilitate the administration of an Enterprise's internal affairs to conduct its business ***or mitigate the Enterprise's risk on assets owned or guaranteed by the Enterprise.***"

4. Required by Law

As highly regulated financial institutions, the Enterprises are subject to numerous requirements imposed by federal laws and regulations. While in conservatorship, the Enterprises must also comply with the orders and directives of FHFA acting as conservator. Activities that an Enterprise undertakes to comply with an applicable law or regulation, or at the direction of FHFA or another federal agency or department, should not be subject to substantive review and approval as "new products."

Fannie Mae undertakes many activities to comply with legal or regulatory requirements or to adhere to direction and guidance from FHFA or another regulator. For example, Fannie Mae may be required to undertake certain actions to comply with FHFA's Uniform Mortgage-Backed Security regulation, including remedial actions ordered by FHFA that require Fannie Mae to change or terminate a program, policy or practice, or to implement a program, policy or practice comparable to one implemented by Freddie Mac.[49] Fannie Mae may change its processes, or require its lenders to change their processes, to respond to HUD or CFPB fair housing or fair lending guidance, or to comply with consumer protection laws.[50] Compliance with FHFA Advisory Bulletins and remediation of supervisory findings may also entail changes to Fannie Mae policies, processes, and business operations.

[49] 12 C.F.R. § 1248.7(a)(2), (c).

[50] For example, to comply with the California Consumer Privacy Act, Fannie Mae was required to implement a new process to receive and respond to California consumer requests for information.

Beyond this, during conservatorship, Fannie Mae has conducted, and continues to engage in, myriad activities at the direction of FHFA. For example, at FHFA's direction under the Servicing Alignment Initiative, Fannie Mae has implemented various protections for homeowners and renters affected by the COVID-19 pandemic. This has included offering new loan modification, forbearance, and repayment options to keep homebuyers and renters in their homes, as well as creating a public website to inform renters whether they live in Fannie Mae-financed multifamily buildings and, if so, of their options for financial relief. Similarly, all of the major data sets collected by Fannie Mae's Single-Family business are created, deployed, and revised under the Uniform Mortgage Data Program, which was created under a conservator directive. Fannie Mae also undertakes certain activities in connection with FHFA's annual Scorecards,[51] which outline specific conservatorship priorities for the Enterprises.

To the extent that a statute, regulation or federal regulator requires Fannie Mae to undertake certain activities, such activities should be treated under the Proposed Rule as necessarily being lawful, consistent with safety and soundness, and in the public interest. Similarly, there is no regulatory purpose to be served by subjecting activities undertaken at the direction of FHFA as conservator to a process designed to bring matters to the attention of FHFA as regulator. Accordingly, Fannie Mae recommends adding an exclusion for "any activity undertaken to comply with applicable law or regulation or at the direction of FHFA or another federal agency or department."

5. Duty to Serve

The Safety and Soundness Act establishes a duty for the Enterprises to serve three specified underserved markets in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for lower-income borrowers in those markets.[52] FHFA's implementing Duty to Serve regulation specifies that each Enterprise must submit to FHFA an Underserved Markets Plan describing the activities and objectives the Enterprise will undertake to serve each of the three underserved markets.[53] Like new products, each proposed Plan is subject to public notice and comment.[54] At the close of the public comment period, FHFA reviews and comments on the proposed Plan, and the Enterprise must address FHFA's comments, as appropriate, through revisions to its proposed Plan.[55] Only after FHFA is

[51] Scorecard objectives can require new and revised data and processes, such as those required to implement FHFA's important changes to the qualifying criteria for Multifamily mission-driven loans.

[52] 12 U.S.C. § 4565.

[53] 12 C.F.R. § 1282.32(a).

[54] 12 C.F.R. § 1282.32(g)(2)-(3). In addition to the formal public comment period, the Enterprises and FHFA have hosted "listening sessions" across the country to provide additional opportunities for the public to provide input on both current and proposed Duty to Serve activities. Fannie Mae has also collected stakeholder input through roundtables, conferences, and conversations with lenders, nonprofits, trade associations, consumers and more.

