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January 8, 2021

By Electronic Delivery Through the FHFA Website

Mr. Alfred Pollard
General Counsel, Federal Housing Finance Agency
Constitution Center, Eighth Floor (OGC)
400 7th Street SW
Washington, DC 20219

Re: Notice of Proposed Rulemaking on Prior Approval for Enterprise Products
Comments/RIN 2590-AA17

Dear Mr. Pollard:

Attached are the comments of Freddie Mac on the proposed Prior Approval for Enterprise Products rulemaking published by the Federal Housing Finance Agency in the Federal Register on November 9, 2020.

Freddie Mac appreciates the opportunity to provide our views on the proposed rule. Please contact me if you have questions or require any further information.

Sincerely,

Ricardo Anzaldua
Executive Vice President and General Counsel

Attachment

FREDDIE MAC

COMMENTS ON PROPOSED PRIOR APPROVAL FOR ENTERPRISE PRODUCTS RULEMAKING

January 8, 2021

EXECUTIVE SUMMARY

Fifty years ago, on July 24, 1970, Congress created Freddie Mac as part of the Federal Home Loan Mortgage Corporation Act of 1970 to provide competition in the secondary mortgage market. Freddie Mac was designed to promote robust, nationwide access to mortgage credit for borrowers across the nation. Since 1970, Freddie Mac has matured as an organization to respond to mortgage-related and housing-related matters ranging from enhancing underwriting capabilities to combatting predatory lending to, most recently, taking steps to keep families in their homes during the COVID-19 pandemic.

We have also taken steps to foster innovation in the mortgage market itself. We issued our first "mortgage-backed security" in 1971, forever changing the way the market was funded. In the decades that followed, we helped launch a multitude of industry innovations, such as collateralized mortgage obligations and credit-risk transfers ("CRT"), among others. We have also led the way in developing new technologies and analytic capabilities to augment our existing core systems, such as one of the first successful automated loan scoring systems, Loan Prospector, as well as one of the first and still most widely used automated valuation models, Home Value Explorer, which now serves as a foundational component of our Automated Collateral Evaluation capability.

Since entering conservatorship during the financial crisis over 12 years ago, we have focused on continuing to achieve our mission while enhancing our safety and soundness. We took important steps to assist borrowers in recovering from the financial crisis through loan modification and other loan workout offerings, and further developed affordable housing initiatives along with borrower education programs to help borrowers obtain, and keep, a home. We also prioritized maturing our enterprise risk framework and promoting a strong risk culture across the company.

As we look ahead, we want to prepare our company to successfully exit from conservatorship, while operating in a safe and sound manner and protecting taxpayers under FHFA's continued supervision as our primary regulator. We recognize that an exit from conservatorship will require that we raise private capital, which in turn will result in a different yardstick for assessing the worth of the company. Beyond generating return on capital, investors will look for the underlying drivers of performance, demonstrated leadership through innovation, overall customer satisfaction, and the ability to operate in a safe and sound manner.

This means continuing to explore new opportunities to move housing forward responsibly, and it means more than just keeping people in their homes: it means finding new ways to address supply issues, continuing to reach underserved communities, addressing racial and social inequities in the housing market, looking toward energy-efficient housing, and identifying incentives for impact investors and private companies to contribute to these solutions.

We are also moving housing forward by investing in technology and other new ways of making the housing industry smarter, faster, and more efficient. We have introduced new, highly successful, and widely adopted initiatives that have helped automate underwriting, assess

borrower assets, expedite appraisals, and help lenders originate mortgages digitally. And we are working across our company to develop additional digital tools that will make housing more efficient and less expensive.

We believe that advancement toward these goals requires innovation, and innovation requires space to identify and test ideas and opportunities, particularly where we can improve operational efficiencies that reduce risk to Freddie Mac and the mortgage finance system.

Our comments on the Federal Housing Finance Agency's ("FHFA's") proposed Prior Approval for Enterprise Products rule (the "Proposed Rule") are informed by our 50 years of experience in housing finance.

Overall, Freddie Mac supports the broad goals of, and principles underlying, the Proposed Rule.

The key concern of our comment letter is balance. We understand the need for transparency, while also recognizing the need for innovation and the development of ideas that benefit the market overall and underserved communities. We also understand the appropriateness of establishing an effective notice, review, and approval process. We believe such process should be designed by taking into consideration FHFA's existing robust supervisory and oversight functions. We would observe that too much process could diminish the positive impact of—or even deter—the pursuit of consumer- and market-benefiting ideas, which could affect our ability to help the market function efficiently. In this comment letter, we offer suggestions to allow for transparency when there are significant changes in our core businesses, but not weigh down the natural and necessary development of our core businesses to meet market needs.

Fundamentally, our comments will focus on four key themes:

1. The Proposed Rule's "New Activity" definition should take into consideration the importance and benefits of innovative approaches for facilitating the financing of housing in our nation, particularly for low- and moderate-income families, in a manner consistent with Freddie Mac's charter and prudential safety and soundness principles. The regulatory framework should support efforts to bring new or updated offerings to market and enhance our ability to respond to changing economic and market conditions, including pandemics and natural disasters, so that we can help keep homeowners and renters in their homes.
2. The Proposed Rule's "New Activity" definition should focus on significant changes in our offerings to the market. We believe that a broad interpretation of the definition of "New Activity" could introduce delays and burdens in bringing new or updated offerings to market, and otherwise affect our ability to respond to changing economic and market conditions.
3. The Proposed Rule's "New Activity" definition (including an activity that is a pilot and an activity resulting from a pilot) should exclude essential components of business-as-usual innovation, such as the utilization of new data, new resources, and new policies that respond to immediate market circumstances without fundamentally revising our core offerings to the market. Interruptions to the regular process of incorporating new information into our business could potentially introduce risk throughout our operations. That is why we would

exclude activities undertaken for the purpose of mitigating risk on mortgages purchased or guaranteed by an Enterprise, which we believe is incidental to the conduct of our business.

4. The Proposed Rule's notice requirements should distinguish between (i) the amount and type of information that is sufficient for FHFA to review a New Activity to determine if it is a New Product, and (ii) the amount and type of information necessary for FHFA to approve a New Product, including the information that should be used to describe the product publicly during the public comment period. We recommend tailoring the requirements for a notice of New Activity ("NNA") to a description of the activity, including its business rationale and intended market, along with the Enterprise's analysis as to whether such activity is a New Product. Any other required information should only be provided if FHFA then determines that such New Activity is a New Product.

By tailoring the definition of "New Activity" and streamlining the process for providing an NNA to FHFA, we believe that the final rule would appropriately balance the goals of the Proposed Rule. These goals include implementing congressional intent for oversight over New Products, while also reducing the operational burdens and delays that could hamper innovation and our ability to continue to serve our core mission, as well as to raise the necessary capital to exit conservatorship. Achieving the appropriate balance is critical to Freddie Mac's ability to continue to bring innovative solutions to changing market conditions while encouraging the necessary investment to raise capital in the future.

In addition, we offer comments that are technical or clarifying in nature, which include:

Confidentiality of Submissions. The final rule should include an explicit presumption of confidentiality for nonpublic information included in submissions to FHFA under the final rule. FHFA should also permit an Enterprise to withdraw a submitted NNA, thereby obviating the need for a public notice, if the Director determines the New Activity should be treated as a New Product or if the Director determines it is necessary to include in a public notice information that is considered confidential by the Enterprise.

Executive Officer Certification. We request that FHFA remove the executive officer certification requirement in the Proposed Rule as unnecessarily burdensome. We note that FHFA has not required such a certification for new initiative submissions while in conservatorship. If retained, any certification requirement should apply only to New Product submissions and be limited to the best of the certifying officer's "knowledge and belief," consistent with other FHFA certification requirements.

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I. Introduction and Background

We submit this letter to offer our comments on the proposed Prior Approval for Enterprise Products rule ("Proposed Rule"), issued by the Federal Housing Finance Agency ("FHFA") to implement section 1321 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (the "Safety and Soundness Act").[1] Section 1321 requires Freddie Mac and Fannie Mae (the "Enterprises") to obtain prior FHFA approval for any product before initially offering the product after public notice and comment. It also requires us to provide written notice to FHFA for any new activity that Freddie Mac does not consider to be a product so that FHFA can determine whether such activity is a product subject to approval.

We appreciate the need for FHFA to obtain the necessary information about new products to evaluate them under the statutory standards for approval. We also understand that Congress has required FHFA to develop submission requirements to determine whether a new activity ("New Activity") is a new product ("New Product") requiring public notice and comment, and FHFA approval. We have a common interest with FHFA in developing efficient and effective review and approval processes so that we can respond expeditiously to the needs of the housing finance system (and, ultimately, current and potential homeowners and renters). We appreciate the opportunity to provide our views on this important regulation. Our comments will focus on four key areas: the scope of the definition of New Activity, the information requirements for the notice of New Activity ("NNA"), confidentiality, and the executive officer certification requirement.

Section 1123 of the Housing and Economic Recovery Act of 2008 ("HERA"), which amended section 1321 of the Safety and Soundness Act, requires the Enterprises to obtain the approval of the Director of FHFA before initially offering any New Product.[2] As a result, the Safety and Soundness Act specifies a process and standards for approval of New Products. Specifically, before a New Product can be approved, the Enterprise must submit to the Director a written request for approval of the Product that describes the Product in such form as prescribed by order or regulation of the Director. Immediately upon receipt of a request for approval of a Product, the Director must publish notice of such request, with a description of the proposed Product, and provide the opportunity for public comment for 30 days. No later than 30 days after the close of the public comment period, the Director must either approve or deny the Product, specifying the grounds for such decision in writing. In considering a request for approval, the Director must determine that the New Product is authorized under certain provisions of the Enterprise's charter, in the public interest, and consistent with the safety and soundness of the Enterprise or the mortgage finance system.

The Safety and Soundness Act also requires an Enterprise to provide written notice to the Director for any New Activity that an Enterprise considers not to be a New Product. If an Enterprise determines that a New Activity is not a New Product, the Safety and Soundness Act requires an expedited notice process. The Enterprise must notify the Director of the New Activity and must then wait up to 15 days for the Director to determine whether the New

[1] *See* Prior Approval for Enterprise Products, 85 Fed. Reg. 71,276 (Nov. 9, 2020).

[2] FHFA issued an interim final rule on July 2, 2009 to implement section 1321 of the Safety and Soundness Act. *See* Prior Approval for Enterprise Products, 74 Fed. Reg. 31,602 (July 2, 2009) (the "Interim Final Rule").

Activity is a New Product subject to public notice and comment and approval. The Director shall, immediately upon so determining, notify the Enterprise. If the Director determines that the New Activity is not a New Product or does not provide such determination within 15 days of receipt of the New Activity notice, the Enterprise may proceed with the activity.

The House of Representatives Committee on Financial Services, in its Committee Report to accompany H.R. 1427, a predecessor to HERA, commented on an early version of what ultimately became the New Product approval section of the legislation:

> The Committee believes that the legislation provides [FHFA] with the flexibility to establish a workable system that will provide predictability as to what offerings or changes to existing offerings rise to the level of a New Product that will be subject to notice and approval, addressing both the need to provide notice to market participants of New Products and the need for the enterprises to respond in a timely manner to market demands. The Committee intends that the Agency will look to similar processes developed by the federal bank regulatory agencies in establishing procedures to minimize unnecessary burden on the enterprises and originating institutions while fulfilling the objectives of the provision.[3]

Following House passage of H.R. 1427, Congress made a number of changes to the New Product approval section in the final bill that aimed at reducing the administrative burden on the Enterprises. As we noted in our 2009 comment letter on the Interim Final Rule, these changes included simplifying the standard for approval of New Products,[4] authorizing the temporary approval of New Products without a public comment period in exigent circumstances, excluding certain activities from the New Product approval requirement, and narrowing the focus of the expedited review process for New Activities.[5]

We believe the statutory language, together with the legislative history, express the intent of Congress that the process: (i) be workable and predictable; (ii) provide notice to the market of New Products; (iii) allow the Enterprises to meet market demands in a timely manner; (iv) be informed by relevant processes developed by the federal bank regulatory agencies; and (v) minimize unnecessary burden on the Enterprises.

II. The Proposed Rule's definition of New Activity should be workable and predictable.

a. Congress provided direction for FHFA's definition of New Activity.

It is critical that the New Activity definition under the final rule capture only the kinds of activities that Congress intended to be considered by the Director as potentially New Products, particularly given the volume and variety of adjustments to our business that may be under consideration by Freddie Mac at a given time. Although Congress did not define "New Activity" or "New Product," section 1321 of the Safety and Soundness Act provides FHFA with strong

[3] *See* House Committee on Financial Services Report 110-142 on Federal Housing Finance Reform Act of 2007, 110th Congress, 1st Session.

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

[5] H.R. 1427 did not require FHFA to act on a New Activity notice within 15 days. In addition, H.R. 1427 would have directed FHFA to treat a New Activity as a product if it merely "consists of," "relates to," or "involves" a New Product, whereas under the Safety and Soundness Act, the Director must determine that a New Activity is a New Product.

signals to guide rulemaking. First, the statutory text of the Safety and Soundness Act indicates Congress designed separate tracks for the submission and review of New Products and New Activities. For New Products, an Enterprise must obtain Director approval before initially offering the product.[6] In contrast, New Activities are subject to an "expedited review" process that grants discretion to the Enterprises in identifying Activities that rise to the level of Products.[7] The statute offers further guidance to FHFA in the prescribed exclusions of both (1) an Enterprise's automated loan underwriting system, including any upgrade to the technology, operating system, or software to operate the underwriting system, and (2) modifications to mortgage terms and conditions or mortgage underwriting criteria provided that such modifications do not alter the underlying transaction so as to include services or financing other than residential mortgage financing. Each exception is a clear example of the order of magnitude intended to rise to the level of a New Product: a business line level Product offered to the public. These examples also clarify what should be out of scope: incremental modifications or upgrades to the component parts of such Products.

While we do not believe it is FHFA's intent, we believe that the term "New Activity" as defined in the Proposed Rule could be broadly interpreted to capture many, or most, of our ordinary course business decisions that allow us to better fulfill our mission. We believe that incremental, typical business adjustments are orders of magnitude below the level of "New Products." In our view, the Proposed Rule's definition of New Activity should be structured to balance the market's need for notice of new Enterprise Products with Freddie Mac's efforts to innovate, respond to changes in market or economic conditions, and meet its affordable housing mission.

Each year, we make hundreds of decisions to update our business, including credit and appraisal policy changes to address market conditions, incorporation of new data to account for the evolving availability of information, and incremental improvements to technology platforms and processes. We do not believe that these lower-level changes should be construed to rise to the level of "New Products." Consequently, we request that the final rule be clear that such day-to-day, ordinary course of business activities are not within the scope of the New Activity definition. Otherwise, we could be required to submit NNAs covering simple updates to a wide range of Single-Family and Multifamily offerings and activities, imposing an unnecessary burden on both the Enterprises and FHFA.

i. **The definition of New Activity is overbroad.**

The Proposed Rule uses a three-part test to broadly define a New Activity as an activity that is a business line, business practice, offering, or service that an Enterprise provides to the market and that either is not engaged in at the time the final rule becomes effective or is an enhancement, alteration, or modification to an existing activity that an Enterprise currently engages in as of the effective date. In addition to these two factors, the Proposed Rule further describes a New Activity as an activity that is described by any of the following: (i) activity which requires one or more of the following: a new type of resource, a new type of data, a new policy or modification to an existing policy, a new process or infrastructure; (ii) activity that

[6] *See* 12 U.S.C. § 4541(a).

[7] *See* 12 U.S.C. § 4541(e)(2)(A) ("For any new activity *that an enterprise considers not to be a product*, the enterprise shall provide written notice to the Director of such activity") (emphasis added).

expands the scope or increases the level of credit risk, market risk, or operational risk to the Enterprise; (iii) activity that involves a new category of borrower, investor, counterparty, or collateral; (iv) activity that would substantially impact the mortgage finance system, safety and soundness of the Enterprise, compliance with the Enterprise's authorizing statute, or the public interest; (v) activity that is a pilot; and (vi) activity resulting from a pilot that is described in (i) through (iv) above.

As a practical matter, if read broadly, the proposed definition of New Activity will likely be difficult to implement as it could unnecessarily capture a multitude of ordinary course of business activities. For example, the mere addition of a new category of vendor or counterparty to an existing initiative could be deemed to trigger the definition of New Activity, as could minor enhancements, alterations, or modifications to existing business offerings[8] or services involving a new type of data,[9] new or modified policy,[10] or new process[11] or infrastructure,[12] none of which

[8] For example, a recent Multifamily affordable transaction differed from the standard structure in that the deal contained taxable and tax-exempt collateral in which Class A certificates were pledged back to Freddie Mac as collateral. The collateral is held by Freddie Mac directly, instead of being held by a custodian. The deal also included a larger taxable series than the tax-exempt series. Although we did not consider these changes to be significant, under a broad reading of the proposed New Activity definition, these differences in structure and collateral type might have resulted in this deal being deemed a New Activity and requiring submission to FHFA. Submission of the transaction would have resulted in delay and introduced uncertainty into the execution of a highly affordable deal.

[9] For example, in response to the COVID-19 pandemic, Freddie Mac announced enhanced forbearance and borrower assistance programs for financial hardships that borrowers may endure, with the underlying objective to retain as many loans as possible in Uniform Mortgage Backed Securities and Mortgage Backed Securities. Based on this, Securitization Policy implemented new pool-level monthly disclosures for both On and Off Platform pools to inform investors if a borrower is enrolled in a Borrower Assistance Plan. Under a broad interpretation of "new type of data", there is the possibility that these new disclosures, which we would not otherwise regard as significant, could require a submission of an NNA to FHFA under the Proposed Rule.