[55] 12 C.F.R. 1282.32(g)(5)(i).

satisfied that all its comments have been addressed will it issue a non-objection.[56] Thereafter, an Enterprise must obtain FHFA non-objection to modify its Plan, and FHFA may seek public input to assist its consideration of the proposed modification.[57]

The preamble to the final Duty to Serve rule expressly states that an Enterprise may include a new product or new activity in its proposed Underserved Markets Plan if it would facilitate the Enterprise's Duty to Serve obligations.[58] Inclusion in a proposed Plan has the effect of providing notice to both FHFA and the public, as well as an opportunity for both FHFA and the public to comment. Moreover, FHFA may withhold its non-objection to a proposed Plan until all its comments have been appropriately addressed. In sum, the regulatory process for obtaining FHFA non-objection to an Underserved Markets Plan already meets the essential statutory requirements for new products and new activities. Given the rigor and transparency of this process, including the many opportunities for FHFA and public input, it would be duplicative and inefficient to impose an additional regulatory burden on Duty to Serve activities. Accordingly, the final rule should exclude "any activity of an Enterprise described in an Underserved Markets Plan (or modification to an Underserved Markets Plan) to which FHFA has given its non-objection in accordance with 12 C.F.R. part 1282, subpart C."

V. Other Comments

A. Confidential and proprietary information should be protected.

The Proposed Rule does not address how confidential and proprietary information and data that is submitted in the notice process will be protected from unnecessary public disclosure. The recommendations below are modeled on provisions of other FHFA regulations that offer explicit protection for commercially sensitive materials submitted by a regulated entity, including FHFA's regulation governing the Enterprise Duty to Serve Underserved Markets and its regulation governing the Federal Home Loan Bank housing goals.

In its current form, proposed § 1253.9 would require an Enterprise to submit in its Notice of New Activity an extremely broad range of items of information that will almost certainly include confidential and proprietary information and data, including, for example:

- competitively sensitive information about an innovative new product, technological improvement or market analysis;

- unpublished patent applications, which are kept in confidence by the U.S. Patent and Trademark Office;[59]

[56] 12 C.F.R. 1282.32(g)(5)(iv).

[57] 12 C.F.R. 1282.32(h).

[58] 81 Fed. Reg. 96242, 96250 (Dec. 29, 2016).

[59] *See* 35 U.S.C. § 122 (confidential status of patent applications).

- sensitive nonpublic information relating to an Enterprise's financial or supervisory condition and confidential supervisory information ("CSI"), such as examination ratings, matters requiring attention, and other supervisory findings;

- information from an Enterprise's counterparties or vendors that it has contracted to keep confidential; and

- privileged legal opinions and information from an Enterprise's fair lending self-evaluation, including data analysis.

Proposed § 1253.6(a)(1) provides that a public notice of a new product "will include such information from the Notice of New Activity as to provide the public with sufficient information to comment on the New Product."

The combination of these provisions of the Proposed Rule could lead to substantial public disclosure of confidential and proprietary information and data and, as a result, could potentially cause competitive harm to Fannie Mae. Further, the risk of such disclosure could create a significant deterrent for innovations and improvements that could require the filing of a Notice of New Activity, thereby impairing the Enterprises' ability to adapt to changing market forces, serve new categories of borrowers and investors, and provide liquidity to the market through their competing business models.

Fannie Mae offers two recommendations to address these concerns. First, FHFA should amend proposed § 1253.6 to clarify that public notices of new products under subsection (a)(1) will not include the disclosure of confidential, proprietary or privileged information, including CSI. FHFA took a similar approach in the Duty to Serve regulation, which provides that an Enterprise's Underserved Markets Plan will be published "with any confidential and proprietary data and information omitted."[60] As FHFA explained, that approach "provides transparency and an opportunity for productive public input, while preserving the proprietary and confidential nature of Enterprise data and information."[61]

That approach is also consistent with the Safety and Soundness Act, which requires only that a public notice include "a description of the product proposed by the [Enterprise's] request [for approval]."[62] The Act does not require a public notice to contain information relevant to ***every*** factor that FHFA must consider before approving a new product. And while public comment may be valuable on public interest issues, FHFA is far better situated than the general public to

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[60] 12 C.F.R. § 1282.32(g)(2) (proposed Plan), (g)(7) (final Plan) & (h) (modified Plan). FHFA's housing goals rule for the Federal Home Loan Banks also states that materials posted for public comment will not include any confidential or proprietary information submitted by a Bank. 12 C.F.R. § 1281.11(c)(4).