[10] For example, during the financial crisis, Freddie Mac rolled out payment deferrals where an eligible borrower will be brought current by deferring delinquent amounts to create a non-interest bearing balance that will become due at the earlier of the mortgage maturity date, payoff date, or upon transfer or sale of the mortgaged premises. In 2020, Freddie Mac announced similar payment deferral initiatives to address payment delinquencies due to the COVID-19 pandemic. In addition, as part of Multifamily credit risk management, we periodically make changes to our credit policies and our underwriting procedures to reflect lessons learned in the conduct of our business. For example, in response to a recent fraud case that involved the alleged staging of units as occupied for inspectors and the potential that vacant units were being represented as occupied on the rent rolls, we quickly changed our inspection requirements to increase the randomization of units inspected and to link lease audits to units inspected (among other minor changes). While we did not regard any of these changes to be significant, under a broad interpretation of the proposed definition of New Activity, we believe it is possible that these changes in existing policies could trigger the definition as "modification[s] to an existing policy," which would delay our ability to make real time changes in our practices to help borrowers and avoid losses.

[11] For example, our Compliance and Eligibility process has a unique requirement whereby data must be certified by the customer, especially as it results in organizational, location, and contact changes. In 2020, we rolled out a new process for validating this data using a third party. Under a broad interpretation of "new process," we believe it is possible that this process change, which we do not regard as significant and is intended to reduce risk, could be required to be submitted under the Proposed Rule. Further, in 2020, Freddie Mac enhanced the automated verification of borrower income to incorporate paystub data along with the borrower's direct deposit data to calculate gross income as part of the process to assess borrower's capacity. This enhanced process provides higher confidence in the income calculation, increased efficiency through decreased loan manufacturing timelines, and reduced risk of fraud/misrepresentation. While we did not view this change in policy and process around how to validate data as significant, there is the potential that the proposed definition of New Activity could capture this change as a "new type of data," a "new process," or a "modification to an existing policy."

[12] *See* Proposed Rule, 12 C.F.R. § 1253.3(a)(3)(i).

would be considered "significant" new initiatives today for purposes of providing notice to FHFA as Conservator under the Revised Letter of Instruction ("RLOI").[13] The impact of this broad approach would appear to capture typical business adjustments, such as standard credit policy changes, which we do not believe is intended by Congress or FHFA. Adjusting our credit policies to adapt to market and economic changes is a vital component of our business. If adopted as proposed, and broadly interpreted by FHFA, we estimate potentially submitting hundreds of NNAs covering policy changes alone, and at least a ten-fold increase in the number of our initiatives that potentially could be considered New Activities under the Proposed Rule and therefore subject to the NNA requirements.

ii. **A broad definition creates potential friction and duplication with competing regulatory requirements.**

We would encourage FHFA to consider the interplay between the affordable housing goals regulation, the Duty to Serve regulation, and this Proposed Rule so that unnecessary tension is not created. For example, a sudden change in market or economic conditions may make achievement of a housing goal infeasible unless we are able to make certain enhancements, alterations, or modifications to one or more of our business practices. Under the Proposed Rule, it would appear that these activities may need to be evaluated by FHFA to determine if any of them merits public notice and comment and formal approval as New Products. While we may be able to comply with the requirements of the Proposed Rule, subject to the ultimate timing of the review and approval process, we may be delayed or even miss the opportunity to employ tactics to achieve the affordable housing goal.

The regulatory layering effect also may be evident regarding our Duty to Serve Underserved Markets initiatives. By statute, we are required to consider innovative approaches to provide financing to certain underserved markets. FHFA provides a non-objection to our Underserved Markets Plan, a process that includes public review and comment. The Underserved Markets Plan, however, may contain activities that fall within the scope of the Proposed Rule. It would appear that, even if FHFA has reviewed, commented on, and issued a non-objection to our Underserved Markets Plan, FHFA also may have to review, and potentially approve, specific activities that are already in such plan. To address this particular concern, we would propose that the FHFA non-objection of the Duty to Serve Underserved Markets Plan should be sufficient, and no further regulatory layering should be required for any activities described in such plan.

b. Freddie Mac recommends amendments to the proposed definition of New Activity.

We have prepared suggested amendments to the Proposed Rule's definition of New Activity. We discuss the proposed New Activity criteria in Section II.b.i below, and then we discuss the New Activity exclusions in Section II.b.ii below.

[13] In conservatorship, FHFA as Conservator of the Enterprises possesses all of the rights and powers of our shareholders, board, and management. In reestablishing our Board of Directors in 2008, FHFA, as Conservator, provided for the Board to exercise the functions necessary to oversee the day-to-day business of the company and reserved certain matters for its approval as Conservator in a Letter of Instruction. We discuss the RLOI in greater detail in Section II.b below.

i. **We recommend amendments to the New Activity criteria in Proposed Rule 12 C.F.R. § 1253.3(a).**

To be workable, predictable, and consistent with statutory intent, we suggest that FHFA revise the definition of New Activity to focus on those activities that will have a novel and significant impact on the Enterprise or the secondary residential mortgage market. This approach is consistent with the language in the Interim Final Rule providing that a New Activity include only activities offered or engaged in "at a significantly different level, or in a significantly different manner."[14] Moreover, for new initiatives while in conservatorship, FHFA as Conservator has focused on significant changes or significant increases in risk when requiring notice or approval of initiatives under the RLOI.[15]

We recommend that FHFA consider making the following revisions to the proposed definition of New Activity.

First, we suggest creating a new standalone paragraph (a) to § 1253.3 that simply elevates the language in current § 1253.3(a)(2)(i), with a slight modification regarding emphasis. The proposed new (a) would read as follows:

> (a) This section does not apply to an activity which the Enterprise is engaged in as of the effective date of this section.

This approach makes clear that existing activities and loan products that the Enterprise has commenced or offered prior to the effective date of the final rule are outside the scope of the New Activity definition.[16] The Safety and Soundness Act recognizes that, by virtue of date, not all activities are within the scope of the prior approval provision. Further, FHFA notes that "particular technologies predate the effective date of the proposed rule (when finalized) and so are outside the rule's scope."[17]

Second, with respect to the criteria by which to identify a New Activity, adding terms such as "substantial," "significant," or "de minimis" would help clarify which activities may be considered a New Activity or a possible New Product and would provide more predictability to the review process. Congress explicitly included the term "substantially" in the statute in the context of describing a similar activity relative to certain other activities. Further, FHFA currently makes a determination whether an initiative significantly increases risk in FHFA's capacity as Conservator when reviewing initiatives under the RLOI. In the Proposed Rule at

[14] *See* Interim Final Rule, 12 C.F.R. § 1253.1(c).

[15] Including a "significance" test would be particularly appropriate in this context, as FHFA has utilized this approach for nearly a decade. In 2012, the Letter of Instruction was expanded to include a new notice requirement for "significant" changes in our business so that FHFA could determine whether any such matters merited Conservator approval under the letter, which we refer to as the RLOI in this letter. The RLOI was revised again in late 2017, retaining the notice of "significant" changes in our business. This 2017 revision of the RLOI also added a 15-day clock for FHFA to decide on whether a notice of a significant change merited Conservator approval, and it set forth a 45-day clock for such approvals. In this way, the RLOI is analogous to the New Product/New Activity statutory requirements. As instructed by FHFA, we have been successfully complying with these statutory requirements while in conservatorship through compliance with the RLOI, rather than by formally complying with the requirements of the Interim Final Rule. Consequently, only "significant" initiatives, not all initiatives, are required to be submitted to FHFA today under the RLOI.

[16] Loan products that have been retired by an Enterprise as of the effective date of the final rule would not be outside of the scope of the final rule.

[17] *See* 85 Fed. Reg. at 71,280.

§1253.3(a)(3)(iv), FHFA describes a New Activity as an "Activity that would *substantially* impact the mortgage finance system, safety and soundness of the Enterprise, compliance with the Enterprise's authorizing statute, or the public interest as identified in §1253.4(b)." Moreover, FHFA's regulation for the Federal Home Loan Banks requiring notice to FHFA for "new business activities" includes a materiality qualifier in its definition.[18] Such terms can, in fact, complement more objective characteristics. We believe such terms are equally applicable to an activity that is a pilot and an activity resulting from a pilot; thus, we propose a unified treatment of all such activities that fall within the definition of New Activity.

We propose modifying current § 1253.3(a)(2)(ii) by adding the term "significant" so that the provision reads as follows:

> (ii) Activity that is a *significant* enhancement, alteration, or modification to an existing activity that the Enterprise currently engages in as of the effective date of this section.

We would further recommend relocating the provision to § 1253.3(a)(3).

We propose modifying current § 1253.3(a)(3)(ii) by adding the term "significantly" so that the provision reads as follows:

> (ii) Activity that *significantly* expands the scope or *significantly* increases the level of credit risk, market risk or operational risk to the Enterprise.

Third, consistent with our view above regarding the use of modifiers such as "significant" to help clarify which activities may be considered a New Activity or a possible New Product, we recommend relocating current § 1253.3(a)(3)(v) and (vi) into current § 1253.3(a)(3) so that it is clear that all activities, including pilots, receive the same type of treatment. Also, we offer a recommendation regarding current § 1253.3(a)(3)(i). We believe our recommendation represents criteria that helps to set the parameters for a New Activity determination and appropriately focuses attention on those activities that are new or novel. We believe this objective can be made more apparent by relocating § 1253.3(a)(3)(i) into current § 1253.3(a)(3).