[61] 81 Fed. Reg. at 96248.

[62] 12 U.S.C. § 4541(c)(2).

determine how a new product may impact safety and soundness and whether it is charter compliant.

Second, Fannie Mae recommends that FHFA make clear and explicit what should already be implicit: submissions under proposed § 1253.9 will be afforded protection from public disclosure consistent with the Freedom of Information Act ("FOIA") and 12 C.F.R. parts 1202, 1214, and 1215. In order to implement FOIA exemptions, Fannie Mae also supports filing procedures that require segregation of confidential information and a request for confidential treatment. FHFA took this approach in 12 C.F.R. § 1281.11(c)(4) which requires a Federal Home Loan Bank to "submit any material supporting its request [for approval of alternative target levels for housing goals] that it considers to be confidential or proprietary as a separate document, clearly designated as confidential or proprietary."[63]

B. The 15-day review period should start upon FHFA's receipt of a Notice of New Activity.

The Safety and Soundness Act requires FHFA to determine whether a new activity is a new product subject to approval not later than 15 days after "the date of receipt" of a notice.[64] Under proposed § 1253.5, however, the 15-day review period does not start when FHFA receives a notice, but only when FHFA has determined that the notice is complete and notified the Enterprise of this determination. This has the potential to prolong the "expedited review" process for all new activities as a matter of course, and perhaps for extended periods, while FHFA reviews each submission for completeness under the rule, "including any follow-up information required by FHFA."[65] The potential for delay is exacerbated by proposed § 1253.5(b), which states that FHFA may review a new activity for safety and soundness, to determine whether it complies with the Enterprise's charter, or under any other applicable law, as part of its determination that a Notice of New Activity is complete.

The 15-day review period for a Notice of New Activity should start on "the date of receipt" by FHFA, consistent with the statutory text. The period should be tolled, however, any time FHFA determines a submission to be incomplete or requires follow-up information, resuming only when the Enterprise delivers the information requested. FHFA adopted a similar framework in its regulation addressing requirements for the Federal Home Loan Banks' new business activity ("NBA") notices. Under that regulation, FHFA's review period commences on the date that FHFA

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[63] FHFA recently advanced a similar approach in its proposed rule on resolution planning. *See* https://www.fhfa.gov/SupervisionRegulation/Rules/RuleDocuments/Resolution%20Planning%20NPR%20TO%20FR_for%20website.pdf (proposed 12 C.F.R. § 1242.6). That proposed rule would also establish both the presumption that material not included in the public section is confidential and a process for an Enterprise to request confidential treatment of information for purposes of FOIA and FHFA regulations, and would assert the non-waiver of otherwise applicable privileges as a result of submitting a resolution plan and the bank examination privilege for any nonpublic information or data in the resolution plan and related materials submitted to FHFA.

[64] 12 U.S.C. § 4541(e)(2)(B).

[65] 85 Fed. Reg. at 71280.

receives the NBA notice,[66] but can be tolled while FHFA awaits responses from the Banks to requests for additional information.[67] Calculating the review period in this manner provides the regulated entity with a strong incentive to ensure that its initial submission is thorough and complete, while ensuring that FHFA will have sufficient time to complete its review, without unnecessary delays.

Alternatively, FHFA could leverage existing conservatorship processes. Under this approach, FHFA's review period would start upon its receipt of an Enterprise submission, but if FHFA determines the submission to be incomplete the matter would be closed, requiring the Enterprise to make a new submission to restart the clock. This approach would ensure that FHFA has sufficient time to review any requested information, while providing process transparency and simplifying the metrics for FHFA to track its response time.

C. FHFA should not impose conditions on new activities that do not constitute new products.

The Safety and Soundness Act provides that, in approving a new product, FHFA "may establish terms, conditions, or limitations with respect to such product with which the enterprise must comply in order to offer such product."[68] There is no comparable provision in the Act with respect to new activities. However, the Proposed Rule states that FHFA may establish "terms, conditions or limitations" with respect to new activities as well as new products. Specifically, under proposed § 1253.5(d), "The Director may establish terms, conditions, or limitations on [an] Enterprise's engagement in [a] New Activity as the Director determines to be appropriate and with which the Enterprise must comply in order to engage in the New Activity."

FHFA should conform the final rule to the statute by providing for the conditioning of new products only. The Safety and Soundness Act provides FHFA with a broad array of authorities to oversee the operations of the Enterprises and regulate their activities. However, the particular authority on which the Proposed Rule is based, the prior approval authority, requires prior approval only for new products. That authority expressly encompasses the authority to approve new products with conditions, but it does not include the authority to disapprove, or to approve with conditions, new activities that do not meet the criteria for new products.

Fannie Mae acknowledges that there may be instances in which FHFA concludes that a new activity will constitute a new product if it takes one form, but not if it takes a different form. In such an instance, FHFA could, consistent with the statute, advise the Enterprise of that view and give it the option to clarify its notice. Moreover, as proposed § 1253.10 makes clear, Fannie Mae's

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[66] 12 C.F.R. § 1272.1 (definition of "NBA Notice Date").

[67] 12 C.F.R. § 1272.4(c) ("For purposes of calculating the review period, no days will be counted between the date that FHFA has requested additional information from the Bank … and the date that the Bank responds to all questions communicated.")

[68] 12 U.S.C. § 4541(d).

recommended reading of FHFA's prior approval authority in no way restricts FHFA's other authorities under the Safety and Soundness Act with respect to Enterprise activities.

D. The "public interest" analysis should focus on protecting competition, not competitors.

Proposed § 1253.4(b) sets forth the factors that FHFA may consider when determining whether a new product is in the public interest. Three factors – paragraphs (3), (4) and (5) of proposed § 1253.4(b) – appear focused on competition issues.

Fannie Mae entirely agrees that paragraph (4) – whether the new product would be pro- or anti-competitive – is an appropriate public interest consideration. Further, paragraphs (3) and (5) reference evidence – concerning actual and potential competitors, market barriers and inefficiencies – that may be relevant to paragraph (4).

However, it is important that paragraphs (3) and (5) not be treated as presumptive independent requirements for approval. In particular, the fact that someone else does or could offer a competitive product does not mean that the Enterprises should not be allowed to compete. Public interest analysis should follow the fundamental principle of antitrust law that it is competition, not competitors, that merits legal protection.[69] If Fannie Mae can (consistent with its charter and safety and soundness) make a market more competitive by offering better terms or more innovation, it is in the public interest to allow it to enter that market regardless of whether competitors are in, or may join, that market.

Further, even currently well-served markets may benefit from the Enterprises' participation if other market participants are apt to exit the market in the event of an economic downturn. Unlike other market participants, the Enterprises have a mission and a history of serving markets in good times and in bad, and their ability to do so would be compromised if they could enter a market only after that market had collapsed.

Accordingly, Fannie Mae recommends that paragraphs (3) and (5) of proposed § 1253.4(b) be deleted. Instead, FHFA should evaluate competition concerns under current paragraph (4).

E. The final rule should provide for an appropriate transition period.

While the Administrative Procedures Act requires most rules to have a delayed effective date of not less than 30 days,[70] this rule should provide for a longer transition period. The rule as proposed would entail substantial changes to the process for submitting information to FHFA – including a

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[69] "The antitrust laws were enacted for 'the protection of ***competition***, not ***competitors***.'" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

[70] 5 U.S.C. § 553(d). "Major" rules must allow for an additional period to elapse before the rule can take effect. *See* 5 U.S.C. § 801(a)(3).

new certification requirement – and to the scope and volume of information that must be submitted. Fannie Mae would need to develop and implement policies, procedures and internal controls to operationalize the governance and ensure compliance. Recognizing this issue, FHFA as conservator provided for transition periods exceeding 100 days when it revised its instructions to the Enterprise Boards of Directors in 2012 and 2017. Accordingly, Fannie Mae requests that the effective date of the final rule be delayed until at least 90 days after its publication in the Federal Register.

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FHFA has broad regulatory and supervisory powers over the Enterprises, which the Safety and Soundness Act supplements by providing a screening process that alerts FHFA before the Enterprises bring new products to market. Fannie Mae's recommendations are intended to ensure that FHFA obtains all the information it needs when it needs it, without imposing inflexible bureaucratic requirements that could impair the efficiency of both FHFA and the Enterprises. If you have questions regarding the matters addressed in this letter, please contact the undersigned at terry_theologides@fanniemae.com.

Sincerely

Stergios "Terry" Theologides
Executive Vice President, General Counsel,
and Corporate Secretary
Fannie Mae