Thus, amended § 1253.3(a) would read as follows:

> (3) An activity (*including a pilot or an activity resulting from a pilot*) that *requires a new type of resource, a new type of data, a new policy or modification to an existing policy, a new process or infrastructure, and* is described by one or more of the following paragraphs:

Fourth, if FHFA does not include such a significance qualifier as proposed in our definition above, FHFA should consider including a clarifying *de minimis* qualifier that would carve out from the definition of New Activity "any business practice or service undertaken by an Enterprise that is de minimis in scope, volume, risk or duration," as was included in the Interim Final Rule. This recommended step would go a long way towards eliminating the unintended consequences and overbroad application of the NNA submission requirement for initiatives that may represent only ordinary course incremental changes to a current Enterprise offering.

[18] *See* 12 C.F.R. § 1272.1 (a Federal Home Loan Bank is required to submit notice only for those business activities that entail "material risks not previously managed by the Bank").

Relatedly, there are some circumstances where Freddie Mac believes a similar clarification that *de minimis* changes to information provided in an NNA, prior to launching a New Activity, should not trigger a new NNA. We believe that small revisions to New Activities, including the name of the offering, anticipated rollout dates, *de minimis* changes in projected profitability, adjustments to risk metrics and controls, or modifications to personnel involved in developing the initiative, should not trigger submission of a new NNA.

Fifth, we note that the Proposed Rule also includes "temporary authorizations" in the definition of a pilot.[19] We agree that, in some circumstances, temporary authorizations may be considered pilots where the temporary authorization establishes an initial policy framework for a new offering. However, temporary authorizations can also reflect policy changes that respond to market needs, such as our temporary authorization enabling virtual property inspection during the COVID-19 pandemic.[20] In such instances, temporary authorizations are used as a means of quickly responding to market conditions, and they are not expected to be permanent or reflect whole new offerings. We ask FHFA to clarify that such temporary authorizations are not meant to be covered by the definition of pilot, as they are not initiated "for purposes of understanding the viability of a new offering."[21]

We have attached as Exhibit 1 our proposed changes to the New Activity definition.

ii. **We recommend amendments to the New Activity exclusions in Proposed Rule 12 C.F.R. § 1253.3(b).**

We believe that FHFA can provide more clarity and predictability by revising the exclusions included in the Proposed Rule to more closely align with the statute. We discuss in detail two exclusions in Sections II.b.ii.a and II.b.ii.b below. We further recommend excluding activities related to our Duty to Serve Underserved Markets Plan, which is already subject to notice and comment as discussed above in Section II.a.ii. Finally, we believe FHFA should clarify that activities mitigating our risk on mortgages that we purchase or guarantee are excluded under Proposed Rule 12 C.F.R. § 1253.3(b)(5) so that such essential internal affairs activities are not subject to the New Activity review process.

a) The exclusion from the New Activity definition for our automated loan underwriting system should be understood to encompass interrelated technology tools and systems to keep pace with technological advances in underwriting and risk mitigation.

Freddie Mac uses an array of component models and tools as part of its automated loan underwriting system, which Congress specifically excluded from the New Product review

[19] *See* Proposed Rule, 12 C.F.R. § 1253.2.

[20] For example, in the past year, our Multifamily business published three "temporary authorizations" to respond to the COVID-19 pandemic and one "temporary authorization" related to the market transition from the London Inter-Bank Offered Rate ("LIBOR") to a LIBOR alternative.

[21] *See* Proposed Rule, 12 C.F.R. § 1253.2. As we note in Section II.d, the proposed temporary approval provisions in Proposed Rule § 1253.7 would only apply to New Products, not temporary authorizations to adjust existing policies as we describe here.

process as a "fundamental aspect[] of enterprise operation."[22] Since the enactment of HERA in 2008 and promulgation of the Interim Final Rule in 2009, automated underwriting has advanced several steps forward to include the broad set of risk assessment tools that implement the credit risk management policies we use today.[23] Our automated underwriting system is constantly upgraded through updates to policies that incorporate new types of data and resources to effectively account for market changes so that we can proactively mitigate losses resulting from the actual or imminent realization of risk.

Loan Product Advisor ("LPA") is the cornerstone of our collection of integrated and interrelated tools that comprise our automated loan underwriting system, Loan Advisor. Loan Advisor is a complex system that incorporates data and information from a suite of component applications and models and interfaces with third-party origination systems, fintech platforms, and consumer reporting agencies. Market participants use Loan Advisor to improve their assessments of credit risk and evaluate whether a loan meets Freddie Mac's requirements for purchase. Loan Advisor ultimately enables Freddie Mac and our selling partners to effectively assess risk associated with credit, borrower capacity, and collateral quality. LPA, previously known as Loan Prospector, was among the first automated loan underwriting platforms, and its advancements over time have contributed powerfully to our mission to promote access to credit throughout the nation.[24] Congress recognized the fundamental importance of automated underwriting technology and its components by excluding the entire underwriting system, and any upgrade to the technology, operating system, or software to operate the system, from the Safety and Soundness Act's New Product approval process.[25] Importantly, Congress also recognized the significance of excluding modifications to our Guide, including those implemented as upgrades in Loan Advisor.[26]

The Proposed Rule includes the same exclusion as the Interim Final Rule, modifying the text only to adjust the effective date. However, the preamble to the Proposed Rule introduced a limit to this statutory exclusion, stating that "technology systems which are not part of the automated underwriting systems would not fall into the exclusion[.]"[27] In particular, FHFA provided that updates to "technology systems that evaluate the appraised value of a property[,]" such as Home Value Explorer and Loan Collateral Advisor, that trigger the definition of New

[22] *Supra* note 3 at 132 ("The product review process does not apply to certain fundamental aspects of enterprise operation. The definition of the term "product" explicitly excludes the automated underwriting system of an enterprise in existence on the date of enactment, including any upgrade to the technology, operating system, or software to operate the system.").

[23] Those credit policies are captured in the first instance in our Freddie Mac Single-Family Seller/Servicer Guide, which establishes mortgage terms and conditions and mortgage underwriting criteria pursuant to which Freddie Mac will purchase or securitize residential mortgage loans. Such terms, conditions, and criteria have long applied to underwriting not just with respect to the borrower's capacity, or ability, to repay, but also their creditworthiness, and, significantly, the quality of the collateral associated with the loan.

[24] Such advancements have included components of the underwriting process such as (i) those pertaining to collateral underwriting (including Home Value Explorer and Loan Collateral Advisor, both of which provide results through Loan Product Advisor), (ii) an automated loan underwriting platform for lenders that do not sell to Freddie Mac (Loan Quality Advisor), and (iii) underwriting project exceptions for condominium-secured mortgage loans (Condo Project Advisor).

[25] *See* 12 U.S.C. § 4541(e)(1)(A).

[26] *See* 12 U.S.C. § 4541(e)(1)(B).

[27] *See* 85 Fed. Reg. at 71,280.

Activity would be subject to NNA filing requirements.[28] In response to the Proposed Rule's Question #3, we submit that this interpretation does not reflect how our automated loan underwriting system functions.[29]

Since the Safety and Soundness Act was amended by HERA in 2008, we have continuously developed and refined our suite of interrelated technology tools that are used by our selling partners in making credit, borrower capacity, and collateral underwriting risk management and secondary marketing execution decisions under the Loan Advisor umbrella. These tools are integral components of our automated underwriting system, and when utilized in this process are not "independent" as presented in Question #3. Without updated appraisal data and the technology that enables our models to deliver information to Loan Advisor, our underwriting system could become obsolete and incomplete.[30] Accordingly, we believe they are "fundamental aspects of enterprise operation" that should be excluded from the definition of New Activity in the final rule.

Importantly, subjecting component systems to the NNA process could unduly delay business-as-usual updates to our policies and the corresponding upgrades incorporating new types of data and resources within the integrated and interrelated components of our automated loan underwriting system. Such delays could potentially render our entire system obsolete as information and technology is incorporated into the market faster than we can mitigate the risk posed by these inevitable changes.

b) FHFA should remove the proviso that if an activity meets one or more of certain of the proposed objective criteria to be treated as a New Activity under the Proposed Rule, then that activity may not be deemed "substantially similar" to an automated loan underwriting system or a modification to mortgage terms and conditions or mortgage underwriting criteria for purposes of being excluded from the definition of New Activity.

In addition to excluding automated loan underwriting systems and mortgage terms and conditions or mortgage underwriting criteria from the New Activity definition, the Safety and Soundness Act also excludes initiatives that are "substantially similar" to those activities.[31] Consistent with the Safety and Soundness Act, the Proposed Rule provides the Enterprises with the ability to engage in complementary and substantially similar activities without filing an

[28] *See* 85 Fed. Reg. at 71,280. FHFA recently acknowledged the importance of appraisal data to automated underwriting systems ("Property value is a key input to a mortgage's loan-to-value ratio, which captures the degree of homeowner equity and is a key determinant of borrower credit risk. In addition, the property data used to determine the value plays a *vital role in supporting the accuracy of appraisals and automated valuation models*") (emphasis added) and ("FHFA is also seeking input on how the policies and tools can be enhanced to ensure that mortgage industry participants do not engage in activities that manipulate the assessments made by the Enterprises' automated underwriting systems[.]"). *See* FHFA, Request for Information on Appraisal-Related Policies, Practices, and Processes (Dec. 28, 2020).

[29] *See* 85 Fed. Reg. at 71,280. Question #3 states: "FHFA requests comments on how the exclusion for the automated underwriting systems as set forth in the Safety and Soundness Act should be applied to related but independent systems and to future technology systems." If FHFA disagrees with our statutory interpretation, we would respond to Question #4 where FHFA requests comments on whether the exclusions should be narrowed or expanded by noting that FHFA's interpretation of the statutory exclusion should be expanded.

[30] We also note that we have incorporated appraisal models into our automated loan underwriting system since at least 2005, prior to the passage of HERA. *See* Guide Bulletin 2005-5 (Oct. 15, 2005).

[31] *See* 12 U.S.C. § 4541(e)(1)(C).

NNA, as a reasonable accommodation to keep pace with rapid technological and business changes in these two areas. However, the Proposed Rule also includes a proviso specifying that an activity described by one or more of certain of the proposed objective criteria describing a New Activity (*e.g.*, would require a new type of data or a new policy),[32] would not be deemed "substantially similar," and an Enterprise would be required to submit an NNA.[33]

We believe this proposed limitation is potentially inconsistent with the statutory text. If implemented, this limitation could effectively eliminate the statutory exclusion for some activities that are "substantially similar" to the "fundamental aspects of enterprise operation" that Congress excluded from New Product review.[34] As a result, the ordinary course updates to automated loan underwriting systems and modifications to the mortgage terms and conditions or mortgage underwriting criteria that involve the broad proposed New Activity criteria would be subject to NNA filings. We recommend removing this limitation in the final rule so that the statutory exclusions for activities that are "substantially similar" to these provisions are not so narrow that, as a practical matter, the exclusion would not apply.

c) The final rule should exclude any activity that is the same as, or substantially similar to, a New Product that the Director has approved for either Enterprise or is otherwise available to either Enterprise.

Subject to certain requirements, § 1253.3(b)(4) of the Proposed Rule would exclude any activity undertaken by an Enterprise that is the same as, or substantially similar to, a New Product that the Director has approved for the *other* Enterprise, or a New Product that is otherwise available to the *other* Enterprise.[35] However, the Safety and Soundness Act excludes "any other activity that is substantially similar to … other activities that have been approved by the Director" under this provision.[36] We believe that the statutory provision is broader than the language in the Proposed Rule and would request that the final rule be clarified that such exclusion applies to "either" Enterprise, not "the other." This approach would also be consistent with the Interim Final Rule, which excludes from the definition of New Product "any activity that is substantially similar to an activity or product that has been approved … for either Enterprise."[37]

d) The internal affairs exclusion from the definition of New Activity should be clarified to include essential risk mitigation activities.

The Proposed Rule, as does the Interim Final Rule, excludes from the definition of New Activity "[a]ny Enterprise business practice, transactions, or conduct performed solely to facilitate the administration of an Enterprise's internal affairs to conduct its business."[38] The

[32] *See* Proposed Rule, 12 C.F.R. § 1253.3(a)(3)(i)-(iv).

[33] *See* Proposed Rule, 12 C.F.R. § 1253.3(b)(3); 85 Fed. Reg. at 71,280.

[34] *Supra* note 22.

[35] *See* Proposed Rule, 12 C.F.R. § 1253.8; *see also* Proposed Rule, 12 C.F.R. § 1253.6(g), providing that, if the Director does not make a determination within 30 days after the end of the public comment period, the Enterprise may offer the New Product.

[36] *See* 12 U.S.C. § 4541(e)(1)(C)(ii).

[37] *See* Interim Final Rule, 12 C.F.R. §1253.2.

[38] *See* Proposed Rule, 12 C.F.R. § 1253.3(b)(5).

preamble to the Proposed Rule states that this exclusion is "limited to an Enterprise's internal affairs—such as human resources—and does not exclude activity which ultimately impacts an offering to the public."[39] We request that this section of the Proposed Rule be revised to make clear that activities we perform to mitigate our risk on mortgages that we purchase or guarantee are excluded from the definition of New Activity. Risk mitigation activities and processes are an inherent and integral part of conducting our business. Risk mitigation activities include, for example, establishing internal controls, updating obsolete systems and technologies, and improving efficiencies related to analyzing, processing, and documenting internal information.[40] Moreover, any delay in conducting these activities could result in a potential increase in risk, which would be contrary to the purpose of the Proposed Rule.

c. Freddie Mac encourages FHFA to consider the example of the federal bank regulatory agencies in defining New Activities to capture only business line level additions to offerings to the market.

The House Committee on Financial Services Report, accompanying H.R. 1427, reads that the Committee "expects that [FHFA] will establish procedures, similar to those developed by the federal bank regulatory agencies, to provide for a timely and efficient process that will minimize unnecessary burden on the enterprises and originating institutions while assuring prompt and appropriate public notice."[41] While there are differences in the statutory schemes that apply to banking organizations and the Enterprises, we believe that the examples of the federal bank regulatory agencies should inform the design of the regulatory New Product review process.

Two key themes emerge from reviewing the processes established by the federal banking regulators. First, the relevant regulations define activities and products at the business line level, rather than at the more granular level used in the Proposed Rule, *e.g.*, as enhancements, alterations, or modifications to existing activities that may include new types of data or resources or new policies. Second, the federal bank regulatory agencies have designed streamlined procedures to calibrate notice and approval requirements and processes for varying types of activities and offerings.[42]

In the federal bank regulatory framework,[43] the agencies typically would not require subsequent notice or approval for a banking organization to change an aspect of a commenced activity or business line at the level of a modified policy, use of a new type of data, or

[39] *See* 85 Fed. Reg. at 71, 280.

[40] For example, Multifamily has developed and continues to develop processes and utilize technology to improve the efficiency of its sourcing, sorting, analyzing, and documenting the data that underlies its prior approval underwriting model. These advancements are being made under the Multifamily "myOptigo" platform which is focused on retiring legacy systems and replacing them with technology and processes that will modernize how we do business rather change the business itself. We believe that these types of enhancements to our business processes should be excluded from the rule.

[41] *Supra* note 3 at 132.

[42] *See* Section III.c.

[43] Each of the Federal Reserve Board, ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC"), which together supervise most of the major U.S. banking organizations, has a business line level, activity-based prior notice or approval framework that is based on a reference list of categories of permissible activities for regulated entities. Examples that demonstrate the business line level focus on "activities" include securities underwriting and dealing, providing investment advice, insurance underwriting and brokerage, and merchant banking. *See* 12 C.F.R. § 225.86(d).

engagement of a new third party vendor.[44] We ask FHFA to consider a similar approach that identifies "New Products" as business line level offerings to the public so that minor changes to aspects of an activity or product already commenced, approved, or offered will not require a subsequent notice or request for approval.

d. The Proposed Rule could have significantly impaired the effectiveness of our response to the COVID-19 pandemic and could impair our ability to quickly respond to unexpected events.

During 2020, Freddie Mac rapidly implemented multiple actions in response to the COVID-19 pandemic. In addition, FHFA was actively engaged in working with the Enterprises to respond to this national emergency. We are concerned that critical initiatives aimed at keeping borrowers and renters in their homes initiated in response to the COVID-19 pandemic potentially could have been treated as New Activities under the Proposed Rule, even though nearly all of these activities could not be said to have resulted in a different product offering to the market. Although the Proposed Rule contains provisions for temporary approval of a New Product in exigent circumstances, this provision appears to apply only to New Products, not to the requirement to provide notice of New Activities.[45] Given the proposed definition of New Activity in the Proposed Rule, absent further clarity in the final rule, the potentially overbroad treatment of each change in a type of data or resource, a new policy, or a new category of vendor as a New Activity could have delayed and disincentivized our multifaceted, daily efforts to sustain homeowners and renters throughout the pandemic. Factoring in the administrative burden of preparing an NNA and providing time for FHFA to complete its review could have imposed unnecessary hurdles and delays that could have negatively affected borrowers, homeowners, and tenants.

For example, our Single-Family business modified our seller and servicer guidelines to provide forbearance and assistance to borrowers affected by the COVID-19 pandemic. Between March and November, we issued approximately 25 Selling and/or Servicing Bulletins specifically addressing housing issues related to the pandemic, in addition to credit and servicing policy updates that enabled remote online notarization and other features that made closings possible under social distancing and shutdowns. The policy changes communicated in these bulletins (and associated revisions and upgrades to Loan Advisor) provided real-time guidance to our sellers/servicers to quickly respond to market conditions (*i.e.*, income verification and appraisal flexibilities, disaster forbearance, and COVID-19 payment deferral).[46] In the Single-Family mortgage market, any failure on our part to implement guidance to facilitate streamlined closing processes in recognition of the concerns posed by the pandemic would likely have resulted in considerable delay in the ability of the industry to continue to close and record mortgages, which could have jeopardized the financial health of mortgage originators and the

[44] *See*, *e.g.*, The Federal Reserve's regulations implementing 12 U.S.C. § 1843(k)(4) (12 C.F.R. § 225.86 (financial holding companies) and 12 C.F.R. § 225.28 (bank holding companies)); the OCC's implementation of 12 U.S.C. § 24(Seventh) (OCC, Activities Permissible for National Banks and Federal Savings Associations (Oct. 2017); and the FDIC's implementation of 12 U.S.C. § 1831a(a).

[45] *See* Proposed Rule, 12 C.F.R. § 1253.7.

[46] Significantly, and often in concert with the title industry, we announced revisions to our framework for accepting remote notarizations and electronically effected signatures on, among other things, powers of attorney. In one instance, in response to requests from lenders and other counterparties, we devised an innovative mechanism for capturing electronic signatures through carefully tailored e-mail exchanges.

entire secondary residential mortgage market.

Additionally, our Multifamily business quickly developed a debt service reserve requirement to protect against shortfalls in rental income, created a process for evaluating incomplete or deferred property due diligence materials, and established lender protections against the impact of the closure of recording offices. Multifamily also implemented a forbearance program that instituted tenant-protection measures and provided property owners with relief from decreases in rent collection, both of which helped stabilize the multifamily housing market. If the Multifamily forbearance program had been delayed, we estimate that over 1,000 multifamily properties could have been put at risk of loan default and possible foreclosure. Additionally, tenants in those properties would not have benefited from greater eviction protections. These tools were utilized in 2020, but they were not introduced for the first time. For example, when Hurricane Harvey made landfall in 2017, we had dedicated teams developing and implementing forbearance plan programs for affected families before the rain even stopped falling. Were we required to prepare an NNA prior to doing so, our response could have been delayed, despite the fact that forbearance programs should not be viewed as New Products, though they may be construed as involving new types of data or resources, or new policies, as appropriate, under broad readings of the definition of New Activity.

Based on our experience in dealing with natural disasters, national emergencies, and exigent market and economic conditions, we believe a timely response is paramount in helping stabilize the market, reducing disruptions and mitigating risk. Although our recommendations set forth in this comment letter to narrow the scope of the definition of New Activity, streamline the information requirements for the NNA, and remove the executive officer certification requirement (the latter two of which are discussed below), would help facilitate our ability to quickly respond to unexpected events such as the COVID-19 pandemic and natural disasters such as earthquakes, wildfires, and hurricanes, we also would recommend that FHFA consider including in the final rule an expedited notice requirement for New Activities that address such exigent circumstances.

III. The information required for a Notice of New Activity should be structured to include only the relevant information needed for FHFA to make the New Product determination.

a. Congress intended New Activities and New Products to involve different submission requirements and pre-launch scrutiny.

Congress required the FHFA Director to approve New Products based on statutory criteria after public notice and comment. By contrast, Congress only required an Enterprise to give FHFA notice for any New Activity that the Enterprise considers not to be a New Product so that FHFA could determine if such activity is a product subject to approval.[47] Thus, there is a two part process by which FHFA is to perform two distinct functions: (i) determining whether a New Activity is a New Product; and (ii) reviewing the New Product to determine if it meets the statutory standards for approval.

[47] *See* 12 U.S.C. §§ 4541(a); 4541(e)(2). Congress specified that New Activities an Enterprise deemed not a New Product should be subject to "expedited review" that consists of "written notice to the Director" prior to engaging in such a New Activity.

While we appreciate FHFA's intent to streamline through a unified notice process requiring an Enterprise to make a single form of submission in an NNA, we are concerned that the Proposed Rule blurs this important distinction and collapses these two distinct processes into one, by requiring the same amount of information for an NNA as is required for a New Product that will be put out for public notice and comment and then formally approved. We believe that the full scope of information that would be required by the Proposed Rule in an NNA is not necessary for FHFA to determine whether a New Activity is a New Product. Accordingly, such information should be limited to the amount necessary for such determination.

As noted above in Section II, the House Committee on Financial Services Report indicates that the Committee intended "an expedited review process" for any New Activity that an Enterprise determines is not a New Product.[48] Congress further provided that FHFA's determination of whether a New Activity is a New Product should take only 15 days from the moment the NNA is received, which is evidence of the limited volume and complexity of the submission that Congress anticipated.[49] The requirements in the Proposed Rule for an NNA set forth fifteen specific pieces of information. While some of these items are open-ended and provide discretion to an Enterprise to draft a tailored narrative, others require complicated and confidential forecasts or analyses.[50] We do not believe that these NNA submission elements could reasonably be understood to constitute an "expedited review" for both the level of effort for the Enterprise to compile the materials or for FHFA in reviewing them.[51] While we agree with FHFA that this information might be important to prepare in connection with determining *whether* to bring a New Product to market, requiring this information in an initial submission to FHFA solely to determine *if* a New Activity is a New Product could impose unnecessary burdens on the Enterprises and FHFA.

It is important to appreciate the significant regulatory burden associated with the designation of an initiative as a New Activity and the submission of an NNA as set forth in the Proposed Rule. Our views are informed by our current internal governance process for new initiatives, in which the level of governance and required approvals depend on the results of our internal risk assessment and whether such initiative must be submitted to FHFA under the RLOI. Overall, we estimate that the information requirements in the Proposed Rule could result in an additional three to seven months, or more, before we could file an NNA. As discussed above, a broad reading of the proposed definition of New Activity could result in a significant expansion of the number of initiatives that require submission of an NNA. Freddie Mac would have to hire additional personnel and dedicate substantial resources to both produce and properly govern the broad scope of detailed information required to be included in these NNAs, including building

[48] *Supra* note 3 at 91 ("The legislation [H.R. 1427] also provides for an expedited review process for any new activity, service, undertaking or offering that an enterprise determines is not a product.").

[49] *See* 12 U.S.C. § 4541(e)(2)(B).

[50] For example, the Proposed Rule requires detailed analyses, including assumptions, development expenses, any applicable fees, expectations for the impact of and projections for the projected quarterly size (for example, in terms of costs, personnel, volume of activity, or risk metrics) of a New Activity for at least the first 12 months of deployment, as well as projections of 12 months of quarterly earnings and capital impacts, including assumptions. It also requires a description of technology requirements, a description of the Enterprise business units involved in conducting the New Activity, including any affiliation or subsidiary relationships, any third-party relationships, and the roles of each. *See* Proposed 12 C.F.R. § 1253.9(a)(6), (7), and (9).

[51] *Supra* note 49.

out new additional processes to govern the proposed executive officer certification requirement in the Proposed Rule.

b. Freddie Mac proposes amendments to the requirements for an NNA that we believe would achieve Congress' objective for an "expedited review" and would provide sufficient information for FHFA to make an informed decision whether the New Activity is a New Product.

The initial notice for a New Activity should be required to contain only a description of the activity, which Freddie Mac believes should be sufficient for the Director to determine whether the New Activity is a New Product. Requiring an Enterprise to provide the full scope of information in the Proposed Rule for an NNA before the Director even determines whether prior approval is required, imposes the burdens of the procedural requirements for launching a New Product (for which Congress chose to impose a higher bar) on commencing a New Activity (for which Congress chose to impose a lower bar). If the Director determines that a New Activity is a New Product, an Enterprise should only then be required to provide the scope of information required by the proposed NNA, subject to the suggestions offered in this letter.

As discussed in more detail below, our suggested approach for an initial notice is consistent with the approach taken by the federal banking agencies, which we ask FHFA to consider as it develops its notice process. Banks are required to provide significantly less information in connection with commencing new activities. The federal banking agencies new activity procedures do not require comparable information with this level of granularity for business as usual modifications to existing activities.

Our suggested revision to the information requirements for an NNA would exclude Proposed Rule § 1253.9(a)(6)-(15), as we believe that they are not necessary or helpful to the Director's determination whether a New Activity, as defined, would be a New Product, and could impose a significant burden on the Enterprises to produce that level of granular information solely for such determination.

Consequently, our recommendation is to retain the first five items in the Proposed Rule for an NNA, as follows:

(1) Name of the New Activity.

(2) Complete and specific description of the New Activity.

(3) Identify under which paragraphs of § 1253.3 the New Activity is described.

(4) State the Enterprise's view as to whether the New Activity is a New Product.

(5) Describe the business rationale, the intended market, the business line, and what products are currently being offered or are proposed to be offered under such business line.

c. Freddie Mac's proposed requirements for an NNA submission are informed by the examples of the federal banking agencies, which have developed streamlined forms and procedures intended to minimize delays and unnecessary burdens in their approval processes.

The federal banking agencies have established processes that rely on narrative submissions and more basic information, similar to what we have proposed in Section III.b

above.[52] Each of the Federal Reserve and the OCC generally rely on established forms that require a limited set of information, typically involving identifying the entities involved and providing a narrative description of the activity proposed.[53] While these agencies may request additional information to supplement the initial narrative filings, the initial streamlined process offers both regulated organizations and the agencies the ability to separate lower-level business adjustments from business line level offerings that warrant further scrutiny within the established processes.

Further, we note that the federal banking regulators, like FHFA, closely supervise the activities of regulated entities. Examiners evaluate any risks the activity or product may pose to the banking organization and its processes for developing, offering, and managing the activity or product on an ongoing basis.[54]

d. Consistent with the Safety and Soundness Act, the Director should impose "terms, conditions, or limitations" only on New Products, not on New Activities.

Under the Safety and Soundness Act, if the Director approves the offering of any "product" by an Enterprise, the Director "may establish terms, conditions, or limitations with respect to such product with which the [E]nterprise must comply in order to offer such product."[55] The Safety and Soundness Act does not provide the Director with comparable conditional approval authority for New Activities that are not determined to be New Products. The Proposed Rule, however, would provide the Director with authority to establish "terms, conditions or limitations," for *both* New Activities and New Products as the Director determines appropriate and that are a condition in order to engage in the New Activity.[56] FHFA should align the Proposed Rule with the Safety and Soundness Act, which would have the practical effect of preserving the Director's authority to impose conditions on New Products while excluding references to imposing terms, conditioning, or limiting a New Activity. Notably, the Director retains the power to use the supervisory process to determine whether activities are consistent with our charter and to address any risks to the safety and soundness of the Enterprises and may use such supervisory power to oversee any New Activity that is not determined to be a New

[52] We believe that the legislative history indicates that FHFA should "look to similar processes developed by the federal bank regulatory agencies in establishing procedures to minimize unnecessary burden on the enterprises and originating institutions while fulfilling the objectives of the provision." *Supra* note 3.

[53] *See*, *e.g.*, the Federal Reserve's regulatory process for certain financial holding companies to request to engage in an activity not already approved by regulation (12 C.F.R. § 224.86(e)), for certain financial holding companies to provide after-the-fact notice of engagement in an activity already permitted (12 C.F.R. § 224.86(d)), for certain qualified bank holding companies to initially engage in an approved activity (12 C.F.R. § 225.22(a), 12 C.F.R. § 225.28(b)), and non-qualifying bank holding companies to initially engage in approved activities (12 C.F.R. § 225.24(a)(1)); the OCC's process for after-the-fact notice for qualifying national banks seeking to conduct an activity through a subsidiary that is not on the OCC's reference list of activities (12 C.F.R. § 5.34(e)(5)(v)), and for non-qualifying national banks who must apply to perform a new activity (12 C.F.R. § 5.34(e)(5)(i)).

[54] *See*, *e.g.*, Federal Reserve, Bank Holding Company Supervision Manual (noting that Federal Reserve examiners may review new products during the regular course of examination of the institution); FDIC, Risk Management Manual of Examination (noting the same); OCC, Bulletin 2017-43, New, Modified, or Expanded Bank Products and Services: Risk Management Principles (Oct. 20, 2017) (noting that as part of ongoing supervision, OCC examiners review new, modified, and expanded products and services).

[55] *See* 12 U.S.C. § 4541(d).

[56] *See* Proposed Rule, 12 C.F.R. § 1253.5(d); 85 Fed. Reg. at 71,281.

Product.[57]

e. A determination that an NNA is complete and "received," triggering the 15-day timeframe for FHFA to determine whether the New Activity is a New Product, should be made expeditiously.

The Proposed Rule states that FHFA will "evaluate the [NNA] to determine if the submission contains sufficient information for the Director to make a determination," but no time period is specified in the Proposed Rule for such review.[58] We believe that the statutory 15-day window should be sufficient to determine completeness and provide the Enterprises with the statutorily mandated expedited review of whether a New Activity is a New Product.[59]

Potential delays in beginning the 15-day period due to FHFA's review for consistency with other applicable law, safety and soundness, or the Enterprises' missions could depart from the text of the Safety and Soundness Act, which requires FHFA to act within 15 days of receiving an NNA and does not provide for any exception.[60] Delays have the potential to impair the commercial viability of modifying existing offerings and launching New Products and the ability of the Enterprises to fulfill their charter purposes.

We believe that FHFA should be able to perform any necessary reviews within the 15-day statutory period, as the only determination required is whether the New Activity is a New Product. If FHFA does not believe that it has all of the necessary information to do so, we recommend following the same practices that exist today for incomplete submissions under the RLOI. If FHFA deems that the RLOI submission is incomplete during the 15-day review period, it can declare it so and the submission is deemed "closed," which means essentially withdrawn.[61] Moreover, FHFA has its supervisory authority to review activities for safety and soundness, charter authority and compliance with laws and regulations; any such reviews do not need to delay the New Product determination.

f. Once the Director deems a New Activity to be a New Product, FHFA should issue a public notice immediately upon receipt of the Enterprise's request for approval of the New Product.

Under the Safety and Soundness Act, once the Director receives a request for approval of a New Product, FHFA must "immediately" upon receipt of a request from the Enterprise for approval of the product publish a public notice of such request soliciting comments on the New Product for a 30-day period.[62] The Proposed Rule does not specify a timeframe for FHFA to publish the public notice. We believe that a specific time frame should reduce the risk to the Enterprises, and at most, a five business-day deadline for FHFA to publish the public notice should provide FHFA with a reasonable period to prepare the notice based on the information

[57] *See* Proposed Rule, 12 C.F.R. § 1253.5(b); 12 U.S.C. § 4541(f).

[58] *See* Proposed Rule, 12 C.F.R. § 1253.5(a).

[59] *See* 12 U.S.C. § 4541(e)(2)(B).

[60] *Id*.

[61] To clarify, routine and clarifying follow-up questions from FHFA on an RLOI submission would not result in a submission being declared incomplete.

[62] *See* 12 U.S.C. § 4541(c)(2); Proposed Rule, 12 C.F.R. § 1253.6(a).

provided by the Enterprise and would provide the Enterprises with a reasonable measure of certainty regarding the timeline for bringing New Products to market. Providing more certainty regarding the timeline for receiving approval would aid in our business planning, reduce commercial risks stemming from delays, and improve our ability to prepare risk assessments and financial projections for New Products.

IV. The final rule should enable confidential treatment of nonpublic information contained in Enterprises' submissions under the rule.

The Proposed Rule would provide FHFA with the sole discretion to determine what information supplied by the Enterprises under the rule is necessary to include in a public notice.[63] This treatment of confidential business information would deviate significantly from the existing protections afforded by FHFA in the Interim Final Rule[64] and from the reasonably tailored protections afforded by the federal banking agencies in their rules.[65] Given that FHFA already provides confidential treatment of other Freddie Mac submissions, we believe such protections should apply to NNA and New Product submissions.[66]

In our view, the final rule should include an explicit presumption of confidentiality for nonpublic information included in an NNA (or a New Product submission) and any supporting materials submitted by the Enterprises under the rule.[67] FHFA should further allow an Enterprise to withdraw a submitted NNA if the Director determines the New Activity should be treated as a New Product, or withdraw a New Product submission if the Director determines it is necessary to include in a public notice information that the Enterprise wishes to keep confidential.[68]

Freddie Mac's ability to prevent the unrestricted disclosure of our (and potentially our counterparties') confidential information is critical to the conduct of our business (including our important research and development efforts in support of our mission) and our ability to innovate

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[63] *See* 85 Fed. Reg. at 71,281; Proposed Rule, 12 C.F.R. § 1253.5.

[64] Under the Interim Final Rule, all submission materials are presumed public, but an Enterprise is permitted to designate submission information as confidential and request that it not be made publicly available. In addition, if FHFA determines that such designated information must be included in a public notice, an Enterprise could withdraw the submission to avoid publication of the information.

[65] *Supra* note 3 at 132 ("As with the banking agencies, the Committee expects that the Agency will establish procedures that provide for appropriate treatment of proprietary business information.").

[66] *See*, *e.g.*, 12 C.F.R. §§ 1282.1, 1282.32, and 1282.66; and Duty to Serve Evaluation Guidance 2020-4a. We also note that FHFA has issued a proposed rulemaking that provides for separate public and confidential sections of resolution planning submissions, which would appear to be a workable framework for submissions that would contain similar proprietary information as involved in an NNA or New Product submission. FHFA, Resolution Planning (Dec. 22, 2020) (proposed rule, 12 C.F.R. § 1242.6).

[67] Providing for the confidentiality of nonpublic information is consistent with the bank regulatory framework that the House Committee on Financial Services indicated should inform FHFA. The bank regulatory framework allows regulated entities to request confidential treatment for portions of submissions in connection with applications. For example, the Federal Reserve's FR Y-4 and the OCC's application permit such requests.

[68] Our view is supported by the statute, which only provides for a period of public comment with respect to a "receipt of a request for approval of a product," which should not be understood to include the initial NNA. *See* 12 U.S.C. § 4541(c)(2). Of course, the ability to withdraw an NNA or a New Product request before its confidential contents are publicly disseminated would require FHFA to inform Freddie Mac of any determination and allow prior review of any public notice.

and compete in the marketplace.[69] We believe the approach in the Proposed Rule is inconsistent with the standard protections included in the Freedom of Information Act ("FOIA"), which is intended to foster government transparency and public disclosure while containing important exemptions recognizing that certain types of information generally are protected from public disclosure.[70] When submitting confidential information to FHFA (both in its capacity as Conservator and regulator) and other government agencies, Freddie Mac regularly relies on FOIA exemptions and processes to protect its confidential information from public disclosure. We currently transmit hundreds of documents to FHFA every year, each of which is subject to the protections of FOIA. These submissions to FHFA naturally relate to our offerings and initiatives, yet these submissions have been protected by standard FOIA exemptions. Those protections, in turn, enable the type of unfettered communication between Freddie Mac and FHFA, as either regulator or Conservator, which enables us to operate our business without risk that commercially sensitive information will become public. At a minimum, FHFA should provide the same protections to information contained in an NNA or New Product submission that FHFA now provides to many other correspondences between the Enterprises and FHFA that contain similar (if not the same) information.

If the rule is finalized without confidentiality protections, it may not be practicable for Freddie Mac to file NNAs or New Product submissions at all. The information required in an NNA (or a New Product submission), as proposed, is certain to include confidential counterparty information, proprietary pricing, securitization, and individual deal structuring information, and credit policy disclosures. Disclosing this information to the public could severely undermine the measures that Freddie Mac undertakes in the ordinary course to prevent the misuse and misappropriation of its confidential information and intellectual property. Furthermore, such disclosures may jeopardize our ability to comply with our contractual obligations to third parties and may even prompt breach of contract claims against the disseminator of such information.

Additionally, public notices of New Products that contain confidential information could provide unwarranted commercial advantages to other market participants. Providing confidential information in a public notice could also limit incentives for Freddie Mac to innovate to fulfill its public mission. Our competitors could have months to use that information to update their existing products or begin developing competing products before we could alter our activities or launch a New Product. Heightened risk that a competitor could beat us to market or improve their existing offerings before we can launch a New Product has the potential to increase development costs and reduce incentives to offer New Products or conduct New Activities. As the processes developed by federal bank regulatory agencies demonstrate, non-confidential information should be sufficient to describe a New Product so that stakeholders can anticipate the impact such a Product could have on the market.

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[69] Internally, these values are maintained in a Freddie Mac corporate-level standard that requires an appropriate, signed nondisclosure agreement to be in place before confidential information is disclosed to third parties. Likewise, we may be required to sign non-disclosure agreements before third parties will share confidential information with us. We actively work to secure such agreements to and from third parties as needed to preserve valuable proprietary information on both sides.

[70] *See* 5 U.S.C. § 552(b)(8), (4) (including exemptions applicable to information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions" and for "trade secrets and commercial or financial information… and [is] privileged or confidential.").

V. FHFA should remove the certification requirement in the Proposed Rule, or limit such requirement to apply only to New Products and add a knowledge and belief qualifier.

We believe that FHFA should eliminate the proposed requirement that an Enterprise certify through an executive officer that any information in an NNA (or New Product submission) or supporting material contains no material misrepresentations or omissions.[71] We note that Congress chose not to include a certification requirement in the relevant sections of the Safety and Soundness Act in connection with the Director's New Product review.[72] As a result, including the certification requirement for each NNA, or even for a notice related to a fully formed New Product, would add a new additional layer of process that we do not believe would proportionally improve the accuracy of our NNA submissions.

Nevertheless, if FHFA were to retain the certification requirement, we believe it should modify the requirement in two ways. First, the requirement should apply only to New Product submissions. As discussed above in Section II, as proposed, the New Activity definition could be read to capture a broad cast of incremental adjustments to existing activities and products that would be unnecessary or impracticable to subject to a certification process. Second, the requirement should be modified to include a "knowledge and belief" qualifier. The qualifier approach for New Product submissions would be consistent with other FHFA certification requirements.[73]

The federal banking agencies ordinarily do not require banking organizations to provide a certification in connection with submissions involving new products or activities. Further, in the few circumstances when federal banking agencies have required certifications, such certifications have been limited to requiring certification to the "best of [the Chief Executive Officer's or designee's] knowledge and belief."[74] We believe that the federal banking agencies' historical approach to executive officer certification is sufficient to safeguard the accuracy of submissions from the institutions subject to their oversight.

Limiting the certification requirement in these two ways would result in a more durable, practical, and efficient certification standard that would not compromise any supervisory or regulatory goal.

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[71] *See* Proposed Rule, 12 C.F.R. § 1253.9(c) (proposing that "[a]n Enterprise shall certify, through an executive officer, that any filing or supporting material submitted to FHFA pursuant to regulations in this part contains no material misrepresentations or omissions.").

[72] *See* 12 U.S.C. § 4541.

[73] *E.g.,* 12 U.S.C. § 4514(a)(4) (requiring an officer to certify that any regular or specific report submitted to FHFA "is true and correct to the best of such officer's knowledge and belief"; 12 C.F.R. § 1282.65(a)(2) (requiring the senior officer of each Enterprise responsible for submitting the fourth quarter Annual Mortgage Report and the Annual Housing Activities Report to certify that the information is true, complete and correct "to the best of [the officer's] knowledge and belief"); Duty to Serve Evaluation Guidance 2020-4a (requiring a senior executive officer to certify the historical information used to set baselines and targets in the Underserved Markets Plan "to the best of his/her knowledge and belief," that the Enterprise's historical information is "true, correct, and complete.").

[74] *See, e.g.,* Federal Reserve, Form FR Y-4 (requiring the Chief Executive Officer or designee to certify that "the information contained in this notification has been examined carefully by me and is true, correct, and complete, and is current as of the date of this submission to the best of my knowledge and belief"); *see also* Federal Reserve, Instructions for Preparation of Notification by a Bank Holding Company to Acquire a Nonbank Company and/or Engage in Nonbanking Activities, Form FR Y-4 at GEN-1 (Feb. 2018).

VI. FHFA should reconsider one of the proposed factors that the Director may consider to determine whether a New Product is in the public interest.

Under the Safety and Soundness Act, in considering any request for approval of a New Product, the Director must determine that "the product is in the public interest."[75] The Proposed Rule includes a list of eight non-exhaustive factors that the Director may consider when determining whether a New Product is in the public interest.[76] In our view, FHFA should remove the factor regarding the degree to which the New Product is being supplied or could be supplied by other market participants.

We do not believe that the potential for market participants other than Freddie Mac to provide a product should be a factor in determining whether it may be in the public interest to permit an Enterprise to offer that product. Recent history has demonstrated that the presence of other market participants in the market does not provide sufficient market support in an economic downturn. While Freddie Mac's mission is to provide a constant and reliable source of liquidity throughout the economic cycle, other market participants may more freely reduce their product offerings or exit particular business lines in response to financial pressures. Depending on how it is applied by FHFA, this particular factor could potentially result in Freddie Mac being restricted from offering New Products based on short-term considerations, which may, in the long run, result in dislocations in the secondary mortgage market as the economic landscape changes.

Further, we believe that consistency with the charter is a strong indicator that a product is in the public interest in Congress' judgment. The presence, or potential presence, of other market participants should not be a significant enough factor to rebut this implied congressional determination.

VII. The final rule should provide a reasonable transition period.

We respectfully request that FHFA include a reasonable transition period in the final rule. We would propose a transition period of three months after the final rule becomes effective so that we would have adequate time to adjust our processes and establish the necessary governance for submissions of New Activities and New Products to FHFA under the final rule. As indicated in this letter, we have requested that the definition of New Activity be amended, the scope of the information in the NNA be more tailored, and the executive officer certification requirement be removed. To the extent that the final rule does not remove the executive officer certification requirement, we would request a longer transition period of six months.

[75] *See* 12 U.S.C. § 4541(b)(3).

[76] *See* Proposed Rule, 12 C.F.R. §1253.4(b).

Exhibit 1: Freddie Mac's Proposed Definition of "New Activity"

We suggest that FHFA adopt the following alternative definition of New Activity (text in italics indicates a proposed addition or revision):

§ 1253.3 New Activity description and exclusions.

(a) *This section does not apply to an activity which the Enterprise is engaged in as of the effective date of this section.*

(b) A New Activity is an activity that meets the requirements of this section:

(1) An activity which is a business line, business practice, offering or service, including guarantee, financial instrument, consulting or marketing, that the Enterprise provides to the market either on a standalone basis or as part of a business line, business practice, offering or service; and

(2) An activity (*including a pilot or an activity resulting from a pilot*) that *requires a new type of resource, a new type of data, a new policy or modification to an existing policy, a new process or infrastructure, and* is described by one or more of the following paragraphs:

(i) Activity that *significantly* expands the scope or *significantly* increases the level of credit risk, market risk or operational risk to the Enterprise.

(ii) Activity that is a *significant* enhancement, alteration, or modification to an existing activity that the Enterprise currently engages in as of the effective date of this section.

(iii) Activity that involves a new category of borrower, investor, counterparty, or collateral.

(iv) Activity that would substantially impact the mortgage finance system, safety and soundness of the Enterprise, compliance with the Enterprise's authorizing statute, or the public interest as identified in § 1253.4(b).

(c) A New Activity excludes an activity which is described as:

(1) The automated loan underwriting system of an Enterprise, including any upgrade to the technology, operating system, or software to operate the underwriting system.

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

(3) Any activity that is substantially similar to the activities described in paragraph (c)(1) or (2) of this section.

(4) Pursuant to the requirements of § 1253.8, any activity undertaken by an Enterprise that is the same as, or substantially similar to, a New Product that the Director has approved for *either* Enterprise under § 1253.6(a) through (e), or a New Product that is otherwise available to *either* Enterprise under § 1253.6(g).

(5) Any Enterprise business practice, transactions, or conduct performed solely to facilitate the administration of an Enterprise's internal affairs to conduct its business, *including mitigating the Enterprise's risk on mortgages purchased or guaranteed by the Enterprise.*

(6) 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.